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DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 301

[TD 8962 ]

RIN 1545-AY09

Classification of Certain Pension and Employee Benefit Trusts, and Other Trusts

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations.

SUMMARY: This document contains final regulations amending the regulations defining a domestic or foreign trust for federal tax purposes. The regulations will affect certain specified employee benefit trusts and investment trusts. The regulations provide that these employee benefit trusts and investment trusts are deemed to satisfy the control test for domestic trust treatment if United States trustees control all of the substantial decisions of the trust made by the trustees of the trust.

DATES: Effective Date: These regulations are effective August 9, 2001.

Applicability Dates: For dates of applicability of §301.7701-7(d)(1)(iv) and (v)

Examples 1 and 5, see §301.7701-7(e)(3).

FOR FURTHER INFORMATION CONTACT: James A. Quinn at (202) 622-3060 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

## **Background**

On October 12, 2000, the Treasury Department and the IRS published a notice of proposed rulemaking (REG-108553-00) under section 7701 of the Internal Revenue Code (Code) in the **Federal Register** (65 FR 60822). The proposed regulations add group trusts consisting of qualified plan trusts and IRA trusts, as described in Rev. Rul. 81-100 (1981-1 C.B. 326), and certain investment trusts to the categories of trusts that may use the safe harbor in §301.7701-7(d)(1)(iv) of the Procedure and Administration Regulations relating to the application of the control test of section 7701(a)(30)(E). The proposed regulations also modify the safe harbor in §301.7701-7(d)(1)(iv) to clarify that employee benefit trusts and investment trusts identified in the regulations are deemed to satisfy the control test if United States trustees control all of the substantial decisions of the trust made by the trustees of the trust. No one requested to speak at the public hearing scheduled for January 31, 2001. Accordingly, the public hearing was canceled on January 26, 2001 (66 FR 7867). Comments in response to the notice of proposed rulemaking were received and are addressed in the following Explanation and Summary of Comments. This document finalizes the proposed regulations without change.

## **Explanation and Summary of Comments**

### Reporting Requirements for Foreign Widely Held Fixed Investment Trusts

Two commentators were concerned about United States investors in widely held fixed investment trusts that are outside the safe harbor provided by §301.7701-7(d)(1)(iv)(I) and therefore are treated as foreign trusts. These

commentators suggested that United States investors in such trusts should not be subject to reporting under section 6048 and to the corresponding penalties in section 6677 for failure to comply with the section 6048 reporting requirements. A guidance project under section 671 concerning reporting requirements for all widely held fixed investment trusts is currently under consideration. Accordingly, these regulations do not specifically address this issue.

#### Application to Certain Pension Trusts Created or Organized in Puerto Rico

Section 1022(i)(1) of the Employee Retirement Income Security Act of 1974, Public Law 93-406 (88 Stat. 829) (September 2, 1974), provides for tax exemption for certain trusts created or organized in Puerto Rico that form part of a pension, profit-sharing, or stock bonus plan. Section 1022(i)(2) and §1.401(a)-50 of the Income Tax Regulations generally provide that the administrator of such a trust may elect to have the trust treated as a trust created or organized in the United States for purposes of section 401(a). In light of the changes made to section 7701(a)(30) in the Small Business Job Protection Act, Public Law 104-188 (110 Stat. 1755) (August 20, 1996), and the Taxpayer Relief Act of 1997, Public Law 105-34 (111 Stat. 788) (August 5, 1997), and the ensuing regulations, some taxpayers have expressed concerns regarding the continuing application of sections 1022(i)(1) and (2) and §1.401(a)-50 to a pension trust created or organized in Puerto Rico that is not a domestic trust within the meaning of section 7701(a)(30). Because the application of these provisions is not restricted to trusts that are domestic trusts within the meaning of section 7701(a)(30),

the 1996 and 1997 amendments to section 7701(a)(30) and the ensuing regulations do not affect the application of these provisions.

### **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) does not apply to these regulations, and, because the regulations do not impose a collection of information on small entities, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Pursuant to section 7805(f) of the Code, the notice of proposed rulemaking preceding these regulations was submitted to the Small Business Administration for comment on the regulations' impact on small business.

### **Drafting Information**

The principal author of these regulations is James A. Quinn of the Office of Associate Chief Counsel (Passthroughs and Special Industries). However, other personnel from the IRS and Treasury Department participated in their development.

### **List of Subjects in 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 part 301 is amended as follows:

PART 301--PROCEDURE AND ADMINISTRATION

Paragraph 1. The authority citation for part 301 continues to read in part as follows:

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

Par. 2. Section 301.7701-7 is amended as follows:

1. Paragraph (d)(1)(iv) introductory text is revised.
2. Paragraph (d)(1)(iv)(H) is redesignated as paragraph (d)(1)(iv)(J).
3. New paragraphs (d)(1)(iv)(H) and (d)(1)(iv)(I) are added.
4. In paragraph (d)(1)(v), Example 1 is revised and Example 5 is added.
5. The first sentence of paragraph (e)(1) is revised.
6. Paragraph (e)(3) is added.

The revisions and additions read as follows:

§301.7701-7 Trusts--domestic and foreign.

\* \* \* \* \*

(d) \* \* \* (1) \* \* \*

(iv) Safe harbor for certain employee benefit trusts and investment trusts.

Notwithstanding the provisions of this paragraph (d), the trusts listed in this paragraph (d)(1)(iv) are deemed to satisfy the control test set forth in paragraph (a)(1)(ii) of this section, provided that United States trustees control all of the substantial decisions made by the trustees of the trust--

\* \* \* \* \*

(H) A group trust described in Rev. Rul. 81-100 (1981-1 C.B. 326) (See §601.601(d)(2) of this chapter);

(l) An investment trust classified as a trust under §301.7701-4(c), provided that the following conditions are satisfied—

(1) All trustees are United States persons and at least one of the trustees is a bank, as defined in section 581, or a United States Government-owned agency or United States Government-sponsored enterprise;

(2) All sponsors (persons who exchange investment assets for beneficial interests with a view to selling the beneficial interests) are United States persons; and

(3) The beneficial interests are widely offered for sale primarily in the United States to United States persons;

\* \* \* \* \*

(v) \* \* \*

Example 1. Trust is a testamentary trust with three fiduciaries, A, B, and C. A and B are United States citizens, and C is a nonresident alien. No persons except the fiduciaries have authority to make any decisions of the trust. The trust instrument provides that no substantial decisions of the trust can be made unless there is unanimity among the fiduciaries. The control test is not satisfied because United States persons do not control all the substantial decisions of the trust. No substantial decisions can be made without C's agreement.

\* \* \* \* \*

Example 5. X, a foreign corporation, conducts business in the United States through various branch operations. X has United States employees and has established a trust as part of a qualified employee benefit plan under section 401(a) for these employees. The trust is established under the laws of State A, and the trustee of the trust is B, a United States bank governed by the laws of State A. B holds legal title to the trust assets for the benefit of the trust beneficiaries. A plan committee makes decisions with respect to the plan and the trust. The plan committee can direct B's actions with regard to those decisions and under the governing documents B is not liable for those decisions. Members of the plan committee consist of United States persons and nonresident aliens, but nonresident aliens make up a majority of the plan

committee. Decisions of the plan committee are made by majority vote. In addition, X retains the power to terminate the trust and to replace the United States trustee or to appoint additional trustees. This trust is deemed to satisfy the control test under paragraph (d)(1)(iv) of this section because B, a United States person, is the trust's only trustee. Any powers held by the plan committee or X are not considered under the safe harbor of paragraph (d)(1)(iv) of this section. In the event that X appoints additional trustees including foreign trustees, any powers held by such trustees must be considered in determining whether United States trustees control all substantial decisions made by the trustees of the trust.

\* \* \* \* \*

(e) Effective date--(1) General rule. Except for the election to remain a domestic trust provided in paragraph (f) of this section and except as provided in paragraph (e)(3) of this section, this section is applicable to taxable years ending after February 2, 1999. \* \* \*

\* \* \* \* \*

(3) Effective date of safe harbor for certain employee benefit trusts and investment trusts. Paragraphs (d)(1)(iv) and (v) Examples 1 and 5 of this section apply to trusts for taxable years ending on or after August 9, 2001. Paragraphs (d)(1)(iv) and (v) Examples 1 and 5 of this section may be relied on by trusts for taxable

years beginning after December 31, 1996, and also may be relied on by trusts whose trustees have elected to apply sections 7701(a)(30) and (31) to the trusts for taxable years ending after August 20, 1996, under section 1907(a)(3)(B) of the SBJP Act.

\* \* \* \* \*

Deputy Commissioner of Internal Revenue

Approved:

Assistant Secretary of the Treasury