

Internal Revenue Service

Department of the Treasury
Washington, DC 20224

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Person To Contact: _____, ID No.

Telephone Number:

In Re:

Refer Reply To:
CC:ITA:B04
PLR-128489-07
Date:
December 13, 2007

Legend:

- Taxpayer =
- EIN: =

- Exempt Organization =
- EIN: =

- State =

- City =

- General Partner, LLC =

- Project, LP =

- Year 1 =

- Year 2 =

- Buildings =

Dear

This letter responds to your private letter ruling request, dated June 12, 2007, regarding an extension of time to make an election under § 168(h) of the Internal Revenue Code (Code). Specifically, you requested an extension of time to make an election under § 168(h)(6)(F)(ii) for Taxpayer, a tax-exempt controlled entity seeking not to be treated as a tax-exempt entity. A tax-exempt controlled entity that elects not to be treated as a tax-exempt entity can avoid limitations on the rehabilitation credit that otherwise would be imposed by § 47(c)(2)(B)(v)(I).

Facts

Taxpayer is organized under the laws of State and is a Subchapter C corporation for federal income tax purposes. Taxpayer uses the accrual method of accounting and the calendar year as its taxable year. Taxpayer is wholly owned by Exempt Organization, which has received a determination that it is a tax-exempt organization described in § 501(c)(3). Because Exempt Organization owns more than 50 percent in value of the stock of Taxpayer, Taxpayer is a "tax-exempt controlled entity" within the meaning of § 168(h)(6)(F)(iii)(I).

Prior to February of Year 1, Exempt Organization held a 99.99 percent interest in, and was a managing member of, General Partner, LLC. General Partner, LLC, in turn owns an 80 percent interest in a limited partnership known as Project, LP. Project, LP, a partnership, is the owner of Buildings located in City, State. The Buildings are historic structures and Project, LP is engaged in the activity of owning and rehabilitating the Buildings. The other partners in Project, LP are taxable investors.

In February of Year 1, Exempt Organization assigned its interest in General Partner, LLC, to Taxpayer. Taxpayer thus became an 80 percent partner in Project, LP.

Taxpayer filed a timely federal income tax return for Year 2, the year in which Buildings were placed in service, but failed to make the § 168(h)(6)(F)(ii) election on that return. However, from the affidavit and other materials submitted it is clear that Taxpayer at all times intended to make the § 168(h)(6)(F)(ii) election. Upon discovering its failure, Taxpayer promptly sought an extension of time in which to file the election.

Applicable Law

Section 47(a)(2) of the Code provides a rehabilitation credit for 20 percent of the qualified rehabilitation expenditures with respect to any certified historic structure.

Section 168(h)(6)(A) provides that, for purposes of § 168(h), if any property which is not tax-exempt-use property is owned by a partnership which has both a tax-exempt entity and a nontax-exempt entity as partners and any allocation to the tax-exempt entity is not a qualified allocation, then an amount equal to such tax-exempt entity's proportionate share of such property shall be treated as tax-exempt use property.

Under § 47(c)(2)(B), expenditures allocable to the portion that is tax-exempt use property (within the meaning of § 168(h)) are not qualified rehabilitation expenditures.

Section 168(h)(6)(F)(i) provides generally that any tax-exempt controlled entity shall be treated as a tax-exempt entity. However, under § 168(h)(6)(F)(ii), a tax-exempt controlled entity can elect not to be treated as a tax-exempt entity. Such an election is irrevocable and will bind all tax-exempt entities holding an interest in the tax-exempt controlled entity.

Section 301.9100-1(b) of the Procedure and Administration Regulations defines the term “regulatory election” as including any election the due date for which is prescribed by a regulation.

Section 301.9100-7T(a)(2)(i) requires an election under § 168(h)(6)(F)(ii) to be made by the due date of the tax return for the first taxable year for which the election is to be effective. Thus, the § 168(h)(6)(F)(ii) election is a regulatory election.

Section 301.9100-9100-9(c) provides that the Commissioner of Internal Revenue has discretion to grant a reasonable extension of time to make a regulatory election.

Section 301.9100-1 through § 301.9100-3 provides the standards that the Service will use to determine whether to grant an extension of time to make a regulatory election. Section 301.9100-3(a) provides that requests for extensions of time for regulatory elections (other than automatic changes covered in § 301.9100-2) will be granted when the taxpayer provides evidence (including affidavits) to establish that the taxpayer acted reasonably and in good faith, and granting relief will not prejudice the interests of the government.

Section 301.9100-3(b)(1) provides that a taxpayer will be deemed to have acted reasonably and in good faith if the taxpayer--

- (i) requests relief before the failure to make the regulatory election is discovered by the Service;
- (ii) failed to make the election because of intervening events beyond the taxpayer's control;
- (iii) failed to make the election because, after exercising due diligence, the taxpayer was unaware of the necessity for the election;
- (iv) reasonably relied on the written advice of the Service; or

- (v) reasonably relied on a qualified tax professional, and the tax professional failed to make, or advise the taxpayer to make the election.

Under § 301.9100-3(b)(3), a taxpayer will not be considered to have acted reasonably and in good faith if the taxpayer--

- (i) seeks to alter a return position for which an accuracy-related penalty could be imposed under § 6662 at the time the taxpayer requests relief and the new position requires a regulatory election for which relief is requested;
- (ii) was fully informed 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 original deadline that make the election advantageous to a taxpayer, the Service will not ordinarily grant relief.

Section 301.9100-3(c) provides that the Service will grant a reasonable extension of time only when the interests of the Government will not be prejudiced by the granting of relief. 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.

Analysis

Based on the facts as represented, we have determined that Taxpayer intended from the outset to make the § 168(h)(6)(F)(ii) election, that its failure to make the election on its original return was inadvertent, and that Taxpayer is not using hindsight in requesting relief. Moreover, Taxpayer requested relief before the failure to make the election was discovered by the Service. We also have determined that Taxpayer acted reasonably and in good faith and that the interests of the Government will not be prejudiced by the granting of relief.

Conclusion

Based solely on the facts as represented and the applicable law, we conclude that the request for relief under § 301.9100-3 should be granted. Accordingly, Taxpayer is granted an extension of time of 60 days from the date of this letter ruling to file an amended return making the election under § 168(h)(6)(F)(ii). Taxpayer should attach this letter to its amended return.

Although this office has not verified any of the material submitted or facts assumed in support of the request for ruling, it is subject to verification on examination.

Except as expressly provided herein, no opinion is expressed or implied concerning the tax consequences of any aspect of any transaction or item discussed or referenced in this letter. In particular, this letter does not rule on whether Taxpayer is entitled to claim the rehabilitation credit under § 47(a). Enclosed is a copy of the letter showing the deletions proposed to be made when it is disclosed under § 6110.

This ruling is directed only to the taxpayer requesting it. Section 6110(j)(3) of the Code provides that it may not be used or cited as precedent.

Sincerely,

Michael J. Montemurro
Branch Chief
Associate Chief Counsel
(Income Tax & Accounting)

Enclosure:

Copy for § 6110 purposes