

Internal Revenue Service

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Department of the Treasury

Washington, DC 20224

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Person To Contact:

, ID No.

Telephone Number:

Refer Reply To:

CC:ITA:B04

PLR-116375-22

Date:

January 17, 2023

In Re:

Taxpayer =

Exempt Organization =

Subsidiary Z =

Firm 1 =

State =

X =

Date 1 =

Date 2 =

Date 3 =

Date 4 =

Year 1 =

Year 2 =

Dear _____ :

This letter responds to Taxpayer's request, dated Date 1, 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 (Code) to not be treated as a tax-exempt controlled entity as of Date 2.

FACTS

Taxpayer was organized as a limited liability company under the laws of State on Date 3 Taxpayer is a wholly owned subsidiary of Exempt Organization, a tax-exempt organization described in § 501(c)(3). For federal tax purposes Taxpayer was treated as a disregarded entity. Taxpayer made an election on Form 8832, Entity Classification Election, to be classified as an association taxable as a corporation effective Year 1 and has been subject to tax as a C corporation since that year. Exempt Organization owns more than 50 percent in value of the stock of Taxpayer, therefore, Taxpayer is a "tax-exempt controlled entity" within the meaning of §168(h)(6)(F)(iii).

Taxpayer owns X percentage of Subsidiary Z, a limited liability company formed under the laws of State. In Year 1, Subsidiary Z acquired and placed in service a property that was eligible to be depreciated for federal income tax purposes. Subsidiary Z expected that its direct and indirect owners, including Taxpayer, would make timely elections under §168(h)(6)(F)(ii) to not be treated as tax-exempt entity, as required by Subsidiary Z's operating agreement.

Taxpayer does not have any separate tax personnel or specialized tax compliance experience and relies on outside advisors for federal and state tax compliance and consulting. Firm 1 has been the sole tax advisor for Taxpayer and was engaged to provide federal and state tax compliance services for Taxpayer for Year 1. Taxpayer engaged Firm 1 to prepare its federal income tax return, including the §168(h)(g)(F)(ii) election, for Year 1. Firm 1 filed Taxpayer's Year 1 tax return; however, Firm 1 did not fill out the § 168(h)(6)(F)(ii) election, thus a § 168(h)(6)(F)(ii) election was not made.

In Year 2, Firm 1 reviewed its own records and could not locate the election statement. Firm 1 contacted Taxpayer on Date 4 to receive a copy of the election form. Taxpayer also could not find a copy of their election form. Thus, Taxpayer and Firm 1 concluded that Taxpayer's election form must not have been filed with the Year 1 tax return.

From the materials submitted, it appears that Taxpayer intended to make the election under § 168(h)(6)(F)(ii) for Year 1 and Firm 1 acknowledges that Taxpayer expected Firm 1 to make a timely § 168(h)(6)(F)(ii) election when Firm 1 filed Taxpayer's Year 1 tax return. Taxpayer has always acted as if the election was timely made in Year 1 and seeks permission under § 301.9100 to obtain an extension of time in which to make the § 168(h)(6)(F)(ii) election.

Taxpayer makes the following representations. Taxpayer is not under audit nor is being considered by an appeals officer or federal court for any tax year in which the § 168(h)(6)(F)(ii) election should have been made or for any tax year affected by that election. Taxpayer is not seeking to alter a return position for which an accuracy-related penalty has been or could be imposed under § 6662. Taxpayer is not using hindsight in requesting the relief sought. The requested relief will not result in a lower tax liability (in the aggregate for all tax years affected by the § 168(h)(6)(F)(ii) election) than Taxpayer would have had if the § 168(h)(6)(F)(ii) election had been timely made.

APPLICABLE LAW

Section 167(a) of the Code generally provides 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)(6)(F)(i) provides generally that any tax-exempt controlled entity is treated as a tax-exempt entity for purposes of § 168(h)(6).

Section 168(h)(6)(A) provides that, for purposes of § 168(h), if any property which 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 is treated as tax-exempt use property.

Under §168(h)(6)(F)(iii)(I), a corporation (without regard to that subparagraph and § 168(h)(2)(E)) constitutes a "tax-exempt controlled entity" if 50 percent or more (in value) of the corporation's stock is held by one or more tax-exempt entities (other than a foreign person or entity). In the case of tiered partnerships and other entities, § 168(h)(6)(E) applies similar rules.

Under § 168(h)(6)(F)(ii), a tax-exempt controlled entity can elect not to be treated as a tax-exempt entity. Once made, the 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 Procedure and Administration Regulations, a §168(h)(6)(F)(ii) election 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 301.9100-7T(a)(3)(i)

provides that the § 168(h)(6)(F)(ii) election must be made by attaching a statement to the tax return for the taxable year for which the election is to be effective.

Section 301.9100-1(c) provides that the Commissioner of Internal Revenue has the 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. The § 168(h)(6)(F)(ii) election is a regulatory election.

Sections 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 a request for an extension of time for a regulatory election (other than automatic extensions of time 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 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 will not be 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 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)(1) provides that the Service will grant a reasonable extension of time only when doing so will not prejudice the interests of the Government. 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.

ANALYSIS

The facts submitted by Taxpayer indicate that Taxpayer intended at the outset to make the § 168(h)(6)(F)(ii) election, that its failure to make the election on a timely-filed return was inadvertent, and that Taxpayer is not using hindsight in requesting relief. Taxpayer relied upon Firm 1, a qualified tax professional, to make the § 168(h)(6)(F)(ii) election in Year 1, but Firm 1 failed to submit the election with the Year 1 return. Moreover, Taxpayer requested this relief before failure to make the election was discovered by the Service. Finally, Taxpayer acted reasonably in and good faith, and the interests of the government will not be prejudiced by the granting of relief under §301.9100-3.

The affidavits, from both Taxpayer and Firm 1, filed in support of the request adequately explain what led to the failure to file the election in a timely manner as required by §301.9100-3(e)(2)-(3).

CONCLUSION

Based solely on the facts as represented and the applicable law, we conclude that the request for relief under § 301.9100-3 should be granted. Taxpayer is granted an extension of 60 days from the date of this letter to file an amended return making the election under § 168(h)(6)(F)(ii). Taxpayer must attach a copy of this ruling letter to its amended return. If Taxpayer files its amended return electronically, it may satisfy this requirement by attaching a statement to its amended return that provides the date and control number of this letter ruling.

This ruling is based upon information and representations submitted by Taxpayer. While this office has not verified any of the material submitted in support of the request for a 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. Specifically, this ruling grants an extension of time to make

a §168(h)(6)(F)(ii) election; however, this ruling does not address whether taxpayer is eligible to make the election.

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.

Pursuant to the Form 2848, Power of Attorney and Declaration of Representation, on file, we are sending a copy of this letter to Taxpayer's authorized representatives. This letter is being issued electronically in accordance with Rev. Proc. 2020-29, 2020-21 I.R.B. 859 and Rev. Proc. 2023-1, 2023-1 I.R.B. 1. A paper copy will not be mailed to Taxpayer.

Sincerely,

Mon L. Lam
Senior Counsel, Branch 4
Office of the Associate Chief Counsel
(Income Tax & Accounting)

cc: