

Internal Revenue Service

Department of the Treasury
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May 17, 2011

Re: Request for Extension of Time to Make the Election to Apply § 168(k)(4)

Legend

Taxpayer =

New Parent =

Date 1 =

Date 2 =

Date 3 =

Date 4 =

Date 5 =

Date 6 =

Date 7 =

A =

B =

Dear _____ :

This letter responds to a letter dated November 16, 2010, 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 was the common parent of an affiliated group of corporations that file a consolidated federal income tax return (“Taxpayer’s consolidated group”) on a calendar-year basis. Taxpayer is a manufacturer, and marketer of specialty chemicals and related services.

On Date 1, New Parent acquired 100 percent of the outstanding stock of Taxpayer. New Parent has a fiscal year ending A. As a result of the transaction, the taxable year of Taxpayer and its subsidiaries ended on Date 1, which is Taxpayer’s first taxable year ending after March 31, 2008. Taxpayer and its subsidiaries were required to file a final consolidated federal income tax return for the short taxable year beginning Date 5, and ending Date 1, and New Parent was required to include income, gain, loss, deductions, and credits of Taxpayer and its subsidiaries for the period Date 2, through Date 3, in its consolidated federal income tax return filed for the taxable year ending Date 3.

During the short taxable year ending Date 1, Taxpayer and its subsidiaries placed in service eligible qualified property. Taxpayer also has unused alternative minimum tax (“AMT”) credits and research tax credits from taxable years beginning before January 1, 2006. 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) for the first taxable year ending after March 31, 2008.

Taxpayer used an outside tax preparer to prepare its consolidated federal income tax return for the short taxable year ending Date 1. This return was timely filed on Date 4, which is after March 11, 2009. As part of this original return, Taxpayer filed Form 4562, *Depreciation and Amortization (Including Information on Listed Property)*, indicating that Taxpayer used the straight-line method and did not claim the Stimulus additional first year depreciation for any qualified property (as defined in § 168(k)(2)) placed in service during the short taxable year ending Date 1, and also included a statement indicating Taxpayer was making the election to apply § 168(k)(4).

Taxpayer’s outside tax preparer advised Taxpayer about the time and manner for making the election to apply § 168(k)(4). Taxpayer’s outside tax preparer mistakenly advised Taxpayer that they were required to file an amended return for the short taxable year ending on Date 1, on or before Date 7, which was the due date (including extensions) of New Parent’s consolidated federal income tax return for the taxable year ending Date 3. When preparing this amended return, Taxpayer’s outside tax preparer

realized that the due date for the amended return was Date 6, which was the due date (without extensions) of New Parent's consolidated federal income tax return for the taxable year ending Date 3.

On Date 6, Taxpayer provided written notification to B and all other partnerships in which Taxpayer owns a partnership interest, that Taxpayer was making the § 168(k)(4) election for Taxpayer's short taxable year ending on Date 1.

RULING REQUESTED

Taxpayer requests on behalf of the consolidated group of which Taxpayer was the common parent 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 short taxable year ending Date 1.

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), allowed 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 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.

Taxpayer was the common parent of an affiliated group of corporations that filed a consolidated federal income tax return for the short taxable year ending Date 1. Further, Taxpayer's consolidated group for the short taxable year ending Date 1, was not a member of any other controlled group. Accordingly, on Date 1 (the testing date for determining the members of a controlled group for the first taxable year ending after March 31, 2008, when that taxable year ends on the same date for all members of a controlled group), Taxpayer's consolidated group is treated as a controlled group and as one taxpayer for purposes of applying § 168(k)(4) and Rev. Proc. 2009-16 for the first taxable year ending after March 31, 2008. See § 168(k)(4)(C)(iv) and sections 2.05 and 3.05(1)(a) of Rev. Proc. 2009-16.

Section 3.05(2)(a) of Rev. Proc. 2009-16 provides that 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.

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 Form 4562, 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.

If the electing corporate partner makes the § 168(k)(4) election by filing an amended return under section 3.02(1)(a)(ii) or 3.03(2) of Rev. Proc. 2009-16, section 5.02 of Rev. Proc. 2009-16 provides that the electing corporate partner must notify the partnership on or before the date it files the amended return containing 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, Taxpayer is granted 60 calendar days from the date of this letter to make the election to apply § 168(k)(4) for the short taxable year ending Date1, and subsequent taxable years. This election must be made by Taxpayer filing an amended consolidated federal income tax return for the short taxable year ending Date 1, and in accordance with the procedures provided in section 3.02(2)(a) of Rev. Proc. 2009-16.

Except as specifically set forth above, no opinion is expressed or implied concerning the 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 by any member of Taxpayer's consolidated group in the short taxable year ending Date1, is eligible for the Stimulus additional first year depreciation deduction under § 168(k) or is eligible qualified property for purposes of § 168(k)(4). Further, no opinion is expressed or implied on whether the members of New Parent's controlled group for the taxable year ending Date 3, that were not members of Taxpayer's consolidated group for the short taxable year ending Date 1, are bound by the § 168(k)(4) election made by Taxpayer.

In accordance with the power of attorney, we are sending a copy of this letter to Taxpayer's authorized representative. We are also sending a copy of this letter to the appropriate operating division director.

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