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FACTS

Taxpayer is a domestic corporation incorporated under the laws of State Z. Taxpayer uses the calendar year as its annual accounting period. Exempt Organization, a tax-exempt organization under § 501(c)(3) of the Code, wholly owns Taxpayer. Taxpayer therefore is a tax-exempt controlled entity within the meaning of § 168(h)(6)(F)(iii) of the Code.

Taxpayer is the managing member of Partnership. The operating agreement of Partnership provides that Taxpayer will not be a tax-exempt controlled entity and that it will make an election under section 168(h)(6)(F)(ii).

Taxpayer engaged Advisor to prepare its Year 1 federal income tax return and specifically requested that Advisor file a section 168(h)(6)(F)(ii) election for Year 1. However, due to an administrative error, Advisor inadvertently failed to file an extension to file the tax return by the due date, Date 1. As a result, Taxpayer's return was not timely filed. When Taxpayer's return was filed, Taxpayer did not include the election with its return, pending the outcome of this ruling request, as it would not have been valid as a result of having not been timely filed by the due date of the return.

APPLICABLE LAW

Section 167(a) of the Code generally provides for a depreciation deduction for property used in a trade or business. Under § 168(g), the alternative depreciation system must be used for any tax-exempt use property as defined in § 168(h). Section 168(h)(6)(F)(i) provides generally that any tax-exempt controlled entity is treated as a tax-exempt entity for purposes of § 168(h)(6).

Section 168(h)(6)(A) provides that, for purposes of § 168(h), if any property 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 is treated as tax-exempt use property.

Under § 168(h)(6)(F)(iii)(I), a corporation (without regard to that subparagraph and § 168(h)(2)(E) constitutes a "tax-exempt controlled entity" if 50 percent or more (in value) of the corporation's stock is held by one or more tax-exempt entities (other than a foreign person or entity). In the case of tiered partnerships and other entities, § 168(h)(6)(E) applies similar rules.

Under § 168(h)(6)(F)(ii), a tax-exempt controlled entity can elect not to be treated as a tax-exempt entity. Once made, the election is irrevocable and will bind all tax-exempt entities holding an interest in the tax-exempt controlled entity.

Under § 301.9100-7T(a)(2)(i) of the Procedure and Administration Regulations, a § 168(h)(6)(F)(ii) election 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 301.9100-7T(a)(3)(i) provides that the § 168(h)(6)(F)(ii) election must be made by attaching a statement to the tax return for the taxable year for which the election is to be effective.

Section 301.9100-1(c) provides that the Commissioner of Internal Revenue has the 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 for which a regulation prescribes the due date. The § 168(h)(6)(F)(ii) election is a regulatory election.

Sections 301.9100-1 through 301.9100-3 provide the standards the Commissioner will use to determine whether to grant an extension of time to make a regulatory election. Section 301.9100-3(a) provides that a request for an extension of time for a regulatory election (other than automatic extensions of time 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) 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 Internal Revenue Service (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 § 301.9100-3(b)(3), a taxpayer will not be considered 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 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 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.

Section 301.9100-3(c)(1) provides that the Service will grant a reasonable extension of time only when doing so will not prejudice the interests of the Government. 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.

ANALYSIS

The facts submitted by Taxpayer indicate that Taxpayer intended at the outset to make the § 168(h)(6)(F)(ii) election, that its failure to make the election on a timely-filed return was inadvertent, and that Taxpayer is not using hindsight in requesting relief. Moreover, Taxpayer requested this relief before failure to make the election was discovered by the Service. Finally, Taxpayer acted reasonably in and good faith, and the interests of the government will not be prejudiced by the granting of relief under § 301.9100-3.

CONCLUSION

Based solely on the facts as represented and the applicable law, we conclude that the request for relief under § 301.9100-3 should be granted. Taxpayer is granted an extension of 45 days from the date of this letter to file an amended return making the election under § 168(h)(6)(F)(ii). Taxpayer must attach a copy of this ruling letter to its amended return. If Taxpayer files its amended return electronically, it may satisfy this requirement by attaching a statement to its amended return that provides the date and control number of this letter ruling.

This ruling is based upon information and representations submitted by Taxpayer. While this office has not verified any of the material submitted in support of the request for a 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. Specifically, this ruling grants an extension of time to make a § 168(h)(6)(F)(ii) election; however, this ruling does not address whether taxpayer is eligible to make the election.

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.

Pursuant to the Form 2848, Power of Attorney and Declaration of Representative, on file, we are sending a copy of this letter to Taxpayer's authorized representative.

Sincerely,

Lisa Mojiri-Azad
Senior Technician Reviewer
Branch 4
Office of Associate Chief Counsel
(Income Tax & Accounting)

cc: