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Telephone Number:

Refer Reply To:
CC:ITA:7
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Date:
May 25, 2011

Re: Request for Private Letter Ruling under Section 168(g)(4)

Taxpayer =
State1 =
Location1 =
A =
B =
C =

Dear :

This letter responds to a letter dated December 13, 2010, submitted by Taxpayer requesting a ruling under § 168(g)(4) of the Internal Revenue Code.

FACTS

Taxpayer represents that the facts are as follows:

Taxpayer is a limited liability company organized under the laws of State1. Taxpayer has not elected to be treated as an association taxable as a corporation under § 301.7701-3(c) of the Income Tax Regulations. Taxpayer has been organized for the purpose of financing, building, owning, and operating a wind facility in Location1 (the "Wind Farm").

The sole member of Taxpayer is A, a limited partnership organized under the laws of State1. A has not elected to be treated as an association taxable as a corporation under § 301.7701-3(c). A limited partnership interest in A is held by B, a limited partnership organized under the laws of State1. The general partner of A is C, a limited liability company organized under the laws of State1. C has not elected to be treated as an association taxable as a corporation under § 301.7701-3(c). The sole member of C is B.

Taxpayer currently is treated as a disregarded entity for federal income tax purposes. Membership interests in Taxpayer, or interests in A or C, may be offered to various parties as a means of raising capital for the construction and operation of the Wind Farm. If membership interests in Taxpayer are sold to investors, Taxpayer will be treated as a partnership for federal income tax purposes. If instead 100 percent ownership of Taxpayer is retained by A and interests in A or C are sold to investors, the assets of Taxpayer will be treated as owned directly by A, which will be treated as a partnership for federal income tax purposes. In either circumstance, the Wind Farm will be treated as held by a partnership for federal income tax purposes.

During the period beginning on the date that the Wind Farm's first wind turbine is placed in service and ending on the last day of the depreciation period of the Wind Farm's last wind turbine placed in service (or, if later, the date that is five years from the date the Wind Farm's last wind turbine is placed in service), all of the Wind Farm's beneficial owners, either directly or through entities classified as disregarded entities or partnerships for federal income tax purposes, will be citizens of the United States (none of whom will be entitled to the benefits of § 931 or 933) or domestic corporations (none of whom will have made an election under former § 936).

RULING REQUESTED

Taxpayer requests a ruling that the Wind Farm will not be treated as property which is used predominantly outside the United States within the meaning of § 168(g)(4).

LAW AND ANALYSIS

Section 168(g)(1)(A) provides that any tangible property used predominantly outside the United States during the taxable year must be determined under the alternative depreciation system of § 168(g).

Section 168(g)(4) lists exceptions to § 168(g)(1)(A) for certain property used outside the United States. Section 168(g)(4)(G) provides that property will not be treated as used predominantly outside the United States if the property is owned by a domestic corporation (other than a corporation which has an election in effect under § 936) or by a United States citizen (other than a citizen entitled to the benefits of § 931 or 933) and which is used predominantly in a possession of the United States by such a corporation or such a citizen, or by a corporation created or organized in, or under the law of, a possession of the United States.

The background of § 168(g)(4) provides insight in determining whether § 168(g)(4)(G) applies to domestic partnerships where all of the partners are domestic corporations (none of which has an election in effect under § 936) or United States citizens (none of whom is entitled to the benefits of § 931 or 933). The rules in §

168(g)(4) are derived from former § 48(a)(2)(B). Prior to 1990, § 168(g)(4) provided, in relevant part, that for purposes of § 168(g)(4), rules similar to the rules under § 48(a)(2) (including the exceptions contained in § 48(a)(2)(B)) shall apply in determining whether property is used predominantly outside the United States. When former § 48 was repealed as a "deadwood" provision in 1990, § 168(g)(4) was amended to incorporate the enumerated exceptions contained in former § 48(a)(2)(B). See § 11813 of the Omnibus Budget Reconciliation Act of 1990, Pub. L. 101-508 (the "Act"). The language of § 168(g)(4)(G) is the same as the language in former § 48(a)(2)(B)(vii) prior to its repeal in 1990.

The Senate Finance Committee stated the following comment, in relevant part, on the reason for the enactment of former § 48(a)(2)(B)(vii):

> "Your committee's amendment extends the application of the investment credit provision to property used in a possession by a U.S. person or by a corporation organized in a possession provided the property would otherwise have qualified for the investment credit. This rule is not extended if the property is owned or used in the possession by U.S. persons who are presently exempt from U.S. tax due to the application of the special provisions of the Code which exempt U.S. persons who derive substantially all of their income from a U.S. possession (sections 931, 932, 933, 934(b))." S. Rep. No. 1707, 89th Cong., 2d Sess. 58 (1966), 1966-2 C.B. 1100.

Based on this Senate Report, it appears that Congress intended former § 48(a)(2)(B)(vii) to apply to United States persons even though the literal language of former § 48(a)(2)(B)(vii) applied to United States citizens or domestic corporations. When former § 48(a)(2)(B)(vii) was enacted in 1966, the term "United States person" was defined under § 7701(a)(30) of the 1954 Code as meaning: (A) a citizen or resident of the United States, (B) a domestic partnership, (C) a domestic corporation, and (D) any estate or trust (other than a foreign estate or foreign trust within the meaning of § 7701(a)(31) of the 1954 Code).

Similar to former § 48(a)(2)(B)(vii), the literal wording of § 168(g)(4)(G) applies to domestic corporations or United States citizens, but not to domestic partnerships. However, the repeal of the "deadwood" provisions and the amendment to § 168(g)(4) by § 11813 of the Act were not intended to be substantive changes in the tax law. H.R. Rep. No. 101-894, 101st Cong., 2d Sess (Oct. 17, 1990).

Section 7701(a)(30) defines the term "United States person" as: (A) a citizen or resident of the United States, (B) a domestic partnership, (c) a domestic corporation, (D) any estate (other than a foreign estate, within the meaning of § 7701(a)(31)), and (E) any trust if a court within the United States is able to exercise primary supervision over the administration of the trust, and one or more United States persons have the authority to control all substantial decisions of the trust.

In light of the legislative history of § 168(g)(4) and former § 48(a)(2)(B)(vii), we believe that § 168(g)(4)(G) is intended to apply to a domestic partnership where all of its partners are domestic corporations that do not have an election in effect under § 936 or are United States citizens that are not entitled to the benefits of § 931 or 933.

CONCLUSION

In this case, Taxpayer represents that the Wind Farm is in Location1, which is a possession of the United States. During the period beginning on the date that the Wind Farm's first wind turbine is placed in service and ending on the last day of the depreciation period of the Wind Farms' last wind turbine placed in service, Taxpayer also represents that: (i) all of the Wind Farm's beneficial owners, either directly or through entities classified as disregarded entities or partnerships for federal income tax purposes, will be United States citizens or domestic corporations; (ii) none of the beneficial owners who are United States citizens are entitled to the benefits of § 931 or § 933; and (iii) none of the beneficial owners who are domestic corporations has an election in effect under former § 936. The representations made by Taxpayer in the preceding sentence are material representations.

If the membership interests in Taxpayer are sold to investors or if 100 percent ownership of Taxpayer is retained by A and interests in A or C are sold to investors, Taxpayer further represents that Taxpayer or A, as applicable, will be treated as a partnership for federal income tax purposes and, thus, in either circumstance, the Wind Farm will be treated as held by a partnership for federal income tax purposes. Provided that Taxpayer or A, as applicable, is a domestic partnership where all of its partners are domestic corporations (other than a corporation which has an election in effect under § 936) or United States citizens (other than a citizen entitled to the benefits of § 931 or 933), the Wind Farm is property described in § 168(g)(4)(G) and, thus, the Wind Farm will not be treated as property that is used predominantly outside the United States within the meaning of § 168(g)(4).

In accordance with the power of attorney, we are sending a copy of this letter to Taxpayer's authorized representative. We are also sending a copy of this letter to the appropriate operating division director.

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

Sincerely,

Kathleen Reed

Kathleen Reed
Branch Chief, Branch 7
Office of Associate Chief Counsel
(Income Tax and Accounting)