

Internal Revenue Service

Department of the Treasury
Washington, DC 20224

Number: **201212004**
Release Date: 3/23/2012

Third Party Communication: None
Date of Communication: Not Applicable
Person To Contact: _____, ID No.

Index Number: 108.01-00, 108.02-01,
9100.00-00

Telephone Number:

Refer Reply To:
CC:ITA:B04
PLR-135580-11
Date:
December 13, 2011

Legend

- Taxpayer =
- Year 1 =
- Year 2 =
- Partnership =
- LLC1 =
- LLC2 =
- Date 1 =
- Date 2 =
- Date 3 =
- Date 5 =
- x% =
- Facility =
- \$y =
- \$z =
- Firm =
- A =
- B =

Dear _____ :

This letter responds to your letter requesting an extension of time under § 301.9100-3 of the Procedure and Administration Regulations to make an election under § 108(c)(3)(C) of the Internal Revenue Code. Specifically, you have requested an extension of time to make an election under § 108(c)(3)(C) and § 1.108-5(b) of the Income Tax Regulations, to exclude income resulting from the discharge of qualified real property business

indebtedness and to reduce the basis of depreciable real property, effective for Taxpayer's Year 1 tax return.

FACTS

Taxpayer uses the cash method of accounting and has a calendar year as an annual accounting period. Taxpayer is a member of Partnership, which is a calendar year-end partnership that files its tax returns using the accrual method of accounting. Partnership was organized in Date 1.

LLC1, a wholly-owned subsidiary of Partnership, owns a x% membership interest in LLC2, which was organized on Date 2 to construct, own, lease, and operate a Facility. LLC1 issued bonds to fund the construction of the Facility and secured the bonds with an interest in its construction. In Date 3, Partnership entered a transaction to purchase \$y of bonds held by a bondholder for \$z (Transaction).

Partnership hired Firm, to prepare its tax return for Year 1. In Year 1, Partnership informed Firm of the Transaction, and Firm concluded that Partnership realized cancellation of indebtedness (COD) income.

In conjunction with the Year 1 Partnership return, A, Partnership's accountant at the Firm, filed Form 982, *Reduction of Tax Attributes Due to Discharge of Indebtedness (and Section 1082 Basis Adjustment)* with the Service, making the election under § 108(c)(3)(C) to exclude the COD income and to reduce the basis of depreciable real property. A, however, did not report the amount of the COD income on the Year 1 Schedules K-1, *Partner's Share of Income, Deductions, Credits, etc.*, which was issued to Taxpayer.¹

Taxpayer hired B from Firm to prepare Taxpayer's federal income tax return for Year 1, with the understanding that the Firm also prepared the Partnership's Year 1 tax return. B, who did not participate in preparing Partnership's return, relied upon the Schedule K-1 issued to Taxpayer for the Year 1 taxable year. The Year 1 Schedule K-1 did not include any COD income, and consequently, B did not file Form 982 with Taxpayer's tax return. Taxpayer timely filed the Year 1 federal income tax return.

On Date 5, the IRS agent examining Partnership's return advised that the § 108(c)(3)(C) election is an election to be made at the partner level. Prior to the discovery of the error by the IRS agent, A did not discuss with B that Partnership realized COD income in Year 1, or inform B that a Form 982 was filed with Partnership's Year 1 tax return.

¹ The partners' Schedule K-1s included a partner footnote reporting that each partner's tax basis had been reduced due to a discharge of real property business indebtedness.

Taxpayer represents it understood that Partnership entered into Transaction and that its accountants would ensure the Transaction resulted in the most tax efficient treatment to Partnership and its members. The most efficient approach would have been for Taxpayer to make a §108(c)(3)(C) election.

The relevant real property was placed into service in Year 2 and accordingly, Taxpayer represents that tax depreciation related to the Facility will pass through to Taxpayer for Year 2. If an extension of time to file an election is granted pursuant to § 301.9100-3, Partnership's Year 2 tax return will reflect that the tax basis of depreciable real property related to the Facility was reduced pursuant to § 1.1017-1 by the COD income. In addition, the Year 2 Schedule K-1 that Partnership issues to Taxpayer will reflect the COD income as a reduction in tax basis.

Taxpayer represents that granting relief under § 301.9100-3 will not result in a lower tax liability in the aggregate for all years to which the election applies than each partner would have had if the election had been timely made.

LAW AND ANALYSIS

Section 108(a)(1)(D) provides that gross income does not include any amount that would be includible in gross income by reason of the discharge of indebtedness if, in the case of a taxpayer other than a C corporation, the indebtedness discharged is qualified real property business indebtedness.

Section 108(c)(3)(C) requires a taxpayer to make an election to exclude COD income under § 108(a)(1)(D).

Section 108(d)(6) provides that in the case of a partnership, § 108(a) and § 108(c) are applied at the partner level.

Section 1.108-5(b) provides that the election under § 108(c)(3)(C) is made on the timely filed (including extensions) federal income tax return for the taxable year in which the taxpayer has discharge of indebtedness income that is excludible from gross income under §108(a). The election is made on a completed Form 982 in accordance with that Form and its instructions.

Sections 301.9100-1 through § 301.9100-3 provide the standards that the Service will use to determine whether to grant an extension of time to make a regulatory election. Section 301.9100-3(a) provides that request for extension of time for regulatory elections (other than automatic extensions covered in § 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 § 301.9100-3(b) a taxpayer is deemed to have acted reasonably and in good faith if the taxpayer 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, § 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 § 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 requests of the required election and related consequences, but chose not to make the election; or
- (iii) Uses hindsight in requesting 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). 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 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 § 6501(a) before the taxpayer's receipt of a ruling granting relief under this section.

Under the facts submitted by Taxpayer, we conclude that Taxpayer has acted reasonably and in good faith under § 301.9100-3(b). In addition, we conclude that granting relief will not prejudice the interests of the government under § 301.9100-3(c).

CONCLUSION

Based solely on the information submitted and the facts as represented in the ruling request, we grant Taxpayer an extension of 45 days from the date of this letter to file an

amended return to make the election under §§ 108(c)(3)(C) and § 1.108-5(b). The election is to be made on Form 982.

Except as expressly provided in the preceding paragraph, we do not express or imply an opinion concerning the tax consequences of any aspect of any transaction or item discussed or referenced in this letter. Specifically, this letter does not rule on whether the income at issue is properly treated as cancellation of indebtedness income under § 61(a)(12). In addition, except for the relief granted to make a late election, this letter also does not rule on whether the income in fact qualifies for exclusion from income under any provision of § 108 (including § 108(c)(3)).

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 representative.

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.

The rulings contained in this letter are 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,

Michael J. Montemurro
Chief, Branch 4
Office of Associate Chief Counsel
(Income Tax & Accounting)

cc: