Internal Revenue Service

Number: **200814001**
Release Date: 4/4/2008

Index Number: 1295.02-02

Department of the Treasury
Washington, DC 20224

Third Party Communication: None
Date of Communication: Not Applicable

Person To Contact:
, ID No.

Telephone Number:

Refer Reply To:
CC:INTL:BR2
PLR-108301-07

Date:
December 20, 2007

Legend

Taxpayer =

Corporation A =
Corporation B =

Tax Advisor N =
Tax Advisor O =

Individual R =
Individual S =
Individual T =

Country X =

Date 1 =
Date 2 =
Date 3 =

Year 1 =
Year 2 =
Year 3 =

Dear :

This is in response to a letter dated November 30, 2006, submitted on behalf of Taxpayer by its authorized representative, requesting the consent of the Commissioner to make a retroactive qualified electing fund ("QEF") election under section 1295(b) of the Internal Revenue Code ("Code") and Treas. Reg. §1.1295-3(f) with respect to Taxpayer's investment in Corporation A and Corporation B.

The ruling contained in this letter is based upon facts and representations submitted on behalf of Taxpayer by Tax Advisor O and accompanied by a penalty of perjury statement executed by Taxpayer. While this office has not verified any of the material submitted in support of the request for a ruling, such material is subject to verification upon examination. The information submitted for consideration is set forth below.

FACTS

Individual R desired to implement a Country X estate freeze for the benefit of Taxpayer and others. To this end, Individual R consulted Tax Advisor N. As a result of the advice provided by Individual S on behalf of Tax Advisor N, several transactions occurred.

In Year 1, Corporation A was formed by Individual R in Country X on Date 1. On Date 2, Individual R made a gift of shares of stock in Corporation A to Taxpayer. As a result of the gift, Taxpayer is a 33 1/3% shareholder of Corporation A. Individual S failed to identify Corporation A as a passive foreign investment company ("PFIC") under Code section 1297, and failed to advise Taxpayer of the possibility of making, or the consequences of failing to make, a QEF election with respect to Corporation A. As a result, Taxpayer failed to make the QEF election relating to Corporation A on Taxpayer's Year 1 federal income tax return.

In Year 2, Corporation B was formed in Country X on Date 3. Taxpayer subscribed for shares of stock in Corporation B. As a result of the subscription, Taxpayer is a 33 1/3 % shareholder of Corporation B. Individual S failed to identify Corporation B as a PFIC under Code section 1297, and failed to advise Taxpayer of the possibility of making, or the consequences of failing to make, a QEF election with respect to Corporation B. As a result, Taxpayer failed to make the QEF election relating to Corporation B on Taxpayer's Year 2 federal income tax return.

Corporation A and Corporation B did not generate any income and did not have any current year earnings and profits in any year prior to Year 3.

In Year 3, Taxpayer contacted Tax Advisor O to prepare Taxpayer's Year 3 federal income tax return. Individual T prepared Taxpayer's return on behalf of Tax Advisor O, and determined that Corporation A and Corporation B were PFICs since Year 1 and Year 2, respectively. Individual T suggested that Taxpayer file a retroactive QEF election relating to Corporation A and Corporation B and recommended that Corporation B sell certain assets.

The sale of those assets in Year 3 resulted in recognition of long-term capital gain by Corporation B. In anticipation of the granting of the retroactive QEF election, and in accordance with Code section 1293, Taxpayer reported its pro-rata share of the net capital gain on Form 8621 and Schedule D of Taxpayer's Year 3 federal income tax return.

Taxpayer has submitted an affidavit, under penalties of perjury, describing the events that led to the failure to make the QEF election by the election due date, including the role of Individual S. Taxpayer represents that in all issues related to the organization of Corporation A and Corporation B, Taxpayer relied on the advice of Individual S. Taxpayer has also submitted an affidavit of Individual S corroborating the statements made by Taxpayer.

Taxpayer represents that the PFIC status of Corporation A or Corporation B has not been raised by the IRS on audit for any of the taxable years.

RULING REQUESTED

Taxpayer requests the consent of the Commissioner of the Internal Revenue Service to make retroactive QEF elections under Treas. Reg. § 1.1295-3(f) with respect to Corporation A and Corporation B.

LAW AND ANALYSIS

Code section 1293(a) provides that every U.S person who owns stock of a QEF at any time during the taxable year of such fund shall include in gross income 1) as ordinary income, such shareholder's pro rata share of the ordinary earnings of such fund for such taxable year, and 2) as long-term capital gain, such shareholder's pro rata share of the net capital gain of such fund for such taxable year.

Code section 1295(a) provides that any PFIC shall be treated as a QEF with respect to a taxpayer if (1) an election by the taxpayer under Code section 1295(b) applies to such company for the taxable year and (2) the company complies with such requirements as the Secretary may prescribe for purposes of determining the ordinary earnings and net capital gains of such company.

Under Code section 1295(b)(2), a QEF election may be made for any taxable year at any time on or before the due date (determined with regard to extensions) for filing the return for such taxable year. To the extent provided in regulations, such an election may be made after such due date if the taxpayer failed to make an election by the due date because the taxpayer reasonably believed the company was not a PFIC.

Under Treas. Reg. § 1.1295-3(f)(1), a taxpayer may request the consent of the Commissioner to make a retroactive QEF election for a taxable year if:

1. The shareholder reasonably relied on a qualified tax professional, within the meaning of § 1.1295-3(f)(2);
2. Granting consent will not prejudice the interests of the United States government, as provided in § 1.1295-3(f)(3);
3. The request is made before a representative of the Internal Revenue Service raises upon audit the PFIC status of the corporation for any taxable year of the shareholder; and
4. The shareholder satisfies the procedural requirements of § 1.1295-3(f)(4).

Taxpayer has satisfied the first requirement of Treas. Reg. § 1.1295-3(f)(1) because Taxpayer reasonably relied on a qualified tax professional within the meaning of Treas. Reg. § 1.1295-3(f)(2). Under Treas. Reg. § 1.1295-3(f)(2), a shareholder will not be considered to have reasonably relied on a qualified tax professional if the shareholder knew, or reasonably should have known, that the foreign corporation was a PFIC and knew of the availability of a Code section 1295 election. In addition, a shareholder cannot claim reliance upon a qualified tax professional if he know or reasonably should have known that the tax professional relied upon was not competent to render tax advice with respect to the ownership of shares of a foreign

corporation or did not have access to all the relevant facts and circumstances. According to the facts submitted and the representations made, Taxpayer relied on the advice of Individual S, who failed to identify Corporation A or Corporation B as PFICs and failed to advise the shareholder of the consequences of making, or failing to make, QEF elections. Individual S was a lawyer competent to render tax advice with respect to ownership of shares of a foreign corporation and who had access to all relevant facts and circumstances. Additionally, Taxpayer did not know, and should not reasonably be expected to have known, that Corporation A or Corporation B was a PFIC, or of the availability of a QEF election.

Taxpayer has satisfied the second requirement of Treas. Reg. § 1.1295-3(f)(1) because granting consent in this case will not prejudice the interests of the United States government as provided in Treas. Reg. § 1.1295-3(f)(3). Pursuant to Treas. Reg. § 1.1295-3(f)(3)(i), the interests of the United States government are prejudiced if granting relief would result in the shareholder having a lower tax liability, taking into account applicable interest charges, in the aggregate for all years affected by the retroactive election (other than by a de minimis amount) than the shareholder would have had if the shareholder had made the Code section 1295 election by the election due date. The time value of money is taken into account for purposes of this computation. According to the facts submitted and the representations made, the interests of the United States government are not prejudiced because the granting of relief does not result in Taxpayer having a lower tax liability than Taxpayer would have had if Taxpayer had made the QEF election by the election due date. Corporation A and Corporation B had no ordinary income or long-term capital gain in any year prior to Year 3. Thus, under Code section 1293(a), Taxpayer would not have been required to include a pro rata share of income or gain in income in any year prior to Year 3. In Year 3, Corporation B had long-term capital gain and Taxpayer included a pro rata share on its federal income tax return for that year. Thus, the interests of the United States government are not prejudiced by allowing Taxpayer to make a retroactive QEF election.

Taxpayer has satisfied the third requirement of Treas. Reg. § 1.1295-3(f)(1) because it has represented that the request to make a retroactive QEF election was made before a representative of the Internal Revenue Service raised the PFIC status of Corporation A or Corporation B in an audit.

Taxpayer has satisfied the fourth requirement of Treas. Reg. § 1.1295-3(f)(1) because Taxpayer has met the procedural requirements of Treas. Reg. § 1.1295-3(f)(4). Pursuant to Treas. Reg. § 1.1295-3(f)(4)(i), a shareholder must file with the Office of the Associate Chief Counsel (International) a ruling request to make a retroactive QEF election and include as part of the request a user fee. Pursuant to Treas. Reg. § 1.1295-3(f)(4)(ii) and (iii), affidavits signed under the penalty of perjury must be submitted by the shareholder and any qualified tax professional upon whose advice the shareholder relied. The affidavits must describe the events that led to the failure to make a QEF election by the election due date, the discovery of such failure, and the engagement and responsibilities of the qualified tax professional and the extent to which the shareholder relied on such professional. According to the facts submitted and the representations made, Taxpayer has filed a completed ruling request, including the correct user fee, and submitted complete and appropriate affidavits.

Based on the information submitted and the representations made:

Consent is granted to Taxpayer to make a retroactive QEF election with respect to Corporation A for Year 1 and Corporation B for Year 2, under Treas. Reg. § 1.1295-3(f), provided that Taxpayer complies with the rules under Treas. Reg. § 1.1295-3(g) regarding the time and manner for making the retroactive QEF elections.

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

A copy of this ruling must be attached to any tax return to which it is relevant.

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

Sincerely,

Ethan A. Atticks
Senior Technical Reviewer, Branch 2
Associate Chief Counsel (International)