Internal Revenue Service

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Legend

Taxpayer	=	.
Charity Corp (CC)	=	
State A	=	
Date 1	=	
Year 1	=	

Dear

This is in reply to Taxpayer's request for permission to make a late election under § 168(h)(6)(F)(ii) of the Internal Revenue Code, under authority contained in § 301.9100-3 of the Procedure and Administration Regulations pertaining to late regulatory elections.

FACTS:

Taxpayer is a calendar year taxpayer using the accrual method of accounting. Taxpayer was incorporated on Date 1 in State A and is wholly owned by Charity Corp. (CC). CC is a non-stock corporation described under § 501(c)(3) of the Code, formed to promote affordable housing in State A.

CC finances its affordable housing operations, in part, by creating limited partnerships (LPs) with other investors, sometimes referred to as tax credit investors (TCIs). The TCIs provide capital and receive benefits, including allocations of low-income housing tax credits arising from CC's investments. CC formed Taxpayer to hold its interests in six separate LPs and to be the general and tax matters partner in the LPs.

CC owns more than 50% in value of Taxpayer's stock. Thus, Taxpayer is a tax-exempt controlled entity within the meaning of § 168(h)(6)(F)(iii) and is treated as a tax-exempt entity unless it makes a § 168(h)(6)(F)(ii) election.

Under § 168(h)(6)(A), property may be tax-exempt use property if it is held by a tax-exempt entity in a partnership that has tax-exempt and non tax- exempt partners and if the partnership allocations are not qualified allocations as defined by §168(h)(6)(B). The partnership allocations in the present case are not qualified allocations.

Section 168(g)(1)(C) provides that any tax-exempt use property must be depreciated under the Alternative Depreciation System (ADS) rules. However, the LPs may use the Modified Cost Recovery System (MACRS) if Taxpayer elects to not be treated as a tax-exempt entity under § 168(h)(6)(F)(ii). This election is irrevocable, binds all tax-exempt entities holding an interest in the tax-exempt controlled entity, and must be effective for the year in which the property is placed in service.

Under § 301.9100-7T(a)(2)(i) of the 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.

Year 1 was the first year for which Taxpayer was required to make the election under § 168(h)(6)(F)(ii). Materials submitted by Taxpayer clearly indicate that Taxpayer intended to make the election with its Year 1 return. For example, under five of the six agreements governing the six LPs, Taxpayer was contractually obligated to use MACRS, which would not be an option unless Taxpayer made the § 168(h)(6)(F)(ii) election. However, Taxpayer never made the required election.

APPLICABLE LAW

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(a)(2)(i) of the regulations, the election is a regulatory election.

Sections 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 by § 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) of the regulations provides 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 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 (taking into account the taxpayer's experience and the complexity of the return or issue), 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, including a tax professional employed by the taxpayer, and the tax professional failed to make, or advise the taxpayer to make, the election.

Under § 301.9100-3(b)(3) of the regulations, 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 § 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 this chapter) 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 IRS will not ordinarily grant relief. In such a case, the 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)(i) provides that 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 (taking into account the time value of money). Similarly, if the tax consequences of more than one taxpayer are affected by the election, the government's interests are prejudiced if extending the time for making the election may result in the affected taxpayers, in the aggregate, having a lower tax liability than if the election had been timely made.

Section 301.9100-3(c)(1)(ii) provides 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 this section.

ANALYSIS:

Taxpayer acknowledges that it did not properly make the § 168(h)(6)(F)(ii) election on the return it filed for Taxable Year 1. However, the facts establish that Taxpayer intended to make the election and that the failure to properly make the election was

inadvertent. Moreover, Taxpayer acted reasonably and in good faith, within the meaning of § 301.9100-3(b)(1), and the government's interest is not prejudiced as a result of granting relief under § 301.9100-3 with respect to the election.

RULING:

Based on facts, affidavits and representations submitted, the requirements for relief under § 301-9100-3 are satisfied. Accordingly, Taxpayer is treated as if it made the § 168(h)(6)(F)(ii) election with the original return it filed for Year 1 provided that Taxpayer attaches a copy of this letter to the next return it files. If Taxpayer files electronically it may satisfy this requirement by attaching a statement to the return that provides the date and control number of this letter ruling. In addition, the letter ruling (or statement) should be attached for all subsequent returns (and amended returns) for all taxable years to which this ruling is relevant.

DISCLAIMERS AND LIMITATIONS:

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.

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

The ruling contained in this letter is 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,

Michael J. Montemurro
Chief, Branch 4
(Income Tax & Accounting)

cc: