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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:
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PLR-118536-16

Date:
December 05, 2016

Re: Request for an Extension of Time to Make the Election Not to Apply § 168(k)(4) to Round 2 Extension Property and Request to Revoke Election to Apply § 168(k)(4) to Round 3 Extension Property

Legend

Taxpayer =

Date 1 =

Date 2 =

Date 3 =

A =

B =

C =

D =

E =

F =

G =

I =

Dear :

This letter responds to a letter dated June 9, 2016, and supplemental correspondence, requesting (i) an extension of time pursuant to § 301.9100-3 of the Procedure and Administration Regulations to make the election under § 168(k)(4)(I)(ii) of the Internal Revenue Code not to apply § 168(k)(4) to round 2 extension property, and (ii) to revoke the election under § 168(k)(4)(J)(iii) to apply § 168(k)(4) to round 3 extension property.

All references in this letter ruling to § 168(k) are treated as a reference to § 168(k) as in effect on the day before the date of the enactment of the Protecting Americans from Tax Hikes Act of 2015 (PATH Act), enacted as part of the Consolidated Appropriations Act, 2016, Division Q, Pub. L. 114-113, 129 Stat. 2242 (December 18, 2015).

FACTS

Taxpayer represents that the facts are as follows:

Taxpayer is the common parent of an affiliated group of corporations as defined under § 1504. The affiliated group of corporations files a consolidated federal income tax return on a calendar-year basis.

Taxpayer made the election to apply § 168(k)(4) (the § 168(k)(4) election) on its timely filed consolidated federal income tax return for its first taxable year ending after March 31, 2008, which is the taxable year ended Date 1 (the A taxable year). On its timely filed consolidated federal income tax returns for the subsequent taxable years through the D taxable year, Taxpayer applied the § 168(k)(4) election to eligible qualified property, extension property, round 2 extension property, and round 3 extension property. Round 2 extension property was placed in service during the B and C taxable years, and round 3 extension property was placed in service during the D taxable year.

Taxpayer's former Director of Tax (the "former Tax Director") was responsible for the preparation of the A through D returns, including preparing the analyses associated with the application of § 168(k)(4). No outside tax professional was engaged by Taxpayer for the preparation of its A through D returns. The former Tax Director departed Taxpayer in F.

After such departure, Taxpayer engaged G to provide tax advice and assistance with the IRS examination of the consolidated federal income tax returns for the E, B, C, and D taxable years. In reviewing Taxpayer's consolidated federal income tax returns with respect to § 168(k)(4), G, if it had been asked to provide advice with respect to § 168(k)(4), would have advised Taxpayer not to apply § 168(k)(4) for the B, C, and D

taxable years. Instead, G would have advised Taxpayer to claim the additional first year depreciation for those years.

G informed Taxpayer that throughout the years Taxpayer applied § 168(k)(4), § 168(k)(4) would not have resulted in greater tax savings for Taxpayer in comparison to deducting additional first year depreciation. Based upon facts known when each return was timely filed, applying § 168(k)(4) was not an economically prudent decision for Taxpayer for the B, C, and D taxable years. Further, no facts have occurred subsequent to the due date of the consolidated federal income tax return for the B taxable year that now makes it more advantageous for Taxpayer not to apply § 168(k)(4) to round 2 extension property and round 3 extension property.

Because the former Tax Director was no longer employed by Taxpayer during G's analysis of § 168(k)(4), current employees of Taxpayer reviewed existing company documentation and conducted discussions with members of the current and former executive management concerning the decision to make the § 168(k)(4) election. As a result, it was determined that the former Tax Director did an incomplete analysis associated with the application of § 168(k)(4). If a complete analysis was presented to the executive management team, they would have instructed the former Tax Director not to make the § 168(k)(4) election.

The period of limitation on assessment for Taxpayer's E, B, and C taxable years has been extended, by agreement under § 6501(c)(4), to Date 2, and the period of limitation on assessment for Taxpayer's D taxable year is open under § 6501(a) to Date 3. Both of these dates are after the date of this letter ruling.

RULINGS REQUESTED

Taxpayer requests (i) an extension of time pursuant to § 301.9100-3 to make the election under § 168(k)(4)(I)(ii) not to apply § 168(k)(4) to round 2 extension property, and (ii) to revoke the election under § 168(k)(4)(J)(iii) to apply § 168(k)(4) to round 3 extension property.

LAW AND ANALYSIS

Prior to amendment by the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010, Pub. L. No. 111-312, 124 Stat. 3296 (December 17, 2010) (TRUIRJCA), § 168(k)(4) allowed a corporation or an S corporation to elect not to claim the additional first year depreciation deduction allowable under § 168(k) for eligible qualified property or extension property and instead increase the business credit limitation under § 38(c) and the alternative minimum tax (AMT) credit limitation under § 53(c). As a result, a corporation or S corporation was able to claim unused credits from taxable years beginning before January 1, 2006, that were allocable to research expenditures or AMT liabilities, and accelerate such credits as either refundable credits in the case of a C corporation or credits against the §

1374(a) tax in the case of an S corporation. With the exception of revised dates, eligible qualified property or extension property is property eligible for the additional first year depreciation deduction under § 168(k).

Section 401(c) of TRUIRJCA amended § 168(k)(4) by adding § 168(k)(4)(I) to the Code. Section 168(k)(4)(I) applied to property placed in service generally after 2010 and before 2013 (round 2 extension property). Section 331(c) of the American Taxpayer Relief Act of 2012, Pub. L. No. 112-240, 126 Stat. 2313 (January 2, 2013) (ATRA), amended § 168(k)(4) by adding § 168(k)(4)(J) to the Code. Section 168(k)(4)(J) applied to property placed in service generally after 2012 and before 2014 (round 3 extension property). With the exception of revised dates, round 2 extension property and round 3 extension property is property eligible for the additional first year depreciation deduction under § 168(k). Pursuant to § 168(k)(4)(I)(i) and (J)(i), § 168(k)(4) increased only the AMT credit limitation under § 53(c) for round 2 extension property and round 3 extension property. As a result, § 168(k)(4) allowed a C corporation or an S corporation to elect not to claim the additional first year depreciation deduction allowable under § 168(k) for round 2 extension property and round 3 extension property and instead increase the AMT credit limitation under § 53(c). Accordingly, a C corporation or S corporation was able to claim unused credits from taxable years beginning before January 1, 2006, that were allocable to AMT liabilities and accelerate such credits as either refundable credits in the case of a C corporation or credits against the § 1374(a) tax in the case of an S corporation.

Under § 168(k)(4)(A), a § 168(k)(4) election applies to a corporation's first taxable year ending after March 31, 2008, and to any subsequent taxable year. However, under § 168(k)(4)(I)(ii)(I), a corporation that made the § 168(k)(4) election for its first taxable year ending after March 31, 2008, or that made the § 168(k)(4) election under § 168(k)(4)(H)(ii) for extension property for its first taxable year ending after December 31, 2008, may elect not to have the § 168(k)(4) election apply to round 2 extension property.

If a corporation does not have an election in effect under § 168(k)(4) for round 2 extension property, § 168(k)(4)(J)(iii) allows the corporation to elect to apply § 168(k)(4) to round 3 extension property.

Section 168(k)(4)(G)(i) provides that any election under § 168(k)(4) (including any allocation under § 168(k)(4)(E)) may be revoked only with the consent of the Secretary. Pursuant to section 4.06 of Rev. Proc. 2008-65, 2008-2 C.B. 1082, the election to apply § 168(k)(4), once made, may be revoked only with the written consent of the Commissioner of Internal Revenue and, to seek the Commissioner's consent, the taxpayer must submit a request for a letter ruling.

Section 168(k)(4)(C)(iv) provides that all corporations that are treated as a single employer under § 52(a) (generally any controlled group of corporations within the meaning of § 1563(a), determined by substituting "more than 50 percent" for "more than

80 percent" each place it appears in § 1563(a)(1)) shall be treated as one taxpayer for purposes of § 168(k)(4) and as having elected the application of § 168(k)(4) if any such corporation so elects. Hereinafter, such group of corporations is referred to as a "controlled group." *See* section 2.05 of Rev. Proc. 2009-16, 2009-6 I.R.B. 449, 450.

Section 3.05 of Rev. Proc. 2009-16 provides guidance regarding the election to apply § 168(k)(4) by a controlled group. Section 3.05(2)(b) of Rev. Proc. 2009-16 provides that if all members of a controlled group are members of an affiliated group of corporations that file a consolidated return ("a consolidated group"), the common parent (within the meaning of § 1.1502-77(a)(1)(ii) of the Income Tax Regulations) of the consolidated group makes the § 168(k)(4) election on behalf of all members of the consolidated group. The common parent makes this election within the time and in the manner provided in section 3.01, 3.02, 3.03, or 3.04 of Rev. Proc. 2009-16, as applicable.

Under § 301.9100-1, the Commissioner of Internal Revenue has discretion to grant a reasonable extension of time under the rules set forth in §§ 301.9100-2 and 301.9100-3 to make a regulatory election.

Sections 301.9100-1 through 301.9100-3 provide the standards the Commissioner will use to determine whether to grant an extension of time to make an election. Section 301.9100-2 provides automatic extensions of time for making certain elections. Section 301.9100-3 provides extensions of time for making 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.

In this case, Taxpayer is the common parent of an affiliated group of corporations that timely filed a consolidated federal income tax return for the taxable year ended Date 1. On that return, Taxpayer made the § 168(k)(4) election. Further, Taxpayer's consolidated group on Date 1, was not a member of any other controlled group on that date. Thus, this election is binding on all members of Taxpayer's consolidated group on Date 1, and applies to Taxpayer's consolidated group for the taxable year ended Date 1, and any subsequent taxable year. (But see section 3.05(2)(d) of Rev. Proc. 2009-16 for guidance regarding members entering or leaving a controlled group.) However, if we grant Taxpayer an extension of time to make the election under § 168(k)(4)(I)(ii) not to apply § 168(k)(4) to round 2 extension property, Taxpayer will no longer have a § 168(k)(4) election in effect for round 2 extension property and will have to make an election under § 168(k)(4)(J)(iii) to apply §168(k)(4) to round 3 extension property. By Taxpayer applying § 168(k)(4) to round 3 extension property, we conclude that Taxpayer is treated as making the election under § 168(k)(4)(J)(iii) to apply §168(k)(4) to round 3 extension property.

CONCLUSIONS

Based solely on the facts and representations submitted and the law and analysis as set forth above, we conclude that:

(1) The requirements of §§ 301.9100-1 and 301.9100-3 have been satisfied with respect to round 2 extension property. Accordingly, Taxpayer is granted 60 calendar days from the date of this letter to make the election under § 168(k)(4)(I)(ii) not to apply § 168(k)(4) to round 2 extension property. This election must be made by Taxpayer: (i) filing an amended consolidated federal income tax return for the B taxable year with a written statement indicating that Taxpayer is making the election under § 168(k)(4)(I)(ii) not to apply § 168(k)(4) to round 2 extension property; (ii) filing an amended consolidated federal income tax return for the C taxable year; (iii) filing an amended consolidated federal income tax return for the D taxable year if Taxpayer or any member of Taxpayer's consolidated group placed in service round 2 extension property in the D taxable year; and (iv) providing written notification to any partnership in which Taxpayer or any member of Taxpayer's consolidated group is a partner that Taxpayer is making the election under § 168(k)(4)(I)(ii) not to apply § 168(k)(4) to round 2 extension property. The amended consolidated federal income tax returns for the B, C, and D taxable years must include the adjustment to tax liability, the adjustment to taxable income for the amount of depreciation allowed or allowable for that taxable year for round 2 extension property, and any collateral adjustments to taxable income or tax liability; and

(2) A revocation of Taxpayer's election under § 168(k)(4)(J)(iii) to apply § 168(k)(4) to round 3 extension property is permitted under § 168(k)(4)(G)(i). Accordingly, Taxpayer is granted 60 calendar days from the date of this letter to revoke the election under § 168(k)(4)(J)(iii) to apply § 168(k)(4) to round 3 extension property. This revocation must be made by Taxpayer: (i) filing an amended consolidated federal income tax return for the D taxable year with a written statement indicating that Taxpayer is revoking the election under § 168(k)(4)(J)(iii) to apply § 168(k)(4) to round 3 extension property; (ii) filing an amended consolidated federal income tax return for the I taxable year, which is the taxable year subsequent to the D taxable year, if Taxpayer or any member of Taxpayer's consolidated group placed in service round 3 extension property in the I taxable year; and (iii) providing written notification to any partnership in which Taxpayer or any member of Taxpayer's consolidated group is a partner that Taxpayer is revoking the election under § 168(k)(4)(J)(iii) to apply § 168(k)(4) to round 3 extension property. The amended consolidated federal income tax returns for the D and I taxable years must include the adjustment to tax liability, the adjustment to taxable income for the amount of depreciation allowed or allowable for that taxable year for round 3 extension property, and any collateral adjustments to taxable income or tax liability.

A copy of this letter ruling must be attached to any federal income tax return to which it is relevant. A copy is enclosed for that purpose. Alternatively, a taxpayer filing its federal income tax return electronically may satisfy this requirement by attaching a statement to the return that provides the date and control number of the letter ruling.

Except as specifically ruled upon above, no opinion is expressed or implied concerning the tax consequences of the facts described above under any other provisions of the Code (including other subsections of § 168). Specifically, no opinion is expressed or implied on whether (i) any item of depreciable property placed in service by Taxpayer or any member of Taxpayer's consolidated group in the A through I taxable years is eligible for the additional first year depreciation deduction provided by § 168(k)(1) or (5), (ii) any item of depreciable property placed in service by Taxpayer or any member of Taxpayer's consolidated group in the A through I taxable years is, under § 168(k)(4), eligible qualified property, extension property, round 2 extension property, or round 3 extension property, as applicable, or (iii) Taxpayer properly determined the bonus depreciation amount under § 168(k)(4) for the A through I taxable years.

The rulings contained in this letter are based upon information and representations submitted by 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.

This ruling is directed only to the taxpayer requesting it. Section 6110(k)(3) provides that it may not be used or cited as precedent.

In accordance with the power of attorney, we are sending a copy of this letter to Taxpayer's authorized representatives. We are also sending a copy of this letter to the appropriate operating division director.

Sincerely,

Kathleen Reed

Kathleen Reed
Chief, Branch 7
Office of Associate Chief Counsel
(Income Tax and Accounting)

Enclosures (2):
copy of this letter
copy for section 6110 purposes