Internal Revenue Service

Number: **201140013**
Release Date: 10/7/2011

Index Number: 168.29-02

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:B04
PLR-116677-11

Date:
July 07, 2011

Legend

Taxpayer =

Exempt Organization =

LLP1 =

CPA firm =

Date 1 =

Year 1 =

Dear :

This letter responds to Taxpayer's request for a private letter ruling requesting an extension of time to make an election under § 168(h)(6)(F)(ii) of the Internal Revenue Code.

Facts

Taxpayer is a for-profit corporation that uses the accrual method of accounting and has the calendar year as its taxable year. Taxpayer is wholly owned by Exempt Organization, an organization described in § 501(c)(3). Because Exempt Organization owns more than 50 percent in value of the stock of Taxpayer, Taxpayer is a "tax-exempt controlled entity" within the meaning of § 168(h)(6)(F)(iii).

Taxpayer is the sole general partner of LLP1, a limited liability partnership that was formed to acquire, rehabilitate, own, and operate apartment housing in a manner allowing low income housing tax credits to be available under § 42, which are, along with other tax attributes, allocated among the partners. The partnership agreement provides that Taxpayer will elect to be treated as a taxable entity under § 168(h)(6)(F)(ii).

You relied on CPA firm to prepare the § 168(h)(6)(F)(ii) election, as required by the partnership agreement. The CPA firm failed to scrutinize the partnership agreement; had it done so, it would have timely filed a federal income tax return for Taxpayer with the § 168(h)(6)(F)(ii) election. Affidavits and other materials that Taxpayer submitted indicate that, at all times, it intended to make the § 168(h)(6)(F)(ii) election. Upon discovering the failure to make the election, Taxpayer promptly sought an extension of time in which to file the election.

Applicable Law

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 by § 168(h).

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 person who is not a tax-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 a tax-exempt use property. 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. 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 Regulations on Procedure and Administration, an election under § 168(h)(6)(F)(ii) must be made by the due date of the tax return (including extensions) for the first taxable year for which the election is to be effective.

Section 301.9100-1(c) provides that the Internal Revenue Service 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. Because the due date of the § 168(h)(6)(F)(ii) election is prescribed in § 301.9100-7T, the 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 requests for extensions of time for regulatory elections

(other than automatic extensions 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 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 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 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) 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 information that Taxpayer submitted indicates that it intended from the outset to make the § 168(h)(6)(F)(ii) election, that its failure to make the election on a timely filed original return was inadvertent, and that Taxpayer is not using hindsight in requesting relief. Moreover, Taxpayer requested relief before the failure to make the election was discovered by the Service. Finally, Taxpayer acted reasonably and in good faith, and the interests of the government will not be prejudiced by the granting of relief under § 301.9100-3.

Conclusion

Based strictly on the information and representations made, we grant Taxpayer's request for relief under § 301.9100-3. Accordingly, Taxpayer is granted an extension of time of 30 days from the date of this letter ruling to make the election under § 168(h)(6)(F)(ii).

The rulings contained in this letter are based upon information and representations submitted by the taxpayer and accompanied by a penalty of perjury statement executed by an appropriate party. While this office has not verified any of the material submitted in support of the request for rulings, it is subject to verification on examination.

Except as expressly provided herein, we do not express or imply an opinion concerning the tax consequences of any aspect of any transaction or item discussed or referenced in this 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,

Michael J. Montemurro
Branch Chief, Branch 4
Office of Associate Chief Counsel
(Income Tax & Accounting)

cc: