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Date:
July 14, 2010

Legend

Company w: =
Company x: =

Company y: =

Company z: =

Tax Director: =
Accountant: =
Attorney: =

Date 1: =
Date 2: =
Date 3: =
Date 4: =
Date 5: =
Date 6: =
Date 7: =
Date 8: =
m: =
n: =
Year a: =
Year b: =
Year c: =
Year d: =

Year e: =

Dear :

This is in response to a letter dated August 21, 2009, and subsequent correspondence submitted on behalf of Company x, Company y and Company z (individually "Taxpayer", jointly "Taxpayers") requesting the Service grant each of them an extension of time under § 301.9100-3 of the Procedure and Administration Regulations to elect use of the mark-to-market method of accounting under section 475(f) of the Internal Revenue Code beginning with calendar Year e.

FACTS

Each Taxpayer is a foreign entity classified as a partnership for U.S. federal income tax purposes and uses a calendar year end. Company w, a domestic limited liability company, is the manager of each Taxpayer.

Company x was formed on Date 1 and is a partnership that trades securities for its own account. Company x made a valid election to use the mark-to-market method of accounting under section 475(f) in its first year of existence, calendar Year a, and immediately prior to the termination described below, Company x had a valid section 475(f) election in effect.

Company y was formed on Date 3 and is a partnership that trades securities for its own account. Company y made a valid election to use the mark-to-market method of accounting under section 475(f) in its first year of existence, calendar Year b, and immediately prior to the termination described below, Company y had a valid section 475(f) election in effect. On Date 4, Company x owned more than n% of the capital and profits interests in Company y.

Company z was formed on Date 2 and is a partnership that trades securities for its own account and focuses on m investments. Company z made a valid election to use the mark-to-market method of accounting beginning with its calendar Year c, and immediately prior to the termination described below, Company z had a valid section 475(f) election in effect.

In late Year d, due to unprecedented turmoil in the capital markets, a large number of investors requested to have their interests in Company x and Company y redeemed, effective at the end of Year d. Typically, redemptions are funded with cash. However, in late Year d a large portion (by value) of Company x's assets and Company y's assets had become temporarily illiquid and dislocated in price as a result of the disruptions in the capital markets. Satisfying the redemption requests at that time would have required selling assets at a substantial discount to their intrinsic fair market values.

Instead of selling the assets, Company w and its advisors developed a plan to respond to the redemptions (Restructuring). The plan called for redemption requests to be satisfied with cash only to the extent of the redeeming investor's indirect shares of assets that could be sold at prices that reasonably approximated their fair market values. In furtherance of this plan, on Date 4 certain interests of Company x and Company z were transferred to a foreign entity classified as a corporation for U. S. federal income tax purposes and a domestic entity classified as a partnership for U. S. federal income tax purposes. In the final steps of the Restructuring, the interests in these two entities were distributed to certain partners and shareholders of Company x and Company z.

LAW AND ANALYSIS

Under section 708(b)(1)(B), a partnership is treated as terminating if there is a sale or exchange of 50 percent or more of the total interests in partnership capital and profit within a 12-month period. As a result of the Restructuring, exchanges of more than 50 percent of the interests in the capital and profits of both Company x and Company z occurred, thereby causing both companies to experience a technical termination. Company x owed more than 50 percent of the interests in the capital and profits of Company y; therefore, the technical termination of Company x also resulted in a technical termination of Company y.

One consequence of the technical termination is that the tax elections made by the terminated Taxpayer partnerships do not apply to the new Taxpayer partnerships. Thus, although each Taxpayer had a section 475(f) election in effect on Date 4, this method was no longer effective after it terminated and became a new partnership. A new taxpayer has the option to elect use of the mark-to-market method of accounting provided in section 475(f) provided it qualifies to make the election and makes the election by following the procedures described below.[1] The Taxpayers did not follow the procedures.

Each Taxpayer represents that at all times it intended for its section 475(f) election to remain in effect after the Restructuring, and that its conduct has been consistent with that intent. The sole reason each Taxpayer did not timely make a new election on its books and records by the Date 6 election due date (see below for how this due date is determined) was that it was unaware it was needed.

[1] The Taxpayers provided us with a legal analysis and supporting documentation that their existence was technically terminated as a result of the Restructuring. However, it was unnecessary for us to determine the validity of this claim because if a Taxpayer's existence had not been terminated, its election under § 475(f) would have continued in effect after the Reorganization and a ruling from us would have no effect. Therefore, we did not make a determination regarding their termination. Also, see below for additional limitations to this ruling.

The Taxpayers have provided affidavits, signed under penalties of perjury, from the tax director of Company w (Tax Director), the Taxpayers' accountant (Accountant) and the Taxpayers' attorney (Attorney), as well as numerous other documents, supporting these facts and demonstrating each of the Taxpayers' consistent belief and intent that continued use of the mark-to-market method was proper. These documents were dated before the Date 6 election due date and include relevant prior election statements, and private placement and disclosure memorandums.

Because each Taxpayer now realizes that it will be treated as a new taxpayer, each of them 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 each of their 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.

Each Taxpayer 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 a taxpayer, § 301.9100-3(b)(3) provides that the Service will grant relief only when the taxpayer provides strong proof that its decision to seek relief did not involve hindsight. Without such proof a taxpayer is deemed to have not acted reasonably or in good faith.

As described above, the Restructuring resulted in each Taxpayer being treated as a new partnership and taxpayer. As such, none of the Taxpayers has either filed a US federal income tax return, or taken any position regarding its method of accounting for securities. Therefore, 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 one of the Taxpayers simply chose not to make a timely election under section 475(f). Sworn affidavits from the Tax Director, the Accountant and the Attorney demonstrate and support the Taxpayers' claim that each of them was unaware of the need to make a new election under section 475(f) until Date 7 for Company x and Company y, and Date 8 for Company z. Each Taxpayer promptly requested relief after it became aware it was needed. Because Date 7 and Date 8 are after Date 6, the due date of the election, no Taxpayer was informed in all material respects of the required election and related tax consequences before the due date of the election, and therefore, §301.9100-3(b)(3)(ii) does not apply.

Further, each of the Taxpayers represents that it made an election to account for securities under section 475(f) that was effective beginning with their Year a, Year b, or Year c calendar year (see FACTS above). This means that each of the Taxpayers consistently used the mark-to-market method of accounting under section 475(f) for multiple years before its termination. The only reason each Taxpayer submitted the request for relief is due to its respective technical termination. Absent the terminations, none of the Taxpayers would need to change its method of accounting for securities because it was already accounting for securities under section 475(f). Given these facts, each Taxpayer's delay in making an election to account for securities under section 475(f) did not provide it 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, no Taxpayer used hindsight when deciding to request permission to make a late election under section 475(f) and each has met the requirements of § 301.9100-3(b)(3)(iii). Therefore, § 301.9100-3(b)(3) does not apply to the Taxpayers.

Because each Taxpayer was already accounting for securities under section 475(f), each Taxpayer's technical termination 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, as of the date of this letter, the taxable year in which the election should have been made or any taxable year that would have been affected by the

election had it been timely made are 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, after the Reorganization described above, each of the Taxpayers is a new taxpayer. Thus, none of the Taxpayers has a 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 none of the Taxpayers is seeking to change from an impermissible method of accounting.

Finally, because each Taxpayer was already accounting for securities under section 475(f), 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 any of the Taxpayers, we conclude that each Taxpayer 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, each Taxpayer 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 if needed, 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 each Taxpayer's initial election under section 475(f) was made timely or properly, or whether each Taxpayer qualifies as a trader in securities.

This ruling is directed only to the taxpayers 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 the Taxpayers' authorized representative.

Sincerely,
Associate Chief Counsel
(Financial Institutions and Products)

/S/

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

Enclosures (2)
Copy of this letter
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