



TAX EXEMPT AND
GOVERNMENT ENTITIES
DIVISION

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

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4942.03-06

Contact Person:

Identification Number:

Telephone Number:

Employer Identification Number:

Legend:

Foundation = year 1 =
Founder = year 5 =
Corporation = year 6 =
State =
date1 =
\$ x =
\$ y =
\$ w =
\$ z =

Dear

We have considered your request dated April 14, 2010 for discretionary relief under § 301.9100-3 of the Procedure and Administrative Regulations ("administrative regulations"), for an extension of time to make an election to treat prior-year distributions as current-year distributions out of corpus pursuant to § 53.4942(a)-3(c)(2)(iv) of the Foundation and Similar Excise Tax Regulations ("foundation regulations").

FACTS:

You are a State nonprofit corporation recognized as exempt from federal income tax under § 501(c)(3) of the Internal Revenue Code ("Code") and classified as a private foundation under § 509(a). You are a grant-making foundation. Founder is a disqualified person with respect to you pursuant to § 4946.

On date1, Founder contributed shares of Corporation stock to you, with a fair market value of \$ x. This was the sole contribution made to you during tax year 6. Your distributable amount for year 6 was \$ y. You had no undistributed income for year 5 or prior years. You made larger qualifying distributions in year 6 than your required distributable amount of \$ y. This resulted in an excess qualifying distribution of w for year 6, which you carried forward. You also had

excess qualifying distributions in each of the preceding five years (year 1 through year 5), which you had carried forward. These excess qualifying distributions totaled \$z. Since excess qualifying distributions may be carried over only for five years before they expire, your excess qualifying distribution for year 1 would expire if you did not use it by year 6. Thus, your total excess qualifying distributions available for year 6 included the entire amount of excess distribution carryovers in the five prior tax years, year 1 through year 5, plus your qualifying distribution in year 6, or \$z + w.

You could have used your excess distribution carryovers from prior years, beginning in year 1 to apply against your distributable amount for year 6. You did not do so. You were eligible to treat your carryovers from those prior years as current distributions out of corpus under section 53.4942(a)-3(c)(2)(iv) of the regulations. However, your CPA did not recommend, and you did not make, the required election under § 4942(h) with your year 6 Form 990-PF to do this. Therefore, your excess distribution carryover for year 1 expired, unused, in year 6.

Your Founder, who contributed appreciated stock to you in year 6, took only a 30 percent deduction as provided by § 170(b)(1)(B)(i), since you were a private foundation not described in subparagraph 170(b)(1)(F) for year 6. This was because you did not make the § 4942 election to treat eligible excess distribution carryovers from prior years as current distributions out of corpus.

Several years later new accountants reviewed Founder's individual tax returns for prior years. These new accountants discovered that had you made the election on your year 6 Form 990-PF, you could have qualified as a pass-through or conduit foundation under § 170(b)(1)(F)(ii) for year 6, and Founder could have claimed a larger charitable deduction on his individual tax return.

You have submitted sworn statements by CPAs for you and Founder for year 6 stating that no communication took place between them regarding your excess qualifying distributions or election. You also have represented that you made this ruling request before the failure to make the election was discovered by the Service, and that granting the relief you request would not result in Founder and you having a lower aggregate tax liability than if the election was timely made. You have filed this ruling request to receive discretionary relief for an extension of time to make a timely election under § 53.4942(a)-3(c)(2)(iv) of the foundation regulations for the year 6 tax year. You also submitted Form 872-B, *Consent to Extend the Time to Assess Miscellaneous Excise Taxes*, with your ruling request. Upon receipt of the requested extension, you will promptly file an amended Form 990-PF for tax year 6 with the election made, and file amended Form 990-PF returns for subsequent tax years for which a return has already been filed.

REQUESTED RULING:

You request that the Commissioner, in accordance with the discretionary relief provisions of § 301.9100-3 of the administrative regulations, grant you an extension of time in which to make a timely election under § 53.4942(a)-3(c)(2)(iv) of the foundation regulations for the year 6 tax year ending December 31st.

