

## Internal Revenue Service

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Department of the Treasury

Washington, DC 20224

Third Party Communication: None

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Person To Contact:

, ID No.

Telephone Number:

Refer Reply To:

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TY:

### Legend

Taxpayer	=
FC1	=
FC2	=
Country X	=
Tax Professional	=
Year 1	=
Year 2	=
Year 3	=
Year 4	=

Dear :

This is in response to a letter submitted on Taxpayer's behalf by an authorized representative requesting the consent of the Commissioner of the Internal Revenue Service ("Commissioner") to make retroactive qualified electing fund ("QEF") elections under section 1295(b) of the Internal Revenue Code (the "Code") and Treas. Reg. § 1.1295-3(f) with respect to Taxpayer's investments in FC1 and FC2.

The rulings contained in this letter are based upon information and representations submitted by Taxpayer 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.

### FACTS

Taxpayer is a United States person who is the owner, trustee, and beneficiary of a trust organized in Country X and treated as a foreign grantor trust under sections 671

through 679. In Year 1, through Taxpayer's Country X trust, Taxpayer invested in FC1, a Country X entity treated as a corporation for U.S. federal income tax purposes. No QEF election was made with respect to FC1 in Year 1. In Year 2, Taxpayer directly invested in FC1. In Year 2, through Taxpayer's Country X trust, Taxpayer invested in FC2, a Country X entity treated as a corporation for U.S. federal income tax purposes. No QEF election was made with respect to FC2 in Year 2. In Year 3, Taxpayer disposed of all her shares, including her shares held indirectly through Taxpayer's Country X trust, in FC1 and FC2 and realized gains.

For all tax years relevant to these rulings, Taxpayer relied on Tax Professional to prepare her U.S. federal income tax returns. Tax Professional failed to identify each of FC1 and FC2 as a passive foreign investment company ("PFIC"). As a result, Tax Professional failed to advise Taxpayer of the availability of a QEF election and the consequences of making or failing to make QEF elections with respect to her investments in FC1 and FC2. Tax Professional has no record of having received PFIC Annual Information Statements with respect to FC1 and FC2 for the years that Taxpayer would have made QEF elections.

Taxpayer first learned about the existence of the PFIC rules in Year 4 when a new associate at Tax Professional prepared Taxpayer's Year 3 U.S. federal income tax returns. The associate noticed that timely QEF elections had not been made with respect to FC1 and FC2. Tax Professional then alerted Taxpayer that Taxpayer's investments in FC1 and FC2 may be subject to the PFIC rules. Prior to Year 4, Taxpayer did not know that FC1 and FC2 may be PFICs and of the availability of a QEF election and related tax consequences. Because timely QEF elections had not been made with respect to FC1 and FC2, Tax Professional treated FC1 and FC2 as PFICs subject to section 1291, resulting in excess distributions from gains recognized on the disposition of shares in FC1 and FC2 in Year 3. Tax Professional then advised Taxpayer to make retroactive QEF elections with respect to FC1 and FC2 to prevent her investments in FC1 and FC2 from being treated as section 1291 funds.

In accordance with a signed closing agreement between Taxpayer and the Commissioner, Taxpayer has paid an amount sufficient to eliminate any prejudice to the United States government as a consequence of her inability to file amended returns for the closed taxable years. Further, Taxpayer has agreed to file an amended return for each of the open taxable years affected by the retroactive elections, if any.

Taxpayer submitted affidavits, under penalties of perjury, describing the events that led to the failure to make the QEF elections by the election due date. In addition, Taxpayer represents that, as of the date of this request for rulings, the PFIC status of FC1 and FC2 has not been raised by the Internal Revenue Service on audit for any of the taxable years at issue.

**RULINGS REQUESTED**

Taxpayer requests the consent of the Commissioner to make retroactive QEF elections under Treas. Reg. § 1.1295-3(f) with respect to her investments in FC1 for Year 1 and FC2 for Year 2.

**LAW**

Section 1295(a) provides that a PFIC will be treated as a QEF with respect to a shareholder if (1) an election by the shareholder under section 1295(b) applies to the PFIC for the taxable year; and (2) the PFIC complies with the requirements prescribed by the Secretary for purposes of determining the ordinary earnings and net capital gains of the company.

Under section 1295(b)(2), a QEF election may be made for a taxable year at any time on or before the due date (determined with regard to extensions) for filing the return for the taxable year. To the extent provided in regulations, the election may be made after the due date if the shareholder failed to make a timely election because the shareholder reasonably believed the company was not a PFIC.

Under Treas. Reg. § 1.1295-3(f), a shareholder may request the consent of the Commissioner to make a retroactive QEF election for a taxable year if:

1. the shareholder reasonably relied on a qualified tax professional, within the meaning of Treas. Reg. § 1.1295-3(f)(2);
2. granting consent will not prejudice the interests of the United States government, as provided in Treas. Reg. § 1.1295-3(f)(3);
3. the request is made before a representative of the Internal Revenue Service raises upon audit the PFIC status of the company for any taxable year of the shareholder; and
4. the shareholder satisfies the procedural requirements of Treas. Reg. § 1.1295-3(f)(4).

The procedural requirements include filing a request for consent to make a retroactive election with, and submitting a user fee to, the Office of the Associate Chief Counsel (International). Treas. Reg. § 1.1295-3(f)(4)(i). Additionally, affidavits signed under penalties of perjury must be submitted that describe:

1. the events that led to the failure to make a QEF election by the election due date;
2. the discovery of the failure;
3. the engagement and responsibilities of the qualified tax professional; and
4. the extent to which the shareholder relied on the tax professional.

Treas. Reg. § 1.1295-3(f)(4)(ii) and (iii).

**CONCLUSION**

Based on the information submitted and representations made with Taxpayer's ruling request, we conclude that Taxpayer has satisfied Treas. Reg. § 1.1295-3(f). Accordingly, consent is granted to Taxpayer to make retroactive QEF elections with respect to FC1 for Year 1 and FC2 for Year 2 provided that Taxpayer complies with the rules under Treas. Reg. § 1.1295-3(g) regarding the time and manner for making the retroactive QEF elections. We have approved a closing agreement with Taxpayer with respect to those issues affecting her tax liability for closed years on the basis set forth above. Pursuant to our practice with respect to such agreements, the agreement contains a stipulation to the effect that any change or modification of applicable statutes enacted subsequent to the date of this agreement and made applicable to the taxable period involved will render the agreement ineffective to the extent that it is dependent upon such statutes.

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.

These rulings are directed only to the taxpayer requesting it. Section 6110(k)(3) of the Code provides that it may not be used or cited as precedent.

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

In accordance with the Power of Attorney on file with this office, a copy of this letter is being sent to your authorized representative.

Sincerely,

/s/ Kristine A. Crabtree

Kristine A. Crabtree  
Senior Counsel, Branch 2  
Associate Chief Counsel (International)

cc: