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Date:
January 16, 2015

LEGEND:

Taxpayer =
Parent =
LLC =
Date 1 =
Date 2 =
Year 1 =
Year 2 =
Year 3 =
Year 4 =
State =
Project =

Firm =
Individual =

Dear :

This is in reply Taxpayer's request for permission to make a late election under § 168(h)(6)(F)(ii) of the Internal Revenue Code, under authority contained in § 301.9100-3 of the Procedure and Administration Regulations pertaining to late regulatory elections.

FACTS

Taxpayer was formed on Date 1 under the laws of State and is a C corporation for Federal income tax purposes. Taxpayer is wholly owned by Parent, a tax-exempt organization under § 501(c)(3).

On Date 2, LLC was formed for the purpose of acquiring, rehabilitating, owning, improving, financing, leasing, managing, and operating Project. Taxpayer represents that Project is a certified historic structure within the meaning of § 47. Taxpayer is the managing member and tax matters partners of LLC, in which it has a 55% interest.

In section 5.3(g) of LLC's Operating Agreement, Taxpayer agreed not to allow Project to be used in a manner that would cause the Project to be treated as tax-exempt use property under § 168(h).

Taxpayer engaged Firm to prepare its Form 1120 for Year 1. At all times since Year 1, the partner of Firm in charge of Taxpayer's account has been Individual, a licensed Certified Public Accountant. Project was placed in service in Year 2. Due to the inadvertence of Individual, Taxpayer did not make an election with its Year 2 return to not be treated as a tax-exempt controlled entity under § 168(h)(6)(F)(ii). Employees of Firm continued to prepare the Taxpayer's Form 1120 for Year 2 through Year 3.

In Year 4, Taxpayer discovered that it had not made the election under § 168(h)(6)(F)(ii), as it intended. Taxpayer represents that all of its Federal income tax returns subsequent to Year 1 have been filed consistent with a § 168(h)(6)(F)(ii) election having been timely made.

APPLICABLE LAW

Section 47(a) provides a rehabilitation credit for qualified rehabilitation expenditures with respect to any certified historic structure.

Section 47(c)(2)(B)(v) states that any expenditure in connection with the rehabilitation of a building which is allocable to the portion of such property which is tax-exempt use property as defined in § 168(h) is not included in qualified rehabilitation expenditures.

Section 168(h) defines tax-exempt use property. Under § 168(h)(6)(A), property may be tax-exempt use property if it is held by a tax-exempt entity in a partnership that has tax-exempt and non tax-exempt partners and if the partnership allocations are not qualified allocations as defined by § 168(h)(6)(B).

Section 168(h)(6)(F) states that a tax-exempt controlled entity is treated as a tax-exempt entity unless under § 168(h)(6)(F)(ii) the tax exempt controlled entity makes an election 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.

Section 168(h)(6)(F)(iii) describes a tax-exempt controlled entity as any corporation, which would not otherwise be considered a tax-exempt entity, where 50% or more of the stock is owned by one or more tax-exempt entities.

Section 301.9100-1(b) of the regulations defines the term regulatory election as including any election the due date for which is prescribed by a regulation. Section 301.9100-7T(a)(2)(i) requires an election under § 168(h)(6)(F)(ii) to be made by the due date of the tax return for the first taxable year for which the election is to be effective. Thus, the § 168(h)(6)(F)(ii) election is a regulatory election.

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 301.9100-3(a) provides that requests for extension of time for regulatory elections will be granted when the taxpayer provides evidence establishing 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) provides that, except as provided in paragraphs (b)(3)(i) through (iii) of § 301.9100-3, a taxpayer is deemed to have acted reasonably and in good faith if the taxpayer (i) requests relief under § 301.9100-3 before the failure to make the regulatory election is discovered by the Internal Revenue Service ("IRS"); (ii) failed to make the election because of intervening events beyond the taxpayer's control; (iii) 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; (iv) reasonably relied on the written advice of the IRS; or (v) reasonably relied on a qualified tax professional, including a tax professional employed by the taxpayer, and the tax professional failed to make, or advise the taxpayer to make, 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 and the new position requires or permits a regulatory election for which relief is requested; (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.

Section 301.9100-3(c)(1) states that the Commissioner will grant a reasonable extension of time to make a 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 the relief would result in the 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). Similarly, if the tax consequences of more than one taxpayer are affected by the election, the Government's interests are prejudiced if extending the time for making the election may result in the affected taxpayers, in the aggregate, having a lower tax liability than if the election had been timely made. Section 301.9100-3(c)(1)(ii) provides that the interest 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 close by the period of limitations on assessment under § 6501(a) before the taxpayer's receipt of a ruling granting relief under this section.

ANALYSIS

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

Taxpayer represents that it intended to timely make the § 168(h)(6)(F)(ii) election and that the failure to properly make the election timely was due to inadvertence of Individual. Based on this representation, we conclude that Taxpayer acted reasonably and in good faith, within the meaning of § 301.9100-3(b)(1). Furthermore, Taxpayer represents that it has consistently filed its Federal income tax returns as if the election had been timely made, and that no relevant facts have changed since the due date for the election that make the election more advantageous for the Taxpayer. Based on this representation, we conclude that taxpayer is not using hindsight in requesting permission to make a late election.

Finally, although the period of limitations under § 6501 for Taxpayer's Year 2 return is closed, we conclude that the interests of the government will not be prejudiced by the granting of relief because, as stated above, Taxpayer represents that it has consistently filed its Federal income tax returns after Year 2 as if the election had been timely made.

Accordingly, we conclude that the requirements for relief under § 301.9100-3 are satisfied. Taxpayer is treated as if it made the § 168(h)(6)(F)(ii) election with the return it filed for Year 2, provided that Taxpayer attaches a copy of this letter to the next return it files. If Taxpayer files electronically it may satisfy this requirement by attaching a statement to the return that provides the date and control number of this letter ruling. In addition, the letter ruling (or statement) should be attached for all subsequent returns (and amended returns) for all taxable years to which this ruling is relevant.

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. This ruling is directed only to the taxpayer requesting it. Section 6110(k)(3) of 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.

The ruling contained in this letter is 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.

Sincerely,

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