Internal Revenue Service

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Date:
January 27, 2014

TY:

Legend

TE =

State =

TE Feeder =

TE1 Feeder =

Fund =

LP =

LLC =

year 1 =

year 2 =

year 4 =

Dear

This letter responds to a letter, dated July 23, 2013, in which TE requests an extension of time to make an election under § 168(h)(6)(F)(ii) of the Internal Revenue Code, effective for year 1.

Facts

TE is a limited partnership organized under the laws of State that has elected to be classified as an association taxable as a corporation for federal income tax purposes. TE uses the accrual method of accounting, and its taxable year is the calendar year.

TE Feeder is a limited partnership organized under the laws of State and is taxable as a partnership for income tax purposes. TE1 Feeder is also a limited partnership organized under the laws of State and is taxable as a partnership for federal income tax purposes. TE Feeder and TE1 Feeder own all of the economic interests in TE. Both TE Feeder and TE1 Feeder are owned by tax-exempt entities.

TE owns a limited partner interest in the Fund. The Fund owns a limited partner interest in LP, which owns 50% of the limited partner interests in LLC. LLC depended, in part, on certain tax benefits, including accelerated depreciation, to finance its projects. These tax benefits are not available to LLC in the years at issue if TE is not allowed to make a late election. TE claimed accelerated depreciation in years 1 and 2 based on its indirect investment in LLC.

TE engaged an accounting firm experienced in tax matters to prepare its tax return for year 1. It also obtained tax advice from a nationally recognized law firm on its investment in the Fund and its indirect investment in LP and LLC. Neither the accounting firm nor the law firm advised TE about the election, and TE did not know about the election until year 4. As soon as TE learned about the election and its status as a tax-exempt controlled entity, TE contacted its advisors and began preparation of this ruling request.

Applicable Law

Section 167(a) of the Code provides generally for a depreciation deduction for property used in a trade or business. Under § 168(g), a taxpayer must use the alternative depreciation system 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 the tax-exempt entity's proportionate share of the property is treated as tax-exempt use property. Section 168(h)(6)(F)(i) provides, in general, that any tax-exempt controlled entity is treated as a tax-exempt entity for purposes of § 168(h)(6). Section 168(h)(6)(F)(iii) defines a tax-exempt controlled entity, generally, as a corporation that is not tax-exempt, if 50 percent or more (in value) of the stock in the corporation is held by 1 or more domestic tax-exempt entities.

Under §168(h)(6)(F)(ii), a tax-exempt controlled entity can elect to not 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 Regulations on Procedure and Administration, 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 for which a regulation prescribes the due date. Because the due date of the § 168(h)(6)(F)(ii) election is prescribed in § 301.9100-7T, the election is a regulatory election.

Section 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 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 (taking into account the time value of money). 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

Because tax-exempt entities own more than 50 percent in value of the economic interests in TE, TE is a "tax-exempt controlled entity" within the meaning of § 168(h)(6)(F)(iii) of the Code. TE is treated as a tax-exempt entity in the years at issue unless TE is allowed to make a late election under § 168(h)(6)(F)(ii).

TE acted reasonably and in good faith. Taxpayer relied on qualified professionals who did not advise TE about the election. TE requested an extension of time to make the election before the Service discovered that TE had not made the election. When TE learned about the election, it promptly sought an extension of time to make the election. No factors indicate that TE did not act reasonably and in good faith.

The interests of the Government will not be prejudiced by the granting of relief under § 301.9100-3. TE represents that it timely filed its federal income tax returns for year 1 and year 2. The period of limitations on assessment under § 6501(a) has not expired with respect to these returns. TE also represents that allowing it to make the election effective for year 1 would not result in TE having a lower tax liability in the aggregate for all 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).

Conclusion

We conclude that the request for relief under § 301.9100-3 should be granted. Accordingly, TE is granted an extension of time of 60 days from the date of this letter ruling to file an amended return making the election under § 168(h)(6)(F)(ii), effective for year 1. Taxpayer should attach this letter to its amended return.

The ruling contained in this letter is based upon the information and representations submitted by the taxpayer and accompanied by a penalty of perjury statement executed by an appropriate party. Although this office has not verified any of the material submitted in support of the request for the ruling, that material is subject to verification on examination.

Except as expressly provided, 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 proposed deletions in the letter before 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.

In accordance with the Power of Attorney on file with this office, a copy of this letter is being sent to two of your authorized representatives.

A copy of this letter must be attached to any income tax return to which it is relevant. Alternatively, a taxpayer filing a return electronically may satisfy this requirement by attaching a statement to the return that provides the date and control number of the letter ruling.

Sincerely,

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