Internal Revenue Service

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Department of the Treasury
Washington, DC 20224

Third Party Communication: None
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Person To Contact:
, ID No.

Telephone Number:

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Date:
January 21, 2022

TY:

Legend

Taxpayer	=
Corporation	=
Group	=
GP LLC	=
Developer LLC	=
LP	=
Parent	=
Date 1	=
Date 2	=
Date 3	=
Date 4	=
Date 5	=
Date 6	=
Date 7	=
Date 8	=
Date 9	=
Date 10	=
Date 11	=
Date 12	=

Date 13	=
State	=
a percent	=
b percent	=
c percent	=
Accounting Firm 1	=
Accounting Firm 2	=
Tax Year	=
Previous Tax Year	=
Subsequent Tax Year	=
Present Year	=
Affidavit 1	=
Affidavit 2	=

Dear :

This is in response to your Request for a Private Letter Ruling dated April 12, 2021, filed by your authorized representative on behalf of Taxpayer. Specifically, Taxpayer is requesting that the Internal Revenue Service exercise its authority under § 301.9100-3 of the Procedure and Administration Regulations (Regulations) to grant an extension of time within which to file an election to not be treated as a tax-exempt controlled entity for purposes of the tax-exempt use property rules (the "election") under § 168(h)(6)(F)(ii) of the Internal Revenue Code (“Code”).

FACTS

Taxpayer is a domestic corporation. Taxpayer was formed as a limited liability company under the laws of State on Date 1. Taxpayer uses the calendar year as its annual accounting period and the accrual method as its overall method of accounting. All of its membership interests are owned by Corporation, which was organized in State, and which is described in § 501(c)(3) of the Code and thus exempt from tax under § 501(a). Taxpayer with its affiliated entities is part of Group. Taxpayer develops and manages sustainable, innovative, and high-quality affordable housing for low-income tenants in several cities.

Taxpayer was disregarded as an entity separate from its owner until Date 2. On Date 3, Taxpayer made an election on Form 8832, Entity Classification Election, to be classified as an association taxable as a corporation effective on Date 2. Taxpayer did not seek an exemption from federal income taxes under § 501(c) of the Code, and thus was subject to tax as a C corporation as of the effective date of the election.

Taxpayer directly owns membership interests in two other entities. First, Taxpayer is a member of GP LLC, a limited liability company formed under the laws of State. Second,

Taxpayer is also a member of Developer LLC, a limited liability company also formed under the laws of State. The Taxpayer owns an a-percent membership interest in each of GP LLC and Developer LLC, although another unrelated member is designated as the managing member of each entity.

GP LLC is the sole general partner, and owns a b-percent interest, in LP, a limited partnership formed under the laws of State. LP's limited partners are unrelated entities that are not tax-exempt entities and own a combined c-percent of LP. Through LP and Developer LLC, Taxpayer rehabilitates, develops, and operates multi-family residential properties for low-income tenants.

Accounting Firm 1 had been the historic tax advisor to Corporation and Taxpayer as part of its services to Group. Taxpayer does not have separate tax personnel or specialized tax compliance experience, and thus relied on outside advisors for federal and state tax compliance and consulting. In a document issued and signed by a representative of Accounting Firm 1 on Date 4, Firm provided a "Certificate Regarding Section 168(h)(6) Election" for Taxpayer. In that document, Accounting Firm 1 acknowledged that GP LLC and the other partners of LP intend that the § 168(h)(6)(F)(ii) election for Taxpayer be made on a timely basis.

This document further provided Accounting Firm 1's understanding that it was material to the limited partner's participation in the LP's investments that the property not be depreciated using the alternative depreciation system under §§ 167 and 168(h). In furtherance of the intention to make this election, Accounting Firm 1 acknowledged its understanding that Taxpayer would first elect to be taxed as a corporation for federal income tax purposes, and that the § 168(h)(6)(F)(ii) election would be made on a timely basis. Accounting Firm 1 provided further written guidance regarding the procedural requirements for making the § 168(h)(6)(F)(ii) election.

From the text of the document, it appears that Accounting Firm 1 understood that property expected to be acquired by LP would not be placed in service until the calendar year of Tax Year. This document provides that the election is required to be made by the due date (including extensions) of the federal tax return for the first taxable year to which the election is to apply. However, the document further provides that Accounting Firm 1 expects this due date (before extensions) to be Date 5, which is March 15 for the year following the year in which LP's housing project is placed in service.

Consistent with its historic practices, Accounting Firm 1 was engaged to prepare the federal and state income tax returns for the calendar year of Previous Tax Year for a number of entities within Group.

On Date 6, LP acquired and placed in service property that is eligible to be depreciated for federal income tax purposes. Consistent with the Accounting Firm 1's certification described above, LP expected that its direct and indirect investors would make timely

and valid elections, as required, under § 168(h)(6)(F)(ii) to avoid being required to treat the property as tax-exempt use property under § 168(h) for federal income tax depreciation purposes.

On Date 7, Parent, the parent organization of Taxpayer, engaged Accounting Firm 2 to prepare the federal and state income tax returns for Corporation and Taxpayer. Taxpayer obtained an automatic extension of time to file its federal income tax return by filing Form 7004, Application for Automatic Extension of Time to File Certain Business Income Tax, Information, and Other Returns, on or before Date 8. Pursuant to this extension, Taxpayer timely filed its federal income tax return on Form 1120, U.S. Corporation Income Tax Return, on Date 9.

When this tax return was prepared and filed, Accounting Firm 2 believed that Taxpayer had previously filed a § 168(h)(6)(F)(ii) election with its tax return for Previous Tax Year. Accounting Firm 2 believed that a tax return for Previous Tax Year should have been filed by Taxpayer, in view of its entity classification election, but was not provided with a copy of this return. Accounting Firm 2 was unable to confirm the year in which LP had first placed its property in service due to delays in the preparation and issuance of the Schedule K-1 (Form 1065), Partner's Share of Income, Deduction, Credits, etc., by GP LLC for Tax Year.

Taxpayer's return for Taxable Year did not include a § 168(h)(6)(F)(ii) election, notwithstanding that the Accounting Firm 1 certification described the intention of Taxpayer to have such election made. A copy of this certification was provided by Taxpayer to a senior manager of Accounting Firm 2 in Date 10. At this time Accounting Firm 2 still did not have any confirmation as to whether a return for Previous Tax Year was filed by Taxpayer, or whether the § 168(h)(6)(F)(ii) election was made with that return. However, the senior manager resigned from Accounting Firm 2 before the federal income tax return for Tax Year was completed and did not provide a copy of the certification to colleagues responsible for the preparation of this return.

Accounting Firm 2 was also engaged to prepare the Taxpayer's federal and state income tax returns for the Subsequent Tax Year. The Taxpayer timely filed a Form 7004 for an automatic extension of time to file the federal income tax return. On Date 11, Accounting Firm 2 obtained a copy of the Schedule K-1 (Form 1065) for Subsequent Tax Year from GP LLC. Taxpayer's federal income tax return for Subsequent Tax Year was prepared on the basis that a § 168(h)(6)(F)(ii) election had been timely made. The Taxpayer filed this return on Date 12.

As LP was preparing to acquire additional property early in Present Year, its representatives asked Taxpayer if a § 168(h)(6)(F)(ii) election had in fact been made by Taxpayer. On Date 13, after reviewing its own records, a representative of the Taxpayer advised Accounting Firm 2 that the appropriate election was not in fact made with any prior tax return (including the Tax Year return that it had prepared) and that LP had first placed property in service in Tax Year. Taxpayer further confirmed that it had

not filed a federal income tax return Previous Tax Year. Accounting Firm 2 confirmed that it had inadvertently omitted the § 168(h)(6)(F)(ii) election from the tax return for Tax Year.

Subsequent to the discovery of the failure to make the required election on a timely basis, Accounting Firm 2 advised Taxpayer that the § 168(h)(6)(F)(ii) election had not been included with Taxpayer's tax return for Tax Year. Representatives of Accounting Firm 2 advised Taxpayer that no automatic or expeditious means of seeking an extension was available, and that the only means of obtaining an extension of time is through the private letter ruling process. Accounting Firm 2 explained the process for requesting an extension of time to make the election under § 30I.9100-3 of the Regulations. Taxpayer authorized Accounting Firm 2 to file a private letter ruling request on its behalf.

In support of this ruling request, Taxpayer has submitted Affidavit 1 from a knowledgeable representative of Taxpayer, and Affidavit 2 from a knowledgeable representative of Accounting Firm 2.

In connection with this ruling request, Taxpayer makes the following representations:

Taxpayer is not seeking to alter a return position for which an accuracy-related penalty has been or could have been imposed under § 6662.

Taxpayer has not used hindsight in requesting relief to make a late § 168(h)(6)(F)(ii) election.

Taxpayer's tax return for the taxable year ended December 31, Tax Year, is not currently under examination and has never been examined by the Internal Revenue Service.

Taxpayer believes that Accounting Firm 2 was aware of all relevant facts relating to the § 168(h)(6)(F)(ii) election for Tax Year.

At the time Taxpayer's income tax return for Tax Year was being prepared and filed, Taxpayer believed that Accounting Firm 2 was competent to render advice on the § 168(h)(6)(F)(ii) election for Tax Year.

Taxpayer was not advised by Accounting Firm 2 regarding the necessity of making the § 168(h)(6)(F)(ii) election or of the tax consequences of making the election and, accordingly, Taxpayer did not choose not to make the election.

Taxpayer requests that the Internal Revenue Service issue a ruling granting an extension of time pursuant to §§ 301.9100-1,2, and 3 to make a § 168(h)(6)(F)(ii) election, and to allow Taxpayer’s election to be effective as of Tax Year.

APPLICABLE LAW AND ANALYSIS

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 shall be treated as tax-exempt use property.

Section 168(h)(6)(F)(i) of the Income Tax Regulations provides generally that any tax-exempt controlled entity shall be treated as a tax-exempt entity for purposes of §§ 168(h)(5) and (6). Section 168(h)(6)(F)(iii)(I) provides that a tax-exempt controlled entity is any corporation if 50 percent or more (in value) of the stock is held by 1 or more tax-exempt entities.

Under § 168(h)(6)(F)(ii), a tax-exempt controlled entity may 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.

Because Corporation is a tax-exempt entity which owns all of the membership interests of Taxpayer, Taxpayer is a tax-exempt controlled entity within the meaning of § 168(h)(6)(F)(iii)(I). As such, Taxpayer is eligible to make the § 168(h)(6)(F)(ii) election.

Under § 301.9100-7T(a)(2)(i) of the 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(a) of the Regulations 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 election allowed by § 168(h)(6)(F)(ii) election is a regulatory election.

Sections 301.9100-1 through 301.9100-3 of the Regulations provide 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) of the Regulations 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 Internal Revenue 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 Internal Revenue 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) of the Regulations, 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 of the Code 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 Internal Revenue Service will not ordinarily grant relief.

Section 301.9100-3(c) of the Regulations provides that the Internal Revenue 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.

CONCLUSION

From the materials submitted, including the affidavits submitted by Taxpayer and other relevant parties, it is clear that Taxpayer at all times intended to make a § 168(h)(6)(F)(ii) election. Upon discovering its failure, the Taxpayers promptly sought an extension of time in which to file the election.

Based on the materials submitted, our office concludes that Taxpayer’s failure to make the § 168(h)(6)(F)(ii) election with its original return for Tax Year was inadvertent and based upon its reliance of tax professionals. In addition, Taxpayer is not using hindsight

in requesting relief. Moreover, Taxpayer requested relief before the failure to make the election was discovered by the Internal Revenue Service. Taxpayer has acted reasonably and in good faith. Finally, the interests of the Government will not be prejudiced by the granting of relief under § 301.9100-3.

Based solely on the facts as represented and the applicable law, we conclude that the requirements of §§ 301.9100-1 and 301.9100-3 of the Regulations have been met. Taxpayer is granted an extension of 60 days from the date of this ruling to file the § 168(h)(6)(F)(ii) election statement with the appropriate service center containing the information required in § 301.9100-7T(a)(3) for that election to be effective for Tax Year.

Taxpayer must attach a copy of this letter to its § 168(h)(6)(F)(ii) election statement. The letter ruling should be attached for all subsequent returns (and amended returns) for all taxable years to which this ruling is relevant. Pursuant to § 301.9100-7T(a)(3)(ii), a copy of that election statement should be attached to the federal income tax returns of all tax-exempt shareholders or holders of membership interests in Taxpayer.

This ruling is based upon information and representations submitted by the taxpayer and accompanied by a penalty of perjury statement signed by an appropriate party. Although this office has not verified any of the material submitted in support of the request for ruling, it is 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.

Enclosed is a copy of the letter showing the deletions proposed to be made when it is disclosed under § 6110 of the Code. If you have any questions concerning this matter, please contact the individual whose name and telephone number appear at the beginning of the 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.

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

Sincerely,

Erika C. Reigle
Senior Technician Reviewer, Branch 5
Office of Chief Counsel
(Income Tax & Accounting)

Enclosure (1)

cc: