

Internal Revenue Service

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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:3

PLR-134419-05

Date: December 16, 2005

Legend:

Year 1 =

A =

Taxpayer =

Property A =

\$X =

Accounting Firm A =

Accounting Firm B =

Date V =

Dear

This responds to your letter which requests an extension of time under §§ 301.9100-1 and -3 of the Procedure and Administration Regulations for taxpayer to make an election under § 198 of the Internal Revenue Code to deduct qualified environmental remediation expenditures (QERs) for Year 1.

FACTS

Taxpayer is an S corporation that is wholly owned by A. Taxpayer uses a calendar taxable year and an overall accrual method of accounting. Taxpayer is engaged in the business of developing, constructing, managing and owning commercial real estate. In Year 1, Taxpayer began constructing an office/warehouse facility on Property A. Taxpayer represents that it incurred QER expenditures in the amounts of \$X during Year 1.

Taxpayer hired Accounting Firm A to prepare its Year 1 tax return which was timely filed. On its Year 1 tax return, Taxpayer did not make an election to deduct QERs incurred during Year 1 but instead, taxpayer capitalized those expenditures. Taxpayer represents that it was unaware of the availability of an election to deduct QERs. Taxpayer relied on Accounting Firm A to identify the availability of an election. Taxpayer represents that Accounting Firm A was provided detailed cost information relating to expenditures incurred on property A and did not identify any costs as deductible under § 198 and did not request documentation from Taxpayer that would enable it to make such a determination. In Year 2, Taxpayer hired Accounting Firm B to perform an analysis on Property A to determine the amount of QERs incurred during Year 1. On Date V, Accounting firm B advised Taxpayer that an election should have been filed for Taxpayer's Year 1 tax year to expense the QERs incurred during Year 1.

STATEMENT OF LAW

Section 198 provides, in part, that a taxpayer may elect to treat any QER 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.

Rev. Proc. 98-47, 1998-2 C.B. 319, provides the procedures for taxpayers to make the election under § 198 to deduct QERs. 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 QERs 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.

Section 301.9100-3 of the Procedure and Administration regulations generally provides extensions of time for making regulatory elections. For this purpose § 301.9100-1(b) defines the term “regulatory election” to include an election whose deadline is prescribed by a revenue ruling, revenue procedure, notice or announcement published in the Internal Revenue Bulletin.

Section 301.9100-3 provides that requests for extensions of time for regulatory elections will be granted when the taxpayer provides evidence (including affidavits described in the regulations) to establish to the satisfaction of the Commissioner 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) states 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 Service;
- (ii) inadvertently 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.

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 competent to render advice on the regulatory election or aware of all relevant facts. Section 301.9100-3(b)(2).

Under § 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 has been or could be imposed under § 6662 at the time the taxpayer requests relief (taking into account § 1.6664-2(c)(3) of the Income Tax

Regulations) and the new position requires 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. 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)(i) provides, in part, 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 (taking into account the time value of money). Section 301.9100-3(c)(1)(ii) 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.

In the present case, Taxpayer acted reasonably and in good faith. As demonstrated in the affidavits provided by Taxpayer and an employee of Accounting Firm A, Taxpayer relied on a qualified tax professional and the professional failed to make the election or advise Taxpayer to make the election for QERs for Year 1. Taxpayer had no reason to know that the professional was not competent to render advice on the regulatory election or aware of all relevant facts. Section 301.9100-3(b)(2). In addition, 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 to file it, and Taxpayer has represented that it did not use hindsight in seeking relief.

In addition, based on the facts provided, the interests of the government will not be prejudiced by granting relief in this case. Taxpayer has represented that 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, Taxpayer has represented that 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 Year 1.

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 1 taxable year. 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 1 taxable year. 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.

No opinion is expressed as to the application of any other provision of the Code or the regulations which may be applicable under these facts. Specifically, no opinion is expressed as to whether the expenditures discussed in this ruling constitute qualified environmental remediation expenditures under § 198 of the Code. 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.

Enclosed is a copy of the letter ruling showing the deletions proposed to be made in the letter when it is disclosed under § 6110 of the Internal Revenue Code.

This ruling is based upon information and representations submitted by Taxpayer and accompanied by a penalty of perjury statement. 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.

Sincerely,

Christopher F. Kane
Branch Chief, Branch 3
(Income Tax & Accounting)

cc: