Internal Revenue Service

Number: **202434008**
Release Date: 8/23/2024

Index Number: 168.00-00, 9100.00-00

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:B08
PLR-124116-23

Date:
May 24, 2024

LEGEND

Taxpayer =

General Partner =

Partnership =

Nonprofit =

Member =

Limited Partner 1 =

Limited Partner 2

Section A =

Section B =

Section C =

LP Agreement =

Accountant =

A =

B =

C =

D =

E =

F =

G =

H =

Property =

Location =

Date 1 =

Date 2 =

Date 3 =

Date 4 =

Year 1 =

Year 2 =

Year 3 =

Month 1 =

Month 2 =

Dear :

This ruling responds to Taxpayer's request for a letter ruling dated Date 1. Specifically, Taxpayer requests an extension of time under sections 301.9100-1 and 301.9100-3 of the Income Tax Regulations, to make a timely election under § 168(h)(6)(F)(ii) of the Internal Revenue Code (Code) to Taxpayer, a tax-exempt controlled entity under § 168(h)(6)(F)(iii).

FACTS

According to the affidavits and information provided to us, Taxpayer has represented that the facts are as follows:

Taxpayer, a limited liability company, uses the calendar year as its annual accounting period and the cash method as its overall method of accounting. Taxpayer was formed to serve as a member of General Partner. General Partner is a limited liability company and is the general partner of Partnership. Taxpayer is wholly owned by Nonprofit.

General Partner uses the calendar year as its annual accounting period, and the cash method as its overall method of accounting. Partnership uses the calendar year as its annual accounting period and the accrual method as its overall method of accounting.

Prior to Date 2, Member owned A% of General Partner and Taxpayer owned B% of General Partner. Effective Date 2, Member assigned its entire interest in General Partner to Taxpayer, which resulted in General Partner becoming a disregarded entity wholly owned by Taxpayer. Consequently, for federal income tax purposes, Taxpayer now has a direct ownership in Partnership and serves as its general partner.

General Partner owns C% of Partnership. The remaining D% of Partnership is collectively owned by Limited Partner 1 and Limited Partner 2, with Limited Partner 1 owning E% of General Partner, and Limited Partner 2 owning F% of General Partner.

Partnership was formed exclusively to provide housing facilities for persons of low and moderate income, or for persons whose income does not exceed limits established in § 42 of the Code. In furtherance of this, the purpose of Partnership was to acquire, rehabilitate, develop, improve, maintain, own, and operate Property located in Location.

Pursuant to Section A of the LP Agreement effective as of Date 3, upon the final sale of Property owned by the Partnership, the balance of net cash shall be distributed G% to General Partner and H%, collectively, to Limited Partner 1 and Limited Partner 2. Pursuant to Section B of the LP Agreement, income from the final sale of Property is to be specially allocated to the partners in proportion to the cumulative distributions each is to receive pursuant to Section A of the LP Agreement. As such, the final allocation to Taxpayer does not remain the same during the entire life of Partnership.

For Year 1, Taxpayer was a partner in General Partner, which was a partner in Partnership. Partnership acquired and began rehabilitating and operating Property in Year 1.

Under the general rule of § 301.7701-3(b)(1)(ii), since Taxpayer is a wholly owned limited liability company, absent an election, it would be considered a disregarded entity.

However, under § 301.7701-3(c), Taxpayer elected to be classified as an association (and thus, a corporation under § 301.7701-2(b)(2)). Taxpayer made this election through the filing of a Form 8832, Entity Classification Election, prepared and filed by a law firm engaged to do so by Nonprofit, with an election effective date of Date 4.

Under the general rule of § 168(h)(6)(F)(iii), because Taxpayer is wholly owned by a tax-exempt entity, absent an election, Taxpayer would be considered a "tax-exempt controlled entity" within the meaning of § 168(h)(6)(F)(iii), and therefore, due to the non-qualified allocation as noted in Section A and Section B of the LP Agreement, a portion of Property would be considered "tax-exempt use property."

However, under § 168(h)(6)(F)(ii), Taxpayer had the ability to elect not to be treated as a tax-exempt entity for purposes of § 168(h)(6), thereby avoiding having any portion of Partnership Property from being considered "tax exempt use property."

It was always Taxpayer's intention to make the election under § 168(h)(6)(F)(ii), so as to not be treated as a tax-exempt entity for purposes of § 168(h)(6). This is evidenced by Section C of the LP Agreement, wherein the partners of Partnership agreed that “No portion of the Partnership Property is or will be treated as ‘tax-exempt use property’ as defined in § 168(h) of the Code.”

Partnership filed its initial tax return, and thus first placed property in service, in Year 1. Due to its election under § 163(j)(7)(B) to be an electing real property trade or business, Partnership computed its depreciation deduction for residential rental property utilizing the Alternative Depreciation System (ADS). Partnership computed its depreciation deduction for all other property utilizing the General Depreciation System (GDS) and it claimed bonus depreciation on this property. For property placed in service for Year 2, Partnership again utilized ADS for residential rental property, and GDS for all other property.

Partnership's utilization of GDS for depreciation and its claim to bonus depreciation were methods that Partnership could properly have used if the § 168(h)(6)(F)(ii) election had been validly made by Taxpayer.

General Partner also filed its initial tax return in Year 1. Because Taxpayer did not receive a Schedule K-1 for Year 3, Nonprofit did not cause for Taxpayer to file an initial tax return for Year 3, as it did not understand Taxpayer to have a filing requirement.

Accountant was engaged by Member to prepare the tax returns for Partnership and General Partner for Year 1. Following the LP Agreement, Accountant prepared the tax returns as if a valid § 168(h)(6)(F)(ii) election was going to be made by Taxpayer. Accountant provided Member a draft of the tax return for Partnership in Month 1, noting Section C of the LP Agreement. At this time, due to inadvertence, nothing was communicated to Nonprofit regarding its tax return filing obligations for Taxpayer, and Nonprofit was not aware of the need for it to cause for Taxpayer to file for an extension of time to file its Year 1 tax return. Thus, no extension request for Taxpayer was filed.

Prior to the original due date for the Year 1 tax returns for Partnership and General Partner, Accountant filed for an extension of time to file said tax returns. Prior to the filing of those tax returns, Accountant confirmed with Member that Taxpayer was to make the § 168(h)(6)(F)(ii) election with its tax return filing for Year 1. The tax returns for Partnership and General Partner for Year 1 were filed in Month 2 prior to the extended due date for those returns.

After the tax return for General Partner was filed, Nonprofit began preparing the tax return for Taxpayer for Year 1 and had prepared a § 168(h)(6)(F)(ii) election. Member requested for Accountant to review the tax return that Nonprofit had prepared. Through Accountant's review, and through communications with Nonprofit, it was then determined that a request for an extension of time to file the Year 1 tax return for Taxpayer had not been made. Therefore, a valid § 168(h)(6)(F)(ii) election could not be made through a timely filed Year 1 tax return for Taxpayer.

Upon discovering this failure to file for an extension, Taxpayer, through Nonprofit, engaged Accountant to prepare this Request for Letter Ruling seeking an extension of time in which to make the § 168(h)(6)(F)(ii) election. Taxpayer, through Nonprofit, also engaged Accountant to prepare its Year 2 tax return(s), and to file any extension request(s), as 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) 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. Because Nonprofit owns more than 50 percent in value of Taxpayer's stock, and because Taxpayer elected to be classified as an association (and thus, a corporation),

Taxpayer is a tax-exempt controlled entity under that section. As such, Taxpayer is eligible to make the § 168(h)(6)(F)(ii) election.

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.

Under § 301.9100-7T(a)(2)(i) of the Procedure and Administration Regulations (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 provide the standards that the Commissioner 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 extensions covered in section 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 the grant of relief will not prejudice the interests of the government.

Under section 301.9100-3(b), a taxpayer is deemed to have acted reasonably and in good faith if the taxpayer requests relief before the failure to make the regulatory election is discovered by the Service, or reasonably relied on a qualified tax professional, and the tax professional failed to make, or advise the taxpayer to make, the election. However, a taxpayer is not considered to have reasonably relied on a qualified tax professional if the taxpayer knew or should have known that the professional was not competent to render advice on the regulatory election or was not aware of all relevant facts.

In addition, section 301.9100-3(b)(3) provides that a taxpayer is deemed not to have 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 section 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 in all material respects of the required election and related tax consequences but chose not to make 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 Commissioner will grant a reasonable extension of time to make the 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 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).

Section 301.9100-3(c)(1)(ii) provides that the interests of the government are ordinarily prejudiced if the taxable year in which the regulatory election should have been made or any taxable year that would have been affected by the election had it been timely made are closed by the period of limitations on assessment under section 6501(a) before the taxpayer's receipt of a ruling granting relief under this section.

CONCLUSION

Based on the facts and information submitted and the representations made, we conclude that Taxpayer has acted reasonably and in good faith, and that the granting of relief would not prejudice the interests of the government. 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) election. Upon discovering its failure, Taxpayer promptly sought an extension of time to file the election.

Based on the materials submitted, our office concludes that Taxpayer's failure to make the § 168(h)(6) election with its tax return for Year 1 was inadvertent and based upon its reliance on 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 IRS. 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.

Accordingly, based solely on the facts and information submitted, and the representations made in the ruling request, we grant Taxpayer an extension of 60 days from the date of this ruling to file the election statement with the appropriate service center containing the information required in § 301.9100-7T(a)(3) for the election to be effective for Year 1. Taxpayer must attach a copy of this letter to the election statement. Further, the letter ruling should be attached for all subsequent returns (and amended returns) for all taxable years to which this ruling is relevant. In addition, pursuant to §

301.9100-7T(a)(3)(ii), a copy of the election statement should be attached to the Federal tax returns of the tax-exempt shareholders of Taxpayer.

This ruling is based upon facts and representations submitted by Taxpayer and accompanied by a penalty of perjury statement executed by an appropriate party. 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.

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. 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) 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 representatives.

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 8
Office of Chief Counsel
(Income Tax & Accounting)

cc: