

Internal Revenue Service

Department of the Treasury
Washington, DC 20224

Number: **202515002**
Release Date: 4/11/2025
565.00-00, 9100.00-00

Third Party Communication: None
Date of Communication: Not Applicable

Person To Contact:

ID No.

Telephone Number:

Refer Reply To:

CC:FIP:01
PLR-112044-24

Date:
January 10, 2025

Taxpayer =

Partnership =
State =
Date 1 =
Date 2 =
Date 3 =
Date 4 =
a =
b =
c =
d =
Accounting =
Firm =
Law Firm =
Year 1 =
Year 2 =

Dear :

This ruling responds to a letter dated June 28, 2024, submitted on behalf of Taxpayer. Taxpayer requests an extension of time under sections 301.9100-1 and 301.9100-3 of the Procedure and Administration Regulations to make a consent dividend election under section 565 of the Internal Revenue Code (the "Code").

FACTS

Taxpayer was formed on Date 1 under the laws of State for the purpose of investing in real property. Taxpayer elected to be taxed as a real estate investment

trust (“REIT”) under sections 856 through 859 of the Code beginning with Taxpayer’s taxable year ended Date 2.

Partnership, a State limited liability company, is a partnership for federal income tax purposes. Partnership is the direct holder of the common interests in Taxpayer. Taxpayer also has preferred interests outstanding.

Taxpayer relies on the advice of several accountants and attorneys on tax matters. Taxpayer engaged Accounting Firm to prepare and file its federal income tax returns for the taxable years ended on Date 2 and Date 3. For those taxable years, Partnership consented to treat specified amounts as dividends under section 565 by providing to Taxpayer a completed Form 972, *Consent of Shareholder To Include Specific Amount in Gross Income*. Taxpayer completed the consent dividend election under section 565 for each of those taxable years by attaching Form 973, *Corporation Claim for Deduction for Consent Dividends*, and a copy of Partnership’s Form 972 to its income tax return.

For the taxable year ended Date 4, Taxpayer paid cash dividends only on its preferred interests. Consistent with the taxable years ended on Date 2 and Date 3, Partnership and Taxpayer intended that the remainder of Taxpayer’s deduction for dividends paid for the year ended on Date 4 would be attributable to consent dividends. Accordingly, Partnership included \$a in dividends on its Form 1065, *U.S. Return of Partnership Income*, for its taxable year ended on Date 4 as if Taxpayer had made the consent dividend election for that amount.

Taxpayer again engaged Accounting Firm to prepare and file its tax return for the taxable year ended on Date 4. For that taxable year, however, Taxpayer also consulted with Law Firm. Because of a misunderstanding, Taxpayer’s return treated only \$b as a consent dividend in the year ended on Date 4 and treated \$c as a cash dividend paid in Year 1 for the taxable year ended on Date 4 pursuant to an election under section 858(a) of the Code (a “throwback dividend”). Specifically, Law Firm prepared a resolution under which Taxpayer resolved to treat the first cash distribution made in Year 1 as a throwback dividend. Accounting Firm attached the resolution to Taxpayer’s return for its taxable year ended on Date 4 and included the throwback dividend for purposes of calculating Taxpayer’s deduction for dividends paid. Taxpayer had never before made a throwback dividend and did not understand the distinction between the election under section 858(a) and the consent dividend election under section 565(a). Taxpayer’s return for the year ending Date 4 contained a second error relating to the deduction for dividends paid. Taxpayer inadvertently treated the amount of contributed capital with respect to its preferred interests as an amount distributed on the preferred interests, resulting in an overstatement of the amount of its cash dividends by \$d.

Both errors on Taxpayer’s return resulted from misunderstandings among Taxpayer, Accounting Firm, and Law Firm. But for the errors, Taxpayer would have

made a consent dividend election on its return for the taxable year ended Date 4 in the amount of \$a.

Accounting Firm became aware of the errors and notified Taxpayer in the second half of Year 2. Accounting Firm advised Taxpayer of the distinction between the treatment of consent dividends and throwback dividends, including for purposes of the excise tax imposed by section 4981 of the Code. Accounting Firm advised that a request for relief under sections 301.9100-1 and 301.9100-3 was the appropriate corrective action. (Taxpayer has requested no ruling on its election under section 858(a), which, pursuant to section 1.858-1(b)(4), cannot be revoked. Taxpayer will determine the treatment of dividends paid in Year 1, taking into account the section 858(a) election and the effect of any consent dividend election for the taxable year ended Date 4.)

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

1. Taxpayer has made this request before the failure to properly make the consent dividend election was discovered by the Internal Revenue Service.
2. Taxpayer is not seeking to alter a return position for which an accuracy-related penalty has been, or could be, imposed under section 6662 at the time Taxpayer requested relief (taking into account any qualified amended return filed within the meaning of section 1.6664-2(c)(3)).
3. Taxpayer has not used hindsight in requesting relief. No specific facts have changed since the due date for making the consent dividend election that make the election more advantageous to Taxpayer than if the consent dividend election had been timely made.
4. 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 consent dividend election applies than it would have had if the election had been timely made (considering the time value of money).
5. The period of limitations on assessment under section 6501(a) has not closed for the taxable year in which the consent dividend election should have been made or any of the subsequent taxable years that would be affected by the election had it been timely filed.
6. Taxpayer did not choose to not file the consent dividend election, being informed in all material respects of the required election and related tax consequences.

LAW

Section 565(a) provides that, if any person owns consent stock (as defined in section 565(f)(1)) in a corporation on the last day of the taxable year of such corporation, and such person agrees, in a consent filed with the return of such corporation in accordance with regulations prescribed by the Secretary, to treat as a dividend the amount specified in such consent, the amount so specified shall, except as provided in subsection (b), constitute a consent dividend for purposes of section 561 (relating to the deduction for dividends paid).

Section 1.565-1(a) provides that the dividends paid deduction, as defined in section 561 of the Code, includes the consent dividends for the taxable year. A consent dividend is a hypothetical distribution (as distinguished from an actual distribution) made by certain corporations, including REITs, to any person who owns consent stock on the last day of the taxable year of such corporation and who agrees to treat the hypothetical distribution as an actual dividend, subject to the limitations set forth in section 565, and sections 1.565-2 and 1.565-1(c)(2), by filing a consent at the time and in the manner specified in section 1.565-1(b). Under section 1.565-1(b)(3) and Rev. Rul. 78-296, 1978-2 C.B. 183, a consent may be filed no later than the due date (including extensions) of the corporation's income tax return for the taxable year for which the dividends paid deduction is claimed. Under section 1.565-1(b)(1), a shareholder makes a consent on Form 972, which it provides to the corporation. Under section 1.565-1(b)(3), the corporation must file Forms 972 for each consenting shareholder, and a return on Form 973 showing by classes the stock outstanding on the first and last days of the taxable year, the dividend rights of such stock, distributions made during the taxable years to shareholders, and other information required by the form. Under section 1.565-1(c), the amount specified in the shareholder's consent generally is included in the gross income of the shareholder as a taxable dividend.

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 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, revenue procedure, notice, or 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 section 301.9100-3 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 generally is deemed to have acted reasonably and in good faith if the taxpayer (i) requests relief under section 301.9100-3 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, however, 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 section 301.9100-3.

CONCLUSION

Based on the information submitted and the representations made, we conclude that Taxpayer has satisfied the requirements for granting a reasonable extension of time to elect to make a consent dividend election under section 565(a) and section 1.565-1 for its taxable year ended Date 4. Accordingly, Taxpayer has 45 calendar days from the date of this letter to elect to make a consent dividend election for the intended amount for its taxable year ended Date 4.

This ruling's application is limited to the facts, representations, Code sections and regulations sections cited herein. Except as provided herein, no opinion is expressed or

implied concerning the tax consequences of any aspect of any transaction or item discussed or referenced in this letter. Specifically, no opinion is expressed as to (a) Taxpayer's qualification as a REIT, (b) the effect of Taxpayer's election under section 858(a), or (c) the consequences of filing any amended return.

The ruling contained in this letter is based upon information submitted and representations made by Taxpayer and accompanied by penalties of perjury statements executed by the appropriate parties. While this office has not verified any of the material submitted in support of the request for a ruling, it is subject to verification on examination.

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,

Steven Harrison
Branch Chief, Branch 1
Office of Associate Chief Counsel
(Financial Institutions and Products)

cc: