Internal Revenue Service

Number: **200927005**
Release Date: 7/2/2009

Index Number: 475.08-00, 9100.00-00

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:FIP:03
PLR-109710-09
Date:
March 24, 2009

Legend

Company X:

Country:

Date 1:

Date 2:

Dear :

This responds to a letter dated June 24, 2008, and subsequent correspondence submitted on behalf of Company X, requesting that the Service grant Company X an extension of time under § 301.9100-3 of the Procedure and Administration Regulations to elect to be treated as a partnership under § 301.7701-3(c) and to elect mark-to-market treatment under Internal Revenue Code section 475(f) for the partnership so formed. Your request under § 301.9100-3 to elect to be treated as a partnership under § 301.7701-3(c) was answered in a letter ruling (PLR-128983-08) issued by CC:PSI:B02 on December 16, 2008 (hereinafter "entity classification election change letter"). This letter addresses your request under § 301.9100-3 with regard to the section 475(f) election.

FACTS

The information submitted states that Company X was formed as a corporation under the laws of Country. Company X represents that Company X is a foreign entity eligible to elect to be treated as a partnership. However, Company X inadvertently

failed to timely file a Form 8832, Entity Classification Election, electing to treat Company X as a partnership effective Date 1. Company X represents that it has timely filed its federal tax returns consistent with Company X's intended treatment as a partnership. In the entity classification election change letter, Company X was granted permission to file a Form 8832 to elect to be treated as a partnership effective Date 1 (hereinafter "entity classification election change"). Company X filed its request under §301.7701-3(c) more than 2 months and 15 days after Date 1.

Company X also represents that it made a valid and timely election under section 475(f) to account for its securities on a mark-to-market basis effective as of Date 2, and that this election remained in effect through Date 1. After Date 2, Company X used the mark-to-market method of accounting for securities for reporting to owners, management, and for tax purposes. Company X continued to use the mark-to-market method of accounting for securities for all of these purposes after Date 1. The request for section 9100 relief for the partnership to make the section 475(f) election would not have been needed but for the entity classification election change. Furthermore, Company X had no reason to enter any statement in its books and records within 2 months and 15 days of Date 1 that it was adopting the mark-to-market method of accounting because, at that time, it had been using that method of accounting for securities since Date 2.

LAW AND ANALYSIS

Under § 301.7701-3(g)(1)(ii), if an eligible entity classified as an association elects under § 301.7701-3(c)(1)(i) to be classified as a partnership, the association is deemed to distribute all of its assets and liabilities to its shareholders in liquidation of the association, and immediately thereafter, the shareholders are deemed to contribute all of the distributed assets and liabilities to a newly formed partnership. Therefore, if Company X makes the election described in the entity classification election change letter, it will be treated as a new taxpayer starting on Date 1.

Because Company X will be treated as a new taxpayer, it is requesting permission to make a late election to adopt a method of accounting for securities under section 475(f) rather than a late election to change its method of accounting for securities.

Section 475(f) provides that a taxpayer engaged in a trade or business as a trader in securities may elect to apply the mark-to-market method of accounting to securities held in connection with such trade or business. *See* section 475(f)(1). Section 7805(d) provides that, except to the extent otherwise provided by the Code, any election shall be made at such time and in such manner as the Secretary shall prescribe.

On February 16, 1999, the Internal Revenue Service published Revenue Procedure 99-17, 1999-1 C.B. 503, (section 6 superseded by Rev. Proc. 99-49, 1999-2 C.B. 725, which was clarified, modified, amplified, and superseded by Rev. Proc. 2002-9, 2002-1 C.B. 327, which was clarified, modified, amplified, and superseded by Rev. Proc. 2008-52, 2008-36 I.R.B. 587). Rev. Proc. 99-17 provides the exclusive procedure for traders in securities to make an election to use the mark-to-market method of accounting under section 475(f). This revenue procedure applies both to existing taxpayers who are changing to the mark-to-market method of accounting for securities and to new taxpayers who are adopting that method.

Section 5.03(2) of Rev. Proc. 99-17 provides, in relevant part, that a new taxpayer (for which no federal income tax return was required to be filed for the taxable year immediately preceding the election year) may make an election under section 475(f) for a tax year beginning on or after January 1, 1999, by placing in its books and records no later than two months and 15 days from the first day of the election year a statement that describes the election being made, the first taxable year for which the election is effective, and the trade or business for which the election is made. To notify the Service that the election was made, the new taxpayer must attach a copy of the statement to its original federal income tax return for the election year.

Section 4 of Rev. Proc. 99-17 states that the election under section 475(f) determines the method of accounting an electing trader is required to use for federal income tax purposes for securities subject to the election. A method of accounting for securities subject to the election is impermissible unless the method is in accordance with section 475 and the regulations thereunder. If an electing trader's method of accounting for its taxable year immediately proceeding the election year is inconsistent with section 475, the taxpayer is required to change its method of accounting to comply with its election. Thus, a taxpayer that makes a section 475(f) election but fails to change its method of accounting to comply with that election is using an impermissible method.

Section 6.03 of Rev. Proc. 99-17 provides that a taxpayer that changes its method of accounting pursuant to Rev. Proc. 99-17 must take into account the net amount of the section 481(a) adjustment.

Section 301.9100-1(c) of the regulations provides, in part, that the Commissioner has discretion to grant a reasonable extension of time to make a regulatory election, 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 Code except subtitles E, G, H, and I. A regulatory election is defined in § 301.9100-1(b) as an election whose due date is prescribed by regulations published in the Federal Register, or by a revenue ruling, revenue procedure, notice, or announcement published in the Internal Revenue Bulletin.

Sections 301.9100-3(a) through (c)(1)(ii) set forth rules that the Service generally will use to determine whether, under the facts and circumstances of each situation, the Commissioner will grant an extension of time for regulatory elections that do not meet the requirements of section 301.9100-2 for an automatic extension. Section 301.9100-3(b) provides that subject to paragraphs (b)(3)(i) through (iii) of § 301.9100-3, when a taxpayer applies for relief under this section before the failure to make the regulatory election is discovered by the Service, the taxpayer will be deemed to have acted reasonably and in good faith; and § 301.9100-3(c) provides that the interests of the Government are prejudiced if either granting relief would result in the taxpayer having a lower tax 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) or the taxable year in which a timely regulatory election should have been made is closed.

Section 301.9100-3(b)(3) describes three situations where a taxpayer is deemed to have not acted reasonably and in good faith. First, under § 301.9100-3(b)(3)(i), a taxpayer seeking to alter a return position for which an accuracy-related penalty has been or could be imposed under section 6662 is not acting reasonably and in good faith. Second, under § 301.9100-3(b)(3)(ii), a taxpayer who was informed in all material respects of the required election and the related tax consequences but chose not to timely file the election is not acting reasonably and in good faith in requesting permission to make a late election. Third, § 301.9100-3(b)(3)(iii) provides that a taxpayer is deemed to have not acted reasonably and in good faith if the taxpayer uses hindsight in requesting relief. If specific facts have changed since the due date for making the election that make the election advantageous to the taxpayer, the Service will not ordinarily grant relief. In such a case, the Service will grant relief only when the taxpayer provides strong proof that the taxpayer's decision to seek relief did not involve hindsight.

Section 301.9100-3(c)(2) provides special rules for accounting method regulatory elections. This section provides, in relevant parts, that the interests of the Government are deemed to be prejudiced by granting an extension of time, except in unusual and compelling circumstances, in several situations: first, if the accounting method regulatory election is subject to the procedure described in § 1.446-1(e)(3)(i) (requiring the advance written consent of the Commissioner) (see § 301.9100-3(c)(2)(i)); second, if the accounting method regulatory election for which relief is requested requires an adjustment under section 481(a) (or would require an adjustment under section 481(a) if the taxpayer changed to the method of accounting for which relief is requested in a taxable year subsequent to the taxable year the election should have been made) (see § 301.9100-3(c)(2)(ii)); third, if the accounting method regulatory election involves certain changes from an impermissible method of accounting (see § 301.9100-3(c)(2)(iii)); fourth, if the accounting method regulatory election would provide a more favorable method of accounting or more favorable terms and conditions if the election is made by a certain date or taxable year (see §301.9100-3(c)(2)(iv)).

As noted above, section 4 of Rev. Proc. 99-17 states that the election under section 475(f) determines the method of accounting an electing trader is required to use for federal income tax purposes for securities subject to the election. If an electing trader's method of accounting for its taxable year immediately preceding the election year is inconsistent with section 475, the taxpayer is required to change its method of accounting to comply with its election. A taxpayer that makes a section 475(f) election but fails to change its method of accounting to comply with that election is using an impermissible method. Because the election is integrally related to the change in accounting method to mark-to-market, it is an accounting method regulatory election subject to § 301.9100-3(c)(2).

Rev. Proc. 2008-52 provides procedures by which a taxpayer may obtain automatic consent to change to the mark-to-market accounting method. However, the automatic change applies to a taxpayer only if the taxpayer has made a valid election under section 475(f) by complying with the requirements of Rev. Proc. 99-17 and is required to change its method of accounting to comply with the election. Section 23(2)(a) of the Appendix to Rev. Proc. 2008-52.

Company X requests an extension of time to make an accounting method regulatory election that is subject to the provisions of § 301.9100-3. Relief under this section of the Regulations will only be granted when a taxpayer provides evidence satisfactory to the Commissioner that the taxpayer acted reasonably and in good faith, and the granting of relief will not prejudice the interests of the Government. If specific facts have changed since the due date for making the election that make the election advantageous to the Company X, § 301.9100-3(b)(3) provides that the Service will grant relief only when Company X provides strong proof that the Company X 's decision to seek relief did not involve hindsight. Without such proof Company X is deemed to have not acted reasonably or in good faith.

As described above, Company X, after making the election described the entity classification election change letter, will be treated as a new partnership and taxpayer. As such, Company X has never filed a prior US federal income tax return, nor has it taken any position regarding its method of accounting for securities. Therefore, because Company X has never filed a prior US federal income tax return, it is not seeking to alter a prior return position, and §301.9100-3(b)(3)(i) does not apply.

This is also not a case where Company X simply chose not to make a timely election under section 475(f). Company X filed its request to make an entity classification election more than 75 days after Date 1, so it clearly could not have received permission to make the entity classification election change, much less the election under 475(f), within the time described in Section 5.03(2) of Rev. Proc. 99-17. Therefore §301.9100-3(b)(3)(ii) does not apply.

Further, Company X represents that it made an election to account for securities under section 475(f) that was effective on Date 2. This means that as of Date 1, Company X's current method of accounting for securities was, and had been for years, section 475(f). The only reason that Company X submitted the request under consideration is due to its need to change its tax entity classification to be treated as a partnership. Absent the tax entity classification change, Company X would have no need to change its method of accounting for securities because it was already accounting for securities under section 475(f). Given these facts, Company X's delay in making an election to account for securities under section 475(f) did not provide Company X with any time to review and consider the results of its securities trading transactions and whether it would benefit by making the election because it was already accounting for securities under section 475(f). Based upon these facts, Company X did not use hindsight when deciding to request permission to make a late election under section 475(f) and has met the requirements of § 301.9100-3(b)(3)(iii). Therefore, §301.9100-3(b)(3) does not apply to Company X.

Because Company X was already accounting for securities under section 475(f), the change in Company X's entity classification and its request to make a late adoption of mark-to-market accounting for securities under section 475(f) will not result in a lower tax liability. Further, we note that the short tax year beginning on Date 1, and all subsequent tax years, are, as of the date of this letter, not closed by the period of limitations on assessment under section 6501(a). Therefore, §301.9100-3(c)(1) is not applicable.

As provided for in Rev. Procs. 99-17 and 2008-52, advance written consent of the Commissioner is not required to make an election under 475(f) assuming all requirements are met. Therefore, §301.9100-3(c)(2)(i) does not apply. Further, Company X, after making the entity classification election change, will be a new taxpayer. Thus, Company X has no method of accounting for securities that it can change, and its adoption of the use of section 475(f) to account for securities will not generate an adjustment to income under section 481(a). Therefore, §301.9100-3(c)(2)(ii) does not apply.

Section 301.9100-3(c)(2)(iii) is not applicable because Company X is not seeking to change from an impermissible method of accounting.

Finally, because Company X was already accounting for securities under section 475(f), the change in Company X's entity classification and its request to make a late adoption of mark-to-market accounting for securities under section 475(f) will not result in a more favorable method of accounting or provide for more favorable terms and conditions if the election was made by a certain date or taxable year. Therefore, §301.9100-3(c)(2)(iv) does not apply.

Based on the facts and representations submitted, and the fact that §§ 301.9100-3(b)(3), -3(c)(1), and -3(c)(2) do not apply to Company X, we conclude that Company X has satisfied the requirements for our granting a reasonable extension of time to make an election under section 475(f) to adopt the mark-to-market method of accounting. To make the election, Company X must, within 75 days of the date of this letter, comply with the requirements of Section 5.03(2) of Rev. Proc. 99-17 and must file a copy of its election statement, a copy of this letter, and an amended federal income tax return for the election year with the appropriate service center.

Except as specifically set forth above, no opinion is expressed concerning the federal tax consequences of the facts described above under any other provision of the Code. Further, no opinion is expressed as to whether Company X's election under section 475(f), effective as of Date 2, was timely or proper, or whether Company X qualifies as a trader in securities.

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

Pursuant to a power of attorney on file with this office, a copy of this letter is being sent to Company X's authorized representative.

Sincerely,
Associate Chief Counsel
(Financial Institutions and Products)

By:_____
Robert B. Williams
Senior Counsel, Branch 3

Enclosures (2)
Copy of this letter
Copy for § 6110 purposes

cc: