Internal Revenue Service

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Department of the Treasury
Washington, DC 20224

Person To Contact:

Telephone Number:

Refer Reply To:
CC:ITA:5
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Date:
December 21, 2021

Legend

Taxpayer	=
Tax Advisor	=
Managing Member	=
State Z	=
Investment LLC X	=
Investment LLC Y	=
Year 1	=
Year 2	=
Year 3	=
Date 1	=
Date 2	=
Date 3	=
W%	=
$X	=
$Y	=

Dear :

This ruling responds to Taxpayer's request dated Date 1, for an extension of time under Treas. Reg. §§ 301.9100-1 and 301.9100-3 to make an election to defer eligible gain pursuant to Internal Revenue Code (IRC) § 1400Z-2(a)(1)(A) on Form 8949, *Sales and Other Dispositions of Capital Assets*, and the Schedule D for Year 1, with respect to amounts invested in a qualified opportunity fund (QOF), as defined in IRC § 1400Z-2(d).

FACTS

According to information submitted to us, Taxpayer is a limited liability company organized in State Z and treated as a partnership for Federal tax purposes. Taxpayer is a real estate investment company, has a calendar tax year, and uses the cash receipts and disbursements method of accounting. Taxpayer has three members, including Managing Member.

For over a decade, Taxpayer has engaged Tax Advisor, a Certified Public Accountant (CPA), to prepare its tax returns. Additionally, two of Taxpayer's members relied on Tax Advisor to prepare individual and business tax returns for several decades. Tax Advisor had decades of experience, advising clients on a wide array of business-related tax issues. In Year 1, Tax Advisor began preparing for retirement. Managing Member and Taxpayer's other members believed Tax Advisor to be competent, reliable, and qualified in all matters pertaining to income tax.

During Year 1, Taxpayer held a W% interest in Investment LLC X, a partnership for Federal tax purposes with a calendar tax year. During Year 1, Investment LLC X sold property at a gain of $X. Investment LLC X did not elect to defer any of the gain realized from the sale of the property by investing the proceeds in a QOF. After Year 1 ended, Taxpayer received its Schedule K-1 from Investment LLC X, which showed an allocation of W% of the IRC § 1231 gain from the sale of property.

On Date 2, Managing Member informed Tax Advisor that Taxpayer was planning to defer $Y of its IRC § 1231 gain from Investment LLC X by making an investment in a QOF. On Date 3, less than 180 days after the close of the Investment LLC X's calendar tax year, Taxpayer invested $Y in Investment LLC Y. Investment LLC Y was formed in Year 2 with the purpose of qualifying as a QOF, as defined in IRC § 1400Z-2(d)(1).

While preparing Taxpayer's tax return, Tax Advisor researched the QOF deferral and reporting requirements. However, in doing so, Tax Advisor focused on the requirements for a QOF—such as the requirement to self-certify on Form 8996, *Qualified Opportunity Fund*—and overlooked the filing requirements of investors in a QOF. As a result, Tax Advisor failed to prepare a Form 8949 to elect to defer the gain from Year 1. Tax Advisor did, however, prepare with Taxpayer's Year 1 tax return a Form 8082, *Notice of Inconsistent Treatment or Administrative Request (AAR)*, which noted that Taxpayer was deferring $Y of IRC § 1231 gain by investing in a QOF. Unaware of his mistake in failing to file Form 8949 with Taxpayer's Year 1 tax return, Tax Advisor prepared Taxpayer's Year 2 tax return without preparing or including Form 8997 to report the continued deferral of the gain.

In Year 3, Taxpayer was notified by the State Z tax authorities that State Z had received a payment of tax without an accompanying State Z tax return. After Taxpayer and Tax Advisor looked into the issue, Tax Advisor discovered that he had inadvertently failed to file Taxpayer's State Z and Federal tax returns that he had prepared for Year 1 and

Year 2. Both Taxpayer's Managing Member and Tax Advisor believed that the Year 1 and Year 2 tax returns had been filed. Tax Advisor attributes the mistake to health problems he was experiencing at the time. In addressing the failures to file, Tax Advisor discovered his additional mistakes in failing to identify Taxpayer's requirement to file Forms 8949 and 8997 for Year 1 and Year 2, respectively. Taxpayer represents that granting of the relief under Treas. Reg. § 301.9100-3 will not result in a lower tax liability for the years affected by the election than Taxpayer would have had if the election had been timely made.

In this letter ruling, Taxpayer requests an extension of time under Treas. Reg. §§ 301.9100-1 and 301.9100-3 to make an election to defer eligible gain pursuant to IRC § 1400Z-2(a)(1)(A) on Form 8949 and Schedule D for Year 1.

LAW AND ANALYSIS

Code § 1400Z-2(a)(1)(A) provides that in the case of gain from the sale to, or exchange with, an unrelated person of any property held by the taxpayer, at the election of the taxpayer, gross income for the tax year shall not include so much of such gain as does not exceed the aggregate amount invested by the taxpayer in a QOF during the 180-day period beginning on the date of such sale or exchange. In the case of a partner of a partnership, if the partnership does not elect to defer some, or all, of the eligible gains and the partner's distributive share includes one or more gains that are eligible gains with respect to the partner, the partner may elect under section 1400Z-2(a)(1)(A) and the section 1400Z-2 regulations to defer some or all of such eligible gains. Treas. Reg. § 1.1400Z2(a)-1(c)(8)(ii). In general, if a partner's distributive share includes eligible gains, the 180-day period with respect to such eligible gains begins on the last day of the partnership tax year in which the partner's distributive share of the partnership's eligible gain is taken into account under section 706(a). Treas. Reg. § 1.1400Z2(a)-1(c)(8)(iii)(A). A partner may, however, elect to treat the partner's own 180-day period with respect to the partner's distributive share of that gain as being the same as the partnership's 180-day period or the 180-day period beginning on the due date for the partnership's tax return, without extensions, for the tax year in which the partnership realized the eligible gain. Treas. Reg. § 1.1400Z2(a)-1(c)(8)(iii)(B).

Treas. Reg. § 301.9100-1(a) provides that the Commissioner of the Internal Revenue Service (Service) has discretion to grant a reasonable extension of time to make a regulatory election. Treas. Reg. § 301.9100-1(b) defines the term "regulatory election" as including any election the due date for which is prescribed by a regulation published in the Federal Register. A taxpayer eligible to defer gain pursuant to IRC § 1400Z-2(a)(1) must make an election on its Federal income tax return for the tax year in which the gain would be included if not deferred. Treas. Reg. § 1.1400Z2(a)-1(a)(2). The election must be made in the manner prescribed by the Service in guidance published in the Internal Revenue Bulletin or in forms and instructions (see §§ 601.601(d)(2) and 601.602 of this chapter). Taxpayers electing to defer gain pursuant to IRC § 1400Z-

2(a)(1) must attach Form 8949 and the Schedule D with their timely filed Federal income tax return for the year of deferral. Thereafter, taxpayers must attach Form 8997, *Initial and Annual Statement of Qualified Opportunity Fund (QOF) Investments*, in each subsequent year of continued deferral. Also, eligible gains in a partner's distributive share are subject to the 180-day investment period described in Treas. Reg. § 1.1400Z2(a)-1(c)(8)(iii). Therefore, the election by a partner of a partnership under Code § 1400Z-2(a)(1) to defer eligible gains invested in a QOF is a regulatory election eligible for relief under Treas. Reg. § 301.9100-3.

Treas. Reg. §§ 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. Treas. Reg. § 301.9100-3(a) provides that requests for extensions of time for regulatory elections (other than automatic changes covered in Treas. Reg. § 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 granting relief will not prejudice the interests of the Government.

Treas. Reg. § 301.9100-3(b)(1) provides that a taxpayer will be 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 Treas. Reg. § 301.9100-3(b)(2), a taxpayer will not be considered to have reasonably relied on a qualified tax professional if the taxpayer knew or should have known that the professional was not —

(i) competent to render advice on the regulatory election; or

(ii) Aware of all relevant facts.

Under Treas. Reg. § 301.9100-3(b)(3), a taxpayer will not be considered to have acted reasonably and in good faith if the taxpayer —

(i) seeks to alter a return position for which an accuracy-related penalty could be imposed under § 6662 at the time the taxpayer requests relief and the new position requires 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. If specific facts have changed since the original deadline that make the election advantageous to a taxpayer, the Service will not ordinarily grant relief.

Treas. Reg. § 301.9100-3(c) provides 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. 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 tax years affected by the election than the taxpayer would have had if the election had been timely made. Treas. Reg. § 301.9100-3(c)(1)(i).

CONCLUSION

Based on the material submitted, we conclude that Taxpayer's failure to make an election to defer gain on Form 8949 and the Schedule D for Year 1 for amounts invested in a QOF was due to Taxpayer's reliance on the advice given and services provided by Tax Advisor, a qualified tax professional employed by Taxpayer for the purpose of providing advice and preparation services related to Taxpayer's tax returns. Taxpayer's reliance on Tax Advisor was reasonable. Taxpayer and its members employed Tax Advisor for several decades for business and income tax return preparation, and this long-standing business relationship, combined with Tax Advisor's qualifications, experience, and reputation led them to reasonably conclude that Tax Advisor was competent to continue to provide advice and services related to Taxpayer's Year 1 and Year 2 tax returns, including issues related to IRC § 1400Z-2(a)(1). Taxpayer made Tax Advisor aware of the relevant facts surrounding Taxpayer's intention and attempt to defer a portion of its IRC § 1231 gain flowing-through from Investment LLC X pursuant to IRC § 1400Z-2(a)(1) by investing in Investment LLC Y. Taxpayer is not using hindsight in requesting relief. In addition to Taxpayer's intent, Taxpayer timely invested in Investment LLC Y within 180 days of the close of Investment LLC X's Year 1 tax year. Investment LLC Y was formed with the purpose of qualifying as a QOF, as defined in IRC § 1400Z-2(d)(1). Therefore, despite having the relevant information and direction from Taxpayer, Tax Advisor failed to advise Taxpayer of the requirement to file Forms 8949 and 8997, and failed to ensure that the forms were properly filed. Lastly, Taxpayer requested relief before the failure to make the election was discovered by the Service.

Therefore, we conclude that Taxpayer acted reasonably and in good faith, and the interests of the Government will not be prejudiced by the granting of relief under Treas. Reg. § 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 45 days from the date of this letter ruling to make a gain deferral election pursuant to IRC § 1400Z-2(a)(1)(A) on Form 8949 and Schedule D for Year 1, with respect to amounts invested in Investment LLC Y. Additionally, Taxpayer should properly submit or amend, as appropriate, Form 8997 for each tax year it is required to be filed with Taxpayer's timely filed tax return, in accordance with this letter ruling.

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. Specifically, we have no opinion, either express or implied, concerning whether any gain allocated to Taxpayer by Investment LLC X is an eligible gain as defined in Treas. Reg. § 1.1400Z2(a)-1(b)(11), whether Investment LLC Y meets the requirements under IRC § 1400Z-2 and the regulations thereunder to be a QOF, or whether the investment made by Taxpayer in Investment LLC Y is a qualifying investment as defined in Treas. Reg. § 1.1400Z2(a)-1(b)(34).

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

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.

This ruling is based upon information and representations submitted by Taxpayer and Attorney and accompanied by a penalty of perjury statement signed by an appropriate party. Although this office has not verified any of the material submitted in support of the request for ruling, it is subject to verification on examination.

In accordance with the provisions of a power of attorney on file with this office, a copy of this letter is being sent to Taxpayer's authorized representative.

Sincerely,

Erika C. Reigle
Senior Technician Reviewer, Branch 5
Office of Associate Chief Counsel
(Income Tax & Accounting)

cc: