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Internal Revenue Service

Department of the Treasury

Washington, D.C. 20224

Index Nos.:851.00-00, 9100.00-00

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Refer Reply to:
CC:DOM:FI&P:3/PLR-108830-99
Date:
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Legend:

Fund =

Trust =

State X =

Adviser =

Accounting Firm =

Date 1 =

Date 2 =

Date 3 =

Date 4 =

Date 5 =

Date 6

This responds to a letter dated May 5, 1999, and subsequent correspondence submitted on behalf of Fund. Fund requests that its election under § 851(b)(1) of the Internal Revenue Code to be treated as a regulated investment company (RIC) beginning with its initial taxable year be considered timely filed pursuant to § 301.9100-3 of the Procedure and Administration Regulations.

FACTS

Fund is a separate series of Trust. Fund commenced operations on Date 1. Trust was organized as a State X Business Trust and is registered as an open-end management investment company under the Investment Company Act of 1940, as amended, 15 U.S.C. Section 80a-1 et seq. Fund uses the accrual method of accounting for tax and financial accounting purposes and has an October 31 year-end.

Fund's first taxable year of operation was the taxable year ended Date 2. Fund at all times has operated in a manner intended to qualify it as a RIC under Subchapter M of the Code.

Fund has a board of directors and officers, but no employees. Fund has engaged Adviser to provide Fund with overall investment advisory and other services, as well as office facilities and personnel necessary to administer Fund. These services include the performance of certain accounting functions for which Adviser directly employs experienced mutual fund accounting professionals to perform such services. Fund directly retains Accounting Firm to prepare tax returns and to be its independent auditor. Accounting Firm is responsible for the preparation and review of Fund's federal, state, and local tax returns, including extension requests, and any applicable elections. Adviser is responsible for reviewing Fund's tax returns and extension requests and arranging for execution and timely filing of those returns and extension requests.

For the taxable year ended Date 2, Fund neither declared nor paid any dividends because it incurred a net investment loss and a net capital loss. Consistent with Fund's prospectuses, financial statements, and operations, Fund intended to make a timely election under § 851(b)(1) of the Code to be taxed as a RIC. This election should have been made on Fund's federal income tax return, due on Date 3.

Accounting Firm prepared a federal income tax extension request for Fund and on Date 4 sent it via courier to Adviser. Internal restructuring and the implementation of a new accounting system, complicated by the fact that a key member of Adviser's financial department was on extended sick leave, strained Adviser's ability to perform certain functions; consequently, Adviser inadvertently failed to file Fund's federal income tax extension request by Date 3. On Date 5, an inquiry by an employee of Accounting Firm led to the discovery that the extension request had not been filed. Upon discovering the failure to timely file the extension request, Accounting Firm immediately commenced preparation of the Form 1120-RIC for Fund. The return was filed on Date 6.

LAW AND ANALYSIS

Section 851(b)(1) provides that a corporation shall not be considered a RIC for any taxable year unless it makes an election to be a RIC on its federal income tax return for the taxable year or has made an election for a previous taxable year.

Section 1.851-2(a) of the Income Tax Regulations provides that the taxpayer shall make its election to be treated as a RIC by computing taxable income as a RIC on its federal income tax return for the first taxable year for which the election is applicable.

Section 301.9100-1(c) of the Procedure and Administration Regulations provides, in part, that the Commissioner has discretion to grant a reasonable extension of time to make a regulatory election (defined in § 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 facts and circumstances of each situation, the Commissioner will grant an extension of time for regulatory elections that do not meet the requirements of § 301.9100-2. 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 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).

HOLDING

Based upon the facts presented and representations made by Fund, we hold that Fund has demonstrated good cause for the granting of relief under § 301.9100-3. Accordingly, Fund will be treated as having made a timely election under § 851(b)(1) of the Code on its federal income tax return filed for the tax year that ended Date 2.

No opinion is expressed as to whether Fund's tax liability is not lower in the aggregate for the year to which the election applies than Fund's 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 district director's office will determine Fund's tax liability for the year involved. If the district director's office determines that Fund's liability is lower, that office will determine the federal income tax effect.

This ruling is limited to the timeliness of Fund's election under § 851(b)(1) of the Code. This ruling does not relieve Fund from any penalty that it may owe as a result of its failure to file its federal income tax return on time. Except as specifically ruled upon above, no opinion is expressed or implied as to any federal excise or income tax consequences regarding Fund. In particular, no opinion is expressed or implied whether Fund qualifies as a RIC that is taxable under subchapter M, part 1 of the Code.

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

Sincerely yours,

Lon B Smith

Assistant Chief Counsel
(Financial Institutions
and Products)

Enclosures:
Copy of this letter
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