Internal Revenue Service

Number: **200302034**
Release Date: 01/10/2003
Index No.: 565.01-02, 9100.00-00

Department of the Treasury

Washington, DC 20224

Person to Contact:

Telephone Number:

Refer Reply To:
CC:ITA:2 – PLR-122547-02
Date:
December 6, 2002

▹

LEGEND:

Taxpayers =

Taxpayer 1 =

Taxpayer 2 =

Taxpayer 3 =

Taxpayer 4 =

Taxpayer 5 =

Taxpayer 6 =

Date 1 =

Date 2 =

Year 1 =

Year 2 =

Year 3 =

Year 4 =

Year 5 =

Year 6 =

Year 7 =

Amount 1 =

Amount 2 =

Amount 3 =

Amount 4 =

Amount 5 =

Firm A =

This is a response to a request for a ruling dated April 16, 2002, submitted by your authorized representative requesting relief under § 301.9100-3 of the Procedure and Administration Regulations to make consent dividend elections under § 565 of the Internal Revenue Code and the regulations thereunder.

Taxpayers are members of a consolidated group with Taxpayer 1 as the common parent corporation. All corporations are accrual method taxpayer filing a consolidated tax return using a fiscal year end of Date 1. Taxpayers are principally engaged in the business of acquiring, developing, owning, and operating independent power-generating facilities. Although Taxpayer 1 is a relatively large corporation with a complex organizational structure, this has not always been the case. Consequently, Taxpayers have not always employed a tax department that was sophisticated in its knowledge of federal tax laws and procedures.

Beginning in Year 1, Taxpayers engaged Firm A to perform financial accounting, to provide tax consulting, and to prepare and file tax returns. Taxpayers have consulted with Firm A on the tax issues associated with the numerous transactions that have occurred over the years. In addition, Taxpayers have relied on Firm A to prepare all income tax returns affected by this request for an extension of time to make consent dividend elections and to bring to Taxpayers' attention any issues that arose during the course of preparing those returns.

In Year 7, Firm A prepared Taxpayers' consolidated return for Year 6, including a Schedule PH (related to the personal holding company (PHC) rules) in connection with a proposed corporate transaction between Taxpayer 1 and Taxpayer 7. Taxpayers requested Firm A to confirm that there were no PHC issues for Year 6. Firm A confirmed that it had tested Taxpayer 7 for PHC status, but Firm A had not tested Taxpayer 1 or the other subsidiaries within the consolidated group -- therefore it could not confirm that there were no PHC issues for those entities.

Taxpayers requested Firm A to perform the necessary calculations to test PHC status and PHC liability for Year 6, and Firm A determined that Taxpayer 2 had a PHC liability. Firm A immediately communicated its findings with respect to Year 6 to Taxpayers' management, who was previously unaware that such a liability existed.

Taxpayers then directed Firm A to determine whether there had been any PHC testing for all other years still open under the applicable statutes of limitations (taxable years ending Date 1, Year 5; Date 1, Year 4; Date 1, Year 3; Date 2, Year 3; Date 2, Year 2, and Date 2, Year 1). Firm A confirmed that it had tested Taxpayer 7 for PHC status and had included a Schedule PH for Taxpayer 7 in the consolidated returns for each of these years. Firm A also confirmed that it had not previously performed PHC status testing on Taxpayer 1 or the other subsidiaries for

each of these years except for the year ended Date 2, Year 1 (an accrual review memorandum for that year contains the statement that “Each company has been reviewed for possible personal holding company (PHC) issues.” However, the memorandum does not contain any documentation). Firm A then tested all the members of the consolidated group for the open years, determining that there would be PHC liabilities absent making a consent dividend.

Following this determination, Taxpayers filed this request for an extension of time to make consent dividend elections. Taxpayers request the Commissioner’s consent to extend the due date to make consent dividend elections under § 565 on Forms 972 and 973 as follows:

Taxable Year Ending	*Corporation Claiming Deduction for Consent Dividend (Form 973)*	*Shareholder Consenting to Include Specific Amount in Gross Income (Form 972)*	*Dividend Amount*
Date 1, Year 5	Taxpayer 3	Taxpayer 6	Amount 1
Date 2, Year 3	Taxpayer 4	Taxpayer 1	Amount 2
Date 2, Year 3	Taxpayer 5	Taxpayer 1	Amount 3
Date 2, Year 2	Taxpayer 5	Taxpayer 1	Amount 4
Date 2, Year 1	Taxpayer 5	Taxpayer 1	Amount 5

Section 301.9100-3 of the Procedure and Administration Regulations generally provides extensions of time for making regulatory elections. For this purpose, § 301.9100-1(b) defines the term "regulatory election" to include an election whose deadline is prescribed by a revenue ruling, revenue procedure, notice, or announcement published in the Internal Revenue Bulletin.

Section 301.9100-3(a) provides, in part, that requests for relief will be granted when the taxpayer provides evidence (including affidavits described in § 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)(1) provides, in part, that except as otherwise provided (in § 301.9100-3(b)(3)(i) through (iii)), a taxpayer is deemed to have acted reasonably and in good faith if the taxpayer (i) requests relief before failure to make the regulatory election is discovered by the IRS; or (v) reasonably' relied on a qualified tax professional and the tax professional failed to make, or advise the taxpayer to make the election.

The affidavits presented show that Taxpayers acted reasonably and in good faith, having relied on Firm A to prepare their returns during the tax years at issue. Hindsight may now indicate that the professionals in Firm A may not have had the expertise necessary to adequately advise Taxpayers with respect to consent dividend elections. However, no evidence indicates that such reliance was unreasonable.

Section 301.9100-3(b)(3) provides, in part, that a taxpayer is 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 § 6662 at the time the taxpayer requests relief (taking into account § 1.6664-2(c)(3) of the Income Tax Regulations) 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. In connection with hindsight, if specific facts have changed since the due date for making the election that make the election advantageous to the taxpayer, the Service will not ordinarily grant relief. In such a case, the Service will grant relief only when the taxpayer provides strong proof that the taxpayer's decision to seek relief did not involve hindsight.

In the present case, Taxpayers are not attempting to alter a return position taken for which a penalty has been or could be imposed under § 6662. Further, Taxpayers were not informed of the need to make the elections under § 565 and so did not make any conscious choice as to whether or not to make the elections. In addition, there is no indication that Taxpayers are using hindsight, as defined above, in requesting this relief. While it is clear that Taxpayers carefully considered all options available to it with its tax advisors before filing this request for relief, specific facts have not changed since the due date for making the elections that make the election more advantageous to Taxpayers.

Section 301.9100-3(c)(1)(i) provides, in part, 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, in part, 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.

In the present case, granting the relief requested will not prejudice the interests of the government under the given criteria. Taken together, the disclosed circumstances indicate that the omission Taxpayers now seek to correct originated from an honest mistake on the part of their tax advisors, and not from a desire to avoid taxes. Granting this application will not prejudice the interests of the government.

Accordingly, the consent of the Commissioner is hereby granted for an extension of time to file the forms necessary to make the § 565 consent dividend elections for each of the years at issue for each Taxpayer as requested. This extension shall be for a period of 45 days from the date of this ruling. Please attach a copy of this ruling to the returns, schedules and forms filed in connection with making the election under § 565 when such forms are filed.

CAVEATS:
A copy of this letter must be attached to any income tax return to which it is relevant. We enclose a copy of the letter for this purpose. Also enclosed is a copy of the letter ruling showing the deletions proposed to be made in the letter when it is disclosed under § 6110.

Except as expressly provided herein, no opinion is expressed or implied concerning the tax consequences of any aspect of any item discussed or referenced in this letter. This ruling is directed only to the taxpayer(s) requesting it. Section 6110(k)(3) provides that it may not be used or cited as precedent.

Sincerely,

Thomas D. Moffitt
Branch Chief
Office of Associate Chief Counsel
(Income Tax & Accounting)

Enclosures (2)
Copy of this letter
Copy for § 6110 purposes