

Internal Revenue Service

Department of the Treasury
Washington, DC 20224

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Date:
October 28, 2009

Legend:

Taxpayer =

State A =

USPO 1 =

USPO 2 =

a =

b =

c =

Accountant =

Year 1 =

Year 2 =

Date 1 =

Date 2 =

Date 3 =

Dear

This is in reply to a letter dated October 7, 2009, requesting a ruling on behalf of Taxpayer. Specifically, you have requested that Taxpayer be granted an extension of time under section 301.9100-1 of the Procedure and Administration Regulations to make an election to treat certain dividends distributed by Taxpayer in Year 2 as having been paid in Year 1, pursuant to § 858(a) of the Internal Revenue Code (the Code) and the regulations thereunder.

Facts:

Taxpayer is a State A corporation that files federal income tax returns as a real estate investment trust (REIT) under subchapter M of the Code. Taxpayer regularly distributes at least a% of its taxable income for each taxable year, as required by § 857(a)(1), and subject to the granting of this letter ruling, believes that it satisfies the REIT qualification requirements in §§ 856 through 860.

Taxpayer engaged Accountant to prepare and sign, as preparer, Taxpayer's Form 1120-REIT, U.S. Income Tax Return for Real Estate Investment Trusts (Form 1120-REIT) for the Year 1 tax year. The Form 1120-REIT was due Date 1 but Taxpayer timely requested an automatic extension to extend the due date until Date 2. On the Form 1120-REIT, Taxpayer reported taxable income before the dividends paid deduction of \$b. In order to meet the 90% distribution requirement in § 857(a)(1) and reduce its taxable income to zero, Taxpayer included an election under § 858(a) to use \$c of dividends declared prior to Date 2 that were or will be paid prior to Date 3 as paid in its Year 1 tax year.

Due to its large size and the volume of its tax filings, Taxpayer's federal and state tax compliance is very time consuming. Taxpayer, therefore, anticipated that its Form 1120-REIT would not be completed until just shortly prior to or on Date 2, its due date. Taxpayer had filed returns in the evening of filing deadlines in the past and believed that USPO 1 stayed open until midnight. However, when Taxpayer checked the United States Postal Office (USPO) website it learned that USPO 1 now stayed open only until 8 PM. Taxpayer also learned by reviewing the USPO website that USPO 2 stayed open until 9PM.

Accountant delivered to Taxpayer's tax department the Form 1120-REIT for filing at approximately 7PM on Date 2. It was decided that Taxpayer's tax manager would hand carry and mail the Form 1120-REIT at USPO 2. Upon arrival at USPO 2 at approximately 8:15PM on Date 2, the tax manager discovered that USPO 2 was closed.

Unable to find an open post office, the decision was made to mail the return the next day. The tax manager subsequently learned USPO 2 changed its hours to close at 7PM as of one day before Date 2, but the website had not been updated.

Taxpayer makes the following representations. The granting of relief under section 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 it 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. Taxpayer has submitted an affidavit of its tax director attesting to and supporting the facts and representations underlying this ruling request.

Law and Analysis:

Section 858(a) of the Code provides that if a REIT declares a dividend before the time prescribed by law for filing its return (including extensions) for a tax year and distributes the amount of such dividend in the 12-month period following the close of the tax year and not later than the date of the first regular dividend payment made after such declaration, the amount so declared and distributed shall, to the extent the trust elects in such return (and specifies in dollar amounts) in accordance with regulations, be considered as having been paid only during such tax year, except as provided in sections 858(b) and (c).

Section 1.858-1(b) of the regulations requires the election to be made in the return filed by a REIT for the tax year. The election is made by treating the dividend (or portion thereof) to which the election applies as a dividend paid during the tax year of the REIT in computing its taxable income and alternative minimum tax. For elections for tax years after October 4, 1976, a REIT must specify in its return (or in a statement attached to its return) the exact dollar amount that is to be treated as having been paid during the tax year.

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 section 301.9100-1(b) as an election whose due date is prescribed by regulations 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.

Sections 301.9100-3(a) through (c)(1)(i) set forth rules that the Internal Revenue Service generally will use to determine whether, under the particular 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. Section 301.9100-3(b) provides that subject to paragraphs (b)(3)(i) through (iii) of section 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 section 301.9100-3(c) provides that the interests of the government are prejudiced if 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).

Based on the information submitted and representations made, we conclude that Taxpayer has satisfied the requirements for granting a reasonable extension of time to elect under § 858(a) to treat certain dividends distributed by Taxpayer in Year 2 as having been paid in Year 1. Accordingly, Taxpayer will be treated as having made a timely election under § 858(a) on its Year 1 Form 1120-REIT.

This ruling is limited to the timeliness of the election under § 858(a). This ruling's application is limited to the facts, representations, Code sections, and regulations cited herein. No opinion is expressed with regard to whether Taxpayer otherwise qualifies as a REIT under subchapter M of the Code.

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 who requested it. Section 6110(k)(3) 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 representatives.

Sincerely,

David B. Silber
David B. Silber
Chief, Branch 2
Financial Institutions & Products