Internal Revenue Service

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Department of the Treasury
Washington, DC 20224

Third Party Communication: None
Date of Communication: Not Applicable

Person To Contact:
, ID No.

Telephone Number:

Refer Reply To:
CC:ITA:B05
PLR-112904-18
Date: November 2, 2018

Legend

Taxpayer =

Parent =

Partnership =

State =

Year 1 =

Year 2 =

Year 3 =

Date 1 =

Date 2 =

Date 3 =

Date 4 =

Date 5 =

Dear :

This letter responds to a request for an private letter ruling dated Date 1 by Taxpayer, requesting an extension of time under §§ 301.9100-1 and 301.9100-3 of the Procedure and Administration Regulations to make an election, under § 168(h)(6)(F)(ii) of the Internal Revenue Code, not to be treated as a tax-exempt controlled entity for Year 2.

Facts

According to the information submitted and representations made, Taxpayer was formed as a limited liability company organized on Date 2 under the laws of State. Taxpayer is wholly-owned by Parent, a tax exempt organization under § 501(c)(3). As such, Taxpayer is a disregarded entity for tax purposes and treated as a tax-exempt controlled entity for purposes of § 168(h)(6)(F)(iii).

On Date 3, Taxpayer formed Partnership for the purpose of owning, holding, developing, and operating a multi-family residential rental property, funded in part by low income housing credits. The property was placed in service on Date 4. Taxpayer is the general partner of Partnership. The limited partners in Partnership are not tax-exempt entities.

Taxpayer filed a Form 8832, *Entity Classification Election*, electing to be classified as an association taxable as a corporation, effective in Year 1. Taxpayer did not file a tax return in Year 1 (neither did Partnership). In Year 2 and Year 3, Taxpayer filed its Form 1120, *U.S. Corporation Income Tax Return*. Also in Year 3, the property was placed in service, and Partnership filed its Form 1065, providing a K-1 to Taxpayer. Partnership began depreciating the Partnership assets in Year 3 as if the Partnership had no tax-exempt use property (*i.e.*, as if Taxpayer had made the § 168(h)(6)(F)(ii) election).

On Date 5, a limited partner in Partnership discovered that the § 168(h)(6)(F)(ii) election was not properly made and advised Taxpayer. Taxpayer promptly filed a request for a private letter ruling to allow Taxpayer to file amended returns to make the § 168(h)(6)(F)(ii) election. Federal tax returns for Years 2 and 3 have been filed consistent with a § 168(h)(6)(F)(ii) election being timely made.

Taxpayer represents that Taxpayer's failure to make the § 168(h)(6)(F)(ii) elections for Tax Years 2 and 3 have not been discovered by the Internal Revenue Service. Taxpayer also represents that it will not have a lower tax liability for all tax years affected by the election, than they would have had if the election had been timely made. Furthermore, taxable years in which the elections should have been made are not closed under § 6501.

Law and Analysis

Section 167(a) provides generally for a depreciation deduction for property used in a trade or business. Under § 168(g), the alternative depreciation system must be used for any tax-exempt use property as defined in § 168(h).

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)(i) provides generally that any tax-exempt controlled entity is treated as a tax-exempt entity for purposes of § 168(h)(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.

Section 168(h)(6)(F)(iii)(I), describes a tax-exempt controlled entity as any corporation which would not otherwise be considered a tax-exempt entity, where 50 percent 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) requires the § 168(h)(6)(F)(ii) election to be made by the due date of the tax return for the first taxable year for which the election is to be effective. Section 301.9100-7T(a)(3) provides the manner in which the § 168(h)(6)(F)(ii) election is made. 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 under the rules set forth in §§ 301.9100-2 and 301.9100-3 to make a regulatory election.

Section 301.9100-3(a) provides that requests for relief subject to § 301.9100-3 will be granted when the taxpayer provides evidence, including affidavits described in § 301.9100-3(e), to establish 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 a taxpayer is 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 is considered 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 fully informed 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 Service will grant a reasonable extension of time 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 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.

Under § 301.9100-3(c)(1)(ii), 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 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.

Taxpayer represents that it has consistently filed its Federal income tax returns as if the election had been timely made, and that no relevant facts have changed since the due date for the election that make the election more advantageous for the Taxpayer. Based on this representation, we conclude that Taxpayer is not using hindsight in requesting permission to make a late election. Finally, Taxpayer represents that it has requested relief before the failure to make the election was discovered by the Service. Under § 301.9100-3(c)(1), the interests of the Government will not be prejudiced by the granting of relief, as Taxpayer represents that there will be no lower tax liability when comparing as if the election had been timely made, and the election does not involve a closed tax year.

Conclusion

Based solely on the information submitted and the representations made, we conclude that the requirements of § 301.9100-3 have been satisfied with respect to Taxpayer’s failure to make the election under § 168(h)(6)(F)(ii) for Year 2. Accordingly, Taxpayer is granted an extension of time of 75 days from the date of this letter to file a return for Year 2 making the election under § 168(h)(6)(F)(ii). Taxpayer should attach a copy of this letter to its return. In addition, the letter ruling should be attached for all subsequent returns (and amended returns) for all taxable year to which this ruling is relevant.

This office has not verified any of the material submitted in support of the request for a ruling. However, as part of an examination process, the Service may verify the factual information, representations, and other data submitted.

This ruling addresses the granting of § 301.9100-3 relief only. We express no opinion regarding the tax treatment of the instant transaction under the provisions of any other sections of the Code or regulations that may be applicable, or regarding the tax treatment of any conditions existing at the time of, or effects resulting from, the instant transaction.

This ruling is directed only to the taxpayer requesting it. Section 6110(k)(3) provides that it may not be used or cited as precedent. Enclosed is a copy of the letter ruling showing the deletions proposed to be made when it is disclosed under § 6110.

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

Sincerely,

Shareen S. Pflanz
Senior Technician Reviewer, Branch 5
Office of Associate Chief Counsel
(Income Tax & Accounting)

Enclosures :
Copy of this letter
Copy of this letter for section 6110 purposes

cc: