Office of Chief Counsel
Internal Revenue Service
memorandum

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date: August 10, 2009

to: Colleen Gallagher
Senior Program Analyst
(SE:S:E:EP:ESTG)

from: James C. Gibbons
Chief
Branch 1
(Procedure & Administration)

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subject: Agreement to Extend Statute of Limitations on Assessments and Reg. Section 1.48-12(d)(7)

This responds to your request for assistance dated April 29, 2009.

LEGEND

A =

B

P =

L =

T =

C

D

X

Address 1

Address 2

Address 3

D1

D2

D3

D4

D5

D6

D7

D8

D9

Item A .

Y1

ISSUES

1. What remedy is available to P, the 100% owner of tenant (T), if P timely submits a notice to the Service pursuant to Treas. Reg. § 1.48-12(d)(7)(ii) in connection with the rehabilitation tax credit but the Service fails to execute a Consent to Extend the Time to Assess Tax Attributable to Partnership (Form 872-P) before the limitation period on assessments expires?

2. What is the Service's remedy if P timely submits a notice pursuant to Treas. Reg. § 1.48-12(d)(7)(ii) in connection with the rehabilitation credit but the Service fails to execute a Form 872-P before the limitation period on assessments expires?

CONCLUSIONS

1. If the Service determines that P is entitled to none or only a part of the rehabilitation credit, P and its members will be able to assert the statute of limitations as a defense if the Service attempts to assess tax.

2. The Service will be barred from recovering any of the tax from the members of P associated with the rehabilitation credit for the taxable year in question if the rehabilitation work on the property is not certified by the U.S. Department of the Interior.

[redacted]

FACTS

P is a limited liability company treated as a partnership for federal tax purposes. P's members and their corresponding interest in P's income, loss and capital are:

Member	Member's share of profit, loss and capital of P
A (managing member)	1%
B	99%

L is the owner of a building located at Address 1. T, the tenant of this building, is a limited liability company wholly owned by P. L and T made an election to pass through the rehabilitation credit[1] respecting the Address 1 property. Under this election, the property's owner, here L, permitted a third party to claim the historic structure rehabilitation credit authorized by I.R.C. §§ 38, 46 and 47. L applied to the U.S. Department of the Interior, National Park Service to receive certification of completed work respecting the repairs and renovations made to the Address 1 property.

By a letter dated D1, D, the treasurer of X and on behalf of A, wrote to the Service stating that A, as P's managing member, intended to provide written notice to the Service that P had not received a final certification of completed work from the National Park Service in connection with P's rehabilitation of the Address 1 property.[2] The copy of D's D1 letter shows the following address of the Service:

[1] I.R.C. § 47.

[2] The materials furnished to us do not include a copy of an executed Form 2848 by which A authorized either X or D to represent it before the Service. This advice assumes that the Service received such power of attorney. The exhibits furnished to us include a copy of a signed Form 2848, dated D9 designating P's representatives. X's signature and title appear on this power of attorney.

Certification that the taxpayer has rehabilitated a historic structure is required for a taxpayer to qualify for the rehabilitation credit authorized under I.R.C. § 47. Under the applicable regulation, if a partnership incurs qualified rehabilitation expenditures, only the entity, not the individual partners or members, must document the receipt of final certification of completed work and include Form 3468 with its return. Treas. Reg. § 1.48-12(d)(7)(iv).

Internal Revenue Service
Tax Credit Unit
Drop 607
P.O. Box 245
Bensalem, PA 19020

This address appears in Notice 2003-19, the Service's publication informing taxpayers of the proper offices for filing elections, statements and other documents following the reorganization under the Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, 112 Stat. 686. Notice 2003-19 designated the above address as the place for filing a request to extend the limitation period on assessments pursuant to Treas. Reg. § 1.48-12(d)(7). According to the copies of correspondence sent to our office, the reference in Notice 2003-19 to "Drop 607 P.O. Box 245" is a correct general mailing address for the Address 2 campus but is not the specific address used by the examination component of this campus. The examination function, which is responsible for processing notices and requesting consents to extend limitation periods under Treas. Reg. § 1.48-12(d)(7)(ii), uses P.O. Box 331 Drop Point 607 South. It is unclear whether D's D1 letter on behalf of A was misplaced or sent to the wrong part of the Address 2 campus.

Thereafter, P's authorized representative sent a letter dated D4 to the Service's Address 3 service center regarding the certification of the Address 1 property. In this second letter to the Service, P's representative indicated that P approved the Service's initiation of a Form 872 and that the letter constituted P's notification of the fact of not receiving a decision from the Interior Department regarding application for certification and the phased-in rehabilitation of the Address 1 property. This letter requested that the consent to extend the limitation period on assessment for P's Y1 taxable year include an expiration date of D2, and that it be restricted to the qualified rehabilitation expenditures reported on Schedule K, line 15c and Form 3468. This letter also requested a timely response because the statute of limitations on assessments was going to expire on D3.

P's authorized representative also notified the Office of Taxpayer Advocate via a fax dated D4 of the Service's failure to acknowledge the notice P sent regarding the non-receipt of the final certification from the Interior Department and to execute a Form 872. In a letter dated D5 the Service's Office of Taxpayer Advocate informed P's authorized representative that the Office of Taxpayer Advocate would assist P in its effort to extend the assessment limitation period respecting P's Y1 taxable year.

The last item in the binder of materials provided to us is captioned as "Item A." The ninth entry from the top on this document states that on D6 C faxed a Form 872 to the Office of Taxpayer Advocate. The binder includes a fax transmittal cover sheet from C to the Office of Taxpayer Advocate dated D6 and attached to this is an unsigned Form 872-P listing P as the partnership seeking to extend the assessment limitation period for its Y1 taxable year through D7.

The Office of Taxpayer Advocate's file for this matter contains no copy of a Form 872 or Form 872-P executed by P's managing member or tax matters partner. We have been informed that the Taxpayer Advocate's file also includes a part of a facsimile, dated D6 from P's representative with fax-stamped "5," which suggests a 5-page transmission.

The materials include a copy of a letter dated D8, drafted by the Service's manager of the Low Income House Credit (LIHC) Tax Credit Unit at the Address 2 campus. This correspondence, sent to P *after* the 3-year period for assessing the partners of P with respect to P's Y1 return expired, also stated that two original signed Forms 872 were enclosed.[3] In the letter, the manager of the LIHC Tax Credit Unit stated that she faxed a signed copy of the Form 872 to P's office on that same day. The letter states that two original copies of the Form 872 were enclosed so that they could be signed and returned to the Service by mail. Neither P nor its representative returned the Form 872 to the manager of the LIHC.

LAW AND ANALYSIS

I.R.C. § 38(b) provides a credit against income taxes for certain credits, including the investment credit determined under I.R.C. § 46. I.R.C. § 46 provides that, for purposes of I.R.C. § 38, the amount of the investment credit includes the rehabilitation credit. I.R.C. § 47(a)(2) provides that the rehabilitation credit for any taxable year includes an amount equal to 20% of the qualified rehabilitation expenditures with respect to any certified historic structure.

I.R.C. § 47(c)(2)(A) defines the term "qualified rehabilitation expenditure" to include: (i) any amount properly chargeable to capital account for property for which depreciation is allowable under § 168 and which is (1) nonresidential real property; (2) residential rental property; (3) real property which has a class life of more than 12.5 years; or (4) an addition or improvement to property described in (1), (2) or (3); and (ii) which is in connection with the rehabilitation of a qualified rehabilitated building.

I.R.C. § 47(c)(3)(A) defines the term "certified historic structure" as any building (and its structural components) which is listed in the National Register, or located in a registered historic district and is certified by the Secretary of the Interior to the Secretary of the Treasury as being of historic significance to the district. The improvement must be a "certified rehabilitation," which means any rehabilitation of a certified historic structure that the Secretary of the Interior has certified to the Secretary of the Treasury as being consistent with the historic character of the property or the district in which the property is located. I.R.C. § 47(c)(2)(C).

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[3] Form 872 was the incorrect form to use for extending the assessment limitation period respecting tax attributable to partnership items. *See* pg. 7, *infra.*

Whether P and other interested parties followed the correct procedure to claim the historic rehabilitation credit?

Treas. Reg. § 1.48-12(d)(1) provides that a building will be considered to be a certified historic structure at the time it is placed in service if the taxpayer reasonably believes on that date the building will be determined to be a certified historic structure and has requested on or before that date a determination from the Department of Interior that the building is a certified historic structure and the Department of Interior later determines that the building is a certified historic structure. To claim the credit, the taxpayer must attach to his tax return a completed Form 3468 and a copy of the final certification of completed work by the Secretary of the Interior, and for returns filed after January 9, 1989, evidence that the building is a certified historic structure. *Id.* at § 1.48-12(d)(7)(i).

The regulation provides a special rule for instances when the Secretary of the Interior has not issued a final certification of completed work as of the time the taxpayer files the tax return for a year in which the historic structure rehabilitation credit is claimed. *Id.* at § 1.48-12(d)(7)(ii). The taxpayer must include with the return Form 3468 and attach to this a copy of the first page of the Historic Preservation Certification Application, Part 2, Description of Rehabilitation, an indication that it has been received by the Department of the Interior or its designate, and proof that the building or structure is a certified historic structure (or that such status has been requested). The taxpayer must thereafter submit a copy of the final certification as an attachment to Form 3468 with the first income tax return filed after receiving the certification. *Id.* If final certification is denied by the Interior Department, the historic structure rehabilitation credit is disallowed for the taxable years for which it was claimed.

Treasury Reg. § 1.48-12(d)(7)(ii) provides that if the taxpayer fails to receive final certification of completed work prior to the date that is 30 months after the date that the taxpayer filed the tax return on which the credit was claimed, the taxpayer must submit a written statement to the District Director stating such fact prior to the last day of the 30th month, and the taxpayer shall be requested to consent to an agreement under I.R.C. § 6501(c)(4) extending the period of assessment for any tax relating to the time for which the credit was claimed. The procedure permitted by the preceding sentence shall be used whenever the entire rehabilitation project is not fully completed by the date that is 30 months after the taxpayer filed the tax return upon which the credit was claimed (e.g. a phased rehabilitation) and the Secretary of the Interior has thus not yet certified the rehabilitation.

Because P is a limited liability company, it is governed by the unified audit and litigation provisions of I.R.C. §§ 6221-6234 (TEFRA Partnership Provisions). It is more appropriate to take into account and determine the amount, timing and characterization of the historic structure rehabilitation credit for rehabilitation of a certified historic building at the partnership level than at the level of its members. Treas. Reg. § 301.6231(a)(3)-1(a)(1)(i). Thus, such credit is a partnership item under I.R.C.

§ 6231(a)(3). As a result, the 3-year minimum period[4] for assessments governing partnership items in I.R.C. § 6229(a) applies to the partners of P:

> (a) General Rule.—Except as otherwise provided in this section, the period for assessing any tax imposed by subtitle A with respect to any person which is attributable to any partnership item (or affected item) for a partnership taxable year shall not expire before the date which is 3 years after the later of—
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> (1) the date on which the partnership return or such taxable year was filed, or
>
> (2) the last day for filing such return for such year (determined without regard to extensions).

The 3-year minimum period for assessments for partnership items may be extended by agreement executed in accordance with I.R.C. § 6229(b), which states:

> (b) Extension by agreement.
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> (1) In general.—The period described in subsection (a) (including an extension period under this subsection) may be extended—
>
> (A) with respect to any partner, by an agreement entered into by the Secretary and such partner, and
>
> (B) with respect to all partners, by an agreement entered into by the Secretary and the tax matters partner (or any other person authorized by the partnership in writing to enter into such an agreement), before the expiration of such period.
>
> (2) [Omitted.]
>
> (3) Coordination with [I.R.C. §] 6501(c)(4).—Any agreement under [I.R.C. §] 6501(c)(4) shall apply with respect to the period described in subsection (a) only if the agreement expressly provides that such agreement applies to tax attributable to partnership items.

As required by I.R.C. § 6229(b)(3), any agreement entered into by the tax matters partner of P and the Service under I.R.C. § 6501(c)(4) to extend the period of assessment for any tax relating to the time for which the historic structure rehabilitation credit was claimed must expressly provide that the agreement to extend applies to tax attributable to partnership items, which would include the historic structure rehabilitation credit. Only standard Service Forms 872-P (signed by the tax matters partner on behalf of all partners) and 872-I (signed by partners on their own behalves) qualify under I.R.C. § 6229(b)(3). A Form 872 qualifies only if the language mandated by I.R.C. § 6229(b)(3) is manually inserted on the Form.

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[4] I.R.C. § 6229 merely operates to extend each partner's I.R.C. § 6501 period for assessing partnership items. It does not provide a separate exclusive period for assessment. Rhone-Poulenc v. Comm'r, 114 T.C. 533 (2000). For purposes of this advice, we assume that the partner's I.R.C. § 6501 period for assessment was not otherwise open after the expiration of the minimum period for assessment.

A taxpayer's consent to extend the statute of limitations under I.R.C. § 6501 is essentially a voluntary, unilateral waiver of a defense by a taxpayer, not a contract. Stange v. United States, 282 U.S. 270, 275 (1931); Feldman v. Comm'r, 20 F.3d 1128 (11th Cir. 1994); United States v. Standard Silk Co., 12 F.Supp. 54 (S.D. N.Y. 1934). Because the statute requires that both the taxpayer and the Service consent in writing to the extension, contract principles are useful in assessing mutual assent. Feldman, 20 F.3d at 1132.[5]

As noted above, on D8, after the last day for assessing tax in connection with P's Y1 taxable year had passed, the Service attempted to enter into an agreement with P to extend the assessment limitation period. In our view, a court will hold that the Service is without authority to extend the assessment limitation period in this situation, even if P or its representative executed the correct consent form (Form 872-P or Form 872 modified to state it applied to tax attributable to partnership items). In Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 835, 104 S.Ct. 2778 (1984), the Supreme Court explained the court's role in interpreting statutory provisions:

> When a court reviews an agency's construction of a statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress . . . .

Chevron, 467 U.S. at 842-43.

I.R.C. § 6229(b)(1)(B) authorizes a tax matters partner and the Service to extend the minimum period on the assessment of tax regarding all partners ***before expiration*** of the period during which the tax may be assessed. Congress has spoken unambiguously on the question of when a taxpayer and the Service may consent to extend an assessment limitation period. Chevron, supra. No authority exists under the Code that would enable the Service, with or without the tax matters partner's consent, to extend the limitation period in I.R.C. § 6229(a) after it has run.

Because the period for assessing the members of P for the Y1 taxable year passed on D3 (see supra pg. 4) and no valid extension existed, P's members can assert the statute of limitations as a defense, assuming that the members' period for assessment is not otherwise still open, if the Service attempts to assess tax for P's Y1 tax year.

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[5] Treas. Reg. § 301.6501(c)-1(d) ("The extension [of time prescribed for assessment of tax] shall become effective when the agreement has been executed by both parties.").

Current section 6501(c)(4), requiring both the Secretary and taxpayer's signature in order for the limitation period on assessments to be extended, can be contrasted with section 276(c) of the Internal Revenue Code of 1939 (26 U.S.C. § 276(c)(1952)), under which a taxpayer could waive the limitation period on collection so long as he did so writing, even if not executed by the Service. United States v. Rosk, 180 F.Supp. 869 (S.D. Fla. 1960).

Thus, even if it is determined that P does not qualify for all or part of the historic structure rehabilitation credit, the Service will be unable to recover the tax. The facts show that P took the necessary steps to comply with Treas. Reg. § 1.48-12(d)(7) and extend the limitation period. The Service's publication stating the address to which P's notice and request should be sent was incorrect and thus caused P's correspondence to be diverted from the Service's officials who execute extension agreements. Moreover, if the facts are as suggested by the documents and exhibits furnished to us, C made a final attempt to extend the limitation period on D6, nine days before the statute governing P's Y1 tax year expired, by faxing a Form 872-P to the Office of the Taxpayer Advocate.[6] *See* Exhibit C. It is not certain whether the Office of Taxpayer Advocate immediately forwarded this to the official who was responsible for executing consents to extend assessment limitation periods. A court is unlikely to sympathize with the Service if P does not qualify for the historic structure rehabilitation credit claimed on its Y1 return.

[redacted]

[redacted]

[redacted]

[redacted]

[6] As noted above, exhibit C, which is the copy of the Form 872-P provided, is not signed by either the Service or P's representative.

[redacted]

It is nearly certain that a court will find that the I.R.C. § 6229(a) minimum period for assessment governing P's Y1 taxable year was not extended. The facts show that P attempted to extend the limitation period, as required by Treas. Reg. § 1.48-12(d)(7)(ii), and sent timely notice to the address listed in Notice 2003-19. The Service will be precluded from assessing tax in connection with P's historic structure rehabilitation credit for periods outside the statute of limitations, whether based on a legal or equitable theory.

Please call (202) 622-4910 if you have any further questions.