Internal Revenue Service

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Department of the Treasury
Washington, DC 20224

[Third Party Communication:
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Person To Contact:
, ID No.
Telephone Number:

Refer Reply To:
CC:ITA:B03
PLR-106784-11

Date:
July 12, 2011

TY:

LEGEND:

Taxpayer =
Year 1 =
Year 2 =
Year 3 =
Year 4 =
Filing Date =
Report Date =
Extension Date=
$A =
$B =
$C =

Dear :

This is in response to your letter dated . In your letter, you requested an extension of time to claim a deduction for qualified environmental remediation expenditures under section 198 of the Internal Revenue Code for the tax years ending December 31, Year 1 and December 31, Year 2. The request is based on sections 301.9100-1 and 301.9100-3 of the Procedure and Administrative Regulations for Years 1 and 2, and sections 1311 through 1314 of the Code for Year 1.

FACTS

Taxpayer, a limited liability company, is engaged in the business of leasing real estate. Taxpayer owned certain land in need of environmental remediation in the tax years at issue. In Year 1, Taxpayer incurred $A of qualified environmental remediation expenditures and reported the amount on its income tax return for Year 1 as a deferred project expense. Taxpayer did not claim a deduction for the amount in Year 1. In Year

2, Taxpayer incurred $B of qualified environmental remediation expenditures and reported the sum of $A and $ B as a deferred project expense and again claimed no deduction. In Year 3, Taxpayer incurred $C of qualified environmental remediation expenditures and claimed a deduction on its return for Year 3 for the sum of all three amounts ($A, $B, and $C). Taxpayer filed its return for Year 3 on or around the Filing Date. Taxpayer relied on its accounting firm to prepare its returns for Years 1 through 3 and believed the accounting firm was taking all necessary steps to preserve its right to deduct qualified environmental remediation expenditures. Taxpayer was not aware that, for Taxpayer to be able to claim any deduction for qualified environmental remediation expenditures, the law required Taxpayer to make a section 198 election and deduct the expenditures on the income tax return of the taxable year in which they were incurred.

The IRS began to examine Taxpayer's income tax return for Year 3 two years later in Year 4. It proposed an adjustment for Year 3 on the Report Date disallowing the sum of $A and $B on the basis that the amounts were not paid or incurred in Year 3. Taxpayer and its members agreed to the proposed adjustment for Year 3 by executing Form 870-PT, Agreement for Partnership Items & Partnership Level Determinations as to Penalties, Additions to Tax, and Additional Amounts. While the period of limitations on assessment for Year 1 is closed, the IRS and Taxpayer have agreed to extend the period of limitations on assessment for Year 2 until the Extension Date.

LAW AND ANALYSIS

Section 198, a provision under subtitle A, provides that a taxpayer may elect to treat any qualified environmental remediation expenditure which is paid or incurred by the taxpayer as an expense which is not chargeable to capital account. The taxpayer may deduct any expenditure so treated in the taxable year in which it is paid or incurred.

Under section 198(b), a "qualified environmental remediation expenditure" means any expenditure which is otherwise chargeable to capital account and which is paid in connection with the abatement or control of hazardous substances at a qualified contaminated site.

Rev. Proc. 98-47, 1998-2 C.B. 319, provides the procedures for taxpayers to make the election under section 198 to deduct qualified environmental remediation expenditures. Under section 3.01 of Rev. Proc. 98-47, the election must be made on or before the due date (including extensions) for filing the income tax return for the taxable year in which the qualified environmental remediation expenditures are paid or incurred. In addition, persons other than individuals are required to make the election by including the total amount of section 198 expenses on the line for "Other Deductions" on their appropriate federal tax return. On a schedule attached to the return that separately identifies each expense included in "Other Deductions," the taxpayer must write "Section 198 Election" on the line on which the section 198 expense amounts separately appear. See section

3.02(2) of Rev. Proc. 98-47.

Section 3.03 of Rev. Proc. 98-47 provides that, if for any taxable year, the taxpayer pays or incurs more than one qualified environmental remediation expenditure, the taxpayer may make a section 198 election for any one or more of such expenditures for that year. Thus, the taxpayer may make a section 198 election with respect to a qualified environmental remediation expenditure even though the taxpayer chooses to capitalize other such expenditures (whether or not they are of the same type or paid or incurred with respect to the same qualified contaminated site). Further, a section 198 election for one year has no effect for other years. Thus, a taxpayer must make a section 198 election for each year in which the taxpayer intends to deduct qualified environmental remediation expenditures.

Sections 301.9100-1 through 301.9100-3 of the Procedure and Administration Regulations provide the standards the Commissioner uses to determine whether to grant an extension of time to make a regulatory 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 section 301.9100-2.

Section 301.9100-1(b) defines the term "regulatory election" as an election whose due date is prescribed by a regulation published in the Federal Register, or a revenue ruling, procedure, notice or announcement published in the Internal Revenue Bulletin.

Section 301.9100-1(c) provides that the Commissioner may grant a reasonable extension of time to make a regulatory election, or a statutory election (but no more than six months except in the case of a taxpayer who is abroad) under all subtitles of the Code except subtitles E, G, H and I.

Section 301.9100-3 provides extensions of time to make a regulatory election under Code sections other than those for which section 301.9100-2 expressly permits automatic extensions. Requests for extensions of time for regulatory elections will be granted when the taxpayer provides evidence (including affidavits described in the regulations) to establish to the satisfaction of the Commissioner 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) states 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 section 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 has been or could be imposed under section 6662 at the time the taxpayer requests relief (taking into account section 1.6664-2(c)(3)) and the new position requires or permits a regulatory election for which relief is requested;

(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 original deadline that make the election advantageous to a taxpayer, the Service will not ordinarily grant relief.

Taxpayer in this case has represented that it reasonably relied on a qualified tax professional, and that the tax professional failed to make, or advise the taxpayer to make, the election. Thus, under section 301.9100-3(b)(1)(v), Taxpayer will be deemed to have acted reasonably and in good faith. Taxpayer has also represented that none of the circumstances listed in section 301.9100-3(b)(3) apply.

Section 301.9100-3(c)(1)(i) provides, in part, that the interests of the government are prejudiced if granting relief would result in the 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). Section 301.9100-3(c)(1)(ii) provides, in part, that the interests of the government are ordinarily 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 assessment under section 6501(a) before the taxpayer's receipt of a ruling granting relief.

Section 1311(a) provides that if a determination (as defined in section 1313) is described in one or more of the paragraphs of section 1312 and, on the date of the determination, correction of the effect of the error referred to in the applicable paragraph

of section 1312 is prevented by the operation of any law or rule of law, other than this part and other than section 7122 (relating to compromises), then the effect of the error shall be corrected by an adjustment made in the amount and in the manner specified in section 1314.

Section 1312(4) states that a double disallowance of a deduction or credit has occurred when the determination disallows a deduction or credit which should have been allowed to, but was not allowed to, the taxpayer for another taxable year.

Section 1311(b)(2)(B) further provides that in the case of a determination described in section 1312(4) (relating to the double disallowance of a credit or deduction), an adjustment shall be made only if credit or refund of the overpayment attributable to the deduction or credit which should have been allowed to the taxpayer was not barred by any law or rule of law at the time the taxpayer first maintained in writing that he or she was entitled to such deduction or credit for the taxable year to which the determination relates.

Section 1313(a)(2) provides that the term “determination” includes a closing agreement made under section 7121.

Under these criteria, the interests of the government are not prejudiced for either tax year at issue. Taxpayer has represented that granting relief would not result in 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 (taking into account the time value of money). Furthermore, the taxable year in which one of the regulatory elections should have been made, Year 2, and any taxable years that would have been affected had it been timely made, are not closed by the period of limitations on assessment.

The mitigation provisions of sections 1311 through 1314 permit an administrative adjustment for Year 1. The Form 870-PT, signed by the IRS and Taxpayer constitutes a determination under section 1313(a)(2). The determination disallowed a deduction under section 198 for Year 3, which should be allowed to Taxpayer for another taxable year, Year 1. Without mitigation, correction of the failure to claim the deduction in Year 1 would not be possible because the three-year period of limitations under section 6227(a) for filing a request for administrative adjustment for Year 1 has expired. Taxpayer and its members, however, qualify for adjustment under section 1312(4). The period of limitation for filing a request for administrative adjustment under section 6227(a) for Year 1 expired before the date of determination (the date Form 870-PT was signed), which Taxpayer represents to be subsequent to Report Date. See section 1311(a). Additionally, Taxpayer’s period of limitation for filing a request for administrative adjustment under section 6227(a) for Year 1 was open when Taxpayer first maintained its claim of entitlement to a deduction on its Year 3 return, Filing Date. See section 1311(b)(2)(B). Therefore, Taxpayer and its members may correct the Year 1 error because Taxpayer and its members have satisfied the requirements of sections

1311 through 1314. See example (1) of section 1.1312-4(b) of the regulations; see also Rev. Rul. 73-82, 1973-1 C.B. 375.

CONCLUSION

Taxpayer's election is a regulatory election, as defined under section 301.9100-1(b), because the due date of the election is prescribed in section 3.01 of Rev. Proc. 98-47. In the present situation, the requirements of sections 301.9100-1 and 301.9100-3(b)(1)(v) of the regulations have been satisfied. The information and representations Taxpayer made establish that Taxpayer acted reasonably and in good faith. Furthermore, granting an extension will not prejudice the interests of the Government. Taxpayer represented that it will not have a lower tax liability in the aggregate for all taxable years affected by the election if given permission to make the election than Taxpayer would have had if the election were made by the original deadline for making the election. Taxpayer also represented that the period of limitation on assessment for Year 2 will not be closed before receipt of a ruling. While the period of limitation on filing a request for administrative adjustment for Year 1 is closed, the mitigation provisions of sections 1311 through 1314 apply for that year. Accordingly, Taxpayer is granted an extension of time to elect to treat certain expenditures for Years 1 and 2 as qualified environmental remediation expenditures until 60 days following the date of this ruling. The election should be made by filing an amended return for Years 1 and 2 in compliance with the relevant provisions of Rev. Proc. 98-47, and by filing requests for administrative adjustments for Years 1 and 2 on Form 8082 (including a copy of this ruling with all filings).

Except as expressly provided herein, no opinion is expressed or implied concerning the federal income tax consequences of any aspect of any transaction or item discussed or referenced in this ruling.

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.

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, taxpayers filing their returns electronically may satisfy this requirement by attaching a statement to their return that provides the date and control number of the letter ruling.

The rulings contained in this letter are based upon information and representations submitted by the taxpayer and accompanied by a penalty of perjury statement executed

by an appropriate party. While this office has not verified any of the material submitted in support of the request for rulings, it is subject to verification on examination.

Sincerely,

Robert Casey
Senior Technical Reviewer, Branch 3
(Income Tax & Accounting)