Internal Revenue Service

Department of the Treasury
Washington, DC 20224

Number: **201234004**
Release Date: 8/24/2012

Index Number: 9100.00-00

Third Party Communication: None
Date of Communication: Not Applicable
Person To Contact:
, ID No.

Telephone Number:

Refer Reply To:
CC:ITA:B04
PLR-103459-12
Date:
May 14, 2012

In Re:

Legend

Taxpayer	=
Exempt Organization	=
State	=
Limited Partnership (LP)	=
Date 1	=
Date 2	=
Building	=
Address	=
Y	=
Z	=
Year 1	=
First Accounting Firm (FAF)	=
Year 2	=
Date 3	=
Additional Property	=
Year 3	=
Year 4	=
Year 5	=
Second Accounting Firm (SAF)	=

Dear :

This letter responds to Taxpayer's private letter ruling request, dated December 15, 2011, regarding an extension of time to make an election under § 168(h) of the Internal Revenue Code (Code). Taxpayer, a tax-exempt controlled entity, seeks to not be treated as a tax-exempt entity under § 168(h)(6)(F)(ii).

Facts

Taxpayer, formed on Date 1, is organized under the laws of State and is a C corporation for Federal income tax purposes. It uses the accrual method of accounting and has the calendar year as its taxable year. Taxpayer is wholly owned by Exempt Organization, a tax-exempt organization described in § 501(c)(3) of the Code. 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).

On Date 2, Limited Partnership (LP) was formed. Taxpayer is the General Partner of LP, with an ownership interest of y percent. Taxpayer is also the tax matters partner of LP. LP was organized to build and operate Building at Address. Building contains z units of qualified low-income housing.

Building was placed in service in Year 2. The taxable investors in LP required Taxpayer to make an election pursuant to § 168(h)(6)(F)(ii) for Year 2 when Taxpayer filed its federal income tax return for Year 2. Taxpayer's Year 2 tax return was filed by First Accounting Firm (FAF) on Date 3. FAF inadvertently failed to make the § 168(h)(6)(F)(ii) election on the Year 2 return. However, FAF computed the depreciation deduction for LP using the Modified Accelerated Cost Recovery System (MACRS), a method LP properly could have used if the election had been timely made.

Taxpayer placed Additional Property in service in Years 3 and 4, using MACRS as the method of depreciation on Additional Property. Although FAF did not make an § 168(h)(6)(F)(ii) election when it filed the Year 3 return, LP continued using MACRS to depreciate Building.

In Year 4, Taxpayer changed to Second Accounting Firm (SAF). SAF filed Taxpayer's Year 4 return using the MACRS system. In Year 5, after Taxpayer's search of its files revealed that it never made a § 168(h)(6)(F)(ii) election, Taxpayer submitted its request for an extension of time to make the election.

Applicable Law and Analysis

Section 167(a) of the Code provides generally for a depreciation deduction for property used in a trade or business. Under § 168(g) of the Code, 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 shall be treated as tax-exempt use property. Section 168(h)(6)(F)(i) provides generally that any tax-exempt controlled entity shall be treated as a tax-exempt entity for purposes of § 168(h)(5) and (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 (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(a) of the Regulations 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. The § 168(h)(6)(F)(ii) election is a regulatory election.

Sections 301.9100-1 through 301.9100-3 of the Regulations provide the standards that 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) of the Regulations 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) 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 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) of the Regulations 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.

Based on the facts and information submitted, we conclude Taxpayer intended from the outset to make the § 168(h)(6)(F)(ii) election, that its failure to make the election on its 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. Accordingly, pursuant to § 301.9100-3, Taxpayer is granted an extension of time of 60 days from the date of this letter ruling to file an amended return for Year 2 making the election under § 168(h)(6)(F)(ii). To make the election, Taxpayer must file an amended Federal income tax return for Year 2, and attach thereto the election and information set forth in § 301.9100-7T(a)(3)(ii). Also, Taxpayer must attach a copy of this letter to its amended return.

Although this office has not verified any of the material submitted or facts assumed in support of the request for ruling, they are 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.

In accordance with the provisions of a power of attorney currently on file with this office, a copy of this letter is being sent to Taxpayer's authorized representative.

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.

Sincerely,

Christina M. Glendening
Assistant to the Branch Chief, Branch 4
Office of Associate Chief Counsel
(Income Tax & Accounting)

Enclosure: Copy for § 6110 purposes

cc: