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TAX EXEMPT AND
GOVERNMENT ENTITIES
DIVISION

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

Date: DEC 16 2002

UIL: 170.07-00
4942.00-00
9100.00-00

Contact Person:

Identification Number:

Telephone Number:

T:EO:B4

Employer Identification Number:

LEGEND:

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Dear Sir or Madam:

This is in response to a ruling request dated March 6, 2002, submitted on your behalf by your authorized representatives. You are requesting that the Commissioner exercise his discretionary authority under section 301.9100-1 of the Miscellaneous Income Tax Regulations and grant you an extension of time for making a regulatory election as more fully set forth below.

FACTS:

X has been recognized as exempt under section 501(c)(3) of the Internal Revenue Code ("Code") and is a private foundation described in section 509(a) of the Code. X provides grants to further the charitable purposes of organizations that are recognized as exempt under section 501(c)(3).

X represents that, for its m tax year, it made qualifying distributions, as defined by section 4942(g) of the Code, in excess of its distributable amount, as defined by section 4942(d). These excess amounts have been treated as distributions out of corpus in accordance with section 4942(h)(1)(C) and section 53.4942(a)-3(d)(1)(iii) of the Foundation and Similar Excise Taxes Regulations, and carried over into succeeding years. X also has carryovers of excess qualifying distributions from its n and o tax years. Four (4) substantial contributors, A, B, C, and D have taken charitable deductions of up to fifty percent (50%) of their adjusted gross incomes on each of their individual income tax returns with respect to their charitable contributions of cash to X during the tax year at issue. The election necessary to satisfy the requirements of section 170(b)(1)(E)(ii) of the Code in order to permit A, B, C, and D to take such deductions at the fifty percent (50%) limit, however, was never made. All of X's excess qualifying distributions have been carried forward into succeeding years; however, no portion of the amounts carried forward thus far has been used for any other purpose.

X represents that it relied on the advice of outside accountants as to matters relating to its tax obligations. X retained Y to assist it in preparing its Form 990-PF (Return of Private Foundation) and to counsel it on matters related to the preparation of its tax returns and their underlying schedules. With respect to tax return preparation and related matters, under the terms of the relationship between X and Y, X was required to supply Y with accurate financial and other data relating to its operations. Y was then obligated to organize this data and to prepare tax returns for, and, to provide tax advice to X, with an eye to ensuring that X continuously qualified as a tax-exempt private foundation and avoided the Chapter 42 excise tax on undistributed income, including, in particular, computation of the Foundation's "minimum investment return," "distributable amount," and "qualifying distributions," as defined in section 4942 of the Code. Y also represented A, B, C, and D and prepared each of their individual income tax returns for the tax year at issue.

During the m tax year, X received cash contributions totaling $e; $f from each of A, B, C, and D and miscellaneous contributions of $g. X made qualifying distributions in the amount of $h, well in excess of X's required distributable amount of $i, calculated at five percent (5%) of the average monthly values of X's liquid assets. The excess qualifying distributions of $j were treated as distributions out of corpus under section 4942(h)(1)(C) of the Code and were carried over to future years, along with X's excess distributions carryovers from its n and o tax years, which totaled $k, bringing X's total excess distributions carry forward to $l. X satisfied its minimum distribution requirement; and, therefore, it was unnecessary for X to make an election pursuant to section 4942(h)(2) to avoid the excise tax on undistributed income. A, B, C, and D deducted their charitable contributions on their corresponding individual income tax returns based on the fifty percent (50%) limitation. X was unaware that it was necessary for X to make the election permitted by section 1.170A-9(g)(2)(v) of the regulations, and section 4942(h)(2)

and the regulations thereunder in order to satisfy the requirements of section 170(b)(1)(E)(ii). Y did not inform X of the necessity of such election and failed to make the election on X's Form 990-PF. Thus, X did not elect to make use of its excess qualifying distributions from the n, o or m tax years in conjunction with A, B, C, and D's individual income tax returns.

