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:B05
PLR-120625-13

Date:
August 26, 2013

Legend

Taxpayer	=
State A	=
General Partner 1	=
Limited Partner	=
General Partner 2	=
Fund	=
LP	=
Holdings LP	=
Holdings GP	=
X percent	=
Projects	=
Project 1	=
Project 2	=
Tax Year 1	=
Tax Year 2	=
Tax Year 3	=
Date 1	=
Date 2	=
$u	=
$v	=
$w	=
$x	=
$y	=

$z =
Former Accountant =
Chief Financial Officer =

Counsel =

Dear :

This letter is in response to a request for a private letter ruling dated April 30, 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 (Code).

FACTS

Taxpayer is a limited partnership organized under the laws of State A that has made an election under § 301.7701-3 of the Income Tax Regulations to be treated as an association taxable as a corporation for Federal income tax purposes. Taxpayer uses an accrual method as its overall method of accounting and has a calendar year as its annual accounting period.

General Partner 1 owns a non-economic general partner equity interest in Taxpayer, and Limited Partner owns a 100 percent limited partner equity interest in Taxpayer. In turn, Limited Partner is a limited partnership organized under the laws of State A. General Partner 2 owns a non-economic general partner equity interest in Limited Partner, and 100 percent of the limited partnership interests in Limited Partner are owned by domestic tax-exempt entities as defined in § 168(h)(2) of the Code. [1] Consequently, more than 50 percent of the value of the interests in Taxpayer are held by domestic tax-exempt entities within the meaning of § 168(h)(2). A list of these tax-exempt entities has been provided by Taxpayer's representative.

Taxpayer, in turn, owns a limited partnership interest in Fund. Fund owns a limited partner interest in LP, which owns substantially all of the limited partner interests in Holdings LP and all of the general partner interest in Holdings LP through Holdings GP,

[1] In a supplemental submission dated July 11, 2013, Taxpayer's representative explained that Taxpayer is a State A limited partnership that has elected to be taxed as a corporation for Federal income tax purposes. The limited partnership form was adopted by the sponsor of Taxpayer for legal governance purposes and under such circumstances a general partner does not need an economic interest. Limited Partner, in turn, is a State A limited partnership taxed as a partnership for Federal income tax purposes. As such, Limited Partner is owned by multiple tax-exempt limited partners, and, as a result, there is no reason for the general partner in Limited Partner to have an economic interest in Limited Partner.

a limited liability company wholly owned by Taxpayer that is disregarded for Federal income tax purposes. Each of Limited Partner, Fund, LP and Holdings LP is a State A limited partnership that is treated as a partnership for Federal income tax purposes.

Holdings LP, through its subsidiaries, is engaged in the business of developing, constructing, owning and operating Projects. Holdings LP began operating Projects in Tax Year 2, when it acquired Project 1 and completed construction of Project 2.

The United States provides incentives, including tax credits and accelerated depreciation, for Projects located in the United States that were placed in service between 2009 and December 31, 2012, including a "cash grant in lieu of tax credits" ("Cash Grant") pursuant to § 1603 of Part B of the American Recovery and Reinvestment Act of 2009 ("ARRA"), Pub. L. No. 111-5, 123 Stat. 115, 516 (February 19, 2009). In addition, certain qualifying Projects are eligible for accelerated depreciation over a 5-year period under the Modified Accelerated Cost Recovery System ("MACRS") in § 168 of the Code.

Holdings LP applied for a Cash Grant for Projects it placed in service on or before December 31, 2012. The eligibility rules for the Cash Grant prohibit receipt of a Cash Grant by a disqualified person, and require repayment of part or all of a Cash Grant if a Project is transferred to a disqualified person during the 5-year period following the date the Project was placed in service. For purposes of a Cash Grant, disqualified persons include governmental entities, organizations exempt from tax under § 501(a), certain cooperatives referred to in § 54(j)(4), and a partnership or other passthrough entity if any direct or indirect partner of the entity is a disqualified person. However, a taxable corporation owned by one or more disqualified persons (including tax-exempt entities) is eligible to receive Cash Grants. Accordingly, to permit Holdings LP to apply for and receive Cash Grants, each Tax-Exempt Investor that was participating in the Fund had to be "blocked," that is, it had to make its investment through an entity treated as a corporation for Federal income tax purposes.

According to your submission, Holdings LP lacked sufficient taxable income to use the above tax incentives, including MACRS depreciation, and therefore sought independent third party investors for its Projects that could use the tax incentives and provide a portion of the equity financing. Consequently, on Date 1, an unrelated third party investor acquired an equity interest in Project 1. The agreements between Holdings LP and the investor required Holdings LP to represent that no portion of Project 1 is subject to the alternative depreciation system within the meaning of § 168(g) or is "tax-exempt use" property within the meaning of § 168(h). On Date 2, Holdings LP sold Project 2 to the investor in a "sale-leaseback" transaction. Holdings LP represented to the investor that Project 2 was not and would not become tax-exempt use property within the meaning of § 168(h)(1) so that the investor could depreciate Project 2 using 5-year, 200 percent declining balance MACRS depreciation. Holdings LP agreed to indemnify the investor for any harm suffered if the representations were not true and correct.

Your submission provides that at the time Holdings LP made the above representations with respect to the sale-leaseback of Project 2, Holdings LP believed these representations were true and correct because it had confirmed that all investors in Holdings LP that were tax-exempt entities owned their interests through taxable corporations. However, Holdings LP represents that it was not aware that a taxable corporation such as Taxpayer could be treated as a tax-exempt entity through the tax-exempt controlled entity rules under § 168(h), and neither its outside counsel, nor Former Accountant, who prepared its Federal income tax returns for the tax years in question, informed Holdings LP of this possibility. Consistent with the representations it made to the investor, Holdings LP claimed depreciation deductions for Project 1 using 5-year MACRS depreciation. Taxpayer, owner of a beneficial interest in Holdings LP, was allocated its share of the 5-year MACRS Depreciation.

Taxpayer engaged a different accounting firm to prepare the Federal income tax returns for Tax Years 1, 2, and 3 for Limited Partner, Taxpayer, Fund, and LP, the entities through which the tax-exempt investors held their beneficial interests in Holdings LP. Each of these entities was formed for the sole purpose of making an investment, directly or indirectly, in Holdings LP. Taxpayer represents that it relied on its accountants to make any tax elections (or to advise it to make such elections) that would have affected Taxpayer or Holdings LP. In addition, Taxpayer relied on its outside law firm to provide tax and legal advice with respect to Taxpayer's investment in the Fund and thereby in Holdings LP. However, neither Former Accountant nor its legal counsel informed Taxpayer about the need to make an election under § 168(h)(6)(F)(ii) pursuant to which a "tax-exempt controlled entity" within the meaning of § 168(h)(6)(F)(iii) can elect not to be treated as a tax-exempt entity ("the Election"). Consequently, no Election was made.

Taxpayer made distributions to its owners in Tax Years 2 and 3. In Tax Year 2, Taxpayer reported taxable income of $u, paid Federal income tax of $v, and paid a dividend of $w. In Tax Year 3, Taxpayer reported taxable income of $x, paid Federal income tax of $y, and paid a dividend of $z. Taxpayer was capitalized with all equity. None of the tax-exempt investors in Limited Partner has disposed of its interest in Taxpayer since its formation.

In February 2013, Holdings LP's counsel, Counsel, discovered that Taxpayer was a tax-exempt controlled entity within the meaning of § 168(h)(6)(F)(iii). According to your submission, Holdings LP promptly contacted Fund and its owners, which made inquiries and determined that the Election had not been made for any taxable year for which a return had been prepared. As soon as it discovered that it should have made the Election, Taxpayer contacted its advisors and began preparation for this private letter ruling request.

Taxpayer makes the following specific representations: (1) Taxpayer filed its Federal income tax returns for Tax Years 1, 2, and 3; (2) No Federal income tax returns of

Taxpayer are under examination by a district director or being considered by an appeals officer or a federal court; (3) Permitting Taxpayer to make the Election effective for its Tax Year 1 taxable year would not result in Taxpayer having a lower tax liability in the aggregate for all 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); and (4) The period of limitations on assessment under § 6501(a) has not expired with respect to any of Taxpayer's Federal income tax return. Taxpayer has submitted affidavits from Chief Financial Officer, Former Accountant, and Counsel in support for the position that Taxpayer acted reasonably and in good faith, and that granting relief will not prejudice the interests of the Government.

As a result of the inadvertent failure to make the Election, you have filed this ruling request for an extension of time for Taxpayer to amend its Tax Year 1 United States Federal income tax return to make the Election.

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)(2)(A)(i) provides that, for purposes of § 168(h), a "tax exempt entity" includes certain governmental entities.

Because Taxpayer represents that tax-exempt entities within the meaning of § 168(h), own more than 50 percent in value of the interests in Taxpayer, Taxpayer is a "tax-exempt controlled entity" within the meaning of § 168(h)(6)(F)(iii).

Under § 168(h)(6)(F)(ii)(I), a tax-exempt controlled entity can elect not to be treated as a tax-exempt entity. Under § 168(h)(6)(F)(ii)(I)(II), if this election is made, any gain

recognized by a tax-exempt entity on any disposition of an interest in such entity (and any dividend or interest received or accrued by a tax-exempt entity from such tax-exempt controlled entity) shall be treated as unrelated business taxable income for purposes of § 511 to the extent properly allocable to the income of the income of the tax-exempt controlled entity which was not subject to tax under this chapter. 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 (taking into account the time value of money). 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 and affidavits submitted by Taxpayer indicates that Taxpayer and Holdings LP requested relief before the failure to make the Election was discovered by the Service. In addition, once it recognized that the Election had not been made, Holdings LP and Taxpayer immediately contacted its advisors to remedy this failure by filing this request for an extension of time to make the Election. In addition, the representations and affidavits indicate that Taxpayer and Holdings LP were aware that the investors were tax-exempt entities but thought that a taxable corporation was not a tax-exempt entity and thus reasonably relied on the advice of qualified tax professionals. However, these qualified tax professionals failed to advise them that even a taxable corporation could be treated as a tax-exempt controlled entity under § 168(h)(6)(F)(iii), and that Taxpayer should make the Election. In addition, there is no evidence that Taxpayer is using hindsight in requesting relief. We conclude, therefore, that Taxpayer 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 taxable 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 for Tax Year 1. 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, partners, 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. In particular, this letter ruling does not address whether any particular transaction referred to in this letter is a sale, financing arrangement, or lease for Federal income tax purposes. 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,

Jeffrey T. Rodrick
Senior Technician Reviewer, Branch 5
Office of Chief Counsel
(Income Tax & Accounting)

Enclosures