



PLR-116340-12	2
Building 1	=
Building 2	=
City	=
Y	=
Z	=
Successor Owner	=
EIN	=
Date 3	=
Year 1	=

Dear \_\_\_\_\_ :

This letter responds to your private letter ruling request, dated February 23, 2012, regarding an extension of time to make an election under § 168(h) of the Internal Revenue Code (Code). Specifically, you requested an extension of time to make an election under § 168(h)(6)(F)(ii) for Taxpayer, a tax-exempt controlled entity under § 168(h)(6)(F)(iii).

#### Facts

Taxpayer is a Subchapter C corporation for federal income tax purposes, uses the accrual method of accounting, and has the calendar year as its taxable year. Taxpayer, a holding company, is wholly owned by Development Corporation, a not-for-profit corporation. Development Corporation, in turn, is wholly owned by Exempt Organization, a not-for-profit corporation which has received a determination that it is a tax-exempt organization described in § 501(c)(3). Based on Exempt Organization's ultimate control of Taxpayer, Taxpayer is a "tax-exempt controlled entity" within the meaning of Code § 168(h)(6)(F)(iii).

Taxpayer, Development Corporation, and Exempt Organization all are organized under the laws of State and all are located at Address.

Taxpayer was formed on Date 1. On Date 2, Limited Partnership was formed. Limited Partnership was formed to acquire, own and rehabilitate Building 1 and Building 2, both of which are low-income housing projects located in City, State.

Taxpayer is the sole general partner of Limited Partnership and has a  $y$  percent interest in Limited Partnership's capital, profits and losses. Exempt Organization owned the remaining  $z$  percent interest in Limited Partnership's capital, profits and losses on Date 2. Subsequently, at a closing held on Date 3, Exempt Organization withdrew as a limited partner, with Successor Organization being admitted to the Limited Partnership and succeeding to Exempt Organization's  $z$  percent interest.

As part of the closing agreements signed on Date 3, Taxpayer was contractually obligated to make an election under Code § 168(h)(6)(F)(ii) to be treated as a taxable entity. The election was to be made for the year in which Buildings were placed in service.

Buildings were placed in service in Year 1. Taxpayer filed a timely federal income tax return for Year 1, but failed to make the § 168(h)(6)(F)(ii) election on that return. However, from the affidavit and other materials submitted it is clear that Taxpayer at all times intended to make the § 168(h)(6)(F)(ii) election. Upon discovering its failure, Taxpayer promptly sought an extension of time in which to file the election.

#### Applicable Law

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 is treated as tax-exempt use property. Section 168(h)(6)(F)(i) provides generally that any tax-exempt controlled entity is 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, 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(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. The § 168(h)(6)(F)(ii) election is a regulatory election.

Section 301.9100-1 through § 301.9100-3 provides 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) 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), 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) 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.

### Analysis

It is apparent from the facts submitted by Taxpayer that 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.

### Conclusion

Based solely on the facts as represented and the applicable law, we conclude that the request for relief under § 301.9100-3 should be granted. Accordingly, Taxpayer is treated as if it made the § 168(h)(6)(F)(ii) election with the tax 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.

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.

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,

Michael J. Montemurro  
Branch Chief  
Associate Chief Counsel  
(Income Tax & Accounting)

Enclosure: Copy for § 6110 purposes