Internal Revenue Service

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Washington, DC 20224

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Person To Contact:
, ID No.
Telephone Number:

Refer Reply To:
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In Re:

Date:
September 11, 2007

Legend

Taxpayer	=	
		SSN:
Fund		
Trust		
LP 1		
LP 2		
Corp 1		
Corp 2		
Corp 3		
Country A		
Country A Act		
Country A Entities	=	
Stock Exchange	=	
Jurisdiction 1		
Jurisdiction 2		
Business		
Trust Document		
Treaty		

Units		
Amount	=	
Date 1		
Date 2		
Date 3	=	

Dear :

This is in response to a letter dated October 13, 2006, requesting rulings concerning section 1(h)(11) of the Internal Revenue Code (the "Code").

The rulings contained in this letter are based upon information and representations submitted by the taxpayer and accompanied by a penalty of perjury statement executed by an appropriate party. While this office has not verified any of the material submitted in support of the request for rulings, it is subject to verification on examination.

FACTS

Taxpayer is a resident alien for U.S. federal income tax purposes who holds Units of the Fund. The Fund's Units are traded in Country A on the Stock Exchange. Each Unit represents an equal, undivided beneficial interest in the Fund and any distributions from the Fund. Each Unit is transferable and entitles the holder to: (1) an equal participation in distributions of the Fund; (2) rights of redemption; and (3) one vote at all meetings of Unit holders.

The Fund is an unincorporated, open-ended, limited purpose trust established under the laws of Jurisdiction 1. The Fund was created for investment purposes. Taxpayer represents that the Fund qualifies as a mutual fund trust for purposes of the Country A Act. In order for the Fund to maintain its status as a mutual fund trust under the Country A Act, the Fund must not be established or maintained primarily for the benefit of nonresidents of Country A. Thus, the Trust Document provides that nonresidents of Country A can never be the beneficial owners of more than 49.9% of the Units.

Taxpayer represents that the Fund is treated as a resident of Country A for Country A tax purposes and that the Fund is subject to Country A tax on its worldwide income, including net realized taxable capital gains, less a deduction for the amounts paid or payable in the year to the Unit holders.

The Fund has Trustees who supervise the activities and manage the investments and affairs of the Fund. The Trustees have full, absolute, and exclusive power over Fund assets and the affairs of the Fund. The Unit holders have limited liability in connection with operation of the Fund.

The Fund owns 100% of the interests in Trust, established under the laws of Jurisdiction 1. Trust owns units in LP 1, a limited partnership existing under the laws of Jurisdiction 2. LP 1 owns units in LP 2, a limited partnership existing under the laws of Jurisdiction 2. LP2 owns all of the shares of Corp 1, a Country A corporation, which holds all of the shares of each of Corp 2 and Corp 3 (both Country A corporations). As of Date 3, Trust also held accounts receivable of approximately Amount. Together, LP1 and LP2 carry

on the Business. Corp 2 and Corp 3 provide insurance coverage to Business customers. The Fund's directly and indirectly held assets are all located outside the United States. The Business is carried on only in Country A.

Trust Document provides that the Fund is restricted to acquiring, investing in, transferring, disposing of, and otherwise dealing with securities of Trust and other corporations, partnerships, trusts, or other persons engaged directly or indirectly in, and assets used in connection with, the Business, as well as activities ancillary or incidental thereto, and such other investments as the trust may determine. In addition, the Fund may acquire, invest in, transfer, dispose of, and otherwise deal with securities of Trust, LP1, LP2, Corp 1, Corp 2, Corp 3, or any of their respective subsidiaries. Also, the Fund can issue Units and other securities of the Fund, including convertible securities and warrants, to obtain funds to conduct the activities of the Fund, including raising funds for acquisitions and development. The Fund can issue debt securities and must satisfy the liabilities, obligations, or debts of the Fund. The Fund can dispose of all or any part of the assets of the Fund.

Taxpayer represents that the Fund is not a passive foreign investment company as defined in section 1297.

On Date 1, the Fund filed a Form 8832, Entity Classification Election, indicating that it was a foreign eligible entity electing to be classified as an association taxable as a corporation for U.S. income tax purposes. The election was effective as of Date 2.

RULINGS REQUESTED

1. Is the Fund is a "foreign corporation" for purposes of section 1(h)(11)(C)?

2. Is the Fund a "qualified foreign corporation" for purposes of section 1(h)(11)(B)(i)(II)?.

RULING 1

Under section 1(h)(11), certain dividends paid by a "qualified foreign corporation" to U.S. individuals are "qualified dividend income," taxed at the capital gains rates. See I.R.C. § 1(h)(11)(A) and (B)(i).

Subject to certain exceptions, the term "qualified foreign corporation" includes any "foreign corporation" that "is eligible for benefits of a comprehensive income tax treaty with the United States which the Secretary determines is satisfactory for purposes of this paragraph and which includes an exchange of information program." See I.R.C. § 1(h)(11)(C)(i).

Section 7701(a)(3) provides that the term “corporation” includes associations, joint-stock companies, and insurance companies.

Treas. Reg. § 301.7701-1(a)(1) provides that the Internal Revenue Code prescribes the classification of various organizations for federal income tax purposes.

Treas. Reg. § 301.7701-1(a)(2) states that a joint venture or other contractual arrangement may create a separate entity for federal income tax purposes if the participants carry on a trade, business, financial operation, or venture and divide the profits therefrom.

Treas. Reg. § 301.7701-4(a) provides that, in general, the term “trust” refers to an arrangement created either by will or by an inter vivos declaration whereby trustees take title to property for the purpose of protecting or conserving it for the beneficiaries under the ordinary rules applied in chancery or probate courts. Usually the beneficiaries of such a trust do no more than accept the benefits thereof and are not the voluntary planners or creators of the trust arrangement. However, the beneficiaries of such a trust may be the persons who create it and it will be recognized as a trust under the Code if it was created for the purpose of protecting or conserving the trust property for beneficiaries who stand in the same relation to the trust as they would if the trust had been created by others for them. Generally speaking, an arrangement will be treated as a trust under the Code if it can be shown that the purpose of the arrangement is to vest in trustees responsibility for the protection and conservation of property for beneficiaries who cannot share in the discharge of this responsibility and, therefore, are not associates in a joint enterprise for the conduct of business for profit.

Treas. Reg. § 301.7701-4(b) provides that there are other arrangements which are known as trusts because the legal title to property is conveyed to trustees for the benefit of beneficiaries, but which are not classified as trusts for purposes of the Internal Revenue Code because they are not simply arrangements to protect or conserve the property for the beneficiaries. These trusts, which are often known as business or commercial trusts, generally are created by the beneficiaries simply as a device to carry on a profit-making business which normally would have been carried on through business organizations that are classified as corporations or partnerships under the Code. However, the fact the corpus of the trust is not supplied by the beneficiaries is not sufficient reason in itself for classifying the arrangement as an ordinary trust rather than as an association or partnership. The fact that any organization is technically cast in the trust form, by conveying title to property to trustees for the benefit of persons designated as beneficiaries, will not change the real character of the organization if the organization is more properly classified as a business entity under Treas. Reg. § 301.7701-2.

Treas. Reg. § 301.7701-4(c)(1) provides that an “investment” trust will not be classified as a trust if there is a power under the trust agreement to vary the investment of the

certificate holders. An investment trust with a single class of ownership interests, representing undivided beneficial interests in the assets of the trust, will be classified as a trust if there is no power under the trust agreement to vary the investment of the certificate holders. An investment trust with multiple classes of ownership interests ordinarily will be classified as a business entity under Treas. Reg. § 301.7701-2; however, an investment trust with multiple classes of ownership interests, in which there is no power under the trust agreement to vary the investment of the certificate holders, will be classified as a trust if the trust is formed to facilitate direct investment in the assets of the trust and the existence of multiple classes of ownership interests is incidental to that purpose.

In Commissioner v. North American Bond Trust, 122 F.2d 545 (2nd Cir 1941), cert. denied, 314 U.S. 701 (1942), the court stated that a power to vary the investment of the certificate holders exists if there is managerial power under the trust instrument that enables a trust to take advantage of market variations to improve the investment of the investors. The court further held that a power to acquire new bonds upon the admission of new investors, where existing investors would acquire a pro rata interest in the new bonds, was a power to vary the investment of the existing investors, because the power allowed the trustee to take advantage of market variations in a manner that could improve the investment of the original investors.

Rev. Rul. 78-149, 1978-1 C.B. 448, concludes that a right to replace bonds called by the issuer prior to maturity with other similar bonds is a power to vary.

In Rev. Rul. 75-192, 1975-1 C.B. 384, a trustee received principal and interest payments on a pool of mortgages. During the period between quarterly distribution dates, the trustee invested cash on hand in short-term obligations of (or guaranteed by) the United States (or any agency or instrumentality thereof) and in certificates of deposit of any bank or trust company having a minimum stated surplus and capital. The trustee was permitted to invest only in obligations maturing prior to the next distribution date and was required to hold the obligations until maturity. The trustee had no authority under the trust agreement to purchase new securities or mortgages, or to make any other new investments. In that case, the revenue ruling concluded that there was no power to vary.

In Rev. Rul. 86-92, 1986-2 C.B. 214, a trust held tax-exempt bonds and contracts to purchase tax-exempt bonds. The contracts provided that the bonds must be transferred to the trust within 90 days of the trust's creation. If a bond was not transferred for reasons beyond the control of the trustee or the trust's sponsor, the sponsor had 20 days within which to transfer different bonds of substantially the same character and quality. The revenue ruling concluded that neither the trustee nor the sponsor had a power to take advantage of market variations to improve the investment of certificate holders and that the powers are incidental to the organization of the trust.

In Rev. Rul. 90-63, 1990-2 C.B. 270, the trustee of an investment trust had a power to consent to changes in the credit support of debt obligations held by the trust. The power was exercisable only to the extent the trustee reasonably believed the change was advisable to maintain the value of trust property by preserving the credit rating of the obligations. The revenue ruling concluded that although it was possible for the change in credit support to result in an increase in the value of the trust property, the increase would be incidental to maintaining the value of the trust property. Thus the trustee's limited power under the circumstances did not constitute a power to vary.

Rev. Rul. 75-192, 1975-1 C.B. 384, concluded that temporary investments will not constitute a power to vary if the purpose is to prevent funds from being non-productive and not to take advantage of market fluctuations.

Treas. Reg. § 301.7701-2(b)(2) provides that for federal income tax purposes, the term "corporation" includes an association as determined under Treas. Reg. § 301.7701-3. See also G.C.M. 36132.

Treas. Reg. § 301.7701-2(a) provides that for purposes of that section and Treas. Reg. § 301.7701-3, a "business entity" is any entity recognized for federal tax purposes (including an entity with a single owner that may be disregarded as an entity separate from its owner under Treas. Reg. § 301.7701-3) that is not properly classified as a trust under Treas. Reg. § 301.7701-4 or otherwise subject to special treatment under the Code. A business entity with two or more members is classified for federal tax purposes as either a corporation or a partnership. A business entity with only one owner is classified as a corporation or is disregarded; if the entity is disregarded, its activities are treated in the same manner as a sole proprietorship, branch, or division of the owner.

Treas. Reg. § 301.7701-3(a) provides that a business entity that is not classified as a corporation under Treas. Reg. § 301.7701-2(b)(1), (3), (4), (5), (6), (7), or (8) (an eligible entity) can elect its classification for federal income tax purposes as provided in that section. An eligible entity with at least two members can elect to be classified as either an association or a partnership.

Treas. Reg. § 301.7701-5(a) provides that a business entity (including an entity that is disregarded as separate from its owner) is foreign if it is not domestic. A business entity is domestic if it is created or organized as any type of entity (including, but not limited to, a corporation, unincorporated association, general partnership, limited partnership, and limited liability corporation) in the United States, or under the law of the United States or of any State.

In this case, the Fund carries on a business for profit through its investments and the Unit holders divide the profits therefrom. The property of the Fund and the affairs of the Fund are conducted and transacted in the name of the Fund. In addition, the Unit

holders are not subject to any liability in connection with the Fund. Therefore, the Fund is an entity separate from its owners for federal tax purposes under Treas. Reg. § 301.7701-1.

The Fund is not a trust under Treas. Reg. § 301.7701-4(a) because it is not simply an arrangement to protect or conserve property for the beneficiaries. The Fund is a device to carry on a profit-making business. In addition, the Trust Document gives the Fund's trustees broad power to acquire, invest in, transfer, dispose of, and otherwise deal with the securities of Trust and other corporations, partnerships, trusts, or other persons engaged, directly or indirectly, in, and assets used in connection with, the Business, as well as activities ancillary or incidental thereto, and such other investments as the Fund's trustees may determine. The power accorded under Trust Document is the managerial power to vary the investments of the Fund to take advantage of market variations to improve the investment of the Unit holders. The Fund has the power to vary its investments and should not be classified as an investment trust under the entity classification regulations. Therefore, because the Fund is not properly classified as a trust under Treas. Reg. § 301.7701-4 and is not otherwise subject to special treatment under the Code, the Fund is a business entity for purposes of Treas. Reg. §§ 301.7701-2 and 301.7701-3.

Because the Fund is a business entity that is not classified as a corporation under Treas. Reg. § 301.7701-2(b)(1), (3), (4), (5), (6), (7), or (8), it is an eligible entity. As an eligible entity, the Fund can elect its classification for federal tax purposes under Treas. Reg. § 301.7701-3. Because the Fund was not created or organized as any type of entity in, or under the law of, the United States or any State, it is treated as a foreign business entity under Treas. Reg. § 301.7701-5(a).

On Date 1, the Fund filed a Form 8832, Entity Classification Election, indicating that is was a foreign eligible entity electing to be classified as an association taxable as a corporation for U.S. income tax purposes. The election was intended to be effective as of Date 2.

Accordingly, based solely on the information submitted and the representations made, we conclude that the Fund can elect its classification for federal income tax purposes under Treas. Reg. § 301.7701-3 and, because it properly filed the appropriate form to elect to be treated as a foreign corporation for federal income tax purposes as of Date 2, the Fund will be treated as a "foreign corporation" for purposes of section 1(h)(11)(C) as of such date.

RULING 2

Section 1(h)(11)(C) provides in relevant part:

(C) Qualified foreign corporations.

> (i) In general. Except as otherwise provided in this paragraph, the term "qualified foreign corporation" means any foreign corporation if—
>
> …
>
> (II) such corporation is eligible for benefits of a comprehensive income tax treaty with the United States which the Secretary determines is satisfactory for purposes of this paragraph and which includes an exchange of information program.

Notice 2006-101, 2006-47 I.R.B. 930, provides that the U.S. income tax treaty with Country A meets the requirements of section 1(h)(11)(C)(i)(II). Notice 2006-101 also provides that a foreign corporation is eligible for benefits of a U.S. income tax treaty listed in such notice if the foreign corporation is a resident within the meaning of such term under the relevant treaty and it satisfies any other requirements of that treaty, including the requirements under any applicable limitation on benefits provision.

Article (Residence) of the Treaty defines the term "resident of a Contracting State." For purposes of the application of the Treaty by the United States, Article (Limitation on Benefits) of the Treaty limits the benefits under the Treaty to residents of Country A that are "qualifying persons."

Taxpayer represents that the Fund is not a PFIC as defined in section 1297 of the Code.

We concluded above that, to determine whether the Fund will be treated as a "corporation" for purposes of section 1(h)(11)(C), we look to whether the Fund is properly treated as a corporation for U.S. tax purposes, rather than for foreign tax purposes. This conclusion is not determinative, however, of whether the Fund is eligible for comprehensive benefits under the Treaty. Whether the Fund is a "qualified foreign corporation" within the meaning of section 1(h)(11)(C) depends on whether the Fund is (1) a resident of Country A within the meaning of Article (Residence) of the Treaty and (2) a "qualifying person" within the meaning of Article (Limitation on Benefits) of the Treaty. The residence and limitation on benefits articles of the Treaty are applied to the Fund, a Country A entity, without regard to the Fund's entity classification for U.S. tax purposes.

Accordingly, based solely on the information submitted and the representations made, the Fund may be treated as a "qualified foreign corporation" for purposes of section 1(h)(11)(B)(i)(II), provided that, for the relevant period, it is a resident of Country A within the meaning of Article and it is a qualifying person within the meaning of Article of the Treaty.

Except as expressly 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. In particular, no opinion is expressed as to whether the Fund is a resident of

Country A for purposes of the Treaty or as to whether the Fund satisfies the requirements of the limitation on benefits article of the Treaty. No opinion is expressed about the tax treatment of the Fund under other provisions of the Code and regulations or about the tax treatment of any conditions existing at the time of, or effects resulting from, any dividend distribution that are not specifically covered by the above rulings.

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

In accordance with the Power of Attorney on file with this office, a copy of this letter is being sent to the taxpayer.

A copy of this letter must be attached to any income tax return to which it is relevant. Alternatively, taxpayers filing their returns electronically may satisfy this requirement by attaching a statement to their return that provides the date and control number of the letter ruling.

Sincerely,

Edward R. Barret
Assistant to the Branch Chief, Branch 1
Office of Associate Chief Counsel
(International)

cc: