Internal Revenue Service

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Department of the Treasury
Washington, DC 20224

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Person To Contact:
, ID No.
Telephone Number:

Refer Reply To:
[CC:INTL:B02]
PLR-154597-05

Date:
January 02, 2008

Legend

Taxpayer =

B =

C =

D =

FC =

Accounting Firm 1 =
Accounting Firm 2 =

Individual 1 =

Year 1 =
Year 2 =
Year 3 =
Year 4 =
Year 5 =
Year 6 =
Year 7 =

Country X =

Dear :

This is in response to your letter dated October 10, 2005, requesting an extension of time to file a qualified electing fund ("QEF") election with respect to Taxpayer's investment in FC.

The rulings contained in this letter are based upon information and representations submitted by 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 this request for ruling, such material is subject to verification upon examination.

FACTS

Taxpayer has represented the following facts:

For the purpose of investing in real estate in Country X, Taxpayer, B, C, and D formed FC under section 351 of the Internal Revenue Code ("Code") in Year 1 and adopted a taxable year ending June 30 for FC. At the time of its formation, B and C owned two shares of redeemable preferred stock, and Taxpayer and D each owned one share of common stock, for a total of 4 shares. In Year 2, Taxpayer, B, C, and D contributed additional capital to the corporation in exchange for the issuance of additional shares. Following the Year 2 contribution of capital, B and C owned 200 shares of redeemable preferred stock, and Taxpayer and D each owned 14,900 shares of common stock.

At all times during his ownership of FC, Taxpayer engaged competent tax advisors to assist him in complying with U.S. tax laws, and relied on those tax advisors to provide him with appropriate guidance to comply with the laws. In Year 3, Taxpayer, B, and C engaged tax advisors from Accounting Firm 1 who were qualified tax professionals competent to render tax advice with respect to the ownership of shares of a foreign corporation. In Year 4, FC was a passive foreign investment company ("PFIC") within the meaning of section 1297(a) of the Code. Taxpayer, B, and C continued to engage Accounting Firm 1 until Year 5, however, at no time did the tax advisors from Accounting Firm 1 inform them that FC was a PFIC and of their need to make a QEF election for FC, or of the tax ramifications for failing to make such an election.

In Year 6, Taxpayer, B, and C engaged the services of Accounting Firm 2. In Year 7, B and C contacted Individual 1 with Accounting Firm 2 to discuss the tax implications of a proposed sale of one of the real estate investments held by FC. Individual 1 determined that FC was a PFIC and advised that a QEF election under section 1295 should have been made with respect to Taxpayer's Year 4. Consistent with that advice, Taxpayer is seeking relief under the special consent procedures of Treas. Reg. §1.1291-3(f).

As of the date of this request for ruling, no representative of the Internal Revenue Service has raised upon audit the PFIC status of FC for any taxable year of Taxpayer.

RULING REQUESTED

Taxpayer requests the consent of the Commissioner of the Internal Revenue Service to make a retroactive QEF election under Treas. Reg. §1.1295-3(f) with respect to his Year 4 taxable year.

LAW AND ANALYSIS

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 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 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), a taxpayer may request the consent of the Commissioner to make a retroactive QEF election for a taxable year. However, the Commissioner will grant relief under Treas. Reg. §1.1295-3(f) only if four conditions are satisfied. The first requirement is that the shareholder reasonably relied on a qualified tax professional, who failed to identify the foreign corporation as a PFIC or failed to advise the shareholder of the consequences of making, or failing to make, a section 1295 election. Treas. Reg. §1.1295-3(f)(2) provides that 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 section 1295 election. In addition, a shareholder cannot claim reliance upon a qualified tax professional if he knew 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 relevant facts and circumstances.

Tax advisors from Accounting Firm 1 were competent to render U.S. tax advice with respect to stock ownership of a foreign corporation and had access to all the relevant facts and circumstances. They failed to advise Taxpayer that FC was a PFIC, failed to make a QEF election on Taxpayer's Year 4 federal income tax return, and failed to advise Taxpayer of the consequences of failing to make such an election. Thus, Taxpayer reasonably relied on a qualified tax professional within the meaning of Treas. Reg. §1.1295-3(f)(1)(i) and (2). Further, Taxpayer did not know and should not reasonably be expected to have known that FC was a PFIC.

The second requirement of Treas. Reg. §1.1295-3(f) is that granting consent will not prejudice the interests of the U.S. government. Under Treas. Reg. §1.1295-3(f)(3)(i), the interests of the U.S. 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 section 1295 election by the election due date. The time value of money is taken into account for purposes of this computation. If granting relief would prejudice the interests of the U.S. government, the Commissioner may, in his sole discretion, grant consent to make the election provided the shareholder enters into a closing agreement with the Commissioner that requires the shareholder to pay an amount sufficient to eliminate any prejudice to the U.S. government as a consequence of the shareholder's inability to file amended returns for closed taxable years. Treas. Reg. §1.1295-3(f)(3)(ii).

This requirement is met in this case because Taxpayer has entered into a closing agreement with the Commissioner that requires him to pay an amount sufficient to eliminate any prejudice to the United States government as a consequence of his inability to file amended returns for closed taxable years. In addition, Taxpayer has agreed to file an amended return for each of his subsequent taxable years affected by the retroactive QEF election.

The third requirement of Treas. Reg. §1.1295-3(f) is that the request must be 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. Treas. Reg. §1.1295-3(f)(1)(iii). In this case, the PFIC status of FC has not been raised upon audit.

The final requirement of Treas. Reg. §1.1295-3(f) is that the procedural requirements set forth in Treas. Reg. §1.1295-3(f)(4) must be met. These include filing a request for consent to make a retroactive election with, and submitting a user fee to, the Office of the Associate Chief Counsel (International). Treas. Reg. §1.1295-3(f)(4)(i). Additionally, affidavits signed under penalties of perjury must be submitted by the shareholder and any qualified tax professional upon whose advice the shareholder relied. Treas. Reg. §1.1295-3(f)(4)(ii), (iii). These 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. Here, affidavits meeting the requirements set forth in Treas. Reg. §1.1295-3(f)(4)(ii) and (iii) as to the failure of Accounting Firm 1's tax advisors to inform Taxpayer of his need to make a QEF election have been submitted, and Taxpayer has otherwise satisfied the procedural requirements of Treas. Reg. §1.1295-3(f)(4).

Based on the information submitted and representations made:

Consent is granted to Taxpayer to make a retroactive election for Year 4, under Treas. Reg. §1.1295-3(f), provided that he complies with the rules under Treas. Reg. §1.1295-3(g) regarding the time and manner for making the retroactive QEF election.

This private letter ruling is directed only to Taxpayer, who requested it. Section 6110(k)(3) of the Code 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 first representative.

Sincerely,

Ethan A. Atticks
Senior Technical Reviewer, CC:INTL:B02
Office of Associate Chief Counsel
(International)

cc: