Internal Revenue Service

Department of the Treasury
Washington, DC 20224

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Person To Contact:
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Refer Reply To:
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February 24, 2009

Legend

Taxpayer =

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Employer =

Company A =

State =

Year 1 =

Year 2 =

Year 3 =

Year 4 =

Dear :

This is in reply to a letter dated October 15, 2008, requesting an extension of time under §§ 301.9100-1 and 301.9100-3 of the Procedure and Administration Regulations for Taxpayer to file a written representation under § 1.7872-15(d)(2)(ii) of the Income Tax Regulations. If this written representation under § 1.7872-15(d)(2)(ii) is considered timely filed and the other requirements under § 1.7872-15(d)(2)(ii) are

satisfied, then an otherwise noncontingent payment on a split-dollar loan that is nonrecourse to the borrower is not a contingent payment under § 1.7872-15.

Facts

Employer is a State non-profit corporation established in Year 1. Employer is a tax-exempt organization under § 501(c)(3) of the Internal Revenue Code of 1986, as amended (Code).

In Year 2, Employer met with a consulting team from Company A to consult on matters relating to the retention and recognition of key Employer employees. The consulting team recommended and implemented Employer's split-dollar life insurance plan (SDP). Company A intended for the SDP to be subject to the regulations under § 1.7872-15 (the Split-Dollar Regulations) and designed the plan to utilize nonrecourse premium loans to the employee participants secured by the policy (the Loans). The Loans were to each have a stated interest rate equal to the applicable federal rate (AFR) so as not to be "below-market split-dollar loans" under the Split-Dollar Regulations.

In Year 3, Taxpayer entered into a split-dollar life insurance arrangement (the Arrangement) with Employer as a participant in the SDP. At the time Taxpayer entered into the Arrangement, Taxpayer had no prior experience with or knowledge of split-dollar life insurance arrangements or SDPs. Taxpayer was the borrower on the Loan and the Employer lent money to Taxpayer to pay the premiums on the policy.

At the time the Arrangement was entered into, calculations prepared by Company A projected that the proceeds of the insurance policy securing the Loan were expected to be sufficient to pay all interest and principal due on the Loan.

Company A was instrumental in implementing the SDP and the Loans under the plan: Company A was responsible for drafting the documents, advising Taxpayer regarding the set-up of the Arrangement, and directing Taxpayer regarding the many documents that required Taxpayer's signature. Taxpayer represents, however, that Company A did not advise Taxpayer regarding the resulting tax consequences if the payments on the Loan were treated as contingent payments under the Split-Dollar Regulations.

After the SDP was implemented, Employer contracted with Company A to serve as the SDP's third party administrator (TPA). As TPA, Company A was responsible for administering the SDP and providing Employer and Taxpayer with ongoing guidance related to the SDP. Taxpayer represents that because Taxpayer lacked knowledge and experience with split-dollar life insurance arrangements, Taxpayer relied on Company A's information, representations, and conclusions regarding the Arrangement.

Taxpayer further represents that Company A was aware of Taxpayer's reliance on its expertise regarding the Arrangement.

Prior to filing Taxpayer's Year 3 tax return, the return corresponding to the taxable year in which Employer made the first split-dollar loan to Taxpayer under the Arrangement, Taxpayer was not advised by Company A that unless the parties to the Arrangement filed a written representation pursuant to §§ 1.7872-15(d)(2)(i) and (ii) of the regulations, payments on the Loan would be treated as contingent payments for purposes of the Split-Dollar Regulations. Unbeknownst to Taxpayer, Company A also failed to advise Employer that Employer and Taxpayer were both required to file a written representation so that the Loan payments would not be treated as contingent payments under § 1.7872-15. Since Year 3, Taxpayer has filed tax returns as if the election had been made and the written representation had been filed pursuant to §§ 1.7872-15(d)(2)(i) and (ii).

In Year 4, Employer informed Taxpayer that Employer's new TPA discovered that a written representation should have been filed with both Employer's and Taxpayer's tax returns for the taxable year in which the first Loan was made. Employer further informed Taxpayer that at the time the written representation was required to be filed, Employer was unaware of the requirement because prior TPAs had failed to advise them to make such a filing. Employer explained the necessity of filing a written representation to ensure that payments on the Loan were not treated as contingent payments, and asked Taxpayer to file an extension of time for filing the written representation as Employer had done for itself.

Taxpayer makes the following representations. The granting of relief under § 301.9100-3 would not result in Taxpayer having a lower tax liability in the aggregate for all years to which the election applies than Taxpayer would have had if the election had been timely made (taking into account the time value of money). Taxpayer did not knowingly choose not to file the election. Taxpayer did not use hindsight in requesting relief. Finally, Taxpayer represents that it is not seeking to alter a return position for which an accuracy-related penalty has been or could be imposed under § 6662. In support of this requested ruling, Taxpayer has submitted the affidavits of Taxpayer, Employer's Controller, Employer's Vice President of Human Resources, and the owner of Employer's current TPA regarding the events that led to Taxpayer's failure to make the regulatory election pursuant to §§ 1.7872-15(d)(2)(i) and (ii).

Law and Analysis

Section 1.7872-15(d)(1) of the regulations provides that, except as provided in § 1.7872-15(d)(2), if a payment on a split-dollar loan is nonrecourse to the borrower, the payment is a contingent payment for purposes of § 1.7872-15.

Section 1.7872-15(d)(2)(i) provides that an otherwise noncontingent payment on a split-dollar loan that is nonrecourse to the borrower is not a contingent payment under § 1.7872-15 if the parties to the split-dollar life insurance arrangement represent in writing that a reasonable person would expect that all payments under the loan will be made. Section 1.7872-15(d)(2)(ii) describes the time and manner requirements for providing the written representation required by § 1.7872-15(d)(2)(i). Section 1.7872-15(d)(2)(ii) provides, in part, that the written representation be signed by both the borrower and lender not later than the last day (including extensions) for filing the federal income tax return of the borrower or lender, whichever is earlier, for the taxable year in which the lender makes the first split-dollar loan under the split-dollar life insurance arrangement.

Section 301.9100-1(b) defines election to include an application for relief in respect of tax; a request to adopt, change, or retain an accounting method or accounting period. The term does not include an application for an extension of time for filing a return under § 6081.

Section 301.9100-1(c) provides that the Commissioner has discretion to grant a reasonable extension of time to make a regulatory election (defined in §301.9100-1(b) as an election whose due date is prescribed by regulation or by a revenue ruling, a revenue procedure, a notice, or an announcement published in the Internal Revenue Bulletin), or a statutory election (but no more than 6 months except in the case of a taxpayer who is abroad), under all subtitles of the Internal Revenue Code except subtitles E, G, H, and I.

Section 301.9100-3 sets forth parameters for determining whether, under particular facts and circumstances, the Commissioner will grant an extension of time for regulatory elections that do not meet the requirements for an automatic extension under § 301.9100-2. Section 301.9100-3(a) provides that when a taxpayer does not meet the requirements for an automatic extension under § 301.9100-2, the taxpayer must provide evidence satisfactorily establishing that the taxpayer acted reasonably and in good faith and that granting relief will not prejudice the Government.

Section 301.9100-3(b)(1) provides that, subject to § 301.9100-3(b)(3), a taxpayer will be deemed to have acted reasonably and in good faith if the taxpayer satisfies at least one of the following five criteria: (i) the request for relief was made before the Service discovered the failure to make the regulatory election; (ii) the failure to make the election was due to intervening events beyond the taxpayer's control; (iii) after exercising reasonable diligence, the taxpayer was unaware of the necessity for the election; (iv) the taxpayer reasonably relied on the written advice of the Service; or (v) the taxpayer reasonably relied upon a qualified tax professional, including a tax professional employed by the taxpayer, and that tax professional failed to make or failed to advise the taxpayer to make the election.

Section 301.9100-3(b)(2) provides that a taxpayer has not reasonably relied on a qualified tax professional if the taxpayer knew, or should have known, that the professional was either (i) not competent to render advice on the regulatory election or (ii) not aware of all relevant facts.

Section 301.9100-3(b)(3) provides that a taxpayer will not be deemed to have acted reasonably and in good faith if taxpayer does one of the following: (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 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 the subsequent tax consequences, but chose not to make the election; or (iii) uses hindsight in requesting relief.

Section 301.9100-3(c)(1) provides that the interests of the Government are prejudiced if granting relief would result in the taxpayer having a lower liability in the aggregate for all years to which the regulatory election applies than the taxpayer would have had if the election had been timely made (taking into account the time value of money).

Conclusion

Based on the information submitted and Taxpayer's representations, we conclude that Taxpayer has satisfied the requirements for granting a reasonable extension of time to file the written representation as required under §§ 1.7872-15(d)(2)(i) and (ii). Taxpayer is therefore granted a period of time not to exceed 30 days from the date of this letter to prepare and have both parties sign the written representation. Provided that the written representation is timely signed by both parties as required by this letter and filed with the Taxpayer's tax return for Year 4, the written representation will be deemed effective for all years in which the Arrangement has been in effect. In accordance with § 1.7872-15(d)(2)(ii), a copy of the written representation should be attached to Taxpayer's tax return for any subsequent taxable year in which Employer makes a split-dollar loan to Taxpayer to which the representation applies.

Except as specifically ruled upon above, no opinion is expressed concerning any federal income tax consequences relating to the facts herein under any other provision of the Code. This ruling is limited to the timeliness of the filing requirement of the written representation under §§ 1.7872-15(d)(2)(i) and (ii); no opinion is expressed with regard to whether Taxpayer satisfied the other requirements under §§ 1.7872-15(d)(2)(i) and (ii), the loan treatment requirements under § 1.7872-15(a)(2), or whether payments under the Loan are otherwise noncontingent payments for purposes of § 1.7872-15.

No opinion is expressed with regard to whether the tax liability of Taxpayer is not lower in the aggregate for all years to which the election applies than such tax liability would have been if the election had been timely made (taking into account the time

value of money). Upon audit of the federal income tax returns involved, the director's office will determine such tax liability for the years involved. If the director's office determines that such tax liability is lower, that office will determine the federal income tax effect.

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 your authorized representative.

Sincerely,

David B. Silber
David B. Silber
Chief, Branch 2
Office of Associate Chief Counsel
(Financial Institutions and Products)