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Person To Contact: \_\_\_\_\_, ID No. \_\_\_\_\_

Date:  
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For all years prior to the Year 1 fiscal year, the Taxpayer consistently expensed Maintenance Activities in the year incurred for tax purposes, but capitalized these expenses for its books and records. The Taxpayer intended to make an election under §1.263(a)-3(n) on its consolidated Federal income tax return filed for its Year 1 fiscal year ended Date a. Section 1.263(a)-3(n) provides an election to capitalize for tax purposes any amounts paid to repair and maintain tangible property which is capitalized for book purposes.

Taxpayer completed and filed its return consistent with the election, but failed to attach the statement required by § 1.263(a)-3(n). The Year 1 fiscal year return was selected for examination. In preparing responses to the examination, the Taxpayer independently became aware that the statement required by § 1.263(a)-3(n) was missing.

## LAW AND ANALYSIS

Section 1.263(a)-3(n) provides that a taxpayer may elect to treat amounts paid during the taxable year for repair and maintenance (as defined under § 1.162-4) to tangible property as amounts paid to improve that property and as an asset subject to the allowance for depreciation if the taxpayer incurs these amounts in carrying on the taxpayer's trade or business and if the taxpayer treats these amounts as capital expenditures on its books and records regularly used in computing income.

Section 1.263(a)-3(n)(2) provides, in part, that a taxpayer makes this election by attaching a statement to the taxpayer's timely filed original Federal tax return (including extensions) for the taxable year in which the taxpayer pays amounts described under paragraph (n)(1) of this paragraph. Sections 301.9100-1 through 301.9100-3 provide the rules governing extensions of the time to make regulatory elections. The statement must be titled "Section 1.263(a)-3(n) Election" and include the taxpayer's name, address, taxpayer identification number, and a statement that the taxpayer is making the election to capitalize repair and maintenance costs under § 1.263(a)-3(n). In the case of a consolidated group filing a consolidated income tax return, the election is made for each member of the consolidated group by the common parent, and the statement must also include the names and taxpayer identification numbers of each member for which the election is made.

Section 301.9100-1(c) provides that the Commissioner of Internal Revenue, in exercising his discretion, may grant a reasonable extension of time under the rules set forth in § 301.9100-3 to make a regulatory election under all subtitles of the Internal Revenue Code except subtitles E, G, H, and I. The term "regulatory election" is defined in § 301.9100-1(b) as an election whose due date is prescribed by a regulation published in the Federal Register, or a revenue ruling, revenue procedure, or announcement published in the Internal Revenue Bulletin.

Section 301.9100-3(a) provides that requests for relief subject to this section will be granted when the taxpayer provides the 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.

Under § 301.9100-3(b)(1), except as provided in § 301.9100-3(b)(3) (i) through (iii), a taxpayer is deemed to have acted reasonably and in good faith if the taxpayer:

- (i) requested relief under this section before the failure to make the regulatory election was discovered by the Internal Revenue 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 Internal Revenue 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.

Paragraphs (b)(3)(i) through (iii) of § 301.9100-3 provide that a taxpayer is deemed not 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 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. 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 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) before the taxpayer's receipt of a ruling granting relief under this section.

Taxpayer's election is a regulatory election, as defined under § 301.9100-1(b), because the due date of the election is prescribed in the regulations under § 1.263(a)-

3(n)(2). In the present situation, the requirements of §§ 301.9100-1 and 301.9100-3 of the regulations have been satisfied. The information and representations made by Taxpayer establish that the Taxpayer acted reasonably and in good faith. The affidavits presented show that Taxpayer reasonably relied on qualified tax professionals for the filing of Taxpayer's return, however, the tax professionals prepared the return consistent with an election under § 1.263(a)-3(n), but failed to attach the statement required by § 1.263(a)-3(n)(2). The affidavits presented show that Taxpayer was unaware of the necessity for the statement and upon discovery of the error, promptly requested relief.

The information and representations presented establish that Taxpayer is not seeking to alter a return position for which an accuracy-related penalty had been or could be imposed under § 6662 at the time relief was requested. Taxpayer was not informed in all material respects of the required election, and its related tax consequences. Furthermore, Taxpayer is not using hindsight in requesting relief, and no facts have changed since the time of the original filing deadline.

Finally, granting an extension will not prejudice the interests of the Government. It is represented that Taxpayer will not have a lower tax liability in the aggregate for all taxable years affected by the election if given permission to make the election in the appropriate amount at this time than Taxpayer would have had if the election were made in the appropriate amount by the original deadline for making the election. Taxpayer has represented that the granting of an extension will only affect the timing of when he will incur the tax liability. Moreover, the taxable year in which the regulatory election should have been made, and any taxable years that would have been affected by the election had it been timely made, are not closed by the period of limitations on 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 will not prejudice the interests of the government. Accordingly, the requirements of §§ 301.9100-1 and 301.9100-3 have been satisfied.

Accordingly, Taxpayer is granted an extension of 60 days from the date of this letter to file an amended return including the statement required by § 1.263(a)-3(n)(2) for its Year 1 fiscal year. Alternatively, a taxpayer filing returns electronically may satisfy this requirement by attaching a statement to the return that provides the date and control number of the letter ruling.

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. In particular, no opinion is expressed regarding Taxpayer's classification of Maintenance Activity expenses as repair and maintenance costs.

In accordance with the provisions of the power of attorney currently on file with this office, a copy of this letter is being sent to your authorized representatives. We are also sending a copy of this letter to the appropriate operating division director. Enclosed is a copy of the letter ruling showing the deletions proposed to be made in the letter when it is disclosed under § 6110.

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.

The rulings contained in this letter are based upon information and representations submitted by the 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.

Sincerely,

Sean M. Dwyer  
Senior Technical Reviewer, Branch 1  
Office of Associate Chief Counsel  
(Income Tax and Accounting)

cc: