Internal Revenue Service

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Department of the Treasury
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Date:
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FAX:

TY=

Legend

Taxpayer =

Managing Member =

LLC =

Development LLC =
Partnership =

Nominee =

Investor =
Project =
City =
Sole Shareholder =

Tax Preparer =

Partner 1	=
Partner 2	=
Year 1	=
Year 2	=
Year 3	=
Date 1	=
Date 2	=
Date 3	=
Date 4	=
Date 5	=
Tax Year	=
a percent	=
b percent	=
c percent	=

Dear :

This is in response to a Request for A Private Letter Ruling dated November 3, 2021, filed by your authorized representative on behalf of Taxpayer. This request is filed pursuant to Revenue Procedure 2021-1. Specifically, Taxpayer is requesting that the Internal Revenue Service (“IRS”) exercise its authority under § 301.9100-3 of the Procedure and Administration Regulations (Regulations) to grant an extension of time within which to file an election to not be treated as a tax-exempt controlled entity for purposes of the tax-exempt use property rules ("§168(h)(6) Election") under § 168(h)(6)(F)(ii) of the Internal Revenue Code (“IRC”).

FACTS

Taxpayer is a domestic corporation. Taxpayer's annual accounting period ends on December 31 of each year. Taxpayer maintains its accounting books and files its federal income tax returns on an accrual basis. Sole Shareholder is the sole shareholder of Taxpayer. Sole Shareholder’s annual accounting period ends on December 31 of each year. Sole Shareholder maintains its accounting books and files its federal income tax returns on an accrual basis.

Taxpayer owns a percent of Managing Member. LLC also owns a percent of Managing Member. Managing Member's annual accounting period ends on December 31 of each year. Managing Member is b percent owner and the managing member of Partnership. Nominee owns c percent Partnership. Partnership owns and operates a mixed income housing project (“Project”) located in City.

Sole Shareholder is a tax-exempt entity under IRC §501(c)(3), formed in Year 1 in City. Its mission is to develop and operate housing projects for persons of low income. In Year 1, Sole Shareholder formed Taxpayer, as its wholly owned corporation. In Year 2,

Taxpayer filed its initial Year 1 Form 1120, U.S. Corporation Income Tax Return and continued its filing of Form 1120 each year thereafter.

In Year 1, Taxpayer and LLC formed Managing Member, a partnership for U.S. federal income tax purposes. In Year 1, Managing Member and Nominee, an unrelated party, formed Partnership to own and operate Project, a mixed-income housing project in City. Project was constructed and is rented to mixed-income tenants. Project operates in a manner necessary to qualify for federal low-income housing tax credits as provided under IRC § 42.

Because Project was nearing a predictable placed-in-service date, in Year 2 Taxpayer engaged Tax Preparer. An Accountant's Certificate Regarding the §168(h)(6) Election ("Certificate"), was signed by Partner 1, a partner in Tax Preparer on Date 1. Certificate was circulated at the closing of Project in Year 2 to Taxpayer and the Managing Member of the Partnership, is part of the Partnership's company records, and was incorporated into Partnership's closing binder.

An election notice regarding the §168(h)(6) Election ("Election Notice"), dated Date 2 and addressed to the IRS was also part of Partnership's closing binder. Election Notice was inadvertently not sent out to the IRS when it was signed on Date 2. Certificate discussed Taxpayer’s intention to make a §168(h)(6) Election, which was to take effect on or before Date 2. However, Project experienced rolling placed in service dates throughout Year 3 and was finished being placing in service on Date 3. Although the initial plan had been to make the §168(h)(6) Election on Taxpayer's tax return for the tax year immediately preceding Tax Year, filing the §168(h)(6) Election with the IRS was not necessary until Taxpayer’s Tax Year return.

Taxpayer did not have any previous experience filing the §168(h)(6) Election. Partner 1, the Tax Preparer partner in charge of Tax Preparer’s engagement team assisting Tax Preparer with tax preparation, retired from the firm before the return was due for Tax Year. Due to the delay in the Project being placed in service and transition of the return to a new preparation team, the §168(h)(6) Election was inadvertently not included with Taxpayer’s tax return for the year prior to Tax Year nor was the §168(h)(6) Election made with the return for Tax Year.

Taxpayer’s Form 1120 returns for all tax years prior to Tax Year were reviewed and approved by both the Chief Financial Officer ("CFO"') and Asset Manager of Development LLC, an affiliate of the Managing Member, and thereby, also an affiliate of Partnership, prior to their filing. Both prior to and in response to the discovery of the error, Managing Member experienced executive turnover. Taxpayer's Form 1120 return for the tax year prior to Tax Year and for Tax Year were reviewed and approved by the then-Director of Finance of LLC prior to their filing. During the relevant time period, none of the appropriate parties at the Taxpayer, Managing Member, or Development LLC were aware that a §168(h)(6) Election must be included with the tax return of a corporate, tax-exempt-controlled partner in the tax year that Project is placed in service.

The CFO, Chief Operating Officer (the "COO"), and President have been in place at Managing Member since before Year 1 and through to the present; the Asset Manager exited Development LLC during the first quarter of Year 3 and had been responsible for reviewing, approving, and signing tax returns during the Asset Manager's time with Development LLC. The Director of Finance of Development LLC held the role from the first quarter of Year 3 through Date 5. The Director of Finance assumed some of the responsibilities of the Asset Manager, including tracking and reviewing tax returns.

Development LLC's Director of Finance reviews and approves the tax returns prior to filing. Development LLC's Chief Operating Officer has more than thirteen years in development and managing low-income housing tax credit project properties.

Partnership has, at all times, depreciated its site improvements for Project using the 150 percent declining balance method of depreciation, and its furniture, fixtures and equipment property using the double declining balance method of depreciation.

The erroneous omission of the §168(h)(6) Election from Taxpayer’s Tax Year Form 1120 was brought to Taxpayer's attention by Investor, an investor in Partnership, on Date 4, after the extended due date of Taxpayer's return for Tax Year.

As a result of the error, Partnership would be required to treat a portion of the Project's fixed assets as tax-exempt use property, subject to the alternative depreciation system of depreciation. Taxpayer requests a ruling granting an extension of time to make the election under IRC §168(h), to ninety (90) days from the date of the ruling. If this request is granted, Taxpayer will continue to utilize the present depreciation methods used on Partnership's Forms 1065. Taxpayer will file an amendment with the IRS to include the §168(h)(6) Election for Tax Year.

From well before Project was placed in service, Taxpayer's intent was to timely file the §168(h)(6) Election. Failure to make the election was inadvertent. The submission notes that Certificate, providing that the §168(h)(6) Election was to be made by Taxpayer in conjunction with the filing of its tax return for the tax year prior to Tax Year, was signed by a Tax Preparer partner on Date 1; is part of Partnership's company records; and is incorporated into Partnership's closing binder with a copy of the Election Notice dated Date 2 and addressed to the IRS. Certificate discussed Taxpayer’s intention to make the §168(h)(6) Election, which was to take effect on or before Date 2. Date 2 was intended to coincide with Project’s placed-in-service date. As stated above, Project experienced rolling placed in service dates and was actually finished placing in service on Date 3.

In Election Notice, which requires Taxpayer to make the §168(h)(6) Election not to be treated as a tax-exempt entity, was drafted and addressed to the IRS, though inadvertently never sent. This omission has not been raised by the IRS in an audit.

To guard against future similar errors, Taxpayer's affiliates have updated and improved staffing and practices with respect to reviewing tax issues: Development LLC has hired a new Director of Finance and new accounting staff; Development LLC holds weekly calls to review open tax issues, which include the Chief Operating Officer of Development LLC; Development LLC has improved its overall internal tracking methods in order to help to prevent any similar errors on future elections.

Taxpayer represents that the interests of the Government would not be prejudiced under the standards set forth in §301.9100-3(c)(1)(ii) of the Regulations because the relief sought here will only allow Taxpayer to depreciate its property as a non-tax-exempt controlled entity, with total depreciation across all years remaining consistent using the same depreciation method taken pursuant to its tax returns. In addition, Taxpayer represents that its intent was to timely make the §168(h)(6) Election. Failure to make the election was inadvertent, the evidence of which is consistently reflected in the underlying Project documents as described above.

In support of this ruling request, Taxpayer has submitted an affidavit from Partner 2, a knowledgeable representative of Tax Preparer.

Taxpayer requests that the Internal Revenue Service issue a ruling granting a 90-day extension of time pursuant to §§ 301.9100-1 and 3 to make a §168(h)(6) Election, and to allow Taxpayer's election to be effective as of Tax Year.

APPLICABLE 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) of the Income Tax Regulations 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.

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.

Because Sole Shareholder is a tax-exempt entity which owns all of the membership interests of Taxpayer, Taxpayer is a tax-exempt controlled entity within the meaning of § 168(h)(6)(F)(iii)(I). As such, Taxpayer is eligible to make the § 168(h)(6) election.

Under § 301.9100-7T(a)(2)(i) of the 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 of the Regulations 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 requests for extensions of time for regulatory elections (other than automatic changes 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 granting relief will not prejudice the interests of the Government.

Section 301.9100-3(b)(1) of the Regulations 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 Internal Revenue 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 Internal Revenue 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) of the Regulations, 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 of the Code 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 Internal Revenue Service will not ordinarily grant relief.

Section 301.9100-3(c) of the Regulations provides that the Internal Revenue 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 taxable years affected by the election than the taxpayer would have had if the election had been timely made.

CONCLUSION

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, Taxpayers promptly sought an extension of time in which 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 Tax Year was inadvertent and based upon its reliance of 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.

Based solely on the facts as represented and the applicable law, we conclude that the requirements of §§ 301.9100-1 and 301.9100-3 of the Regulations have been met. Taxpayer is granted an extension of 90 days from the date of this ruling to file the § 168(h)(6) Election statement with the appropriate service center containing the information required in § 301.9100-7T(a)(3) for that election to be effective for Tax Year. Taxpayer must attach a copy of this letter to its § 168(h)(6) Election statement. The letter ruling should be attached for all subsequent returns (and amended returns) for all taxable years to which this ruling is relevant. Pursuant to § 301.9100-7T(a)(3)(ii) of the Regulations, a copy of that election statement should be attached to the federal income tax returns of all tax-exempt shareholders or holders of membership interests in Taxpayer.

This ruling is based upon information and representations submitted by the taxpayer 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.

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.

Enclosed is a copy of the letter showing the deletions proposed to be made when it is disclosed under § 6110 of the Code. If you have any questions concerning this matter, please contact the individual whose name and telephone number appear at the beginning of the letter.

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.

Sincerely,

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

Enclosure (1)

cc: