Internal Revenue Service

Number: **201340006**
Release Date: 10/4/2013

Index Number: 9100.00-00, 9100.22-00, 168.00-00

Department of the Treasury
Washington, DC 20224

[Third Party Communication:
Date of Communication: Month DD, YYYY]

Person To Contact:
, ID No.

Telephone Number:

Refer Reply To:
CC:ITA:B05
PLR-123060-13

Date:
June 28, 2013

Legend

Taxpayer	=
Organization	=
General Partner	=
Partnership A	=
Partnership B	=
Investor	=
Co-Investor	=
w percent	=
x percent	=
y percent	=
z percent	=
Date 1	=
Date 2	=
Date 3	=
Date 4	=
Date 5	=
Section X	=
Tax Year 1	=
Project 1	=
Project 2	=
CPA	=

Dear :

This letter is in response to a request for a private letter ruling dated May 6, 2013, submitted on your behalf by your authorized representative. Specifically, you have

requested an extension of time under §§ 301.9100-1and 301.9100-3 of the Procedure and Administration Regulations for Taxpayer to make an election under § 168(h)(6)(F)(ii) of the Internal Revenue Code ("the 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 Organization, an exempt organization as described in § 501(c)(3) of the Code.

Taxpayer is a w percent member of General Partner, the general partner of both Partnership A and Partnership B, which were formed to develop, construct, own and operate apartment housing in a manner allowing low income housing tax credits to be available under § 42, which are allocated among the partners. General Partner owns a x percent interest in each of Partnership A and Partnership B. For Tax Year 1, Investor and Co-Investor were the only limited partners in Partnership A and Partnership B and owned y percent and z percent, respectively, in each of Partnership A and Partnership B. Partnership A constructed a low income housing project, Project 1, which was placed in service in Date 2. Partnership B constructed a low income housing project, Project 2, which was placed in service in Date 3.

According to your submission, because Organization owns more than percent of the value of the stock of Taxpayer, Taxpayer is a "tax-exempt controlled entity" within the meaning of § 168(h)(6)(F)(iii) of the Code. Taxpayer was organized in part with the intent that it would serve as the general partner in various housing projects and that it would make the election under § 168(h)(6)(F)(ii) of the Code to not be treated as a tax-exempt entity (the "Election").

Section X of the Amended and Restated Agreement of Partnership A dated Date 1, and Section X of the Amended and Restated Agreement of Partnership B dated Date 5, each require that, "[Taxpayer] has made, or will make, the election described in Section 168(h)(6)(F)(ii) of the Code (the requirements of which are set forth in Treasury Regulation § 301.9100-7T) on its tax return…."

Taxpayer represents that it relied on CPA to prepare the Election as it intended. Due to an oversight, CPA did not include the Election in the timely filed Federal income tax return for the Taxpayer. However, Partnership A's Tax Year 1 Form 1065 and Partnership B's Tax Year 1 Form 1065 were timely filed on the basis that the Election had been made so that no portion of the properties would be treated as "tax-exempt use" property for depreciation purposes. In addition, the Election was included in a timely filed Form 990 for Organization for its fiscal year ended Date 4.

LAW

Section 167(a) of the Code 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 in § 168(h).

Section 168(h)(1)(A) provides generally that "tax exempt use property" means that portion of any tangible property (other than certain nonresidential real property) which is leased to a tax-exempt entity. 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 is treated as 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)(iii)(I), a "tax-exempt controlled entity" means any corporation (without regard to that subparagraph and § 168(h)(2)(E)) 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). Section 168(h)(6)(E) applies similar rules in the case of tiered partnerships and other entities. Section 168(h)(2)(A)(i) provides that, for purposes of § 168(h), a "tax exempt entity" includes certain governmental entities. Because Taxpayer represents that Organization is a tax-exempt entity within the meaning of § 168(h), and because Organization owns more than percent in value of the stock of Taxpayer, Taxpayer is a "tax-exempt controlled entity" within the meaning of § 168(h)(6)(F)(iii).

Under § 168(h)(6)(F)(ii), a tax-exempt controlled entity can elect not to 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), the § 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 301.9100-1(c) 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. Because the due date of the § 168(h)(6)(F)(ii) election is prescribed in § 301.9100-7T, the election is a regulatory election.

Section 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 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 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)(1) provides that the 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.

Section 301.9100-3(c)(1)(i). In addition, 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 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 this section. Section 301.9100-3(c)(1)(ii).

ANALYSIS

The information submitted indicate that Taxpayer at all times intended to make the Election, that the Amended and Restated Agreement of Partnership A dated Date 1, and the Amended and Restated Agreement of Partnership B dated Date 5 both required that Taxpayer make the Election; that Taxpayer reasonably relied on CPA, a qualified tax professional, to make the Election, and Taxpayer represents that the qualified tax professional inadvertently failed to make the Election when it filed Taxpayer's Form 1120 for Tax Year 1. Taxpayer further represents that it has requested relief before the failure to make the Election was discovered by the Service. In addition, there is no evidence that Taxpayer is using hindsight in requesting relief. We conclude, therefore, that Taxpayer has acted reasonably and in good faith.

Furthermore, based on the facts presented and the representations made, Taxpayer will not have a lower tax liability for all tax years affected by the Election than it would have had if the Election had been timely made and the taxable year in which the Election should have been made is not closed under § 6501. Therefore, the interests of the Government will not be prejudiced by the granting of relief.

CONCLUSION

Accordingly, we conclude that the requirements of § 301.9100-3 have been met and Taxpayer is granted an extension of time of 60 days from the date of this letter to file an amended return for Tax Year 1, the year for which the Taxpayer is making the Election under § 168(h)(6)(F)(ii). Taxpayer must attach the aforementioned Election and the information set forth in § 301.9100-7T(a)(3) to the amended return. Taxpayer also must attach a copy of this letter to the amended return. Pursuant to § 301.9100-7T(a)(3)(ii), a copy of the Election statement also should be attached to the Federal income tax returns of each of the tax-exempt shareholders or beneficiaries of Taxpayer.

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. Further, we express no opinion concerning the assessment of any interest, additions to tax, additional amounts or penalties for failure to file a timely income tax return with respect to any taxable year.

The ruling in this letter is based upon the information and representations submitted by the Taxpayer and accompanied by a penalty of perjury statement executed by an

appropriate party. Although this office has not verified any of the material submitted in support of the request for the ruling, it is subject to verification on examination.

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.

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

In accordance with the Power of Attorney on file with this office, a copy of this letter is being sent to your authorized representatives.

Sincerely,

R. Matthew Kelley
Assistant to the Branch Chief, Branch 5
Office of Chief Counsel
(Income Tax & Accounting)

Enclosure

cc: