

Internal Revenue Service

Number: **202346004**

Release Date: 11/17/2023

Index Number: 1400Z.02-00, 9100.00-00

Department of the Treasury

Washington, DC 20224

Third Party Communication: None

Date of Communication: Not Applicable

Person To Contact:

, ID No.

Telephone Number:

Refer Reply To:

CC:ITA:B04

PLR-103905-23

Date:

August 23, 2023

Legend

Taxpayer =

Tax Advisor =

Date 1 =

Date 2 =

Date 3 =

Date 4 =

Date 5 =

Date 6 =

Year 1 =

Year 2 =

Year 3 =

State Z =

\$A =

\$B =

\$C =

The Gain =

LLCs

Investment =

LLC

Dear :

This letter responds to Taxpayer's request dated Date 6, seeking a private letter ruling granting relief to make a late regulatory election pursuant to Treas. Reg. §§ 301.9100-1

and 301.9100-3 of the Procedure and Administration Regulations. Specifically, Taxpayer requests an extension of time to make an election to defer eligible gain pursuant to section 1400Z-2(a)(1)(A) on Form 8949, *Sales and Other Dispositions of Capital Assets*, and the Schedule D for Year 2, with respect to amounts invested in a qualified opportunity fund (QOF), as defined in section 1400Z-2(d).

This letter ruling is being issued electronically in accordance with Rev. Proc. 2023-1, 2023-1 I.R.B.1. A paper copy will not be mailed to Taxpayer.

FACTS

According to information submitted to us, Taxpayer is a limited liability company which was organized in State Z on Date 1. Taxpayer is treated as a partnership for Federal tax purposes, has a calendar tax year, and uses the cash receipts and disbursements method of accounting. Taxpayer has three members.

During Year 2, Taxpayer held membership interests in five limited liability companies (the Gain LLCs) which were treated as partnerships for Federal tax purposes. The due date, without extensions, for the Year 2 tax returns of each of the Gain LLCs was Date 2. During Year 2, the Gain LLCs realized long-term capital gains. None of the Gain LLCs elected to defer their long-term capital gains by investing such gains in a QOF. The Gain LLCs issued Taxpayer Forms K-1 for Year 2, on which the Gain LLCs allocated an aggregate total of \$A of such long-term capital gains to Taxpayer.

On Date 3, less than 180 days after Date 2, Taxpayer invested \$B of its distributive Gain LLC capital gains into Investment LLC, a limited liability company which was formed in Year 1 to be a QOF. On Date 4, also less than 180 days after Date 2, Taxpayer invested another \$C of its distributive Gain LLC capital gains into Investment LLC.

Taxpayer engaged Tax Advisor to prepare its Federal income tax returns for the Year 2 tax year. Tax Advisor has provided tax advice and tax return preparation services to Taxpayer since Taxpayer was organized. While Tax Advisor was preparing the tax returns of Taxpayer, Taxpayer informed Tax Advisor of Taxpayer's two investments of \$B and \$C into Investment LLC during Year 2 and provided Tax Advisor with the associated documentation. Taxpayer also informed Tax Advisor of its intention for such investments to qualify for tax deferral as investments into a QOF. Tax Advisor subsequently researched the filing requirements for investment in a QOF and came to the mistaken conclusion that Taxpayer's investments in Investment LLC were untimely to qualify for deferral as an investment in a QOF. As a result, Tax Advisor failed to prepare and include a Form 8949 (or record the investments on a Schedule D), for Year 2 with Taxpayer's returns, which were filed on Date 5. Tax Advisor subsequently discovered their mistake.

LAW AND ANALYSIS

Section 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 section 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. § 1.1400Z2-1(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 section 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 section 1400Z-2(a)(1) to defer eligible gain 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 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 is 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 reasonable 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 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 taxable 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 2 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 tax 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 since the year Taxpayer was organized and relied upon Tax Advisor for accurate and complete tax reporting. Taxpayer informed Tax Advisor of each of the investments in Investment LLC along with documentary evidence, as well as Taxpayer's intention for such investments to qualify for tax deferral as investments into a QOF under sections 1400Z-1 and 1400Z-2. Taxpayer is not using hindsight in requesting relief. 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, the interests of the Government will not be prejudiced by the granting of relief under Treas. Reg. § 301-900-3. 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 section 1400Z-2(a)(1)(A) on Form 8949 and Schedule D for Year 1, with respect to amounts invested in Investment LLC. 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.

This ruling addresses the granting of Treas. Reg. § 301.9100-3 relief as applied to the election to defer gain on Form 8949 and the Schedule D for Year 2. Specifically, we have no opinion, either express or implied, concerning whether any investments made into Investment LLC are qualifying investments as defined in Treas. Reg. § 1.1400Z2(a)-1(b)(34) or whether Investment LLC meets the requirements under section 1400Z-2 and the regulations thereunder to be a QOF. 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 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.

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.

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.

In accordance with the Power of Attorney on file with this office, a copy of this letter is being sent to your authorized representative.

Sincerely,

Mon L. Lam
Senior Counsel, Branch 4
Office of Associate Chief Counsel
(Income Tax & Accounting)

cc: