Internal Revenue Service

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Department of the Treasury
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Person To Contact:
, ID No.

Telephone Number:

Refer Reply To:
CC:ITA:B08
PLR-106766-23

Date:
September 20, 2023

Legend

Taxpayer	=
General Partner	=
Partnership	=
Nonprofit	=
General Partner Owner 1	=
General Partner Owner 2	=
Member	=
Investor Limited Partner	=
Paragraph A	=
Paragraph B	=
LP Agreement	=
Accountant	
A%	=
B%	=
C%	=

D%	=
E%	=
F%	=
Property	=
Location	=
Former Accountant	=
Date 1	=
Date 2	=
Date 3	=
Year 1	=
Year 2	=
Year 3	=

Dear :

This ruling responds to Taxpayer's request for a letter ruling dated Date 1. Specifically, Taxpayer requests an extension of time under sections 301.9100-1 and 301.9100-3 of the Income Tax Regulations, to make a timely election under § 168(h)(6)(F)(ii) of the Internal Revenue Code (Code) to Taxpayer, a tax-exempt controlled entity under § 168(h)(6)(F)(iii).

FACTS

According to the affidavits and additional information provided to us, Taxpayer has represented that the facts are as follows.

Taxpayer, a C corporation, uses the calendar year as its annual accounting period and the accrual method as its overall method of accounting. Taxpayer was formed to serve as a member of General Partner. General Partner is a limited liability company and is the general partner of Partnership. Taxpayer is wholly owned by Nonprofit.

General partner uses the calendar year as its annual accounting period, and the cash method as its overall method of accounting. Partnership uses the calendar year as its annual accounting period and the accrual method as its overall method of accounting.

Taxpayer owns A% of General Partner, and General Partner owns B% of Partnership. The remaining C% of General Partner is owned by General Partner Owner 1, a disregarded S corporation wholly owned by General Partner Owner 2. General Partner Owner 2 is a disregarded S corporation wholly owned by Member.

Investor Limited Partner owns the remaining D% of Partnership. Partnership was formed exclusively to provide housing facilities for persons of low and moderate income, or for persons whose income does not exceed limits established in § 42 of the Code. In furtherance of this, the purpose of Partnership was to construct, develop, improve, maintain, own, and operate Property located in Location.

Pursuant to Paragraph A of the LP Agreement effective as of Date 2, upon the final sale of Property owned by the Partnership, the balance of net cash shall be distributed E% to General Partner and F% to Investor Limited Partner. Of the E% of the balance of net cash distributed to General Partner, A% shall be distributed to Taxpayer. As such, the final allocation to Taxpayer does not remain the same during the entire life of Partnership.

Partnership acquired land and began constructing Property in Year 1. Partnership completed its construction of Property in Year 2.

Under the general rule of § 168(h)(6)(F)(iii), because Taxpayer is wholly owned by a tax-exempt entity, absent an election, Taxpayer would be considered a "tax-exempt controlled entity" within the meaning of § 168(h)(6)(F)(iii), and therefore, due to the non-qualified allocation as noted in Paragraph A of LP Agreement, a portion of Property would be considered "tax-exempt use property."

However, under § 168(h)(6)(F)(ii), Taxpayer had the ability to elect not to be treated as a tax-exempt entity for purposes of § 168(h)(6), thereby avoiding having any portion of Partnership Property from being considered "tax exempt use property."

It was always Taxpayer's intention to make the election under § 168(h)(6)(F)(ii), so as to not be treated as a tax-exempt entity for purposes of § 168(h)(6). This is evidenced by Paragraph B of LP Agreement, wherein the partners of Partnership agreed that General Partner 'warrants and represents that it will cause Taxpayer to make, on its tax return, the election described in § 168(h)(6)(F)(ii) of the Code.'

Partnership filed its Year 2 tax return with Former Accountant, and first placed property in service in Year 2. Due to its election under § 163(j)(7)(B) to be an electing real property trade or business, Partnership computed its depreciation deduction for residential rental property utilizing the Alternative Depreciation System (ADS). Partnership computed its depreciation deduction for all other property utilizing the General Depreciation System (GDS) and it claimed bonus depreciation on this property.

Partnership's utilization of GDS for depreciation and its claim to bonus depreciation were methods that Partnership could properly have used if the § 168(h)(6)(F)(ii) election had been validly made by Taxpayer.

In their normal course of business, Former Accountant would typically prepare tax returns for Member and affiliated entities, including any tiered relationship tax returns if

required. Member expected Former Accountant to prepare the Year 2 tax return for General Partner. Due to an administrative oversight of filing requirements, Former Accountant did not prepare a tax return for General Partner. As a result, a Year 2 Schedule K-1 for General Partner was not prepared or furnished to Taxpayer. Additionally, Nonprofit believed all property was to be placed in service in Year 3 rather than Year 2. General Partner inadvertently did not provide correspondence to Nonprofit regarding the buildings being placed in service in Year 2.

Because Taxpayer did not receive a Schedule K-1 and Nonprofit was unaware that Property was placed in service during Year 2, Nonprofit did not cause for Taxpayer to file an initial tax return for the tax year ending Date 3, as it did not believe Taxpayer had a filing requirement.

Accountant was engaged by both General Partner to prepare the tax return for General Partner and Nonprofit to prepare the tax return for Taxpayer for Year 2 upon discovery of the missing filing requirement for General Partner and Taxpayer. Realization of the missing filing requirement for General Partner and Taxpayer was made after the filing deadline. Therefore, a valid § 168(h)(6)(F)(ii) election could not be made through a timely filed Year 2 tax return for Taxpayer. Following LP Agreement, Accountant is preparing the tax returns as if a valid § 168(h)(6)(F)(ii) election is going to be made by Taxpayer.

Upon discovering this failure to file a timely return, Taxpayer, through Nonprofit, engaged Accountant to prepare this Request for Letter Ruling seeking an extension of time in which to make the § 168(h)(6)(F)(ii) election.

LAW AND ANALYSIS

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 shall be treated as tax-exempt use property.

Section 168(h)(6)(F)(i) provides generally that any tax-exempt controlled entity shall be treated as a tax-exempt entity for purposes of §§ 168(h)(5) and (6). Section 168(h)(6)(F)(iii)(I) provides that a tax-exempt controlled entity is any corporation if 50 percent or more (in value) of the stock is held by 1 or more tax-exempt entities. Because Nonprofit owns more than 50 percent in value of Taxpayer's stock, Taxpayer is a tax-exempt controlled entity under that section. As such, Taxpayer is eligible to make the § 168(h)(6)(F)(ii) election.

Under § 168(h)(6)(F)(ii), a tax-exempt controlled entity may elect to not 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.

Under § 301.9100-7T(a)(2)(i) of the Procedure and Administration Regulations (Regulations), an election under § 168(h)(6)(F)(ii) 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(a) of the Regulations 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. The election allowed by § 168(h)(6)(F)(ii) election is a regulatory election.

Sections 301.9100-1 through 301.9100-3 provide the standards that the Commissioner 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 covered in section 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 the grant of relief will not prejudice the interests of the government.

Under section 301.9100-3(b), a taxpayer is deemed to have acted reasonably and in good faith if the taxpayer requests relief before the failure to make the regulatory election is discovered by the Service, or reasonably relied on a qualified tax professional, and the tax professional failed to make, or advise the taxpayer to make, the election. However, a taxpayer is not considered to have reasonably relied on a qualified tax professional if the taxpayer knew or should have known that the professional was not competent to render advice on the regulatory election or was not aware of all relevant facts.

In addition, section 301.9100-3(b)(3) provides that a taxpayer is deemed not to have 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 section 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 in all material respects of the required election and related tax consequences but chose not to make 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 Commissioner will grant a reasonable extension of time to make the 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 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)(ii) provides that the interests of the government are ordinarily prejudiced if the taxable year in which the regulatory election should have been made or any taxable year that would have been affected by the election had it been timely made are closed by the period of limitations on assessment under section 6501(a) before the taxpayer's receipt of a ruling granting relief under this section.

CONCLUSION

Based on the facts and information submitted and the representations made, we conclude that Taxpayer has acted reasonably and in good faith, and that the granting of relief would not prejudice the interests of the government. From the materials submitted, including the affidavits submitted by Taxpayer and other relevant parties, it is clear that Taxpayer at all times intended to make a § 168(h)(6) election. Upon discovering its failure, Taxpayer promptly sought an extension of time to file the election.

Based on the materials submitted, our office concludes that Taxpayer's failure to make the § 168(h)(6) election with its original return for Year 2 was inadvertent and based upon its reliance on tax professionals. In addition, Taxpayer is not using hindsight in requesting relief. Moreover, Taxpayer requested relief before the failure to make the election was discovered by the IRS. Taxpayer has acted reasonably and in good faith. Finally, the interests of the Government will not be prejudiced by the granting of relief under § 301.9100-3.

Accordingly, based solely on the facts and information submitted, and the representations made in the ruling request, we grant Taxpayer an extension of 60 days from the date of this ruling to file the election statement with the appropriate service center containing the information required in § 301.9100-7T(a)(3) for the election to be effective for Year 1. Taxpayer must attach a copy of this letter to the election statement. Further, the letter ruling should be attached for all subsequent returns (and amended returns) for all taxable years to which this ruling is relevant. In addition, pursuant to § 301.9100-7T(a)(3)(ii), a copy of the election statement should be attached to the Federal tax returns of the tax-exempt shareholders of Taxpayer.

This ruling is based upon facts and representations submitted by Taxpayer and accompanied by a penalty of perjury statement executed by an appropriate party. 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.

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. 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) of the Code 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 representatives.

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

Sincerely,

Erika C. Reigle
Senior Technician Reviewer, Branch 8
Office of Chief Counsel
(Income Tax & Accounting)

cc: