Internal Revenue Service

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Department of the Treasury
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Person To Contact:
, ID No.
Telephone Number:

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CC:INTL:B02
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Date:
November 17, 2008

TYs

Legend

Taxpayers =

Year 1 =
Year 2 =
Year 3 =

R =
S =

FC =
Country X =

Accountant O =
Accounting Firm P =

Dear :

This is in response to your letter received by our office on October 16, 2007, submitted on behalf of Taxpayers by their authorized representative, requesting the consent of the Commissioner of the Internal Revenue Service 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).

The rulings contained in this letter are based upon information and representations submitted by Taxpayers and accompanied by a penalty of perjury statement executed by appropriate parties. 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

Taxpayers invested $R in S shares of FC, an open-end mutual fund incorporated as a company in Country X, in Year 1. In Year 3, while analyzing information in order to prepare Taxpayers' Year 2 federal income tax return, Accountant O discovered that FC has been a PFIC since Year 1.

During the years at issue, Taxpayers sought tax advice from Accountant O relating to Taxpayers' investment in FC. Taxpayers are not tax professionals and have no experience in international taxation. Taxpayers represent that in all issues related to their investment in FC, they relied on the advice of Accountant O. Accountant O was aware of all the facts and circumstances relating to Taxpayers' investment in FC. Accountant O is a tax professional competent to render advice on U.S. tax laws and has diligently advised Taxpayers on tax matters for over 15 years. Currently, Accountant O is a partner with Accounting Firm P.

Taxpayers have submitted an affidavit, signed 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 Accountant O. Taxpayers have also submitted an affidavit of Accountant O corroborating the statements made by Taxpayers.

Taxpayers represent that as of the date of this request for ruling, the PFIC status of FC has not been raised by the IRS on audit for any of the taxable years at issue.

RULING REQUESTED

Taxpayers request the consent of the Commissioner of the Internal Revenue Service to make a retroactive QEF election with respect to FC for Year 1 under Treas. Reg. §1.1295-3(f).

LAW AND ANALYSIS

Section 1295(a) of the Code 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 if:

1. the shareholder reasonably relied on a qualified tax professional, within the meaning of Treas. Reg. §1.1295-3(f)(2);
2. granting consent will not prejudice the interests of the United States government, as provided in Treas. Reg. §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).

The first requirement is that the shareholder reasonably relied on a qualified tax professional, within the meaning of 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 section 1295 election. Treas. Reg. §1.1295-3(f)(2)(i). 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. Treas. Reg. §§1.1295-3(f)(2)(i)(A) and (B)

Accountant O was 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. She failed to advise Taxpayers that FC was a PFIC, failed to make a QEF election on Taxpayers' Year 1 federal income tax return, and failed to advise Taxpayers of the consequences of failing to make such an election. Thus, Taxpayers reasonably relied on a qualified tax professional within the meaning of Treas. Reg. §1.1295-3(f)(1)(i) and (2). Further, Taxpayers 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.

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 Taxpayers having a lower tax liability than Taxpayers would have had if they had made the QEF election by the election due date.

The third requirement under Treas. Reg. §1.1295-3(f)(1) is that the request must be made before a representative of the IRS raises upon audit the PFIC status of the corporation for any taxable year of the shareholder. Taxpayers have satisfied the third requirement of Treas. Reg. §1.1295-3(f)(1) because they represent that the request to make a retroactive QEF election was made before a representative of the IRS raised the PFIC status of FC in an audit.

The final requirement under Treas. Reg. §1.1295-3(f)(1) is that the procedural requirements set forth in Treas. Reg. §1.1295-3(f)(4) must be met. The procedural requirements 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 that describe:

1. the events which led to the failure to make a QEF election by the election due date;
2. the discovery of such failure;
3. the engagement and responsibilities of the qualified tax professional; and
4. the extent to which the shareholder relied on such professional,

must be submitted. Treas. Reg. §§1.1295-3(f)(4)(ii) and (iii).

According to the facts submitted and the representations made, Taxpayers have filed a completed ruling request, including the correct user fee, and submitted complete and appropriate affidavits. Thus, Taxpayers have satisfied the fourth requirement of Treas. Reg. §1.1295-3(f)(1).

CONCLUSION

Based on the information submitted and representations made:

Consent is granted to Taxpayers to make a retroactive QEF election with respect to FC for Year 1 under Treas. Reg. §1.1295-3(f), provided that they comply 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 the 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 Taxpayers' authorized representative.

Sincerely,

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

cc: