Internal Revenue Service

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Department of the Treasury
Washington, DC 20224

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Person To Contact:
, ID No.

Telephone Number:

Refer Reply To:
CC:ITA:B01
PLR-108560-10

Date:
October 04, 2010

TY:

:

Legend

Parent =
S1 =
S2 =
S3 =
Old Group =

New Group =
Taxpayers =
Accounting Firm 1 =
Accounting Firm 2 =
Individual A =
Individual B =
Year 1 =
Year 2 =
Year 3 =
Year 4 =
Year 5 =
Year 6 =
Year 7 =
State A =
State B =
Acquisition Date =
Date a =
Date b =
Date c =

Date d =
Trade Name =
GP =
Fund I =
Fund II =
Fund III =
Fund IV =
Fund V =
Fund VI =
Fund VII =

Amount *a* =
Amount *b* =
Amount c =
Amount d =
Amount e =
Amount *f* =
Amount g =
Amount *h* =
Amount *i* =
Amount *j* =

Warrants A =

Warrants B =

Dear :

This letter is in response to a ruling request dated February 18, 2010, submitted on behalf of the Parent, S1, and S2, (Taxpayers) requesting an extension of time to make a consent dividend election under § 565 of the Internal Revenue Code. The request was made pursuant to §§ 301.9100-1 and 301.9100-3 of the Procedure and Administration Regulations.

FACTS

Parent is a State A corporation and is the common parent of the New Group. Parent acts as a holding company for its subsidiaries.

S1 is also a State A corporation. Parent acquired all of the stock of S1 on the Acquisition Date. S1 was the common parent of the Old Group until the acquisition by Parent. S1 joined the New Group as a result of the acquisition. S1 acts as a holding company for its subsidiaries. During Year 1 through Year 6, S1 owned 100% of the stock of S2.

S2 was a corporation organized under the laws of State A. On Date a, S2 converted from a corporation into a limited liability company. After the conversion, S2 was treated as a disregarded entity. On Date c, S2 filed a disclosure form with respect to the adoption of a plan of liquidation. S2 acts as a holding company for the Trade Name used under license by the operating subsidiaries of Parent and S1.

S1 was the common parent of the Old Group, of which S2 was a member in Year 1. Parent is the common parent of the New Group, of which S1 was a member in Years 2 through 7 and S2 was a member in Year 2 through Date a.

Substantially, all of the operations of the business of the Old Group and the New Group in Years 1 through 7 occur at GP. GP is a State B general partnership. S1 owns 99% of the interest in GP. S3 owns the remaining 1% interest in GP. S3 is a State A corporation wholly owned by S1.

Prior to the Acquisition Date, S2 was not a personal holding company (PHC) as it did not meet the stock ownership requirement of § 542(a)(2). On the Acquisition Date, Parent acquired 100% of the stock of S1. On the Acquisition Date, Fund I owned Amount *a* of the Parent's common stock. Fund I is a State A limited liability company treated as a partnership for U.S. tax purposes. Funds II, III, IV, and Individual A own Fund I.

In Year 5, Parent issued Amount *b* of Stock to Fund V, a State A newly-formed limited liability company treated as a partnership for U.S. tax purposes. In conjunction with the issuance of the Amount *b* of Stock, Parent issued Warrants A. Warrants A also were issued to Fund V. Fund II acquired Amount *c* of a total Amount *d* issued by Fund V.

On Date b, Parent issued Amount *e* of Stock to Fund VI, a newly formed State A limited liability company treated as a partnership for U.S. tax purposes. In conjunction with the issuance of the Amount *e* of Stock, Parent issued Warrants B. Warrants B were also issued to Fund VI. Fund II acquired Amount *f* of Amount *g* issued by Fund VI. Fund VII acquired Amount *h* of Amount *i* issued by Fund VI.

S2's gross receipts consisted of royalty and interest income. Royalty and interest income are types of Personal Holding Company (PHC) income under § 543(a). For Year 6, S2 did not report any gross income initially. S2 filed an amended return and reported income in the Amount *j* in Year 6. Year 7 was a final taxable year for S2 as a result of the conversion by S2 into a disregarded entity for tax purposes.

S2 was a PHC in Years 1 through 7, but was not a PHC in prior years. The acquisition of S1's stock by Parent on the Acquisition Date caused S2 to meet the stock ownership requirements for PHC status under the attribution rules in § 544. Parent and S1 should have attached the required forms to the returns of the New Group and the Old Group in Years 1 to 6 to treat S1 as having received a consent dividend from S2. Parent, S1, and S2 did not realize that S2 was a PHC at the time of the filing of the Years 1 through 6 returns for the Old Group and the New Group. Accounting Firm 1 which prepared and filed these returns was also unaware that S2 was a PHC. The Parent and S1 did not have an in-house tax department and reasonably relied on Accounting Firm 1 to prepare all of the Old Group and New Group's consolidated returns for Years 1 through 6.

Individual B was responsible for the tax services provided by Accounting Firm 1 to Parent, S1, and S2 in Years 1 through 6, including the preparation of the Old Group and New Group consolidated returns. Individual B is generally aware of the PHC rules. Individual B was aware of Parent's acquisition of S1 and generally aware of Parent's ownership. However, he was unaware (until recently) that the acquisition of the stock of S1 by Parent changed S2's PHC status. As a result, Individual B did not alert the Taxpayers of the need to determine the PHC status of S2 or to effect a consent dividend.

A potential purchaser of Parent hired Accounting Firm 2 to perform tax and financial due diligence on Parent and its subsidiaries. On Date d, the potential purchaser and Accounting Firm 2 notified Parent that S2 may have been a PHC since the Acquisition Date. Parent immediately took steps to determine whether any of the members of the New Group and the Old Group were subject to the PHC tax. Accounting Firm 1 and Parent determined that S2 was a PHC from Year 1 through Year 7. Before Date d Parent was unaware of the liability for PHC tax. The failure of Parent and S1 to file the requisite forms to effect a consent dividend by S2 was due to the lack of knowledge and reasonable reliance on Accounting Firm 1. Individual B acknowledged this error in an affidavit.

The Taxpayers represent that if they had been advised of the PHC issue and the availability of the consent dividend election, they would have effected a consent dividend by S2 to S1 for the taxable years of Year 1 through Year 6. The Taxpayers represent that the hypothetical dividend would not have impacted the group's consolidated income tax liability. Further, inclusion by S1 of such consent dividend would not have caused S1 to constitute a PHC. In addition, the Taxpayer represents that S2 met the stock ownership requirement to constitute a PHC with respect to Year 1. The potential PHC issue was not discovered in audit by the Internal Revenue Service (the "Service").

LAW AND ANALYSIS

Section 565(a) provides that if any person owns consent stock (as defined in § 565(f)(1)) in a corporation on the last day of the taxable year of such corporation, and such person agrees, in a consent filed with the return of such corporation in accordance with the regulations, to treat as a dividend the amount specified in such consent, the amount so specified shall, except as provided in § 565(b), constitute a consent dividend for purposes of § 561 (relating to the deduction for dividends paid).

Section 1.565-1(a) of the Income Tax Regulations provides that the dividends paid deduction, as defined in § 561, includes the consent dividends for the taxable year. A consent dividend is a hypothetical distribution (as distinguished from an actual distribution) made by certain corporations to any person who owns consent stock on the last day of the taxable year of such corporation, and who agrees to treat the hypothetical distribution as an actual dividend, subject to specified limitations, by filing a consent at the time and in the manner specified in § 1.565-1(b). Section 1.565-1(b)(3) provides that a consent may be filed no later than the due date of the corporation's income tax return for the taxable year for which the dividends paid deduction is claimed. Under Rev. Rul. 78-296, 1978-2 C.B. 183, the due date for purposes of § 1.565-1(b)(3) includes the extended due date of a return filed pursuant to an extension of time to file.

Section 1.565-1(b)(3) also permits a taxpayer to file unsigned consent forms with the taxpayer's return so long as the unsigned consent forms contain the same information as the duly executed originals, and the duly executed originals are kept for the taxpayer's records.

Section 6501(f) provides that if a corporation, which is a personal holding company for any taxable year, fails to file with its return under chapter 1 for such year a schedule setting forth: (1) the items of gross income and adjusted ordinary gross income, described in § 543, received by the corporation during such year, and (2) the names and addresses of the individuals who owned within the meaning of § 544 at any time during the last half of such year more than 50 percent in value of the outstanding capital stock of the corporation; the personal holding company tax for such year may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment at any time within 6 years after the return for such year was filed.

Section 301.9100-1(c) provides that the Commissioner of Internal Revenue, in exercising his discretion, may grant a reasonable extension of time under the rules set forth in § 301.9100-3 to make a regulatory election under all subtitles of the Internal

Revenue Code except subtitles E, G, H, and I. The term "regulatory election" is defined in § 301.9100-1(b) as an election whose due date is prescribed by a regulation published in the Federal Register, or a revenue ruling, revenue procedure, or announcement published in the Internal Revenue Bulletin.

Section 301.9100-3(a) provides that requests for relief subject to this section will be granted when the taxpayer provides the evidence to establish to the satisfaction of the Commissioner that the taxpayer acted reasonably and in good faith, and the grant of relief will not prejudice the interests of the government.

Under § 301.9100-3(b)(1)(i), except as provided in paragraphs (b)(3)(i) through (iii), a taxpayer is deemed to have acted reasonably and in good faith if the taxpayer requests relief before the failure to make the regulatory election is discovered by the Service.

Paragraphs (b)(3)(i) through (iii) of § 301.9100-3 provide that a taxpayer is deemed not to have acted reasonably and in good faith if the taxpayer:

> (i) seeks to alter a return position for which an accuracy-related penalty 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 related tax consequences, but chose not to file the election; or
>
> (iii) uses hindsight in requesting relief. If specific facts have changed since the due date for making the election that make the election advantageous to a 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)(1) 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 taxable years affected by the election than the taxpayer would have had if the election had been timely made. The interests of the government are ordinarily prejudiced if the taxable year in which the regulatory election should have been made, or any taxable years that would have been affected by the election had it been timely made, are closed by the period of limitations on assessment.

CONCLUSION

Based upon the represented facts, Taxpayers acted reasonably and in good faith, and granting relief will not prejudice the interests of the government. Therefore, the requirements of §§ 301.9100-1 and 301.9100-3 have been met. Accordingly, Taxpayers are granted an extension of 45 days from the date of this ruling to file its consent dividend election. A copy of this letter should be attached to the amended returns reflecting the elections.

Except as expressly provided herein, no opinion is expressed or implied concerning the tax consequences of any aspect of any transaction or item discussed or referenced in this letter.

This ruling is directed only to the taxpayers 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.

A copy of this letter must be attached to any income tax returns to which it is relevant. Alternatively, taxpayers filing their returns electronically may satisfy this requirement by attaching a statement to their returns that provides the date and control number of the letter ruling.

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 an appropriate party. 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.

Sincerely,

Sean M. Dwyer
Assistant to the Branch Chief, Branch 1
(Income Tax & Accounting)