During p, each of A, B, C, and D retained the services of Z, to provide tax advice with respect to an audit of their o through q individual income tax returns. Z was neither involved in the preparation of X's n, o, m and r Forms 990-PF, nor asked to review those returns before they were filed. Z had the opportunity to review those returns in relation to their representation of A, B, C, and D. Z determined that X should have made the election permitted by section 1.170A-9(g)(2)(v) of the regulations and section 4942(h)(2) of the Code and the regulations thereunder to treat certain excess qualifying distributions from the n, o, and m tax years as current distributions out of corpus in X's m tax year in order to have satisfied the requirements of a distributing foundation under section 170(b)(1)(E)(ii), thus substantiating A, B, C, and D's charitable deductions of up to fifty percent (50%) of their adjusted gross incomes, rather than thirty percent (30%). If X fails to make the required election necessary to satisfy the requirements of section 170(b)(1)(E)(ii), A, B, C, and D will lose a portion of their charitable deductions in their related tax year. However, because the period for making the election expired at the time the Form 990-PF was due, including extensions, X is filing this private letter ruling request, under section 301.9100-1 and 301.9100-3, of the regulations to seek an extension of time for making the election pursuant to section 170(b)1)(E)(ii) of the Code, section 1.170A-9(g)(2)(v) of the regulations and section 4942(h)(2) and the regulations thereunder for X's m tax year. X's m tax year is closed by the period of limitations on assessment.

LAW:

Section 301.9100-1(c) of the regulations generally provides that the Commissioner, in his discretion, may grant a reasonable extension of time to make a regulatory election under all subtitles of the Internal revenue Code except subtitles E, G, H, and I.

Section 301.9100-1(b) of the regulations defines "regulatory election" to include an election whose due date is prescribed by a regulation published in the Federal Register.

Section 301.9100-3(a) of the regulations provides that requests for extensions of time for regulatory elections that do not meet the requirements of section 301.9100-2 (automatic extensions), must be made under the rules of section 301.9100-3. Requests for relief subject to section 301.9100-3 will be granted when the taxpayer provides evidence to establish that the taxpayer acted reasonably and in good faith, and that granting of relief will not prejudice the interests of the government.

Section 301.9100-3(c)(1)(ii) of the regulations provides that 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 under section 6501(a) before the taxpayer's receipt of a ruling granting relief under this section. The IRS may condition a grant of relief on the taxpayer providing the IRS with a statement from an independent auditor

(other than an auditor providing an affidavit pursuant to paragraph (e)(3) of this section) certifying that the interests of the government are not prejudiced under the standards set forth in paragraph (c)(1)(i) of this section.

Section 53.4942(a)-3(c)(2)(iv) of the regulations provides that in order to satisfy the distribution requirements under section 170(b)(1)(E)(ii) of the Code, the election permitted by this section must be made by attaching a statement to the return the foundation is required to file under section 6033 with respect to the taxable year for which such election is to apply. Under section 53.4942(a)-3(d)(2) 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 return the foundation is required to file under section 6033 with respect to the taxable year in which such qualifying distribution was made.

ANALYSIS:

Because X has complied with the Procedural Requirements set forth in subsection (e) of section 301.9100-3, by providing evidence, including certain affidavits, and a statement from an independent auditor which establishes that it acted reasonably, and in good faith while relying on a qualified tax professional, and, that granting such relief will not prejudice the interests of the government, relief under section 301.9100-3 was recommended to the Commissioner.

RULING OF RELIEF:

Based on the information submitted and the representations made therein, The Commissioner, through his delegate, has exercised his discretionary authority under section 301.9100-3 of the regulations and has granted the requested extension of time to make the election to treat your excess qualifying distributions as distributions made out of the undistributed income of a designated prior taxable year or as current distributions out of corpus for the m tax year pursuant to sections 170(b)(1)(E)(ii) of the Code, section 1.170A-9(g)(2)(v) of the regulations and, section 4942 of the Code and the regulations thereunder.

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

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.

Sincerely,

Robert C. Harper, Jr.

Robert C. Harper, Jr.
Manager, Exempt Organizations
Technical Group 3