

## Internal Revenue Service

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Department of the Treasury

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PLR-106023-18

Date:

August 08, 2018

### Legend

Taxpayer =

Trust 1 =

Advisor =

Manager =

Accounting Firm =

State =

Date 1 =

Date 2 =

Date 3 =

Date 4 =

Date 5 =

Date 6 =

Date 7 =

Date 8 =

Year 1 =

Year 2 =

a =

b =

Dear :

This responds to a letter dated January 29, 2018, submitted on behalf of Taxpayer. Taxpayer requests extensions of time under section 301.9100-1 and section 301.9100-3 of the Procedure and Administration Regulations (1) to make an election under section 853 of the Internal Revenue Code ("Code") and section 1.853-1 of the Income Tax Regulations ("Regulations") for the taxable year ended on June 30, Year 2 and (2) to make an election under section 1296 and section 1.1296-1 for the taxable year ended on June 30, Year 2.

## FACTS

Taxpayer is registered as a diversified, open-end management investment company under the Investment Company Act of 1940, as amended, and has elected to be taxed as a regulated investment company ("RIC") under part I of subchapter M of the Code. Taxpayer uses an accrual method of accounting for U.S. federal income tax purposes, and its taxable year is a fiscal year ending on June 30.

Taxpayer is one of a series of investment portfolios comprising Trust 1, a State trust that was established on Date 1. Taxpayer commenced operations on Date 2.

Advisor serves as the investment advisor to a of the b investment funds comprising Trust 1, including Taxpayer. In its role as investment advisor, Advisor manages the investment and reinvestment of Taxpayer's assets and is accountable for the administration of Taxpayer's affairs.

Taxpayer has two types of investments that require an election as part of its Form 1120-RIC, *U.S. Federal Income Tax Return for Regulated Investment Companies*. First, Taxpayer has direct and indirect investments in foreign countries for which foreign taxes must be paid on income derived from such investments. As such, Taxpayer may make an election under section 853 to pass through any foreign tax credits earned by Taxpayer on to its shareholders. Second, Taxpayer has direct investments in passive foreign investment companies ("PFICs"). These investments generally require separate

reporting by Taxpayer and its shareholders. Taxpayer is the first U.S. person in the chain of ownership. As such, Taxpayer may make certain elections under section 1296 with respect to such PFICs.

Since it was established, Taxpayer has been taxed as a corporation for U.S. federal income tax purposes.

For many years, Advisor has engaged Manager to manage a number of investment funds, including Taxpayer. Manager's management responsibilities include managing Taxpayer's tax matters, including all tax return preparation work. On Date 3, Manager engaged Accounting Firm to assist with the tax preparation work formerly performed by Manager, including the preparation of Taxpayer's Form 1120-RIC for the taxable year ended on June 30, Year 2 ("Year 2 Form 1120-RIC"), and all relevant forms, statements, and elections.

In all taxable years prior to the taxable year ended on June 30, Year 2, Taxpayer has consistently and timely made the elections that are the subject of the ruling request.

As part of Taxpayer's Year 2 Form 1120-RIC, Taxpayer intended to make elections under section 853 and section 1296. The election under section 853 would allow Taxpayer to pass through any foreign tax credits earned by Taxpayer on to its shareholders. Under section 1.853-4, the election must be made in a statement with supporting information included on or with Form 1118, *Foreign Tax Credit—Corporations*, and must be made not later than the time prescribed for filing the return (including extensions thereof). The election under section 1296 would allow Taxpayer to include in income the excess of the fair market value of its PFIC stock over its adjusted basis in such stock or, if the adjusted basis of such stock exceeds the fair market value of such stock as of the close of the taxable year, to take a deduction equal to the lesser of the amount of such excess or the unreserved inclusions with respect to such stock for the Year 1 taxable year. Under section 1.1296-1(h)(1), the election must be made on or before the due date (including extensions) of the Taxpayer's U.S. income tax return for that year.

Accounting Firm was required to prepare and submit Form 7004, *Application for Automatic Extension of Time to File Certain Business Income Tax, Information, and Other Returns*, on behalf of Taxpayer for the taxable year ended on June 30, Year 2 ("Year 2 Form 7004").

Section 2006(a) of the Surface Transportation and Veterans Health Care Choice Improvement Act of 2015, P.L. 114-41 (the "Act"), made certain amendments to the Code that modified tax return due dates for certain taxpayers. Section 2006(a)(3)(A) of the Act provides, in general, that except as provided in Section 2006(a)(3)(B) of the Act, the amendments made by Section 2006(a) of the Act apply to returns for taxable years beginning after December 31, 2015. Section 2006(a)(3)(B) of the Act provides a special

rule for C corporations with fiscal years ending on June 30. Under this special rule, the amendments made by section 2006(a) of the Act to tax return due dates apply to returns for taxable years beginning after December 31, 2025. Accordingly, the amendments made by section 2006(a) of the Act did not modify the due date for Taxpayer's Year 2 Form 1120-RIC. See Section 2006(a)(3)(B) of the Act.

During the tax return planning and preparation phases related to Taxpayer's Year 2 Form 1120-RIC, neither Manager nor Accounting Firm identified that Taxpayer's taxable year end fell under the special rule provided by section 2006(a)(3)(B) of the Act and that the tax return due date for Taxpayer's Year 2 Form 1120-RIC had not changed. Two main factors contributed to this oversight. First, because this was the first year that Accounting Firm was engaged by Manager, Accounting Firm and Manager were still working out an effective communication system to ensure that all filing obligations were being met. On previous projects with filing deadlines, Manager and Accounting Firm worked together to prepare a production calendar to ensure filing deadlines were met. No production calendar was prepared that involved Taxpayer's Year 2 Form 7004, due on Date 4, because both Manager and Accounting Firm believed that Taxpayer's Year 2 Form 7004 was due on Date 7. Second, Accounting Firm's manager, who was responsible for Taxpayer's Year 2 Form 1120-RIC, was in the process of transitioning away from Accounting Firm in order to pursue other opportunities. Accounting Firm's manager's last day at Accounting Firm was shortly after the Date 4 due date for Taxpayer's Year 2 Form 7004. As such, Accounting Firm's manager's attention was not focused on the impact of the amendments made to the Code by section 2006(a) of the Act and the impact of these amendments, if any, on the tax return due date for Taxpayer's Year 2 Form 1120-RIC.

On Date 5, during Manager's review of Forms 7004 for its managed entities, Manager discovered that the correct due date for filing Taxpayer's Year 2 Form 7004 was Date 4. Also on Date 5, Manager advised Accounting Firm and Taxpayer that Taxpayer's Year 2 Form 7004 was due on Date 4. Accounting Firm subsequently filed Taxpayer's Year 2 Form 7004 on Date 6.

The difficulties described above surrounding the communication between both Manager and Accounting Firm resulted in the late filing of Taxpayer's Year 2 Form 7004. Because Taxpayer's Year 2 Form 7004 was not timely filed, Taxpayer cannot make timely elections under sections 853 and 1296 absent the requested relief. Taxpayer represents that it submitted its request for relief promptly and as soon as practicable after learning of the untimely filing of the Year 2 Form 7004.

To be timely, Taxpayer should have filed the elections under sections 853 and 1296 by Date 4, or, if Taxpayer had timely filed the Year 2 Form 7004, Taxpayer should have filed the elections by Date 8, the extended due date for Taxpayer's Year 2 Form 1120-RIC. Taxpayer represents that Taxpayer's Year 2 Form 1120-RIC was filed on or about Date 8 and contained elections under sections 853 and 1296, and that

Taxpayer's Year 2 Form 1120-RIC was not timely because of the failure to file Taxpayer's Year 2 Form 7004 timely.

Taxpayer makes the following additional representations in connection with its request for an extension of time:

1. The request for relief was filed before the failure to make the regulatory elections was discovered by the Service.
2. Granting the relief requested will not result in Taxpayer having a lower U.S. federal tax liability in the aggregate for all years to which the elections apply than Taxpayer would have had if the elections had been timely made (taking into account the time value of money).
3. Taxpayer does not seek to alter a return position for which an accuracy-related penalty has been or could have been imposed under section 6662 of the Code at the time Taxpayer requested relief and the new position requires or permits the regulatory elections for which relief is requested.
4. Being fully informed of the required regulatory elections and related tax consequences, Taxpayer did not choose to not file the elections.
5. Taxpayer is not using hindsight in making the decision to seek the relief requested. No specific facts have changed since the due date for making the elections that make the elections advantageous to Taxpayer.
6. The period of limitations on assessment under section 6501(a) has not expired for Taxpayer for the taxable year in which the elections should have been filed, nor for any taxable year(s) that would have been affected by the elections had the elections been timely filed.

In addition, affidavits on behalf of Taxpayer, Manager, and Accounting Firm have been provided as required by sections 301.9100-3(e)(2) and (3).

#### LAW AND ANALYSIS

Section 853(a) provides that a RIC, more than 50 percent of the value (as defined in section 851(c)(4)) of whose total assets at the close of the taxable year consist of stock or securities in foreign corporations, and which meets the requirements of section 852(a) for the taxable year, may elect the application of section 853 for the taxable year with respect to certain taxes paid by the RIC during the taxable year to foreign countries and possessions of the United States. Section 853(b)(1) provides that the effect of the election is to deny an electing RIC any deduction under section 164(a)

or any credit under section 901 for these taxes. The electing RIC is allowed an addition to its dividends paid deduction for the taxable year for the amount of these taxes.

Section 853(b)(2) further describes the effect of the election by providing that each shareholder of the RIC shall include in gross income and treat as paid by him his proportionate share of these taxes. Each shareholder shall treat as gross income from sources within the respective foreign countries and possessions of the United States the sum of his proportionate share of these taxes and the portion of any dividend paid by the RIC which represents income derived from sources within foreign countries and possessions of the United States. Section 853(c) provides that the amount to be treated by the shareholder as his proportionate share of taxes paid to any foreign country or possession of the United States, and gross income derived from sources within any foreign country or possession of the United States, shall not exceed the amounts so reported by the RIC in a written statement furnished to the shareholder.

Sections 1.853-4(a) and (b) provide that an election under section 853 must be made not later than the time prescribed for filing the return (including extensions thereof), and is irrevocable with respect to the dividend (or portion thereof), and the foreign taxes paid with respect thereto, to which the election applies. Section 1.853-4(c) requires that certain information pertinent to the election, including, among other things, the date, form and contents of its notice to its shareholders, shall accompany the RIC's timely filed federal income tax return for the taxable year on or with a modified Form 1118, Foreign Tax Credit-Corporations.

Section 1296(a) provides that, in the case of marketable stock in a passive foreign investment company that is owned by a United States person at the close of any taxable year, the person may elect to include in gross income the excess of the fair market value of the stock over its adjusted basis. Section 1.1296-1(h) provides that an election under section 1296 for a taxable year must be made on or before the due date (including extensions) of the person's U.S. income tax return for that year.

Section 301.9100-1(c) provides that the Commissioner has discretion to grant a reasonable extension of time to make a regulatory election, or a statutory election (but no more than 6 months except in the case of a taxpayer who is abroad), under all subtitles of the Code except subtitles E, G, H, and I. Section 301.9100-1(b) defines a regulatory election as an election whose due date is prescribed by regulations or by a revenue ruling, a revenue procedure, a notice, or an announcement published in the Internal Revenue Bulletin.

