

**Internal Revenue Service**

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Person To Contact: \_\_\_\_\_, ID No. \_\_\_\_\_

Telephone Number: \_\_\_\_\_

In Re:

Refer Reply To:  
CC:ITA:2 – PLR-162557-03

Date:  
March 10, 2004

Taxpayer	=
A	=
B	=
C	=
Date1	=
Date2	=
Date3	=
Date4	=
Date5	=
Date6	=
Date7	=

Dear \_\_\_\_\_ :

This responds to a letter dated October 24, 2003, submitted by your authorized representative, requesting a ruling under Treas. Reg. §§ 301.9100-1 and -3 of the Procedure and Administration Regulations, relief provisions on the basis of reasonable cause so that Taxpayer can be deemed to have timely filed its federal partnership tax return for the tax year ended Date2, as well as the election to use the alternative cost method of accounting in conformity with the requirements of Rev. Proc. 92-29, 1992-1 C.B. 748. The facts are as follows:

Taxpayer is an accrual basis limited partnership formed on Date1. Taxpayer began developing three main real estate projects: A, B, and C. In the tax year ending Date2, C was the first project to have sales as a result of the development. Up to the point of sale, all development costs were capitalized. Thus, it was necessary to choose a method of accounting for determining the cost of these sales. Taxpayer intended to use the alternative cost method of I.R.C. § 461(h) as provided by section 6 of Rev. Proc. 92-29.

Taxpayer's federal tax return for tax year ended Date 2 was due on Date3. On Date4, Taxpayer filed a request to automatically extend the time for filing this return until Date5. During this tax year, Taxpayer had first-time lot sales from one of its land development projects. Due to its intention to file the election to use the alternative cost method and related annual statement under section 6 of Rev. Proc. 92-29, as well as the entity having a reorganization during the tax year, Taxpayer intended to request the maximum period of time (i.e. 6 months or until Date6) within which to file its return. This would have necessitated filing a second extension request for the additional 3 month extension period by Date5. However, due to unforeseen circumstances as represented by Taxpayer, Taxpayer inadvertently omitted to file the requisite second extension request by Date5. Taxpayer filed this return on Date7, within 30 days of discovery of its inadvertent procedural error.

I.R.C. § 6072(a) provides that a partnership return must be filed by the 15<sup>th</sup> day of the fourth month following the tax year end of the entity. Section 6081 and related regulations grant the taxpayer an automatic extension of time to file this return provided Form 8736 is filed by the original due date of the return. Section 6081 and related regulations will grant an additional 3 month extension of time (total 6 months) to file the return provided taxpayer filed for the automatic extension on Form 8736, Form 8800 is filed prior to the expiration of time granted under the first extension and the taxpayer shows reasonable cause for needing additional time within which to file the return.

In the instant case, Taxpayer timely filed the first extension on Date4, but the second extension was inadvertently not filed. The implication of this failure was that Taxpayer intended to elect the alternative cost method provided by Rev. Proc. 92-29, section 6. This election must be filed by the due date of the partnership's returns, including extensions of time. Inadvertent failure to file this second extension has technically made this election unavailable to Taxpayer.

Section 301.9100-2 of the regulations provides for an automatic six month extension to file the election, but this relief is predicated upon the taxpayer's timely filing of their tax return for the relevant tax year. Section 301.9100-3 of the regulations will permit the taxpayer relief so that a late election could be filed upon proving that a reasonable cause exists for failure to timely file.

Rev. Proc. 92-29 allows a developer of real estate to automatically elect the alternative cost method with respect to its projects. This alternative cost method allows a developer to include in the basis of properties sold their allocable share of the estimated cost of common improvements without regard to whether the costs are incurred under section 461(h), subject to certain limitations.

Under section 6.01 of Rev. Proc. 92-29, the developer must file a request with the appropriate director for the internal revenue district in which is located the principal

place of business or the principal office or agency. The request must be filed on or before the due date of the developer's original federal income tax return (determined with regard to extensions of time) for the taxable year in which the first benefited property in the project is sold. In addition, the developer must also attach a copy of the request to its timely filed original income tax return for the taxable year.

Sections 301.9100-1 through 301.9100-3 set forth the standards that the Commissioner will use to determine whether to grant an extension of time to make a regulatory election. Section 301.9100-2 provides an automatic extension of time to make certain statutory elections. Section 301.9100-3 provides extensions of time for making regulatory elections that do not meet the requirements of section 301.9100-2. Section 301.9100-3(a) provides that request for relief under section 301.9100-3 will be granted when the taxpayer provides evidence to establish to the satisfaction of the Commissioner that the taxpayer acted reasonably and in good faith, and the grant of relief will not prejudice the interests of the government.

Section 301.9100-3(a) of the regulations provides in part that requests for relief subject to this section will be granted when the taxpayer provides the evidence to establish to the satisfaction of the Commissioner that the taxpayer acted reasonably and in good faith, and the grant of relief will not prejudice the interests of the government.

Section 301.9100-3(b)(1) of the regulations provides in part that a taxpayer is deemed to have acted reasonably and in good faith if the taxpayer requests relief under this section before the failure to make the regulatory election is discovered by the Internal Revenue Service (IRS), and failed to make the election because of intervening events beyond the taxpayer's control.

Section 301.9100-3(b)(3) of the regulations provides in part that a taxpayer is deemed to have not acted reasonably and in good faith if the taxpayer- -

- i) Seeks to alter a return position for which an accuracy-related penalty has been or could be imposed under section 6662 at the time the taxpayer requests relief;
- ii) Was informed in all material respects of the required election and related tax consequences, but chose not to file the election; or
- iii) Uses hindsight in requesting relief. If specific facts have changed since the due date for making the election that make the election advantageous to a taxpayer, the IRS will not ordinarily grant relief. In such a case, the IRS will grant relief only when the taxpayer provides strong proof that the taxpayer's decision to seek relief did not involve hindsight.

Section 301.9100-3(c) of the regulations provides in part that the interests of the government are prejudiced if granting relief would result in a taxpayer having a lower tax liability in the aggregate, for all taxable years affected by the election, than the taxpayer would have had if the election had been timely made (taking into account the time value of money). This section also provides that the interests of the government are 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 assessments under section 6501(a) before the taxpayer's receipt of a ruling granting relief under this section.

Based upon our analysis of the facts, Taxpayer in the instant case acted reasonably and in good faith, and granting relief will not prejudice the interests of the government, and therefore the requirements of section 301.9100 have been met.

Under the facts represented, Taxpayer's tardiness in filing the election to use the alternative cost method was not due to the intentional disregard of the tax rules, but due to an inadvertent procedural error of not filing the necessary second extension request to obtain the maximum allowable sixth month extension period for filing the return and a timely election. Thus, the failure to file a copy of the request for election was an inadvertent error on the part of Taxpayer, and Taxpayer did not affirmatively choose not to file the election. Taxpayer is not seeking to alter a return position or to use hindsight to request relief. Finally, Taxpayer acted promptly in filing its request for relief, before the IRS discovered the failure to make a regulatory election. Therefore, Taxpayer did not act unreasonably or in bad faith.

Furthermore, granting relief will not result in Taxpayer having a lower tax liability in the aggregate for all taxable years affected by the election than Taxpayer would have had if the election had been timely made, nor will any closed years be affected. Therefore, the interests of the government will not be prejudiced by granting the request for relief.

Because Taxpayer acted reasonably and in good faith, and because the interests of the government will not be prejudiced if the request for relief is granted, Taxpayer is granted an extension of 45 days from the date of this ruling to file with the director a request to use the alternative cost method under Rev. Proc. 92-29.

The ruling contained in this letter is based upon facts and representations submitted by Taxpayer. Except as specifically addressed herein, no opinion is expressed regarding the tax treatment of the subject transactions under the provisions of any other sections of the Code or regulations that may be applicable thereto. This ruling is directed only to the taxpayer requesting it. Section 6110(k)(3) of the Code provides that a private letter ruling may not be used or cited as precedent.

In accordance with the power of attorney on file in our office, a copy of this letter is being sent to your representative. A copy of this letter ruling should be attached to the returns, schedules, and forms filed in connection with making the election under Rev. Proc. 92-29 when such forms are filed.

Sincerely yours,

ROBERT M. BROWN  
Associate Chief Counsel  
(Income Tax & Accounting)

By:     Clifford M. Harbourt      
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Senior Technician Reviewer  
Branch 2