LAW:

Section 170(b) of the Code describes various percentage limitations on the deductibility of contributions to public charities or private foundations.

Section 170(b)(1)(B)(i) of the Code states, in part, that a 30 percent deduction limitation applies to an individual's contribution base for the taxable year when the contribution is made to a private foundation not described in subparagraph 170(b)(1)(F).

Section 170(b)(1)(F)(ii) of the Code provides, in part, that contributions by an individual to a private foundation that makes qualifying distributions that are treated as distributions out of corpus in an amount equal to 100% of the contribution within three months and 15 days of the end of the private foundation's taxable year, are deductible at 50 percent of the taxpayer's contribution base for the taxable year.

Section 4942 of the Code, in general, imposes excise taxes on the "undistributed income" of a private foundation when it fails to make "qualifying distributions" in the distributable amount for any taxable year.

Section 4942(d) of the Code defines a private foundation's "distributable amount" for any taxable year as an amount equal to –

- (1) the sum of the minimum investment return plus the amounts described in subsection (f)(2)(C), reduced by
- (2) the sum of the taxes imposed on such private foundation for the taxable year under subtitle A and section 4940.

Section 4942(h) of the Code provides rules as to the treatment of "qualifying distributions" made during a taxable year. Generally, qualifying distributions for a taxable year are treated as made (A) first out of the undistributed income of the immediately preceding taxable year (if the private foundation was subject to tax imposed by this section for the preceding year) to the extent thereof, (B) second out of undistributed income for the taxable year to the extent thereof, and (C) then out of corpus.

Section 4946 of the Code defines the term "disqualified person" to mean, in part, with respect to a private foundation, a person who is a substantial contributor to the foundation or a foundation manager.

Section 53.4942(a)-3(c)(2)(iv) of the foundation regulations provides that in order to satisfy distribution requirements under § 170(b)(1)(F)(ii), a donee organization may elect to treat as a current distribution out of corpus any amount distributed within the prior five tax years which was treated as a distribution out of corpus and was or is not availed of for any other purpose. Such election must be made by attaching a statement to Form 990-PF with respect to the tax year for which such election is to apply. Such statement must contain a declaration by an appropriate foundation manager that the foundation is making an election under this paragraph and it must specify that the distribution was treated as a distribution out of corpus in a designated prior taxable year (or years). For purposes of such elections, see § 1.9100-1 relating to extensions of time for making certain elections.

Section 53.4942(a)-3(d)(1) of the foundation regulations provides for the order of treatment of qualifying distributions.

Section 53.4942(a)-3(d)(2) of the foundation regulations provides that a private foundation may elect to treat any portion of a qualifying distribution not treated as made out of the undistributed income of the preceding tax year as made out of undistributed income of a prior taxable year or out of corpus. The election must be made by filing a statement with the Commissioner during the taxable year in which such qualifying distribution is made or by attaching a statement to the Form 990-PF for that taxable year.

Section 53.4942(a)-3(e)(1) of the foundation regulations provides for the carryover of excess qualifying distributions for up to five years to reduce distributable amounts in the five-year adjustment period. Earlier excess qualifying distributions are applied before later ones.

Section 53.4942(a)-3(e)(2) of the foundation regulations provides that an excess of qualifying distributions is created for a tax year if --

- (i) the total qualifying distributions treated as made out of the undistributed income for such tax year or as made out of corpus with respect to such tax year (other than amounts distributed in satisfaction of §§ 170(b)(1)(F)(ii) or 4942(g)(3) or applied to a prior tax year by election under §§ 53.4942(a)-3(c)(2)(iv) or 53.4942(a)-2(d)(2)), exceeds
- (ii) the distributable amount for such tax year (determined without regard to § 53.4942(a)-3(e), which provides for carryovers).

Section 301.9100-3(a) of the administrative regulations provides that requests for extensions of time for regulatory elections may be granted when the taxpayer provides 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.

Section 301.9100-3(b)(1) of the administrative regulations provides that a taxpayer is deemed to have acted reasonably and in good faith if the taxpayer:

- (i) Requests relief under this section before the failure to make the regulatory election is discovered by the Internal Revenue Service ("Service");
- (ii) Failed to make the election because of intervening events beyond the taxpayer's control;
- (iii) Failed to make the election because, after exercising reasonable diligence (taking into account the taxpayer's experience and the complexity of the return or issue), the taxpayer was unaware of the necessity for the election;
- (iv) Reasonably relied on the written advice of the Service; or
- (v) Reasonably relied on a qualified tax professional, including a tax professional employed by the taxpayer, and the tax professional failed to make, or advise the taxpayer to make, the

election.

Section 301.9100-3(b)(2) of the administrative regulations provides that a taxpayer will not be considered to have reasonably relied on a qualified tax professional if the taxpayer knew or should have known that the professional was not:

- (i) Competent to render advice on the regulatory election; or
- (ii) Aware of all relevant facts.

Section 301.9100-3(b)(3)(ii) of the administrative regulations provides, in part, that a taxpayer is deemed to have not acted reasonably and in good faith if the taxpayer was informed in all material respects of the required election and related tax consequences, but chose not to file the election.

Section 301.9100-3(c)(1) of the administrative regulations provides that the Commissioner will grant a reasonable extension of time to make a regulatory election only when the interests of the Government will not be prejudiced by the granting of relief.

Section 301.9100-3(c)(1)(i) of the administrative regulations provides, in part, that the interests of the Government are prejudiced if granting relief would result in a 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.

Section 301.9100-3(d)(2) of the administrative regulations states, in part, that for relief to be granted, the Service may require the taxpayer to consent under section 6501(c)(4) of the Code to an extension of the period of limitations on assessment for the taxable year in which the regulatory election should have been made and any taxable years that would have been affected by the election had it been timely made.

Section 301.9100-3(e) of the administrative regulations specifies evidence which must be provided when a taxpayer requests relief under this section.

Internal Revenue Manual 1.2.53.4 Delegation Order 30-3 (formerly DO-183, Rev. 8), Extension of Time for Making Certain Elections, provides, in part, authority to grant a reasonable extension of the time fixed by regulations for the making of an election or application for relief in respect of tax under all subtitles of the Code, except subtitles E, G, H, and I, subject to the requirements of 26 CFR 301.9100-1. Authority delegated to Director, EO; Manager, EO Technical; Manager, EO Technical Guidance and Quality Assurance.

ANALYSIS:

Private foundations are required to distribute minimum amounts of income to charity each year or pay substantial excise taxes pursuant to § 4942 of the Code. A foundation that makes a greater than required qualifying distribution in one tax year, may carry that excess forward for up to five years to use towards a qualifying distribution in a future year. Section 53.4942(a)-3(e)(1). Pursuant to § 53.4942(a)-3(c)(2)(iv) of the foundation regulations, a foundation may elect to

treat excess distribution carryovers from its five prior tax years as a current distribution out of corpus in order to qualify as a conduit or pass-through foundation under § 170(b)(1)(F)(ii).

You did not make such an election when you timely filed your Form 990-PF for year 6. However, § 301.9100-3(a) of the administrative regulations provides, in part, that requests for extensions of time for regulatory elections may be granted when the taxpayer provides evidence to establish that the taxpayer acted reasonably and in good faith, and the grant of relief will not prejudice the interests of the Government.

You have submitted documentation showing that you acted reasonably and in good faith under § 301.9100-3(b)(1) of the administrative regulations in that you reasonably relied on your CPA who failed to make, or advise you to make, the election for year 6. Founder's accounting professional did not communicate with you or your CPA. You were unaware of the consequences of making the election. You have submitted affidavits and other evidence to corroborate these facts which satisfy the procedural requirements for relief under § 301.9100-3(e) of the administrative regulations.

To qualify for discretionary relief to now make the election, you must also demonstrate that the interests of the Government will not be prejudiced by the granting of relief according to § 301.9100-3(c)(1) of the administrative regulations. The government's interest is prejudiced if granting relief will result in affected taxpayers, in the aggregate, having a lower tax liability than if the election had been timely made. Section 301.9100-3(c)(1)(i) of the administrative regulations. In addition, the Government's interests are 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 under § 6501(a) of the Code before the taxpayer's receipt of a ruling granting relief under this section. Section 301.9100-3(c)(1)(ii). In this instance, we must look at the effect of the election on the tax liability on both you and your Founder, a disqualified person.

In year 6 you made qualifying distributions in excess of the distributable amount, so you were not liable for excise tax under § 4942 of the Code. You also made excess qualifying distributions in years 1 through 5 and had no undistributed amount during those years. Thus, the excess qualifying distributions for years 1 through 5 could be carried forward up to five years according to § 53.4942(a)-3(e)(3) of the foundation regulations. These excess qualifying distribution carryovers from years 1 through 5 were available to be used in year 6. This is not a case of attempting to refresh expired carryovers in a manner not permitted by the Code and regulations. Consequently, your request for relief to extend the time to elect to treat your excess qualifying distributions from year 1 through year 5 as made out of corpus in year 6 does not lower your tax liability for those years or year 6.

While granting the relief you request will allow the Founder to amend his individual income tax return to lower his tax liability for year 6, his tax liability will not be lower than it would have been if you had timely made the election. A taxpayer may deduct up to 50 percent of his contribution base for the taxable year if the donee-private foundation makes qualifying distributions that are treated as distributions out of corpus in an amount equal to 100% of the contribution within three months and 15 days of the end of the private foundation's taxable year. Section 170(b)(1)(F)(ii). Because you had already made large excess qualifying distributions that were carried over from

year 1 through year 5, your election to treat those excess qualifying distributions as year 6 distributions made out of corpus meets the timing requirement of section 170(b)(1)(F)(ii). Those year 1 through 5 carryovers totaled \$z. In addition, your qualifying distribution for year 6 was greater than the distributable amount by \$w. In total, your excess qualifying distributions in years 1 through 6 were greater than 100% of the Founder's year 6 contribution, \$x. Therefore, you were able to make qualifying distributions that are treated as distributions out of corpus in an amount equal to 100% of your year 6 contribution during year 6.

You submitted Form 872-B, *Consent to Extend the Time to Assess Miscellaneous Excise Taxes*, with your ruling request. This extended the period of limitations under § 6501(a) on assessment of excise taxes under § 4942 during the pendency of this ruling request. Thus, granting this extension of time to make the election will not prejudice the Government's interest pursuant to § 301.9100-3(c)(1)(i) of the administrative regulations.

RULING:

Based on the facts and circumstances represented, the Commissioner, through his delegate, has exercised his authority under § 301.9100-3 of the regulations, to grant you an extension of time in which to make an election under § 53.4942(a)-3(c)(2)(iv) of the foundation regulations for the year 6 tax year ending December 31st. You must file an amended Form 990-PF for year 6 to make this election within 60 days of the date of this letter ruling.

This ruling will be made available for public inspection under § 6110 of the Code after certain deletions of identifying information are made. For details, see enclosed Notice 437, *Notice of Intention to Disclose*. A copy of this ruling with deletions that we intend to make available for public inspection is attached to Notice 437. If you disagree with our proposed deletions, you should follow the instructions in Notice 437.

This ruling is directed only to the organization that requested it. Section 6110(k)(3) of the Code provides that it may not be used or cited by others as precedent.

This ruling is based on the facts as they were presented and on the understanding that there will be no material changes in these facts. This ruling does not address the applicability of any section of the Code or regulations to the facts submitted other than with respect to the sections described. This office does not have jurisdiction over § 170 of the Code. Therefore, this ruling does not address the propriety of deductions under § 170 or whether the facts presented by the taxpayer with regard to § 170 are correct. Because it could help resolve questions concerning your federal income tax status, this ruling should be kept in your permanent records.

If you have any questions about this ruling, please contact the person whose name and telephone number are shown in the heading of this letter.

In accordance with the Power of Attorney currently on file with the Internal Revenue Service, we are sending a copy of this letter to your authorized representative.

Sincerely,

Michael Seto, Acting
Manager, EO Technical

Enclosure
Notice 437