Section 301.9100-3(a) through (c)(1) sets forth rules that the Service generally will use to determine whether, under the particular facts and circumstances of each situation, the Commissioner will grant an extension of time for regulatory elections that do not meet the requirements of section 301.9100-2. Section 301.9100-3(a) provides that requests for relief subject to this section will be granted when the taxpayer provides

the evidence (including affidavits described in section 301.9100-3(e)) to establish to the satisfaction of the Commissioner that the taxpayer acted reasonably and in good faith, and the grant of relief will not prejudice the interests of the Government.

Section 301.9100-3(b) provides that a taxpayer is deemed to have acted reasonably and in good faith if the taxpayer (i) requests relief under this section before the failure to make the regulatory election is discovered by the Service; (ii) failed to make the election because of intervening events beyond the taxpayer's control; (iii) failed to make the election because, after exercising reasonable diligence (taking into account the taxpayer's experience and the complexity of the return or issue), the taxpayer was unaware of the necessity for the election; (iv) reasonably relied on the written advice of the Service; or (v) reasonably relied on a qualified tax professional, including a tax professional employed by the taxpayer, and the tax professional failed to make, or advise the taxpayer to make, the election. A taxpayer will be deemed to have not acted reasonably and in good faith if the taxpayer (i) seeks to alter a return position for which an accuracy-related penalty has been or could be imposed under section 6662 at the time the taxpayer requests relief and the new position requires or permits a regulatory election for which relief is requested; (ii) was informed in all material respects of the required election and related tax consequences, but chose not to file the election; or (iii) uses hindsight in requesting relief.

Section 301.9100-3(c)(1) provides that a reasonable extension of time to make a regulatory election will be granted only when the interests of the Government will not be prejudiced by the granting of relief. Section 301.9100-3(c)(1)(i) provides that the interests of the Government are prejudiced if granting relief would result in the taxpayer having a lower tax liability in the aggregate for all taxable years affected by the election than the taxpayer would have had if the election had been timely made (taking into account the time value of money). Section 301.9100-3(c)(1)(ii) provides that the interests of the Government are ordinarily prejudiced if the taxable year in which the regulatory election should have been made or any taxable years that would have been affected by the election had it been timely made are closed by the period of limitations on assessment under section 6501(a) before the taxpayer's receipt of a ruling granting relief under this section.

## CONCLUSION

Based upon the information submitted and representations made, we conclude that Taxpayer has shown good cause for granting a reasonable extension of time to make the elections under sections 853 and 1296 for the taxable year ended on June 30, Year 2. Accordingly, Taxpayer's Year 2 Form 1120-RIC, which was filed on or about Date 8 and contained elections under sections 853 and 1296, is treated as timely filed for purposes of making these elections.

This ruling is limited to the timeliness of the filing of the elections in section 853 and section 1296 of the Code. This ruling's application is limited to the facts, representations, Code sections, and regulations cited herein. No opinion is expressed with regard to whether Taxpayer otherwise qualifies as a RIC under subchapter M of the Code.

No opinion is expressed with regard to whether the tax liability of Taxpayer is not lower in the aggregate for all years to which the elections apply than such tax liability would have been if the elections had been timely made (taking into account the time value of money). Upon audit of the federal income tax returns involved, the director's office will determine such tax liability for the years involved. If the director's office determines that such tax liability is lower, that office will determine the federal income tax effect.

Except as specifically provided otherwise, no opinion is expressed on the federal income tax consequences of the transactions described above.

This ruling is directed only to the taxpayer that requested it. Section 6110(k)(3) of the Code provides that it may not be used or cited as precedent.

In accordance with the terms of a power of attorney on file in this office, a copy of this letter is being sent to your authorized representatives.

Sincerely,

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Robert A. Martin  
Senior Technician Reviewer  
Office of Associate Chief Counsel  
(Financial Institutions & Products)

Enclosure:

A copy of this letter

cc: