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Person To Contact:

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Date:
December 21, 2012

TY:

LEGEND:

Taxpayer =
Parent =
Landlord =
Tenant =
Investor =
Area =
Project =
Firm A =
Firm B =

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:

Project is a certified historic structure eligible for rehabilitation tax credits under § 47 of the Code. Taxpayer is a C corporation wholly owned by Parent. Parent is a corporation that is a tax-exempt entity under § 501(c)(3). Taxpayer was formed to develop and manage quality affordable housing in Area. Its activities include acting as the general partner for Landlord and as the managing member for Tenant. Landlord is a limited partnership and Tenant is a limited liability company. Landlord was formed to acquire, develop, maintain, improve and manage the Project and to lease the Project to Tenant. Tenant was formed to acquire a leasehold interest in the Project and, as Master Tenant,

to operate the building on a day-to-day basis in order to obtain long term appreciation, cash income and return of capital. Tenant is owned % by Taxpayer (its general partner) and % by Investor (as a limited partner). The Taxpayer owns % of Landlord; Tenant and Parent own the remaining % and % of Landlord respectively.

Section 5.5 of the Landlord operating agreement executed by Taxpayer, Parent, and Tenant requires Taxpayer to make an election under § 168(h)(6)(F)(ii) to ensure that the Project would not constitute "tax-exempt use property" under § 168. Taxpayer had no knowledge of the specific tax compliance procedures required for this type of transaction because this was Taxpayer's first historic rehabilitation tax credit project. Therefore, Taxpayer relied on qualified tax professionals to ensure that all necessary elections were made and timely filed.

Taxpayer engaged Firm A to prepare tax projections and provide consulting services related to the transaction structure. Although Taxpayer intended for Firm A to prepare the tax returns as well, Taxpayer never actually engaged Firm A for this purpose. Not until October 2011 did Taxpayer realize it had not engaged Firm A to file its tax returns for the tax year ending December 31, 2010.

In November 2011 Parent engaged Firm B to prepare Taxpayer's corporate return for tax year 2010. Parent did not inform Firm B of the § 168(h)(6)(F)(ii) election requirement to be filed with the original 2010 return for Taxpayer, so it was inadvertently omitted from the return filed. Firm B was unaware of the requirement to make the election and was not informed by Taxpayer that the election was required pursuant to the Landlord's operating agreement. Parent and Taxpayer were unaware of the tax consequences of not making a timely § 168(h)(6)(F)(ii) election until after filing Taxpayer's original return.

APPLICABLE LAW:

Section 47(a)(2) of the Code provides a rehabilitation credit for 20 percent of the qualified rehabilitation expenditures with respect to any certified historic structure.

Section 47(c)(2)(B)(v) states that any expenditure in connection with the rehabilitation of a building which is allocable to the portion of such property which is tax-exempt use property as defined in § 168(h) is not included in qualified rehabilitation expenditures.

Section 168(h) defines tax-exempt use property. 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).

Section 168(h)(6)(F) states that a tax-exempt controlled entity is treated as a tax-exempt entity unless under § 168(h)(6)(F)(ii) the tax exempt controlled entity makes an

election 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.

Section 168(h)(6)(F)(iii) describes a tax-exempt controlled entity as any corporation, which would not otherwise be considered a tax-exempt entity, where 50% or more of the stock is owned by one or more tax-exempt entities.

Parent owns 100% 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.

Section 301.9100-1(b) of the regulations defines the term "regulatory election" as including any election the due date for which is prescribed by a regulation. Section 301.9100-7T(a)(2)(i) requires an election under § 168(h)(6)(F)(ii) to be made by the due date of the tax return for the first taxable year for which the election is to be effective. Thus, the § 168(h)(6)(F)(ii) election is a regulatory election.

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 301.9100-3(a) provides that requests for extension of time for regulatory elections will be granted when the taxpayer provides evidence establishing to the satisfaction of the Commissioner that the taxpayer acted reasonably and in good faith, and the grant of relief will not prejudice the interests of the Government.

Section 301.9100-3(b)(1) provides that, except as provided in paragraphs (b)(3)(i) through (iii) of § 301.9100-2, a taxpayer is deemed to have acted reasonably and in good faith if the taxpayer (i) requests relief under § 301.9100-3 before the failure to make the regulatory election is discovered by the Internal Revenue Service ("IRS"); (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 IRS; 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.

Section 301.9100-3(b)(3) provides that a taxpayer is deemed to have not 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 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.

Section 301.9100-3(c)(1) states 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) provides that the interests of the Government are prejudiced if granting the 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). 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.

ANALYSIS:

Taxpayer acknowledges that it did not properly make the § 168(h)(6)(F)(ii) election on the return it filed for taxable year ending December 31, 2010. However, the facts establish that Taxpayer intended to make the election and that the failure to properly make the election was inadvertent. Thus, Taxpayer acted reasonably and in good faith, within the meaning of § 301.9100-3(b)(1) and is not using hindsight in requesting permission to make a late election.

Moreover, the government’s interest is not prejudiced as a result of granting relief under § 301.9100-3 with respect to the election. The interests of the Government are prejudiced if granting the relief would result in a taxpayer having a lower tax liability in the aggregate for all years affected by the election than they would have had if the election had been timely made. The aggregate tax liability of Taxpayer, Parent, Landlord and Tenant will not be lower than the aggregate tax liability as reported as a result of granting relief. The returns for Parent and Taxpayer were filed as if the election was made in a timely fashion so there will be no change to the tax liability if the relief is granted.

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 Taxpayer’s taxable year ended December 31, 2010 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
Branch Chief, Branch 4
(Income Tax & Accounting)

cc: