Internal Revenue Service

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Department of the Treasury
Washington, DC 20224

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September 15, 2008

FY:

LEGEND
Taxpayer =
Date1 =
Development1 =
Location1 =
Year1 =
Year2 =
Year3 =
Firm =
Person1 =
Person2 =

Dear :

This ruling responds to a letter dated March 14, 2008, submitted by your authorized representative, requesting an extension of time, under 301.9100-3 of the Procedure and Administration Regulations, for Taxpayer to make an election to use the alternative cost method of accounting in conformity with the requirements of Rev. Proc. 92-29, 1992-1 C.B. 748.

FACTS

Taxpayer is an accrual-basis corporation engaged in the business of real estate development. Taxpayer's fiscal year ends on Date1. This request for relief concerns one development project, Development1, located at Location1. Development1 involves residential units and is projected to last 10 years. Taxpayer is required to build certain common improvements in association with Development1. The first sale of residential units in Development 1 occurred in June of fiscal Year1.

Rev. Proc. 92-29, 1992-1 C.B. 748 allows a developer of real estate to automatically elect the alternative cost method with respect to its projects. This alternative cost method allows a developer to include in the basis of properties sold their allocable share of the estimated cost of common improvements without regard to whether the costs are incurred under section 461(h) of the Internal Revenue Code, subject to certain limitations.

Under § 6.01 of Rev. Proc. 92-29, 1992-1 C.B. 748, the developer must file a request with the appropriate director for the internal revenue district in which is located the principal place of business or the principal office or agency.[1] The request must be filed on or before the due date of the developer's original federal income tax return (determined with regard to extensions of time) for the taxable year in which the first benefited property in the project is sold. In addition, the developer must also attach a copy of the request to its timely filed original income tax return for the taxable year.

Further, under § 8.01 of Rev. Proc. 92-29, 1992-1 C.B. 748.01 a developer that has received permission to use the alternative cost method with respect to a project must file an annual statement with the appropriate Director for the internal revenue district in which is located the principal place of business or the principal office or agency (if the developer is a corporation or partnership). The annual statement must be filed on or before the due date of the developer's original federal income tax return (determined with regard to extensions of time) for the first taxable year following the taxable year for which the developer received permission to use the alternative cost method and for each succeeding taxable year in which the developer uses the alternative cost method. The developer must also attach a copy of the annual statement to its timely filed (determined with regard to extensions of time) original federal income tax return for each taxable year.

Taxpayer’s federal Form 1120 for fiscal Year1 was prepared by Firm. In its fiscal Year1 return, Taxpayer used the alternative cost method to determine the basis of the residential units sold in Development1 during fiscal Year1. However, Taxpayer did not file a timely request to use the alternative cost method for Development1 with the Director or attach a copy of such a request to its original fiscal Year1 income tax return as required under Rev. Proc. 92-29, 1992-1 C.B. 748. Although Taxpayer continued to use the alternative cost method on its fiscal Year2 and fiscal Year3 income tax returns, Taxpayer did not file the applicable annual statement with the Director for those fiscal years. Further, Taxpayer did not attach a copy of the applicable annual statement to its fiscal Year2 income tax return, but it did attach the applicable statement to its fiscal Year3 return with a copy of this request.

Firm has been preparing Taxpayer’s income tax returns for over ten years. For developments that taxpayer planned to use the alternative cost method described in Rev. Proc. 92-29, 1992-1 C.B. 748, Firm’s normal practice was to direct Taxpayer to file the appropriate request to elect the alternative cost method with the Director and to

attach a copy of such request to its income tax return in the year the first benefited property was sold. Firm would also direct Taxpayer to file the applicable annual statement each year as required under the revenue procedure. Firm did not direct Taxpayer to file the appropriate documents to request to use the alternative cost method for Development1 when Firm prepared Taxpayer's fiscal year1 Form 1120. Also, Firm did not direct Taxpayer to file the applicable annual statement regarding the alternative cost method and development1 with the Director or attach a copy of such statement to its fiscal Year2 Form 1120.

Taxpayer's internal tax expert, Person1, relied on Firm to direct her regarding the filings required under Rev. Proc. 92-29, 1992-1 C.B. 748. Person1's expertise was auditing and financial accounting and not federal tax law. In May of fiscal Year2, Person1 asked Firm if Taxpayer needed to file any documents required under Rev. Proc. 92-29, 1992-1 C.B. 748, regarding Development1 for fiscal Year2. Unfortunately, Person1 died unexpectantly before Firm contacted her about the inquiry. It appears Firm did not respond to Person1's May fiscal Year2 inquiry at any time. Taxpayer hired Person2 to replace Person1. Firm prepared Taxpayer's fiscal Year2 Form 1120 using the alternative cost method for Development1, but did not direct Taxpayer to file the annual statement required under the revenue procedure. Person2 was unaware of the requirement and only compared the fiscal Year2 Form 1120 to the fiscal Year1 form 1120 in analyzing any need for changes to the fiscal Year2 Form 1120.

In August of fiscal Year3, Taxpayer hired a new tax firm to prepare its tax returns. The new firm noted the failure to timely file the election to use the alternative cost method for Development1 and informed Taxpayer of the need to file this request.

LAW AND ANALYSIS

Sections 301.9100-1 through 301.9100-3 set forth the standards that the Commissioner will use to determine whether to grant an extension of time to make a regulatory election. Section 301.9100-2 provides an automatic extension of time to make certain statutory elections. Section 301.9100-3 provides extensions of time for making regulatory elections that do not meet the requirements of 301.9100-2. Section 301.9100-3(a) provides that requests for relief under 301.9100-3 will be granted when the taxpayer provides evidence 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) enumerates five circumstances under which a taxpayer is deemed to have acted reasonably and in good faith. 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 if the taxpayer failed to make the election because, after exercising reasonable diligence (taking into account the taxpayer's experience and the complexity of the return or issue), the taxpayer was

unaware of the necessity for the election.

Section 301.9100-3(b)(3) provides that a taxpayer is deemed 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;

(ii) Was informed in all material respects 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 due date for making the election that make the election advantageous to a taxpayer, the Service will not ordinarily grant relief. In such a case, the Service will grant relief only when the taxpayer provides strong proof that the taxpayer's decision to seek relief did not involve hindsight.

Section 301.9100-3(c)(1) provides, in part, 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) also provides, in part, 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 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 301.9100-3.

Section 301.9100-3(c)(2) provides that the interests of the government are deemed to be prejudiced except in unusual and compelling circumstances if the accounting method regulatory election for which relief is requested --

(i) Is subject to the procedure described in 1.446-1(e)(3)(i);

(ii) Requires an adjustment under 481(a) (or would require an adjustment under 481(a) if the taxpayer changed to the method of accounting for which relief is requested in a taxable year subsequent to the taxable year the election should have been made);

(iii) Would permit a change from an impermissible method of accounting that is an issue under consideration by examination, an appeals office, or a federal court and the change would provide a more favorable method or more favorable terms and conditions than if the change were made as part of an examination; or

(iv) Provides a more favorable method of accounting or more favorable terms and conditions if the election is made by a certain date or taxable year.

Based on our analysis of the facts, the taxpayer in the present case acted reasonably and in good faith, and granting relief will not prejudice the interests of the government. Therefore, the requirements of 301.9100-3 have been met. Furthermore, the time for making elections under Rev. Proc. 92-29 is not expressly prescribed by statute and Taxpayer's request for relief was filed within such time considered reasonable under the circumstances.

Taxpayer failed to timely file an election to use the alternative cost method regarding Development1 because Taxpayer reasonably relied on the advice of a qualified tax professionals who failed to make known to Taxpayer the requirement to make the election under Rev. Proc. 92-29 regarding Development1. Taxpayer always intended to use the alternative cost method under Rev. Proc. 92-29 for Development1 and represents that it in fact used the method to compute its basis in the properties sold in fiscal Year1. Taxpayer is not seeking to alter a return position for which an accuracy-related penalty has been or could be imposed under 6662. Taxpayer did not use hindsight in requesting relief. No facts have changed since the due date for making the election that make the election advantageous to Taxpayer. Finally, Taxpayer acted promptly in filing its request for relief, before the Service discovered the failure to make the regulatory election. Therefore, Taxpayer acted reasonably and in good faith.

Furthermore, granting relief will not result in Taxpayer having a lower tax liability in the aggregate for all taxable years affected by the election than Taxpayer would have had if the election had been timely made, nor will any closed taxable years be affected. Additionally, none of the circumstances listed in 301.9100-3(c)(2), which describes conditions under which the interests of the government are generally deemed to be prejudiced with respect to accounting method regulatory elections, are present in this case. Therefore, the interests of the government will not be prejudiced by granting the requested relief.

Because Taxpayer acted reasonably and in good faith, and because the interests of the government will not be prejudiced if the request for relief is granted, Taxpayer is granted an extension of 45 days from the date of this ruling to file with the Director a request to use the alternative cost method under Rev. Proc. 92-29.

Taxpayer represents that it will comply with the other requirements of Rev. Proc. 92-29, including any consent to extend the period of limitation required by §7, any annual statement required by §8, and any supplemental statement required by §9 for all applicable fiscal years after fiscal Year1. Please note that any correspondence or documents required under Rev. Proc. 92-29, including the required annual statements for fiscal Year2 and Year3, should be filed directly with the Director.

The ruling contained in this letter is based upon facts and representations submitted by Taxpayer. Except as specifically addressed herein, no opinion is expressed regarding the tax treatment of the subject transactions under the provisions of any other sections of the Code or regulations that may be applicable thereto. This ruling is directed only to the taxpayer requesting it. Section 6110(k)(3) of the Code provides that a private letter ruling may not be used or cited as precedent.

In accordance with the power of attorney on file in our office, a copy of this letter is being sent to your representative. A copy of this letter ruling should be attached to the returns, schedules, and forms filed in connection with making the election under Rev. Proc. 92-29, 1992-1 C.B. 748 when such forms are filed.

Sincerely yours,

Thomas D. Moffitt
Chief, Branch 2
Office of Associate Chief Counsel
(Income Tax & Accounting)

cc:

[1] Under the new structure of the Internal Revenue Service, a developer must now file its request with the Director, as defined in section 1 of Rev. Proc. 2008-1, 2008-1 I.R.B. 1.