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IRS PRIVATE LETTER RULINGS ON "COMBINATION" INSURANCE PRODUCTS

By Craig R. Springfield and Mark E. Griffin

In two recently issued private letter rulings, the Internal Revenue Service ("IRS") addressed federal tax issues pertaining to so-called "combination" insurance products. The first ruling, PLR 200903001 (Oct. 14, 2008), involved a critical illness insurance rider to a life insurance contract, and the second ruling, PLR 200919011 (Feb. 2, 2009), is the first private letter ruling to be issued regarding combinations of long-term care ("LTC") insurance with an annuity contract, which were authorized by the Pension Protection Act of 2006 ("PPA").

PLR 200903001—
Critical Illness Rider to Life Insurance Contract

In PLR 200903001, a critical illness rider (the "Rider") to a life insurance contract provided for an acceleration of the life insurance contract's death benefit upon the insured's critical illness. More specifically, the accelerated death benefit (referred to as the "Rider Benefit") was payable when the insured was diagnosed by a physician as having one of a number of qualifying covered conditions, which in turn were defined by the Rider.

The underlying life insurance contract was an individual, nonparticipating, flexible premium adjustable life insurance contract and generally was designed to comply with the requirements of section 7702 (defining "life insurance contract" for federal tax purposes) by meeting the guideline premium limitation/cash value corridor test of section 7702(a)(2), (c) and (d). The ruling notes, however, that certain of the contracts would be issued with an endorsement that would ensure their compliance with the cash value accumulation test of section 7702(a)(1) and (b). The taxpayer represented that the contract and critical illness rider were purchased with after-tax monies and that the critical illness rider was not a "qualified additional benefit" under section 7702(f)(5)(A).

Because the triggering event for benefits was the insured's critical illness, the Rider is not governed by section 101(g), which addresses certain accelerated death benefits payable upon an insured's terminal illness or chronic illness, nor is the Rider governed by section 7702B, which also can apply to certain accelerated death benefits payable upon an insured's chronic illness.

The IRS ruled that the critical illness rider was accident or health insurance and that benefits received under the rider would be excludable from the recipient's gross income under section 104(a)(3). (Section 104(a)(3) generally excludes from income amounts received through accident or health insurance for personal injuries or sickness.) The ruling also notes that a request for ruling had been withdrawn under section 7702(f).

The IRS's conclusion in this private letter ruling is consistent with its prior rulings under section 104(a)(3). *See, e.g.,* PLR 200339015 (June 17, 2003) and PLR 200339016 (June 17, 2003), both involving critical illness riders to cash value life insurance contracts, and PLR 200627014 (March 6, 2006), involving a critical illness rider to a term life insurance contract.

PLR 200919011—LTC-Annuity Rider

In PLR 200919011, a life insurance company intended to add an LTC insurance rider (the "Rider") to a deferred annuity contract. For tax years after 2009, the Rider was designed to comply with the definition of a "qualified long-term care insurance contract" under section 7702B(b). The Rider provides for monthly LTC benefit payments (not to exceed the per diem limitation of section 7702B(d)(2)) upon the insured's chronic illness. The Rider is funded through an annual charge assessed against the annuity contract's cash value. This charge is at an arms-length rate for the Rider coverage and is determined in accordance with widely accepted actuarial principles based on the insurer's good faith expectation for the claims experience it will incur.

Prior to the annuity starting date, LTC benefits are comprised of two components: i) a "Linked Component" that reduces the annuity contract's cash value on a dollar-for-dollar basis, and ii) an "Unlinked Component" that is paid from net amount at risk. If the insured is chronically ill and LTC benefits are being paid on the scheduled annuity starting date, LTC benefits continue until the contract's cash surrender value is reduced to zero. If the contract owner is not receiving LTC benefits on the scheduled annuity starting date, the Rider generally terminates unless the contract owner elects to continue LTC coverage.

If the annuity contract is annuitized on the annuity starting date, the contract owner elects to continue LTC coverage after this date, and the insured then meets the eligibility requirements for payment of LTC benefits, LTC benefits will replace the annuity payments being made from the contract. The monthly LTC benefits in this circumstance equal the sum of the annuity payments that would have been made plus the monthly Unlinked Component immediately prior to the annuity starting date, subject to certain maximums.

In the first requested ruling, the insurer had asked the IRS to rule that the LTC portion of the annuity-LTC contract met the definition of a "qualified long-term care insurance contract" under section 7702B(b). In this regard, the insurer represented that, if the LTC portion of the contract constituted an "insurance contract," all of the requirements to be a qualified long-term care insurance contract under section 7702B(b)(1) would be satisfied for tax years beginning after Dec. 31, 2009. Thus, the question before the IRS was whether the LTC "portion" of the annuity-LTC contract, as defined by section 7702B(e), constituted an "insurance contract."

The IRS ruled that the "insurance contract" requirement was met, citing *Helvering v. Le Gierse*, 312 U.S. 531 (1941) and related authorities. Under these authorities, the IRS observed that risk shifting and risk distribution must be present, and the arrangement must constitute insurance in the commonly accepted sense based on all the facts surrounding the case. The ruling noted that courts had identified several nonexclusive factors bearing on this, including the treatment of the arrangement under state law, premiums priced at arm's length, and the language of the operative agreements and the method of resolving claims.

From the disclosed facts of the ruling, it is unclear how large the Unlinked Component of LTC benefits was (*i.e.*, the amount paid from net amount at risk) relative to the Linked Component (*i.e.*, the amount paid from the annuity cash value or from annuity payments). Also, the ruling otherwise largely focuses only on the facts presented, which is typical for private letter rulings. Thus, even though the PPA appears to offer considerable flexibility with respect to designs for annuity-LTC products, the ruling provides little indication of how the IRS will address design alternatives, apart from it being clear that the LTC portion of a contract must constitute an "insurance contract."

In the second requested ruling, the insurer had asked the IRS to rule that LTC benefits (including both the Linked and Unlinked Components) would be excludable from gross income to the extent not in excess of the per diem limitation of section 7702B(d)(2). The IRS agreed with the insurer and ruled favorably. In describing the applicable law, the ruling stated that, under section 7702B(a)(1) and (2), LTC insurance benefits received under a qualified long-term care insurance contract are treated as amounts received for personal injuries and sickness under accident or health insurance, subject to limits with respect to per diem LTC benefits under section 7702B(d).

In addition, the ruling stated that the LTC "portion" of a contract means only the terms and benefits under an annuity contract that are in addition to the terms and benefits under the contract without regard to LTC insurance coverage. In this regard, the ruling cited the Joint Committee on Taxation's "Bluebook" explanation of the PPA, which states that –

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> … if the applicable requirements are met by the long-term care portion of the contract, amounts received under the contract as provided by the rider are treated in the same manner as long-term care insurance benefits, whether or not the payment of such amounts causes a reduction in the life insurance contract's death benefit or cash surrender value or in the annuity contract's cash value.[1]

In the third requested ruling, the insurer had asked the IRS to rule that payment of LTC benefits did not reduce the "investment in the contract" of the annuity contract for purposes of section 72. The IRS disagreed with the insurer and ruled that "investment in the contract" was reduced by "the payment of LTC Benefits under the Rider."

The definition of "investment in the contract" in section 72(e)(6) provides that this term means, as of any date, "(A) the aggregate amount of premiums or other consideration paid for the contract before such date, minus (B) the aggregate amount received under the contract before such date, to the extent that such amount was excludable from gross income…." While the IRS's rationale for the third ruling is not expressly stated, it appears to be based on the view that LTC benefits that are excludable from income constitute amounts within the scope of section 72(e)(6)(B). The IRS does not address the interaction between section 72(e)(6)(B) and section 7702B(e), which treats the LTC portion of the contract as a separate contract for purposes of the entire Internal Revenue Code. Given the separate contract treatment under section 7702B(e), seemingly the LTC benefits should be treated as having been received under the qualified long-term care insurance portion of the contract (as the IRS so held in the second ruling), and correspondingly no part of the LTC benefits should be treated as having been received from the annuity "portion" of the contract. Since section 72(e)(6)(B) only accounts for amounts received "under the contract" (and not amounts received under a separate LTC insurance contract), it is not clear why the IRS concluded that "investment in the contract" is reduced by LTC benefits.

It is also pertinent that section 72(e)(11) (as amended by the PPA) excludes from income LTC rider charges that are assessed against an annuity contract's cash value, but then further provides that such charges reduce "investment in the contract" under section 72(e)(6). Implicitly, this rule recognizes that imposition of LTC rider charges results in deemed distributions from the annuity contract that then are paid into the rider. Section 72(e)(11) is entirely consistent with section 7702B(e), *i.e.*, one reflects and the other dictates separate contract treatment for the LTC portion of a contract. What is inconsistent, however, is the ruling's rejection of separate contract treatment when LTC benefits are paid. It seems very unlikely that Congress would have intended for "investment in the contract" to be reduced by the deemed distributions arising from charges for an LTC rider, but then to disregard the separate contract treatment prescribed by section 7702B(e) and further reduce "investment in the contract" when LTC benefits are paid.

Even if such a result were somehow justified, it also seems incorrect to reduce "investment in the contract" by the net amount at risk portion of LTC benefits, since the effect of this would be to create additional income on the contract that would not have existed absent the LTC coverage.

As the Jan. 1, 2010, effective date for the new annuity-LTC rules enacted as part of the PPA draws nearer, it will be interesting to watch the development of both products and IRS guidance on this subject. ◂

END NOTES

[1] Staff of the J. Comm. on Tax'n, 109th Cong., Technical Explanation of H.R. 4, the "Pension Protection Act of 2006," as passed by the House on July 28, 2006, and as considered by the Senate on August 3, 2006, at 195 (J. Comm. Print.).

IRS APPLIES SECTION 845 TO DISALLOW REINSURANCE

By Biruta P. Kelly

Background

Section 845[1] contains two rules available for the IRS to use to adjust the federal income tax consequences of the parties to a reinsurance transaction—one for related party reinsurance and one for any reinsurance transaction, including reinsurance between unrelated parties. Section 845(a) applies only to related parties and, in general, allows the IRS to make necessary adjustments that reflect the "proper amount, source or character of the taxable income" of the parties to the agreement. The second rule, under section 845(b), in general, allows the IRS to make adjustments where the reinsurance contract has a "significant tax avoidance effect." Although Congress enacted section 845 as part of the Deficit Reduction Act of 1984,[2] section 845 had its genesis in the Tax Equity and

Fiscal Responsibility Act of 1982 ("TEFRA"),[3] which repealed the special election for modco reinsurance. Unlike the substantial explanation of section 845 provided in the 1984 legislative history, Congress provided no guidance on the precursor to section 845 in 1982.[4]

During the 1990s, the IRS sought to apply section 845 in several instances.[5] At that time it pursued litigation under both section 845(a)[6] and section 845(b).[7] The section 845(b) *Trans City* case[8] was a significant loss for the IRS and to date is still the only case that analyzes the scope of IRS authority under section 845. After *Trans City*, the IRS spent many years reconsidering the application of section 845, but issued nothing definitively applying section 845, until FAA 20092101F (Feb. 4, 2009).[9]

FAA 20092101F

FAA 20092101F[10] involves a reinsurance contract between a domestic corporation and a related section 953(d) insurance company that is a member of the same consolidated group. The FAA indicates that the section 953(d) company's only insurance business is the insurance of a line of business (details are redacted) that had been profitable in the first year, but then experienced losses over the next five years, resulting in a build-up of net operating losses ("NOLs"). Under section 1503(d), a section 953(d) company is required to treat any losses as "dual consolidated losses" with the result that they can be used only by the section 953(d) company and cannot be used to offset or reduce taxable income of the parent or any other member of the affiliated group that includes the section 953(d) company.

In the FAA, therefore, the section 953(d) company's NOLs could not have been used against the income of the ceding company, because of the application of section 1503(d). The reinsurance transaction in the FAA resulted in income for the section 953(d) company, against which the company attempted to use its NOLs. This tax effect was the determining factor for the FAA's application of section 845(b).

The FAA provides a detailed explanation of section 845 and its legislative history. The FAA notes that although it could apply the section 845(a) related party rule, which is subject to a lower standard of proof, it opts for an application of section 845(b). Under section 845(b), the FAA notes that adjustments may be made only if the transaction has a tax avoidance effect and the effect is significant. The FAA finds that the reinsurance contract has a tax avoidance effect because of the shifting of income between the two companies, which allowed the section 953(d) company to obviate the dual consolidated loss rule. Next, the FAA analyzes whether the tax avoidance effect is significant. The FAA notes that the legislative history for section 845 sets out seven factors for analyzing whether a tax avoidance effect is significant ("Conference Report"),[11] and that the *Trans City* case contains two more factors. Instead of analyzing these factors, however, the FAA asserts that they are largely irrelevant, "in part because the parties are related," and the FAA finds only two factors are applicable—the relative tax positions of the parties and state determinations. The FAA states that the first factor weighs in favor of applying section 845(b), due to the shifting of the income to the loss corporation. The FAA finds that the fact that the state had approved the transaction to be a neutral factor and, therefore, concludes that the tax avoidance effect is significant based solely on the amount of tax that is avoided and disallows the reinsurance transaction under section 845(b). It is not stated in the FAA exactly what adjustments are to be made.

The FAA's analysis is deficient. The key to "significant" tax avoidance effect is whether "the transaction is designed so that the tax benefits enjoyed by one or both parties to the contract are disproportionate to the risk transferred between the parties." Conference Report at 1063. The Conference Report notes that the existence of tax benefits is only the beginning, not the end, of the analysis. The various factors provided in the Conference Report and *Trans City*, and perhaps others, need to be analyzed to make this determination. An appropriate weighing of the tax benefits against the factors giving the transaction substance is required. The FAA does not do this and, in particular, ignores the level of risk transfer. This disregard of the many factors to be considered in weighing the tax benefit against the non-tax effect to determine whether the tax avoidance is significant reflects an application of section 845 in a broad, result-oriented manner.[12]

In FAA 20092101F the IRS may be placing undue emphasis on the fact that the transaction is between related parties because it is attempting to apply section 845(b), which applies equally, and presumably similarly, to reinsurance between unrelated parties. Would the IRS invoke section 845(b) if the

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953(d) company with losses had assumed a profitable block of business from an unrelated company?

Future Litigation?

FAA 20092101F advocates the use of litigation: "The [section 845] adjustment is not merely appropriate, but absolutely necessary. Further, absent full concession by Company A, it should be litigated." This statement expresses the views of the Associate Industry Counsel Property and Casualty Insurance of LMSB and is not a determination that the case is a designated litigating vehicle. The FAA provides guidance to revenue agents, but need not be followed by the Appeals Division, should the case ultimately be forwarded for Appeals Office consideration, unless and until IRS Chief Counsel designates the case for litigation.[13] Nevertheless, the strong statements by LMSB in the FAA presage increased IRS section 845 activity, including perhaps litigation.

END NOTES

1 Unless otherwise specified, all references to a section are to a section of the Internal Revenue Code of 1986, as amended.
2 Pub. L. No. 98-369.
3 Pub. L. No. 97-248.
4 Even the TEFRA blue book contains little guidance, merely that the "scope of authority granted under the provision is broader than that granted under existing law generally (Code section 482)," and that the provision may be applied to reinsurance involving a property/casualty or foreign company. Staff of the Jt. Comm. on Tax'n, *General Explanation of the Revenue Provisions of the Tax Equity and Fiscal Responsibility Act of 1982* 345.
5 *See, e.g.*, Field Service Advice ("FSA") 1812 (May 31, 1996); Technical Advice Memorandum ("TAM") 9346004 (Aug. 10, 1993); TAM 9339001 (May 6, 1993); TAM 9308003 (Nov. 20, 1992).
6 FSA 1812 states that the IRS was seeking a litigating vehicle under section 845(a). A related-party section 845 case was docketed in the Tax Court, *Lone Star Life Ins. Co. v. Commissioner,* Tax Ct. Docket Nos, 14781-96 and 5898-97, but was resolved without a trial.
7 *Trans City v. Commissioner*, 106 T.C. 274 (1996).
8 The IRS nonacquiesced in *Trans City*, 1997-2 C.B. 1. In AOD 1997-011, the IRS specifies that its disagreement is with the following aspects of the case: The Service disagrees with the court's factual finding of abuse of discretion in this case. The Service also disagrees with the court's apparent characterization of the economic substance test of section 845(b), "risk transferred versus tax benefits derived," as only a factor to be used in the determination of whether a significant tax-avoidance effect exists. The Service also disagrees with the court's definition of "risk," in the overriding economic substance test of section 845(b), in terms of the amount of risk, or the possibility of loss, rather than the amount at risk, or the probability of loss.
9 Several rulings issued by the IRS since 1996 note the potential for the application of section 845, but fail to apply it specifically. *See, e.g.*, Notice 2002-70, 2002-2 C.B. 765; FSA 200027008 (Mar. 31, 2000); FSA 200026016 (Mar. 31, 2000).
10 The FAA, Field Attorney Advice, is a memorandum from the Associate Industry Counsel Property and Casualty Insurance of LMSB (Large & Mid-Size Business ("LMSB")) to a supervisory revenue agent to guide the revenue agents examining the taxpayer's return.
11 H. R. Rep. 861, 98th Cong., 2d Sess. 1063.
12 If the section 953(d) company could have assumed the same risks and accomplished the exact same results if it had written the reinsured business directly, did the reinsurance result in a significant tax avoidance effect? *See* Conference Report at 1063 ("There is no significant tax avoidance effect for a reinsurer, however, merely because a tax reduction arises from a loss on the reinsurance contract for a particular year, if the loss experienced was no greater than if the reinsurer had written the allocable portion of the reinsured business directly").
13 Prop. Treas. Reg. § 601.106(a)(4)(viii) eliminates Appeals consideration of cases that are designated for litigation by IRS Chief Counsel.

PLR 200917002—IS THE IRS STILL IN THE BUSINESS OF ISSUING WAIVERS?

By Daniela Stoia

On April 24, 2009, the Internal Revenue Service (the "Service") released PLR 200917002[1] (the "PLR"). The PLR provides a waiver, pursuant to section 7702(f)(8), for a number of contracts that failed to satisfy the requirements of section 7702 (the "Failed Contracts") due to certain errors, described below. This article begins with a review of the PLR and the waiver that was issued. The article then summarizes the types of errors eligible for correction under Rev. Proc. 2008-42[2] and finishes with a discussion of what conclusions can be drawn, if any, about the status of the traditional the waiver request process based on the release of this PLR after the effective date of the Auto Waiver Procedure.

The PLR

In order for a taxpayer to receive a waiver pursuant to section 7702(f)(8), the taxpayer must demonstrate to the Service that the failure to satisfy the requirements of section 7702 was due to "reasonable error" and that "reasonable steps" are being taken to remedy the error.

Reasonable Errors

The PLR addressed Failed Contracts that were intended to satisfy the requirements of section 7702 by meeting the "guideline premium test" (the "GPT").[3] However, due to the five errors described below, the Failed Contracts did not satisfy the GPT.

- *Errors 1, 2, and 3 – Programming Errors.* The PLR describes three programming errors that caused certain of the Failed Contracts not to comply with the requirements of the GPT. The first programming error occurred during the conversion of some of the Failed Contracts to the taxpayer's administration system, which also monitors the taxpayer's contracts for compliance with the require-

ments of the GPT (the "GPT System"). As part of that process, the taxpayer's programmers inadvertently converted the contracts in such a manner as to cause the GPT System to increase erroneously the guideline premium limitation used by the system to monitor the contracts' compliance with the GPT. Effectively, the error prevented the GPT System from identifying premiums that were paid in excess of the correctly calculated guideline premium limitation. This programming error is similar to other programming errors relating to conversions that the Service has waived in the past.[4] The second programming error was a failure of the taxpayer's programmers to program the specifications developed for certain policy forms as related to the duration for which certain expense charges were expected to be imposed. This error is also consistent with other programming errors that the Service has waived relating to the implementation of specifications for a policy form.[5] The third programming error was made by the taxpayer's programmers when they modified the taxpayer's GPT System to reflect a contract feature as an interest rate guarantee, which resulted in unintended consequences in the manner in which the system treated the contracts with this feature. This error is also consistent with prior waivers issued by the Service in the case of programming errors arising when modifications were made to a system to reflect a new product or a new product feature.[6]

- *Error 4 – Application of Reasonable Expense Charge Rule.* Although the precise nature of the fourth error addressed by the PLR is uncertain, it appears to have related to the assumptions that were made in reflecting certain expense charges in calculating guideline premiums. The reasonable expense charge rule of section 7702(c)(3)(B)(ii) provides that in calculating guideline premiums "any reasonable charges (other than mortality charges) which (on the basis of the company's experience, if any, with respect to similar contracts) are reasonably expected to be actually paid" may be reflected. In this case, it appears that the assumptions that were made regarding the collection of certain expense charges were inconsistent with the requirements of the reasonable expense charge rule. Although very few waivers have been issued by the Service relating to the reasonable expense charge rule, this PLR is consistent with an earlier PLR issued by the Service in a circumstance where that taxpayer's assumptions about its expense charges were inconsistent with the reasonable expense charge rule.[7]

- *Error 5 – Clerical Errors.* Like most insurers, the taxpayer seeking the PLR had in place procedures for its employees to follow in interacting with the GPT System. Nonetheless, the taxpayer discovered that its employees failed to follow these procedures, *e.g.*, they overrode the guideline premiums calculated by the GPT System. Historically, such errors have been characterized as "clerical errors" and they are the classic types of errors that the Service has waived since waiver private letter rulings were first issued in the late 1980s.[8] One could even go as so far as to say that it was these types of clerical errors that were the impetus for the issuance of the Auto Waiver Procedure.

After evaluating each of the five errors described above, the Service concluded that the errors were "reasonable errors" within the meaning of section 7702(f)(8). This conclusion was not surprising because, as described above, the Service has issued waivers for similar errors in the past.

Reasonable Steps to Correct

The taxpayer took a number of steps to minimize the possibility that any of its life insurance contracts would fail to satisfy the requirements of the GPT in the future. For example, the taxpayer corrected the programming errors by recalculating guideline premiums in accordance with the requirements of section 7702, entering those amounts into its GPT System, and making the necessary modifications to the coding of the GPT System to correct the programming errors. The taxpayer also took certain additional steps to strengthen its procedures to minimize the possibility of further clerical errors causing compliance issues. In addition to the foregoing, the taxpayer also corrected the Failed Contracts by refunding excess premiums with interest to bring them back into compliance with the requirements of section 7702. After evaluating the taxpayer's corrective actions, the Service concluded that the taxpayer's actions satisfied the requirements of section 7702(f)(8).

In light of the foregoing, the Service granted the taxpayer a waiver because the errors causing the Failed Contracts were determined to be "reasonable errors" and the taxpayer's corrective actions were determined to be "reasonable steps" to remedy the errors.

Eligible Reasonable Errors Addressed by Rev. Proc. 2008-42

In relevant part, Rev. Proc. 2008-42 applies to any issuer of a life insurance contract that fails to satisfy the requirements

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of section 7702 due to an "eligible reasonable error" if reasonable steps are taken to remedy the error.[9] The revenue procedure specifically provides that an "eligible reasonable error" exists if three criteria are satisfied. First, the issuer has compliance procedures with specific, clearly articulated provisions that if followed would have prevented the contract from failing to satisfy the requirements of section 7702. Second, an employee or independent contractor of the issuer acted, or failed to act, in accordance with those procedures. Third, such act or failure to act was inadvertent, and was the sole reason that the contract failed to satisfy the requirements of section 7702.

The revenue procedure also provides some specific examples of errors causing failures under section 7702 that are not eligible for correction under the Auto Waiver Procedure. Specifically, neither a defective legal interpretation nor a computer programming error would be eligible reasonable errors under the Auto Waiver Procedure. This is because these errors would not satisfy the requirements of the revenue procedure that the issuer's compliance procedures, if followed, would have prevented the error. Nonetheless, if a defective legal interpretation or a computer programming error is reasonable, the issuer may request a traditional waiver by private letter ruling under the procedures set forth in Rev. Proc. 2009-1.[10] If such errors are not reasonable, an issuer may request a closing agreement under the procedures set forth in Rev. Proc. 2008-40[11] to correct any failures resulting from the error.

Conclusions to be Drawn from the PLR

As various individuals from the Service have said on countless occasions, it is dangerous to draw too many conclusions from private letter rulings because they are issued to address a taxpayer's specific facts and the pertinent facts may be redacted in the version of the private letter rulings released to the public. In this case, taxpayers may quickly jump to the conclusion that this PLR indicates that the Service is as willing as it was prior to the release of the Auto Waiver Procedure to issue waivers pursuant to section 7702(f)(8). That conclusion may be premature in light of the fact that the request for the PLR may have predated the release of the Auto Waiver Procedure. In fact, one might speculate that the request for the PLR was submitted prior to the release of the Auto Waiver Procedure because one of the types of errors covered by the PLR—the clerical error—seems to be an example of an eligible reasonable error that the Auto Waiver Procedure was intended to correct. However, that is not certain because the PLR primarily focuses on the types of errors that cannot be corrected under the Auto Waiver Procedure, *e.g.*, programming errors. Only time will tell if the number of waiver private letter rulings issued by the Service will decrease because more and more taxpayers will avail themselves of the Auto Waiver Procedure. This, in part, will depend on whether taxpayers find that errors causing section 7702 compliance failures satisfy the eligible reasonable error criteria of Rev. Proc. 2008-42.

END NOTES

1. Jan. 15, 2009. A private letter ruling is issued to a particular taxpayer and can be relied upon only by that taxpayer. *See* section 6110(k)(3). Unless otherwise indicated, all references to "section" are to sections of the Internal Revenue Code of 1986, as amended.
2. 2008-29 I.R.B. 160, *amplifying* Rev. Rul. 91-17, 1991-1 C.B. 190. Rev. Proc. 2008-42 provides the procedures under which taxpayers may automatically obtain a waiver pursuant to section 7702(f)(8) for certain "eligible reasonable errors" (the "Auto Waiver Procedure"). The Auto Waiver Procedure became effective on July 21, 2008.
3. In order for a life insurance contract that is treated as such under state law to satisfy the GPT it must both meet the "guideline premium requirements" set forth in section 7702(a)(2)(A) and (c) and fall within the "cash value corridor" of section 7702(a)(2)(B) and (d).
4. *See, e.g.*, PLR 200044016 (Aug. 1, 2000) (waiving programmers' inadvertent disabling of the code in the taxpayer's administration system which indicated that the contracts should be monitored for compliance with the GPT during the conversion of contracts to the taxpayer's administration system).
5. *See, e.g.*, PLR 200646002 (Aug. 3, 2006) (waiving a number of inadvertent errors by programmers, such as the failure to load the correct table of guaranteed mortality charges or to change a reference point to the correct table of guaranteed mortality charges); PLR 200027030 (Apr. 10, 2000) (waiving various programming and coding errors such as the incorrect coding of a plan as a 1958 CSO plan).
6. *Id.*
7. *See, e.g.*, PLR 9517042 (Jan. 31, 1995) (addressing the reasonable expense charge rule and stating: "None of the contracts issued as the result of intracompany exchanges, including the dd contracts here, were subject to the charges taken into account by Taxpayer in the calculation of the guideline premium limitation. The same charges were reasonably expected to be actually paid under all other contracts issued on the same policy forms. Contracts issued in intracompany exchanges are not 'similar' to contracts that are original issue or received in an intercompany exchange, if each class of contracts is treated differently for charge purposes. In the absence of regulations defining the term 'similar contracts,' however, we find that Taxpayer's interpretation of the parenthetical phrase to include the company's experience with respect to other contracts using the same policy form was a reasonable error.").
8. *See, e.g.*, PLR 200749005 (Aug. 24, 2007) (waiving contract failures resulting from employees failing to follow the company's procedures for addressing adjustment events and from employees "[m]anually overriding the system to backdate a premium to the date it was received rather than the date the system indicated was permissible"); PLR 200646002 (waiving contract failures resulting from employees failing to follow the company's procedures for addressing adjustment events and from employees releasing premiums from a premium deposit account or other suspense arrangement and crediting those premiums when permitted by the GPT, but with an effective date that preceded the actual date on which the premiums were credited).
9. The Auto Waiver Procedure also applies to section 101(f) failures. *See* Rev. Proc. 2008-42 section 3.01.
10. 2009-1 I.R.B.1.
11. 2008-29 I.R.B. 151, *superseding* in part Rev. Rul. 91-17, 1991-1 C.B. 190, and *superseding* Notice 99-48, 1992-2 C.B. 429.