

Internal Revenue Service

Department of the Treasury

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Refer Reply to:
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Date: October 05, 1999

Legend

Fund =

State =

Accountant =

Advisor =

Corporation =

date 1 =

date 2 =

date 3 =

date 4 =

date 5 =

date 6 =

date 7 =

date 8 =

Dear:

This is in reply to a letter dated May 28, 1999, and subsequent correspondence, submitted on behalf of Fund requesting an extension of time for Fund to make an election under § 855(a) of the Internal Revenue Code for the Fund's tax year ended date 2. Fund requests that its election be considered timely filed pursuant to §§ 301.9100-1 and -3 of the Procedure and Administration Regulations.

FACTS

Fund is registered with the Securities and Exchange Commission as a closed-end management investment company under the Investment Company Act of 1940, 15 U.S.C. § 80a-1, et seq.

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Fund is organized as a State corporation. It uses the overall accrual method of accounting and a calendar tax year. It commenced operations on date 1. Fund elected to be taxed as a regulated investment company (RIC) under § 851 in its initial tax year and every year thereafter.

Advisor and Accountant were engaged to provide services to Fund. Advisor managed and administered Fund. Accountant served as an independent accountant to Fund. Accountant was responsible for preparing Fund's federal income tax return and for preparing and mailing Fund's extension requests. Although Advisor and Accountant provide services for over fifty mutual funds, Accountant was responsible for preparing and mailing the extension requests only for Fund. Ten of the mutual funds served by Advisor and Accountant, including Fund, had a tax year ending on date 2. Accountant was responsible for preparing the federal income tax returns for all ten funds and the extensions for Fund. The responsibility for preparing and mailing the extension requests for the nine other funds belonged to Corporation.

For the tax year ending on date 2, the extension of time to file Fund's income tax return (Form 7004, Application for Automatic Extension of Time to File Corporation Income Tax Return) was due on date 5. As part of servicing the over 50 funds it serves with Advisor, Accountant maintained a computerized tickler system in order to monitor all tax return filings and applicable due dates. It was the responsibility of an Accountant tax senior manager to monitor Accountant's tickler system to ensure that all client filings were timely made. As part of that procedure and shortly before date 5, the Accountant tax senior manager called the tax director of Corporation to ensure that all the extensions for Advisor's date 2 year end funds were filed. It was overlooked at this point by Accountant that only nine of the ten funds' extension requests were prepared by Corporation, and Fund's extension request should have been prepared and filed by Accountant. Thus, due to human error, the extension request was not prepared or filed by date 5. Corrective action has been taken by Accountant to address the cause of the error.

On date 6, the Accountant tax senior manager discovered the error during his review of upcoming work to be prepared by his associate. On date 7, Accountant informed management at Advisor of the missed extension request and discussed a course of action to be taken. Advisor requested Accountant to seek an extension of time under § 301.9100-1 for making the election under § 855(a). As soon as the error was discovered, Accountant began to prepare a tax return for Fund. Fund's tax returns for the year ending date 2 were mailed to the Internal Revenue Service on date 8.

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Fund represents that it has been its practice to declare and pay dividends from net investment income, if any, on a monthly basis and net realized capital gains (including net short-term capital gains) at least annually. In order to eliminate the need to pay federal income and excise taxes, distributions are declared and paid to the extent necessary to comply with the distributions required under §§ 852 and 855, and an amount is calculated to comply with the distribution required under § 4982. Fund further represents that since its inception each return has included an election pursuant to § 855(a) if such a dividend was required to pay all of Fund's investment company taxable income and net capital gain. In this case, the dividend to which the election under § 855 relates was declared on date 3 and distributed by date 4.

LAW

Section 855(a) provides, in part, that if a RIC declares a dividend prior to the time prescribed by law for the filing of its return for a taxable year (including the period of any extension of time granted for filing such return), and distributes the amount of such dividend to shareholders in the 12-month period following the close of such taxable year and not later than the date of the first regular dividend payment made after such declaration, the amount so declared and distributed shall, to the extent the company elects in such return in accordance with regulations prescribed by the Secretary, be considered as having been paid during such taxable year, except as provided elsewhere in the section.

Section 1.855-1(b) of the Income Tax Regulations provides that the § 855 election must be made in the return filed by the company for the taxable year. The election should be made by the taxpayer by treating the dividend (or portion thereof) to which such election applies as a dividend paid during the taxable year in computing its investment company taxable income, or if the dividend (or portion thereof) to which such election applies is to be designated by the company as a capital gain dividend, in computing the amount of capital gain dividends paid during such taxable year. After the expiration of the time for filing the return for the taxable year for which an election is made under § 855(a), the election is irrevocable.

Section 301.9100-1(c) 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

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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).

CONCLUSION

Based on the information provided and the representations made, we hold that Fund has demonstrated good cause for the granting of a reasonable extension of time under §§ 301.9100-1 and -3. Therefore, Fund will be treated as having made a timely election under § 855(a) on its federal income tax return filed for the tax year that ended on date 2.

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

Except as specifically ruled upon herein, no opinion is expressed or implied as to any federal income tax consequences regarding Fund. In particular, no opinion is expressed or implied whether Fund has satisfied the requirements of § 855 and the regulations thereunder or whether Fund qualifies as a RIC under subchapter M, part 1, of the Code.

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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,

Assistant Chief Counsel
(Financial Institutions & Products)

Enclosures:

Copy of this letter
Section 6110 copy