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DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Parts 1 and 301

[TD 9012]

RIN 1545-AX75

Clarification of Entity Classification Rules

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final and temporary regulations.

SUMMARY: This document contains final regulations under section 7701 that address the Federal tax classification of a business entity wholly owned by a foreign government and that also provide that a nonbank entity wholly owned by a foreign bank cannot be disregarded as an entity separate from its owner (disregarded entity) for purposes of applying the special rules applicable to banks under the Internal Revenue Code. This document also contains final regulations providing that a partnership can be a controlled commercial entity for purposes of section 892(a)(2)(B) and reissues certain section 892 temporary regulations with references to the final regulations.

DATES: Effective Date: These regulations are effective August 1, 2002.

Applicability Dates: The regulations that address the Federal tax classification of business entities wholly owned by a

foreign government under §301.7701-2 apply on or after January 14, 2002, to such business entities regardless of any prior entity classification, and the regulations that address the definition of the term entity for purposes of section 892(a)(2)(B) apply on or after January 14, 2002. The regulations relating to a nonbank entity that is wholly owned by a foreign bank apply to taxable years beginning after January 12, 2001.

FOR FURTHER INFORMATION CONTACT: Camille B. Evans at (202) 622-3870 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

This document contains amendments to 26 CFR parts 1 and 301. On January 12, 2001, the IRS and the Treasury Department issued a notice of proposed rulemaking (REG-101739-00), published in the **Federal Register** (66 FR 2854), to amend the existing elective business entity classification regime under section 7701 known as the check-the-box regulations, and to amend the existing temporary rules providing for the income of entities owned by foreign governments as described under section 892. No public hearing was requested or held. Written comments responding to the notice of proposed rulemaking were received. After consideration of all the comments, the proposed regulations are adopted as revised by this Treasury

decision. The revisions are discussed below.

Explanation and Summary of Comments

On December 18, 1996, the IRS and Treasury published the elective Federal tax classification regime under section 7701 known as the check-the-box regulations, 61 FR 66584. On January 12, 2001, the IRS and Treasury issued a notice of proposed rulemaking (REG-101739-00) that proposed to amend the Procedure and Administration Regulations (26 CFR Part 301) to address the Federal tax classification of an entity wholly owned by a foreign government (as defined in §1.892-2T) and to address the Federal tax treatment to a foreign bank of income and assets and liabilities of an otherwise disregarded nonbank entity that it owns. As noted in the preamble to the notice of proposed rulemaking, the purpose of the proposed regulations was to ensure parity between the treatment of entities wholly owned by State governments and entities wholly owned by foreign governments, as well as to ensure parity between the treatment of nonbank subsidiaries owned by U.S. banks and the treatment of nonbank subsidiaries owned by foreign banks engaged in a U.S. banking business. The January 12, 2001, notice of proposed rulemaking also proposed to provide that a partnership can be a controlled commercial entity under section 892.

A. §301.7701-2(b)(6)

A commentator suggested that the rule in the proposed regulations that a business entity wholly owned by a foreign government (as defined in §1.892-2T) is a per se corporation should be limited to those entities directly owned by the foreign government. As indicated above, the proposed regulations were issued because the IRS and Treasury believe that it is appropriate to treat controlled entities owned by foreign governments similarly to controlled entities owned by State governments. The per se rule relating to controlled entities owned by State governments is not limited to those entities directly owned by a State government. Thus, except for minor changes to language, the final regulations retain the proposed rule that a business entity wholly owned by a foreign government, like a business entity wholly owned by a State government, will be treated as a per se corporation.

B. §301.7701-2(c)(2)(ii)

Two comments were received on the proposed regulation that provides that foreign banks, like domestic banks, would be precluded from treating their wholly owned nonbank subsidiaries as disregarded entities for purposes of the special rules of the Internal Revenue Code (Code) applicable to banks. Both comments asked for guidance on the phrase "special rules of the Internal Revenue Code applicable to banks" and the circumstances under which the regulation would apply

to entities owned by foreign banks.

As noted above, the regulations are intended to ensure parity of treatment between domestic banks and foreign banks engaged in a U.S. trade or business by providing that neither domestic banks as defined in section 581 nor foreign banks as defined in section 585(a)(2)(B) (without regard to the second sentence thereof) may apply the special rules applicable to banks to their nonbank subsidiaries. A foreign bank is described in section 585(a)(2)(B) only when it is engaged in a U.S. trade or business that meets the requirements of section 581 but for the fact the bank is a foreign corporation. Accordingly, a foreign bank will be subject to the provisions of these final regulations only if the foreign bank is engaged in a U.S. trade or business that meets the requirements of section 581 but for the fact that the bank is a foreign corporation. The reference to "special rules applicable to banks" includes not only provisions of the Code but also regulations and other published guidance under the Code.

One of these comments specifically requested clarification on how §301.7701-2(c)(2)(ii) would affect a foreign bank's treatment of its disregarded entity for purposes of applying the fixed ratio election in the interest allocation rules under §1.882-5(c)(4). Because under §1.882-5 a foreign bank that meets the definition of section 585(a)(2)(B) does not distinguish between its banking and

nonbanking activities for purposes of taking assets, liabilities and interest expense into account in the interest allocation formula, the IRS and Treasury do not believe the regulations under §1.882-5 are appropriately considered "special rules applicable to banks" for purposes of the §301.7701-2(c)(2)(ii) regulations. Accordingly, the final regulations clarify that a foreign bank that is defined in section 585(a)(2)(B) is entitled to use the 93 percent fixed ratio under §1.882-5 for the assets, liabilities and interest expense of a nonbank subsidiary that otherwise is treated as a disregarded entity for federal income tax purposes. Similarly, in calculating the amount of excess interest that may be treated as interest expense paid or accrued on deposits under §1.884-4(a)(2)(iii), a foreign bank defined in section 585(a)(2)(B) is entitled to take into account its combined banking and nonbanking U.S. assets (as defined in §1.884-1(d)), including the assets of a nonbank subsidiary that is otherwise treated as a disregarded entity for federal income tax purposes.

A similar analysis applies to the rules under §§1.864-4(c)(5), 1.864-5, and 1.864-6, which relate to the determination of the effectively connected income of a banking, financing or similar business. Because those rules apply to both section 585(a)(2)(B) banks and to foreign corporations that are not regulated as banks but otherwise engage in financial services activities (See Inverworld v. Commissioner, T.C. Memo. 1996-301, supplemented by T.C. Memo 1997-

226), the final regulations clarify that these rules are not considered "special rules applicable to banks."

Effective Dates

The regulations that address the Federal tax classification of business entities wholly owned by a foreign government under §301.7701-2 apply on or after January 14, 2002, to such business entities regardless of any prior entity classification, and the regulations that address the definition of the term entity for purposes of section 892(a)(2)(B) apply on or after January 14, 2002. The regulations relating to a nonbank entity that is wholly owned by a foreign bank apply to taxable years beginning after January 12, 2001.

Special Analyses

It has been determined that this Treasury decision is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) and the Regulatory Flexibility Act (5 U.S.C. chapter 6) do not apply to these regulations. Therefore, a Regulatory Flexibility Analysis is not required. Pursuant to section 7805(f) of the Code, the notice of proposed rulemaking preceding these regulations was submitted to the Chief Counsel for Advocacy of

the Small Business Administration for comment on their impact on small businesses.

Drafting Information

The principal author of these regulations is Camille B. Evans of the Office of Associate Chief Counsel (International). However, other personnel from the IRS and Treasury Department participated in their development.

List of Subjects

26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

26 CFR Part 301

Employment taxes, Estate taxes, Excise taxes, Gift Taxes, Income taxes, Penalties, Reporting and recordkeeping requirements.

Adoption of Amendments to the Regulations

Accordingly, 26 CFR parts 1 and 301 are amended as follows:

PART 1--INCOME TAXES

Paragraph 1. The authority citation for part 1 is amended by removing the entry for "Sections 1.892-1T through 1.892-7T" and adding the following entries in numerical order:

Authority: 26 U.S.C. 7805 * * *

Section 1.892-1T also issued under 26 U.S.C. 892(c).
Section 1.892-2T also issued under 26 U.S.C. 892(c).
Section 1.892-3T also issued under 26 U.S.C. 892(c).
Section 1.892-4T also issued under 26 U.S.C. 892(c).

Section 1.892-5 also issued under 26 U.S.C. 892(c).
Section 1.892-5T also issued under 26 U.S.C. 892(c).
Section 1.892-6T also issued under 26 U.S.C. 892(c).
Section 1.892-7T also issued under 26 U.S.C. 892(c). * * *

Par. 2. Section 1.892-5 is added to read as follows:

§1.892-5 Controlled commercial entity.

(a) through (a)(2) [Reserved]. For further information, see §1.892-5T(a) through (a)(2).

(3) For purposes of section 892(a)(2)(B), the term entity means and includes a corporation, a partnership, a trust (including a pension trust described in §1.892-2T(c)) and an estate.

(4) Effective date. This section applies on or after January 14, 2002. See §1.892-5T(a) for the rules that apply before January 14, 2002.

(b) through (d) [Reserved]. For further information, see §§1.892-5T(b) through (d).

Par. 3. Section 1.892-5T is amended by:

1. Removing the concluding text immediately following paragraph (a)(2).

2. Adding paragraph (a)(3).

The addition reads as follows:

§1.892-5T Controlled commercial entity (temporary regulations).

(a) * * *

(3) [Reserved]. For further information, see §1.892-5(a)(3).

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PART 301--PROCEDURE AND ADMINISTRATION

Par. 4. The authority citation for part 301 continues to read in part as follows:

Authority: 26 U.S.C. 7805 * * *

Par. 5. Section 301.7701-2 is amended by:

1. Revising paragraphs (b)(6) and (c)(2)(ii).
2. Revising the first sentence of paragraph (e).

The revisions read as follows:

§301.7701-2 Business entities; definitions.

* * * * *

(b) * * *

(6) A business entity wholly owned by a State or any political subdivision thereof, or a business entity wholly owned by a foreign government or any other entity described in §1.892-2T;

* * * * *

(c) * * *

(2) * * *

(ii) Special rule for certain business entities. If the single owner of a business entity is a bank (as defined in section 581, or, in the case of a foreign bank, as defined in section 585(a)(2)(B) without regard to the second sentence thereof), then the special rules applicable to banks under the

Internal Revenue Code will continue to apply to the single owner as if the wholly owned entity were a separate entity. For this purpose, the special rules applicable to banks under the Internal Revenue Code do not include the rules under sections 864(c), 882(c), and 884.

* * * * *

(e) Effective date. Except as otherwise provided in this paragraph (e), the rules of this section apply as of January 1, 1997, except that paragraph (b)(6) applies on or after January 14, 2002, to a business entity wholly owned by a foreign government regardless of any prior entity classification, and paragraph (c)(2)(ii) of this section applies to taxable years beginning after January 12, 2001. * *

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Deputy Commissioner of Internal Revenue.
Robert E. Wenzel

Approved: July 25, 2002

Acting Assistant Secretary of the Treasury.
Pamela F. Olson