

Internal Revenue Service

Department of the Treasury
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Person To Contact:
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Date:
November 2, 2010

TY:

Legend

Taxpayer =

Exempt Organization

LLC =

LLC 2 =

Date 1 =

Dear

This letter responds to your request for a private letter ruling, dated August 31, 2010, 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 under § 168(h)(6)(F)(iii).

Facts

Taxpayer is a for-profit corporation that uses the accrual method of accounting and has 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).

Taxpayer owns an interest in LLC 1, a limited liability company that was formed to lease a parcel of land and to rehabilitate an historic building on the land. Taxpayer also owns an interest in LLC 2, a limited liability company that was formed to operate a leasehold interest in the Project. The Project involves the rehabilitation of a certified historic structure. Taxpayer is the managing member of both LLC 1 and LLC 2.

Taxpayer filed a corporate tax return for its initial year beginning on Date 1. LLC 1 and LLC 2 each filed a partnership tax return for its initial year beginning on Date 1. The operating agreements of LLC 1 and LLC 2 provide that the managing member will elect to be treated as a taxable entity under § 168(h)(6)(F)(ii).

Taxpayer engaged a CPA firm to prepare its tax return for its initial year. Taxpayer relied on the firm to file its tax return on time. Through human error, Taxpayer's name, tax year, and its identity as a corporation were not entered into the firm's engagement management system. Consequently, Taxpayer's return was not filed on time. However, the affidavits and other materials submitted by Taxpayer indicate that, at all times, it intended to make the § 168(h)(6)(F)(ii) election. Upon discovering the failure to make the election, Taxpayer promptly sought an extension of time in which to file the election.

Applicable Law

Section 167(a) of the Code provides generally for a depreciation deduction for property used in a trade or business. Under § 168(g), the alternative depreciation system must be used for any tax-exempt use property as defined in § 168(h).

Section 168(h)(6)(A) provides that, for purposes of § 168(h), if any property that is not tax-exempt use property is owned by a partnership having 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 is treated as tax-exempt use property. Section 168(h)(6)(F)(i) provides generally that any tax-exempt controlled entity is treated as a tax-exempt entity for purposes of § 168(h)(6).

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. Under § 301.9100-7T(a)(2)(i) of the Procedure and Administration Regulations, an election under § 168(h)(6)(F)(ii) must be made by the due date of the tax return for the first taxable year for which the election is to be effective.

Section 301.9100-1(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(b) defines the term “regulatory election” as including any election the due date for which is prescribed by a regulation. Because the due date of the § 168(h)(6)(F)(ii) election is prescribed in § 301.9100-7T, the election is a regulatory election.

Section 301.9100-1 through § 301.9100-3 provide the standards 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

The information submitted by Taxpayer indicates that Taxpayer intended from the outset to make the § 168(h)(6)(F)(ii) election, that its failure to make the election on a timely filed 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. Finally, Taxpayer acted reasonably and in good faith, and the interests of the Government will not be prejudiced by the granting of relief under § 301.9100-3.

Conclusion

We conclude that the request for relief under § 301.9100-3 should be granted. Accordingly, Taxpayer is granted the requested extension of time of 30 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.

The ruling contained in this letter is based upon the information and representations submitted by the taxpayer and accompanied by a penalty of perjury statement executed by an appropriate party. Although this office has not verified any of the material submitted in support of the request for the ruling, that material 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.

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

Enclosed is a copy of the letter showing the deletions proposed to be made when it is disclosed under § 6110. If you have any questions concerning this matter, please contact the individual whose name and telephone number appear at the beginning of the letter.

In accordance with the Power of Attorney on file with this office, a copy of this letter is being sent to your authorized representative.

A copy of this letter must be attached to any income tax return to which it is relevant. Alternatively, a taxpayer filing a return electronically may satisfy this requirement by attaching a statement to the return that provides the date and control number of the letter ruling.

Sincerely,

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

Enclosure: Copy for § 6110 purposes