Internal Revenue Service

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Department of the Treasury
Washington, DC 20224

Third Party Communication: None
Date of Communication: Not Applicable
Person To Contact:
, ID No.

Telephone Number:

Refer Reply To:
CC:ITA:B07
PLR-146858-09
Date:
April 16, 2010

Re:

Legend

Taxpayer =

Date 1 =

Date 2 =

A =

B =

Dear :

This letter responds to a letter dated September 15, 2009, requesting an extension of time pursuant to § 301.9100-3 of the Procedure and Administration Regulations to make the election to apply § 168(k)(4) of the Internal Revenue Code.

FACTS

Taxpayer represents that the facts are as follows:

Taxpayer is the common parent of an affiliated group of corporations that file a

consolidated federal income tax return ("Taxpayer's consolidated group") and have a fiscal year ending B. Taxpayer is a software company.

Taxpayer placed in service eligible qualified property during the taxable year ended Date 1 (the A taxable year). Taxpayer also has unused research tax credits from taxable years beginning before January 1, 2006. Taxpayer was not a partner in any partnership during the A taxable year. Further, Taxpayer's consolidated group was not a member of any other controlled group (as defined in section 2.05 of Rev. Proc. 2009-16, 2009-6 I.R.B. 449) on Date 1.

For the A taxable year, Taxpayer used an outside tax preparer to prepare its consolidated federal income tax return. This return was timely filed on Date 2. Taxpayer relied upon its outside tax preparer to make the election to apply § 168(k)(4) on this return but such tax preparer inadvertently failed to make this election. On the return, Taxpayer did not claim the Stimulus additional first year depreciation deduction for the eligible qualified property placed in service in the A taxable year but did not use the straight line method of depreciation for such eligible qualified property. Taxpayer represents that it did not make the election under § 168(k)(2)(D)(iii) not to deduct the Stimulus additional first year depreciation for any qualified property (as defined in § 168(k)(2)) placed in service in the A taxable year.

Taxpayer filed an amended consolidated federal income tax return for the A taxable year in the manner described in section 3.02(2)(a) Rev. Proc. 2009-16 on or before the due date (excluding extensions) of Taxpayer's consolidated federal income tax return for the succeeding taxable year.

RULING REQUESTED

Taxpayer requests an extension of time pursuant to § 301.9100-3 of the Procedure and Administrative Regulations to make the election to apply § 168(k)(4) for the taxable year ended Date 1 and subsequent taxable years.

LAW AND ANALYSIS

Section 168(k), amended by § 103 of the Economic Stimulus Act of 2008, Pub. L. No. 110-185, 122 Stat. 613 (February 13, 2008), and by § 1201(a)(1) of the American Recovery and Reinvestment Tax Act of 2009, Div. B of Pub. L. No. 111-5, 123 Stat. 115 (February 17, 2009), allows a 50-percent additional first year depreciation deduction (Stimulus additional first year depreciation deduction) for the taxable year in which qualified property acquired by a taxpayer after 2007 is placed in service by the taxpayer before 2010 (before 2011 in the case of property described in § 168(k)(2)(B) or (C)).

Section 3081(a) of the Housing and Economic Recovery Act of 2008, Pub. L. No. 110-289, 122 Stat. 2654 (July 30, 2008) (Housing Act), amended § 168(k) by adding §

168(k)(4). Section 168(k)(4)(A) provides that a corporation may elect to apply § 168(k)(4) (the § 168(k)(4) election). If the corporation makes the § 168(k)(4) election, § 168(k)(4)(A) further provides that for the corporation's first taxable year ending after March 31, 2008, and for each subsequent taxable year, the corporation must not claim the Stimulus additional first year depreciation deduction for all eligible qualified property, must use the straight line method of depreciation as the applicable depreciation method for all eligible qualified property, and must increase its business credit limitation under § 38(c) and the alternative minimum tax (AMT) credit limitation under § 53(c) by the bonus depreciation amount (as defined in § 168(k)(4)(C) and as determined under section 5 of Rev. Proc. 2008-65, 2008-44 I.R.B. 1082) that is determined for that taxable year and allocated to such limitation. Specifically, § 168(k)(4)(E)(iii) and (iv) provides, in general, that the corporation will be able to claim unused credits from taxable years beginning before January 1, 2006, that are allocable to research expenditures or AMT liabilities.

Section 4.01 of Rev. Proc. 2008-65 provides that, except as provided in § 3081(b) of the Housing Act (relating to certain automotive partnerships), only a corporation may elect to apply § 168(k)(4). If the election to apply § 168(k)(4) is made, the election applies to all eligible qualified property placed in service by the taxpayer in the taxpayer's first taxable year ending after March 31, 2008, and in any subsequent taxable year.

Because Taxpayer is a member of an affiliated group of corporations that file a consolidated federal income tax return, Taxpayer is a member of a controlled group for purposes of § 168(k)(4). See § 168(k)(4)(C)(iv) and section 2.05 of Rev. Proc. 2009-16. Accordingly, pursuant to § 168(k)(4)(C)(iv) and section 3.05(2)(a) of Rev. Proc. 2009-16, a § 168(k)(4) election made by any member of a controlled group is binding on all other members of the controlled group for all members' first taxable year ending after March 31, 2008.

Section 3.05(2)(b) of Rev. Proc. 2009-16 provides that if all members of a controlled group are members of an affiliated group of corporations that file a consolidated return ("a consolidated group"), the common parent (within the meaning of § 1.1502-77(a)(1)(ii) of the Income Tax Regulations) of the consolidated group makes the § 168(k)(4) election on behalf of all members of the consolidated group. The common parent makes this election within the time and in the manner provided in section 3.01, 3.02, 3.03, or 3.04 of Rev. Proc. 2009-16, as applicable.

Section 3.01 of Rev. Proc. 2009-16 provides that a corporate taxpayer must make the § 168(k)(4) election by the due date (including extensions) of the federal income tax return for the taxpayer's first taxable year ending after March 31, 2008. Even if the taxpayer does not place in service any eligible qualified property during its taxable year ending after March 31, 2008, the taxpayer must make the § 168(k)(4) election for that taxable year if the taxpayer wishes to apply the election to eligible qualified property placed in service in subsequent taxable years.

Section 3.02 of Rev. Proc. 2009-16 provides the manner for making the § 168(k)(4) election for a taxpayer whose first taxable year ending after March 31, 2008, ends before December 31, 2008. If the taxpayer has not filed its original federal income tax return for such taxable year on or before March 11, 2009, section 3.02(1)(a) of Rev. Proc. 2009-16 provides that the taxpayer must complete three actions to make the § 168(k)(4) election. First, the taxpayer must either (I) claim the Stimulus additional first year depreciation deduction for any eligible qualified property placed in service by the taxpayer during such taxable year on its timely-filed federal income tax return for such taxable year. Such property must not be property in a class for which the taxpayer elects out of the Stimulus additional first year depreciation deduction under § 168(k)(2)(D)(iii); or (II) file with its timely-filed federal income tax return for such taxable year the 2007 Form 4562, *Depreciation and Amortization (Including Information on Listed Property)*, indicating that the taxpayer used the straight line method and did not claim the Stimulus additional first year depreciation deduction for all eligible qualified property. Taxpayers that choose to follow this option must not claim a refundable credit on their original federal income tax return. Section 3.02(1)(a)(i) of Rev. Proc. 2009-16. Second, the taxpayer must file an amended federal income tax return for such taxable year in the manner described in section 3.02(2) of Rev. Proc. 2009-16 on or before the due date (without regard to extensions) of the taxpayer's federal income tax return for the succeeding taxable year. Section 3.02(1)(a)(ii) of Rev. Proc. 2009-16. Finally, if the taxpayer is a partner in a partnership, the taxpayer must notify the partnership in accordance with section 5.02 of Rev. Proc. 2009-16. Section 3.02(1)(a)(iii) of Rev. Proc. 2009-16.

If the taxpayer filing the amended federal income tax return under section 3.02(1)(a)(ii) of Rev. Proc. 2009-16 is not an S corporation, section 3.02(2)(a) of Rev. Proc. 2009-16 provides that the taxpayer: (i) includes the amount of the refundable credit allowed by the § 168(k)(4) election on Line 5g of the Form 1120X, *Amended U.S. Corporation Income Tax Return*, (ii) makes appropriate adjustments to Lines 2, 3, and 4 of the Form 1120X to reflect the requirements of § 168(k)(4)(A) (requiring that the depreciation deduction for all eligible qualified property be determined by using the straight line method and by not claiming the Stimulus additional first year depreciation deduction), and (iii) indicates in Part II of the Form 1120X that the taxpayer is making the § 168(k)(4) election.

Under § 301.9100-1 of the Procedure and Administration Regulations, the Commissioner has discretion to grant a reasonable extension of time under the rules set forth in §§ 301.9100-2 and 301.9100-3 to make a regulatory election.

Sections 301.9100-1 through 301.9100-3 provide the standards the Commissioner will use to determine whether to grant an extension of time to make an election. Section 301.9100-2 provides automatic extensions of time for making certain

elections. Section 301.9100-3 provides extensions of time for making elections that do not meet the requirements of § 301.9100-2.

Section 301.9100-3(a) provides that requests for relief under § 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.

CONCLUSIONS

Based solely on the facts and representations submitted, we conclude that the requirements of §§ 301.9100-1 and 301.9100-3 have been satisfied. Accordingly, an extension of time is hereby granted to Taxpayer to make the election to apply § 168(k)(4) for the taxable year ended Date1 and subsequent taxable years. In this regard, we will treat Taxpayer's filing of its amended consolidated federal income tax return for the taxable year ended Date 1 in accordance with section 3.02(1)(a)(ii) of Rev. Proc. 2009-16 as Taxpayer timely making the election to apply § 168(k)(4) for the taxable year ended Date 1 and subsequent taxable years. Pursuant to § 168(k)(4)(C)(iv) and section 3.05(2)(a) of Rev. Proc. 2009-16, this election is binding on all members of Taxpayer's consolidated group (and on all members of any other controlled group in which Taxpayer's consolidated group is a member) for all members' first taxable year ending after March 31, 2008. See section 3.05(2)(a) and (2)(d) of Rev. Proc. 2009-16 for the effect of this election in succeeding taxable years for members of Taxpayer's consolidated group (and members of any other controlled group in which Taxpayer's consolidated group is a member).

Taxpayer should file a copy of this letter ruling with the IRS Service Center(s) where Taxpayer filed its original and amended consolidated federal income tax returns for the taxable year ended Date 1.

Except as specifically set forth above, we express no opinion concerning the federal income tax consequences of the facts described above under any other provisions of the Code. Specifically, no opinion is expressed or implied on whether any item of depreciable property placed in service in the A taxable year is eligible for the Stimulus additional first year depreciation deduction under § 168(k) or is eligible qualified property for purposes of § 168(k)(4).

In accordance with the power of attorney, we are sending a copy of this letter to Taxpayers' authorized representative. We are also sending a copy of this letter to the appropriate Industry Director, LMSB.

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

Sincerely,

Kathleen Reed

Kathleen Reed
Chief, Branch 7
Office of Associate Chief Counsel
(Income Tax and Accounting)

Enclosures (2):
copy of this letter
copy for section 6110 purposes