

Internal Revenue Service

Department of the Treasury
Washington, DC 20224

Number: **201320013**
Release Date: 5/17/2013
Index Number: 9100.04-00

Third Party Communication: None
Date of Communication: Not Applicable

Person To Contact: _____, ID No.

Telephone Number:

Refer Reply To:
CC:ITA:B04
PLR-147713-12
Date:
February 13, 2013

TY:

LEGEND

- Taxpayer =
- LP =
- Parent =
- City =
- State =
- t% =
- Date 1 =
- Date 2 =
- Date 3 =

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 Information

Taxpayer is the general partner of LP, a limited partnership owning residential rental property in City. Taxpayer holds a t% interest in LP and is designated as the Tax Matters Partner of LP. Taxpayer was formed on Date 1 under the laws of State as a “for-profit” C corporation for federal income tax purposes. Taxpayer is wholly owned by Parent, which is a State not-for-profit corporation and a tax-exempt § 501(c)(3) entity for

federal income tax purposes. Taxpayer uses the accrual method of accounting and the calendar year as its taxable year.

Specific Facts relating to Taxpayer's Application for Relief

Pursuant to the agreement between Taxpayer and the Limited Partner of LP (the "partnership agreement"), Taxpayer is entitled to 90 percent of LP's net cash flow as a management fee if it timely makes a § 168(h) election. In addition, the partnership agreement uses a timely § 168(h) election as a trigger for the Limited Partner's obligation to make a capital contribution to LP. Making this election permits LP to use a shorter depreciation life for its property than what is permitted in the absence of a § 168(h) election.

LP's real property was placed in service on Date 2. Thus, Taxpayer was required to make the § 168(h) election and attach the election to its return for that tax year. Although the partnership agreement clearly required that Taxpayer make this election as a prerequisite for a larger management fee for Taxpayer and to trigger a capital contribution from the limited partner, the accounting firm preparing Taxpayer's federal tax return for that year failed to prepare the election and attach it to the return (although, the preparers of LP's U.S. Tax and Information Returns used the shorter depreciation life for the real property owned by LP as if the § 168(h) election had been made). In a sworn statement, the accounting firm admitted that this failure was due to an oversight by the accounting firm. Soon after realizing that this election had not been made, Taxpayer applied for this ruling.

APPLICABLE LAW

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.

Section 301.9100-1(b) of the Procedures and Administration 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) of the regulations 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, in part, that a taxpayer is deemed to have acted reasonably and in good faith if the taxpayer 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 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. The agreement required Taxpayer, as the tax matters partner, to make the § 168(h)(6)(F)(ii) election. Taxpayer acknowledges that it did not properly make the § 168(h)(6)(F)(ii) election on the return it filed for the taxable year ending Date 3. However, the facts

establish that Taxpayer intended to make the election and that the failure to properly make the election was inadvertent. 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 interests are not prejudiced as a result of granting relief under § 301.9100-3 with respect to this election.

RULING:

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 Date 3 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.

The rulings contained in this letter are 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: