Internal Revenue Service

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Department of the Treasury
Washington, DC 20224

Third Party Communication: None
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Refer Reply To:
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Date:
July 17, 2017

Legend

Taxpayer =

Subsidiary =

Exempt Organization =

State =

Year 1 =

Date 1 =

Date 2 =

Partnership B =

Partnership C =

Partnership D =

x =

y =

Dear :

This letter responds to a request for a private letter ruling dated Date 1, submitted on behalf of Subsidiary by Taxpayer, requesting that the Internal Revenue Service grant Taxpayer an extension of time under §§ 301.9100-1 and 301.9100-3 of the Procedure and Administration Regulations to make an election, under § 168(h)(6)(F)(ii) of the Internal Revenue Code, not to be treated as a tax-exempt controlled entity for Year 1.

Facts

According to the information submitted and representations made, Taxpayer is a corporation organized under the laws of State. Taxpayer uses an accrual method of accounting for financial reporting and U.S. federal income tax purposes and annual accounting period of December 31. All of Taxpayer's stock is owned by an S corporation, which is itself wholly-owned by Exempt Organization. Accordingly, Taxpayer is a tax-exempt controlled entity for purposes of § 168(h)(6)(F)(iii).

Taxpayer formed Subsidiary on Date 2. All of the outstanding stock of Subsidiary is owned by Taxpayer. Taxpayer contributed two partnership interests to Subsidiary, Partnership B and Partnership C, at the end of Year 1 in a transaction qualifying under § 351. As a result, Subsidiary owns approximately x percent of the outstanding common interest in Partnership B. Further, Subsidiary and Partnership B each own half of the outstanding common interest in Partnership C. Partnership C is the managing member and owns a majority (y percent) of Partnership D, which renovates and develops historic property.

Taxpayer filed a consolidated return for Year 1 by the due date of the return, by mailing a paper copy to the Service. Taxpayer timely filed a separate return for Subsidiary for Year 1 by the due date of the return. On the separate return, Subsidiary made a § 168(h)(6)(F)(ii) election not to be treated as a tax-exempt entity, thereby permitting Subsidiary to make use of rehabilitation credits, through its allocations as the majority owner of Partnership D, a partnership which renovates and develops historic property. Subsidiary filed the separate return by mailing a paper copy to the Internal Revenue Service.

Due to a misinterpretation of the consolidated return regulations by Taxpayer's in-house tax professional, two errors occurred: (1) Subsidiary should have been part of Taxpayer's consolidated return, rather than filing separately, and (2) Taxpayer should have filed its consolidated return electronically, rather than by mailing a paper return. Due to these two errors, Taxpayer is considered to have not timely filed its consolidated return for Year 1. Likewise, Subsidiary is considered to have not timely filed its § 168(h)(6)(F)(ii) election for Year 1. As a result of the failure to make the § 168(h)(6)(F)(ii) election timely, Subsidiary is considered a tax-exempt controlled entity. If Subsidiary is considered a tax-exempt controlled entity, Subsidiary is effectively denied use of rehabilitation credits associated with Subsidiary's partnership allocations from Partnership D.

After Taxpayer realized, on Subsidiary's behalf, that it had not timely filed the § 168(h)(6)(F)(ii) election, it requested relief to make the election provided for under § 168(h)(6)(F)(ii) effective Year 1.

From the materials submitted, it is evident that, at all times, Subsidiary intended to and did initially make the § 168(h)(6)(F)(ii) election timely, but on a separate return and in the wrong format. Upon realizing this error, and with the additional understanding that Subsidiary should have filed as part of Taxpayer's consolidated return, Taxpayer, on behalf of Subsidiary, represents that it has acted reasonably and in good faith, that granting relief will not prejudice the interests of the government, and that it is not using hindsight in making either election.

Law

Section 168(h)(6)(A) provides that, for purposes of § 168(h), if any property which (but for this subparagraph) is not tax-exempt use property is owned by a partnership having a tax-exempt entity and a non-tax-exempt entity as partners and any allocation to the tax-exempt entity is not a qualified allocation, then an amount equal to the 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). Section 168(h)(6)(F)(iii)(I), describes a "tax-exempt controlled entity" as any corporation (which would not otherwise be considered a tax-exempt entity, where 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).

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.

Section 301.9100-1(b) of the Procedures and Administration 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 the § 168(h)(6)(F)(ii) election to be made by the due date of the tax return for the first taxable year for which the election is to be effective. Section 301.9100-7T(a)(3) provides the manner in which the § 168(h)(6)(F)(ii) election is made. 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 under the rules set forth in §§ 301.9100-2 and 301.9100-3 to make a regulatory election.

Section 301.9100-3(a) provides that requests for relief subject to § 301.9100-3 will be granted when the taxpayer provides evidence, including affidavits described in

§ 301.9100-3(e), 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.

Section 301.9100-3(b)(1) provides that a taxpayer is 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 is considered 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 fully informed 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 Service will grant a reasonable extension of time 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 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. Under § 301.9100-3(c)(1)(ii), 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.

Analysis

The information and representations submitted indicate, at all times, that Subsidiary intended to make the § 168(h)(6)(F)(ii) election, and that Taxpayer’s failure to make the § 168(h)(6)(F)(ii) election, on Subsidiary’s behalf, was inadvertent. Taxpayer represents that it has requested relief before the failure to make the election was discovered by the Service. Further, Taxpayer has acted reasonably and in good faith, within the meaning

of § 301.9100-3(b)(1), and is not using hindsight in requesting permission to make a late election. Further, the interests of the Government will not be prejudiced by the granting of relief. Based solely on the above facts and representations, we conclude that Taxpayer has met the requirements of §§ 301.9100-1 and 301.9100-3 with respect to obtaining an extension of time to file the § 168(h)(6)(F)(ii) election.

Conclusion

Based solely on the information submitted and the representations made, we conclude that the requirements of § 301.9100-3 have been satisfied with respect to Taxpayer's failure to make the election under § 168(h)(6)(F)(ii) for Year 1. Accordingly, Taxpayer is granted an extension of time of 75 days from the date of this letter to file a return for Year 1 making the election under § 168(h)(6)(F)(ii). Taxpayer should attach a copy of this letter to its return.

This office has not verified any of the material submitted in support of the request for a ruling. However, as part of an examination process, the Service may verify the factual information, representations, and other data submitted.

This ruling addresses the granting of § 301.9100-3 relief only. We express no opinion regarding the tax treatment of the instant transaction under the provisions of any other sections of the Code or regulations that may be applicable, or regarding the tax treatment of any conditions existing at the time of, or effects resulting from, the instant transaction.

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. Enclosed is a copy of the letter ruling showing the deletions proposed to be made when it is disclosed under § 6110.

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

Sincerely,

Shareen S. Pflanz
Senior Technician Reviewer, Branch 5
Office of Associate Chief Counsel
(Income Tax & Accounting)

Enclosures (2)
Copy of this letter
Copy of this letter for section 6110 purposes

cc: