Internal Revenue Service

Department of the Treasury

Washington, DC 20224

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Person to Contact:

Telephone Number:

Refer Reply To:
CC:ITA:3 PLR-102746-02

Date:
April 16, 2002

Attention:

EIN:

LEGEND:

Taxpayer =

Year 1 =

Year 2 =

Year 3 =

Year 4 =

Date 1 =

Month 1 =

n =

A =

B =

Dear :

This ruling responds to letters dated January 9, 2002 and April 8, 2002, submitted by your authorized representative, requesting an extension of time, under § 301.9100-3 of the Procedure and Administration Regulations, for Taxpayer to make elections under § 198 of the Internal Revenue Code to expense qualified environmental remediation expenditures for its Year 2 and Year 3 taxable years.

FACTS

Taxpayer is a limited liability company that is classified as a partnership for federal income tax purposes. Taxpayer uses a calender taxable year and an overall accrual method of accounting. Taxpayer is engaged in the business of developing, owning, and managing commercial property. On Date 1, Taxpayer acquired a n-acre tract of unimproved real property located in A. The property was developed in Year 1 through Year 3, and was ready for lease in Year 4. Taxpayer represents that it incurred "qualified environmental remediation expenditures" during the development of the property from Year 1 until Year 3.

Taxpayer hired the accounting firm of B to render tax advice and prepare the returns of the partnership, which were timely filed for the years at issue. On its returns for these years, Taxpayer capitalized its qualified environmental remediation expenditures. At that time, Taxpayer was unaware of the enactment of § 198 and the availability of an election under that section to expense certain qualifying environmental remediation expenditures. Taxpayer's members had developed other projects in years prior to the enactment of § 198 and had capitalized similar costs under § 263. Taxpayer relied on its accounting firm to identify the availability of an election that would allow it to deduct these costs.

B was not aware that Taxpayer qualified for the election under § 198 and did not request documentation from Taxpayer that would enable it to make that determination. In Month 1, after B completed Taxpayer's Year 3 income tax return, B requested detailed project information and discovered that Taxpayer's site would have qualified for the election provided under § 198 for its Year 1, Year 2, and Year 3 taxable years. At that time, B advised Taxpayer that an election should have been filed for Year 1, Year 2, and Year 3 to deduct qualified enviromental remediation expenditures under § 198. Because the time for making these elections had expired, Taxpayer requested relief under § 301.9100-3 for its Year 1, Year 2, and Year 3 taxable years. After discussions with this office, Taxpayer withdrew its request for relief for Year 1.

LAW AND ANALYSIS

Section 198 provides, in part, that a taxpayer may elect to treat any qualified environmental remediation expenditure which is paid or incurred by the taxpayer as an expense which is not chargeable to capital account. Any expenditure which is so treated shall be allowed as a deduction for the taxable year in which it is paid or incurred.

Under § 198(b), a qualified environmental expenditure means any expenditure which is otherwise chargeable to capital account and which is paid in connection with the abatement or control of hazardous substances at a qualified contaminated site. For expenditures paid or incurred before December 21, 2000, a qualified contaminated site included only sites which were located within specified targeted areas. For expenditures paid or incurred on or after December 21, 2000, the election under § 198 was no longer limited to sites located in targeted areas. See Community Renewal Tax

Relief Act of 2000, Pub. L. 106-554, § 1(a)(7), 114 Stat. 2763 (2000).

Rev. Proc. 98-47, 1998-2 C.B. 319, provides the procedures for taxpayers to make the election under § 198 to deduct any qualified environmental remediation expenses. Under section 3.01 of Rev. Proc. 98-47, the election must be made on or before the due date (including extensions) for filing the income tax return for the taxable year in which the qualified environmental expenditures are paid or incurred. In addition, persons other than individuals are required to make the election by including the total amount of § 198 expenses on the line for "Other Deductions" on their appropriate federal tax return. On a schedule attached to the return that separately identifies each expense included in "Other Deductions," the taxpayer must write "Section 198 Election" on the line on which the § 198 expense amounts separately appear. See section 3.02(2) of Rev. Proc. 98-47.

Section 3.03 of Rev. Proc. 98-47 provides that, if for any taxable year, the taxpayer pays or incurs more than one qualified environmental remediation expenditure, the taxpayer may make a § 198 election for any one or more of such expenditures for that year. Thus, the taxpayer may make a § 198 election with respect to a qualified environmental remediation expenditure even though the taxpayer chooses to capitalize other such expenditures (whether or not they are of the same type or paid or incurred with respect to the same qualified contaminated site). Further, a § 198 election for one year has no effect for other years. Thus, a taxpayer must make a § 198 election for each year in which the taxpayer intends to deduct qualified environmental remediation expenditures.

Sections 301.9100-1 through 301.9100-3 set forth the standards that the Commissioner will use to determine whether to grant an extension of time to make certain statutory and regulatory elections. Section 301.9100-2 provides an automatic extension of time to make certain statutory and regulatory elections where the taxpayer takes corrective action within the automatic extension period. Section 301.9100-3 provides extensions of time for making regulatory elections that do not meet the requirements of § 301.9100-2. 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 the grant of relief will not prejudice the interests of the government.

Section 301.9100-3(b)(1) enumerates certain circumstances under which a taxpayer is deemed to have acted reasonably and in good faith. A taxpayer is deemed to have acted reasonably and in good faith if the taxpayer 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)(1)(v). A taxpayer will not be considered to have relied on a qualified tax professional if the taxpayer knew or the should have known that the professional was not competent to render advice on the regulatory election or aware of all relevent facts. Section 301.9100-3(b)(2).

Section 301.9100-3(b)(3) provides that a taxpayer is 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; (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. If specific facts have changed since the due date for making the election that make the election advantageous to a taxpayer, the Service will not ordinarily grant relief. In such a case, the Service will grant relief only when the taxpayer provides strong proof that the taxpayer's decision to seek relief did not involve hindsight.

Section 301.9100-3(c)(1) provides, in part, that the Commissioner will grant a reasonable extension of time to make a regulatory election only when the interests of 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 (taking into account the time value of money). Section 301.9100-3(c)(1) also provides, in part, that 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) before the taxpayer's receipt of a ruling granting relief under § 301.9100-3.

Based on our analysis of the facts, Taxpayer in the present case acted reasonably and in good faith. As demonstrated in the affidavits provided by Taxpayer and B, Taxpayer reasonably relied on a qualified tax professional and such professional failed to make the election when preparing Taxpayer's returns for the years at issue. Moreover, Taxpayer had no reason to know that the tax professional was not competent to render advice on the election or was not aware of all relevant facts. Further, Taxpayer is not seeking to alter a return position for which an accuracy-related penalty has been or could be imposed under § 6662, Taxpayer was not informed of the election and chose not file for it, and Taxpayer did not use hindsight in requesting relief.

In addition, based on the facts provided, the interests of the government will not be prejudiced by granting relief in this case. Granting relief will not result in Taxpayer having a lower tax liability in the aggregate for all taxable years affected by the election than Taxpayer would have had if the election had been timely made. In addition, none of the taxable years for which the taxpayer is requesting relief are closed, nor will any closed taxable years be affected by the making of the election for these years.

Because Taxpayer acted reasonably and in good faith, and because the interests of the government will not be prejudiced if the request for relief is granted, Taxpayer has met the requirements for an extension under § 301.9100-3 for making the elections under § 198 for its Year 2 and Year 3 taxable years. Accordingly, Taxpayer is

granted an extension of 60 days from the date of this ruling letter to make the elections under § 198 by filing amended federal income tax returns for its Year 2 and Year 3 taxable years. Taxpayer must comply with all the requirements of Rev. Proc. 98-47, 1998-2 C.B. 319, for the manner of making such election upon its amended returns. A copy of this letter ruling should be attached to each amended return.

The ruling contained in this letter is based upon facts and representations submitted by Taxpayer. Except as specifically addressed herein, no opinion is expressed regarding the tax treatment of the subject transaction under the provisions of any other sections of the Code or regulations that may be applicable thereto. Specifically, no opinion is expressed as to whether the expenditures discussed in this ruling constitute qualified environmental remediation expenditures under § 198 during the tax years at issue. 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 a power of attorney on file with this office, we are sending a copy of this letter ruling to Taxpayer's authorized representative.

Sincerely yours,
CHRISTOPHER F. KANE
Chief, Branch 3
Office of Associate Chief Counsel
(Income Tax & Accounting)

cc: