Internal Revenue Service

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Department of the Treasury
Washington, DC 20224

Third Party Communication: None
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Person To Contact:
, ID No.
Telephone Number:

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PLR-115693-11

Date:
August 31, 2011

LEGEND:

Taxpayer	=
LLC	=
State A	=
Property	=
Accountant	=
Accounting Firm	=
Year 1	=
Year 2	=
Year 3	=
Year 4	=
Year 5	=
Year 6	=

Dear :

This responds to your letter dated April 6, 2011, submitted by your authorized representatives, requesting an extension of time under §§ 301.9100-1 and -3 of the Procedure and Administration Regulations (the "Regulations"), for the Taxpayer to make an election under § 198 of the Internal Revenue Code to deduct qualified environmental remediation expenditures ("QER expenditures") for Year 4.

FACTS

Since Year 1, the Taxpayer has been the sole member of a State A LLC, which has been a disregarded entity for federal income tax purposes. The Taxpayer uses a calendar taxable year and an overall cash method of accounting. The Taxpayer reports income and expenses from the LLC on a federal income tax Schedule E.

The LLC has been the owner of the Property since Year 2. At all times since its acquisition until Year 3, the Property was leased as commercial property for light industrial use. In Year 3, the LLC began redeveloping the Property from light industrial use to retail use and the Property was ready for lease in Year 4. In the redevelopment of the Property, the LLC incurred QER expenditures in Year 4.

The Taxpayer engaged the Accountant, a member of the Accounting Firm, to render tax advice and to prepare the Taxpayer's tax returns, including Schedule E relating to the income of the LLC. The Taxpayer's tax return for Year 4 prepared by the Accountant capitalized expenditures related to environmental remediation to land. During the preparation of the Taxpayer's Year 4 federal income tax return, the Taxpayer was unaware of the provisions of § 198 of the Code and the availability of an election under that section to expense QER expenditures. Neither the Taxpayer's attorney, who was handling legal issues related to the redevelopment of the Property, nor the Taxpayer's environmental consultant advised the Taxpayer or the Accountant that Taxpayer could obtain a statement from the State A Department of Environmental Protection that the Property met the requirements of § 198(c)(1)(B) so that it could be considered a qualified contaminated site for purposes of § 198.

The Taxpayer relied on the Accountant to identify the availability of all deductions, including any deductions available as the result of elections. The Accountant submitted an affidavit stating he (i) was aware that expenditures related to environmental remediation had been incurred in Year 4 in preparing the Property for redevelopment, (ii) was not aware that the Property could be considered a qualified contaminated site as defined in §198(c) of the Code, (iii) was not aware that the Taxpayer had incurred expenditures in Year 4 which could qualify for the election under § 198 as QER expenditures, and (iv) did not request documentation from the Taxpayer that would enable him to make that determination. In Year 6, while preparing the Taxpayer's Year 5 tax return, the Accountant requested detailed project information and discovered that the Taxpayer's site would have qualified for the election provided under §198 for Year 4. At that time, the Accountant advised the Taxpayer that an election should have been filed for Year 4 to deduct QER expenditures under § 198 and should be filed for Year 5 for QER expenditures incurred in Year 5. At the behest of the Accountant, the Taxpayer obtained a statement from the State A Department of Environmental Protection that the LLC had paid or incurred certain QER expenditures with respect to the Property and that the Property meets the requirements set forth in §198(c)(1)(B) of a qualified contaminated site. The Taxpayer timely made the election for expenses incurred in Year 5 on his Year 5 tax return, but because the time for making the election for Year 4 had expired, the Taxpayer is requesting relief under §§ 301.9100-1 and -3 of the Regulations to make a late § 198 election for Year 4.

STATEMENT OF LAW

Section 198 of the Code provides, in part, that a taxpayer may elect to treat any QER expenditure which is paid or incurred by the taxpayer as an expense which is not chargeable to capital account. Any expenditure which is so treated shall be allowed as a deduction for the taxable year in which it is paid or incurred.

Under § 198(b) of the Code, 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 § 198 to deduct any QER expenditure. 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 QER expenditures are paid or incurred. In addition, persons other than individuals are required to make the election by including the total amount of § 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 § 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 QER expenditure, the taxpayer may make a § 198 election for any one or more of such expenditures for that year. Thus, the taxpayer may make a § 198 election with respect to a QER 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 § 198 election for one year has no effect for other years. Thus, a taxpayer must make a § 198 election for each year in which the taxpayer intends to deduct QER expenditures.

Section 301.9100-3 of the Regulations generally provides extensions of time for making regulatory elections. For this purpose, § 301.9100-1(b) defines the term "regulatory election" to mean an election whose due date is prescribed by a regulation published in the Federal Register, or a revenue ruling, revenue procedure, notice or announcement published in the Internal Revenue Bulletin.

Section 301.9100-3 of the Regulations provides that requests for extensions of time for regulatory elections will be granted when the taxpayer provides evidence (including affidavits described in § 301.9100-3(e)) 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) of the Regulations states that a taxpayer is deemed to have acted reasonably and in good faith if the taxpayer --

(i) requests relief under this section before the failure to make the regulatory election is discovered by the Internal Revenue 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 reasonable diligence, the taxpayer was unaware of the necessity for the election;

(iv) reasonably relied on the written advice of the Internal Revenue Service; or

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

A taxpayer will not be considered to have reasonably relied on a qualified tax professional if the taxpayer knew or should have known that the professional was not competent to render advice on the regulatory election or aware of all relevant facts. Section 301.9100-3(b)(2) of the Regulations.

Under § 301.9100-3(b)(3) of the Regulations, a taxpayer is deemed to have not acted reasonably or 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 § 6662 at the time the taxpayer requests relief (taking into account any qualified amended return filed within the meaning of § 1.6664-2(c)(3) of the Income Tax Regulations) 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 due date for making the election that make the election advantageous to a taxpayer, the Internal Revenue Service will not ordinarily grant relief. In such a case, the Internal Revenue Service will grant relief only when the taxpayer provides strong proof that the taxpayer's decision to seek relief did not involve hindsight.

Section 301.9100-3(c)(1) of the Regulations provides, in part, that the Commissioner will grant a reasonable extension of time to make a regulatory election only when the interests of the Government will not be prejudiced by the granting of relief.

Section 301.9100-3(c)(1)(i) of the Regulations 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) of the Regulations 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 § 6501(a) before the taxpayer's receipt of a ruling granting relief under § 301.9100-3.

ANALYSIS

In the present case, the Taxpayer acted reasonably and in good faith. The affidavits provided by the Taxpayer and the Accountant demonstrated that the Taxpayer relied on a qualified tax professional and the professional failed to make the election or advise the Taxpayer to make the election for QERs for Year 4. The Taxpayer had no reason to know that the professional was not competent to render advice on the regulatory election or aware of all relevant facts. In addition, the Taxpayer is not seeking to alter a return position for which an accuracy-related penalty has been or could be imposed under § 6662 of the Code, the Taxpayer was not informed of the election and chose not to file it, and the Taxpayer has represented that he did not use hindsight in seeking relief.

In addition, based on the facts provided, the interests of the government will not be prejudiced by granting relief in this case. The Taxpayer has represented that granting relief will not 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. Further, the taxable year for which the Taxpayer is requesting relief is not closed, nor will any closed taxable years be affected by the making of the election for Year 4.

Because the Taxpayer acted reasonably and in good faith, and because the interests of the government will not be prejudiced if the request for relief is granted, the Taxpayer has met the requirements for an extension under § 301.9100-3 of the Regulations for making the election under § 198 of the Code for Year 4. Accordingly, the Taxpayer is granted an extension of 60 days from the date of this ruling letter to make the election under § 198 by filing an amended federal income tax return for Year 4. The Taxpayer must comply with all the requirements of Rev. Proc. 98-47 for the manner of making such election upon his amended return. A copy of this letter ruling should be attached to the Taxpayer's amended return to which it is relevant.

CAVEATS

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. Specifically, no opinion is expressed as to whether the expenditures discussed in this ruling constitute QER expenditures under § 198 of the Code. This ruling simply extends the period of time in which the taxpayer may make an election under § 198. 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, copies of this letter are being sent to your authorized representatives.

Enclosed is a copy of the letter ruling showing the deletions proposed to be made in the letter when it is disclosed under § 6110 of the Code.

This ruling contained in this letter is based upon information and representations submitted by the taxpayer and accompanied by a penalty of perjury statement. 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,

Christopher F. Kane
Branch Chief, Branch 3
(Income Tax & Accounting)

Enclosure (1)