

Internal Revenue Service

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Department of the Treasury

Washington, DC 20224

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CC:ITA:B03

PLR-104589-23

Date:

August 29, 2023

LEGEND

Date 1 =

Date 2 =

Date 3 =

Date 4 =

Date 5 =

Date 6 =

Accounting Firm =

Business =

City =

Managing Member =

Investor Member =

Taxpayer =

Year 1 =

Year 2 =

Year 3 =

Jurisdiction =

Dear _____ :

This letter responds to a letter ruling request dated Date 6, submitted by Accounting Firm on behalf of Taxpayer, requesting an extension of time under §§ 301.9100-1 and 301.9100-3 of the Procedure and Administration Regulations (“P&A Regulations”) to make an election under § 163(j)(7)(B) of the Internal Revenue Code (“Code”) to treat Taxpayer as an “electing real property trade or business” as of Date 1.

FACTS

Taxpayer is a limited liability company formed under the laws of Jurisdiction engaged in the business of Business. Taxpayer was formed on Date 2. Taxpayer owns and operates a real estate project located in City. Taxpayer represented that it is a real property trade or business engaged in activities described in § 469(c)(7)(C), and therefore, it may elect to not be subject to the §163(j) limitation.

Taxpayer is currently owned 0.01% by Managing Member and 99.99% by Investor Member. Taxpayer’s personal and real property was placed in service in Year 1. Taxpayer filed a federal income tax return for its year ending Date 3 on a Form 1065 but failed to attach the election statement required by § 163(j)(7)(B) of the Code (“the election”) to its U.S. federal income tax return.

Taxpayer provided all information to Accounting Firm that was necessary to prepare and file Taxpayer’s Year 1 U.S. federal income tax return including the preparation of the election. Taxpayer provided a copy of the entity’s operating agreement that required the entity to file the election under § 163(j)(7)(B). Accounting Firm prepared Taxpayer’s U.S. federal tax return consistent with the requirements of a valid election under § 163(j)(7)(B), including, the use of the alternative depreciation system (ADS) under § 163(j)(11), as required under § 1.163(j)-9(c)(3) of the Income Tax Regulations (“Regulations”). Taxpayer’s Year 2 and Year 3 returns were also filed consistent with the requirements of a valid election under § 163(j)(7)(B).

Notwithstanding Taxpayer providing such information, Accounting Firm failed to attach the election to Taxpayer’s Year 1 U.S. federal income tax return which was e-filed by Accounting Firm and accepted by the Internal Revenue Service on Date 4. Taxpayer’s failure to make the election was first discovered on or around Date 5 when the Controller of the Taxpayer requested a copy of the Taxpayer’s original Year 1 tax return. This inquiry prompted Accounting Firm to review Taxpayer’s Year 1 tax return. Upon review, Accounting Firm discovered that the election was not attached to Taxpayer’s Year 1 tax return. On Date 5, Taxpayer engaged Accounting Firm to prepare a private letter ruling request to seek an extension of time under §§ 301.9100-1 and 301.9100-3 to file the election for Year 1.

LAW

Section 163(a) of the Code provides generally for an interest deduction for all interest paid or accrued within the taxable year of indebtedness.

Section 163(j) of the Code provides that the amount of business interest allowed as a deduction under § 163(j) shall not exceed the sum of (1) the business interest income of such taxpayer for such taxable year; (2) 30 percent of the adjusted taxable income of such taxpayer for such taxable year, plus; (3) the floor plan financing interest of such taxpayer for such taxable year.

Section 163(j)(A)(ii) of the Code provides the term “trade or business” for purposes of § 163 shall not include any electing real property trade or business.

Section 163(j)(7)(B) of the Code defines an electing real property trade or business as “any trade or business which is described in § 469(c)(7)(C) and which make an election under this subparagraph. Any election shall be made at such time and in such manner as the Secretary shall prescribe and, once made, shall be irrevocable.” Section 1.163(j)-9(d)(1) of the Regulations provides that an election is made by attaching an election statement to the taxpayer’s timely filed original Federal income tax return, including extensions.

Section 469(c)(7)(C) of the Code defines “real property trade or business” as “any real property development, construction, reconstruction, acquisition, conversion, rental, operation, management, leasing, or brokerage trade or business.”

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 an election. Section 301.9100-2 provides automatic extensions of time for making certain elections. Section 301.9100-3 provides extensions of time for making elections that do not meet the requirements of § 301.9100-2.

Section 301.9100-1(c) provides that the Commissioner has discretion to grant a reasonable extension of time under the rules set forth in §§ 301.9100-2 and 301.9100-3 to make certain regulatory elections. Section 301.9100-1(b) defines a “regulatory election” as an election whose due date is prescribed by a regulation published in the Federal Register, or a revenue ruling, revenue procedure, notice, or announcement published in the Internal Revenue Bulletin.

Section 301.9100-3(a) provides that requests for relief under § 301.9100-3 will be granted when the taxpayer provides evidence to establish to the satisfaction of the Commissioner that the taxpayer acted reasonably and in good faith, and that granting relief will not prejudice the interests of the Government.

Section 301.9100-3(b)(1) of the P&A Regulations 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 (taking into account the taxpayer's experience and the complexity of the return or issue), 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, including a tax professional employed by the taxpayer, and the tax professional failed to make, or advise the taxpayer to make, the election.

Section 301.9100-3(b)(2) provides that 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.

Section 301.9100-3(b)(3) provides that a taxpayer will be deemed to have not 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 material respects of the required election and related tax consequences, but chose not to file the election; or
- (iii) Uses hindsight in requesting relief.

Section 301.9100-3(c)(1) provides that the interests of the Government are prejudiced if granting relief would result in the 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. The interests of the Government are ordinarily prejudiced if the taxable year in which the regulatory election should have been made, or any taxable years 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).

ANALYSIS

Taxpayer's election is a regulatory election, as defined under § 301.9100-1(b) because the requirements and due date of the election are prescribed in § 1.163(j)-9(d). The

Commissioner has the authority under §§ 301.9100-1 and 301.9100-3 to grant an extension of time to file a late regulatory election.

To receive an extension of time to file a regulatory election, a taxpayer must provide evidence sufficient to establish that it acted reasonably and in good faith. Taxpayer's operating agreement indicates that Taxpayer was required to make the § 163(j)(7)(B) election for the taxable year that ends Date 3. The affidavits submitted by Taxpayer indicate that Taxpayer and its Accounting Firm intended to make the election. Additionally, Taxpayer's U.S. federal income tax return for the taxable year that ends on Date 3, and the income tax returns for Year 2 and Year 3 were filed consistently with the requirements of the real property trade or business election given that Taxpayer elected the ADS depreciation method.

Taxpayer has also requested relief prior to the discovery of the failure to make the election was discovered by the IRS during an examination. After exercising reasonable diligence (as discussed immediately above) Taxpayer relied on Accounting Firm, which is a qualified tax professional to prepare its tax return.

There is nothing to indicate that Taxpayer did not act reasonably or in good faith, or is using hindsight. Based on Taxpayer's representations, the government is not prejudiced as a result of granting this ruling because granting relief will not result in Taxpayer having a lower tax liability in the aggregate for the tax years at issue than Taxpayer would have had if the election would have been made timely. Additionally, Taxpayer's tax return for the taxable year ending Date 3 was filed on Date 4, therefore, the taxable year is not closed by the period of assessment.

CONCLUSION

Based solely on the facts submitted and the representations made, we conclude that Taxpayer acted reasonably and in good faith and that granting the request for an extension to file the election under § 163(j)(7)(B) of the Code will not prejudice the interests of the government.

Taxpayer is granted an extension of 60 calendar days from the date of this letter ruling to file, in accordance with the procedures set forth in § 1.163(j)-9(d), the election statement required by § 163(j)(7)(B) of the Code, stating that Taxpayer is an "electing real property trade or business" as of Date 1.

The ruling contained in this letter is based on information and representations submitted by 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. If any of the information or representations provided are subsequently determined to be inaccurate and/or incomplete this ruling and its conclusions are void.

Except as expressly provided herein, no opinion is expressed or implied concerning the tax consequences arising from the facts described above under any other provision of the Code or regulations. In particular, we are not expressing any opinion concerning whether Taxpayer qualifies as an electing real property trade or business that is qualified to make the election under § 163(j)(7)(B).

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

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

In accordance with the provisions of the power of attorney currently on file with this office, copies of this letter are being sent to your authorized representative. We are also sending a copy of this letter to the appropriate operating division director.

Sincerely,

JUSTIN R. GRILL
Senior Counsel, Branch 3
(Income Tax & Accounting)
Office of Chief Counsel

Enclosure: Copy for § 6110 purposes

cc: