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Date:
October 18, 2017

Legend

Company =

Subsidiary A =

Subsidiary B =

Building =

Fund =

Fund Manager =

Accounting Firm =

Auditor =

State =

Year 1 =

Date 1 =

Date 2 =

Date 3 =

Date 4 =

Date 5 =

Date 6 =

Date 7 =

Date 8 =

Date 9 =

a =

b =

c =

Dear :

This responds to a letter dated June 6, 2017, and supplemental correspondence, submitted on behalf of Company, Subsidiary A, and Subsidiary B (collectively, "Taxpayers"). Taxpayers request an extension of time under sections 301.9100-1 and 301.9100-3 of the Procedure and Administration Regulations to elect to treat Subsidiary A and Subsidiary B as taxable REIT subsidiaries ("TRSs") of Company under section 856(l) of the Internal Revenue Code ("Code").

FACTS

Company, a State limited liability company, was formed on Date 1. Company represents that it has operated in a manner intended to satisfy the real estate investment trust ("REIT") requirements of sections 856 through 860 of the Code, and that it intends to make an election to be treated as a REIT, pursuant to section 1.856-2(b), by timely filing Form 1120-REIT, U.S. Income Tax Return for REITs, for the tax year ended Date 2.

Company (through a disregarded entity) acquired Building on Date 3. Building contains offices, a hotel, a fitness club, and restaurants. Subsidiary A, a State limited liability company, was formed on Date 1. Immediately after Company's acquisition of Building, Subsidiary A entered into a lease agreement with Company's disregarded entity to lease and operate the athletic club and restaurants in Building. Company represents that Subsidiary A has operated in a manner intended to enable the rents it pays to Company for the athletic club and restaurants to satisfy the limited rental exception of section 856(d)(8)(A).

Subsidiary B, a State limited liability company, was also formed on Date 1. Immediately after Company's acquisition of Building, Subsidiary B entered into a lease agreement with Company's disregarded entity to lease the hotel in Building. Subsidiary B contracts with an eligible independent contractor to operate and manage the hotel. Company represents that Subsidiary B has operated in a manner intended to enable the rents it pays to Company for the hotel to satisfy the lodging facility exception of section 856(d)(8)(B).

Additionally, Company represents that Building's athletic club, restaurants, and hotel leased to Subsidiary A and Subsidiary B occupy less than ten percent of the "leased space of the property" of Building for purposes of section 856(d)(8)(A).

Taxpayers were formed by, and are currently managed by, Fund Manager. Fund Manager’s Vice President of Tax (“VP of Tax”) provides tax advice and manages the tax compliance needs of Fund Manager’s portfolio. VP of Tax manages approximately a entities of which about b are REITs, only c of which have TRSs. Therefore, as of Date 1, VP of Tax had experience with REITs, but not much personal experience with filing TRS elections.

Fund Manager also relies on the advice of outside tax professionals. Fund Manager received advice from Accounting Firm on structuring the acquisition of Building and engaged Accounting Firm to provide tax compliance for Company. Furthermore, Fund Manager engaged Auditor as the auditor for Fund, which indirectly owns all of the common stock of Company.

Accounting Firm recommended utilizing a REIT to acquire Building with TRSs: one for the hotel in Building and another for the athletic club and restaurants in Building. As such, Taxpayers always intended for Subsidiary A and Subsidiary B to elect to be TRSs of Company. However, as described below, these elections were not timely made.

Taxpayers represent that VP of Tax intended to timely file Forms 8832, Entity Classification Election, and Forms 8875, Taxable REIT Subsidiary Election, on behalf of Subsidiary A and Subsidiary B at the time Company acquired Building. However, due to

the volume of work and number of entities for which VP of Tax was responsible, VP of Tax inadvertently failed to do so.

VP of Tax discovered this error in late Year 1, during preparation for year-end, when VP of Tax looked for copies of Forms 8832 and 8875. VP of Tax had limited experience with the procedure for obtaining late election relief under sections 301.9100-1 and 301.9100-3. Additionally, given that the restaurants, athletic club, and hotel account for only a small fraction of the total leasable space of Building, VP of Tax did not realize the importance of timely filing TRS elections.

Accordingly, VP of Tax filed the elections at the time the error was discovered with the earliest effective date then possible. On Date 4, Subsidiary A and Subsidiary B each filed Forms 8875 to be a TRS of Company with effective dates of Date 5 and Date 6, respectively.

On Date 7, Subsidiary A and Subsidiary B each filed Forms 8832, electing to be classified as associations taxable as corporations for federal income tax purposes using the automatic procedure for late election relief pursuant to Rev. Proc. 2009-41, 2009-39 I.R.B. 439. The forms each had an effective date of Date 1. By letters dated Date 8 and Date 9, the Internal Revenue Service (“Service”) approved Subsidiary B’s and Subsidiary A’s late filed Forms 8832, respectively, confirming that the effective date of the classification elections is Date 1.

Shortly thereafter, a managing director with Accounting Firm was assisting Auditor and discovered the untimely TRS elections while reviewing Company’s income and asset tests, REIT qualification requirements, and TRS elections. Accounting Firm advised Taxpayers that without an extension of time to file the Forms 8875, Subsidiary A and Subsidiary B, as corporations wholly owned by a REIT, would be characterized as qualified REIT subsidiaries (“QRSs”) of Company under section 856(i), and therefore disregarded for federal tax purposes prior to the date Subsidiary A's and Subsidiary B's TRS elections became effective. If this were the case, Company would be considered the operator of the athletic club and restaurants for the period that began on Date 1 and ended when the Subsidiary A TRS election became effective, resulting in impermissible tenant service income (“ITSI”) under section 856(d)(2)(C). Similarly, Company would be considered the operator of the hotel (although using an eligible independent contractor), and the payments generated from hotel guests would not be considered “rents from real property,” for the period that began on Date 1 and ended when the Subsidiary B TRS election became effective. Accounting Firm advised Taxpayers to obtain the relief requested.

Company, Subsidiary A, and Subsidiary B make the following additional representations:

1. The request for relief was filed before the failure to make the regulatory elections was discovered by the Service.

2. Granting the relief requested will not result in Company, Subsidiary A, or Subsidiary B having a lower tax liability in the aggregate for all years to which the elections apply than it would have had if the elections had been timely made (taking into account the time value of money).

3. Company, Subsidiary A, and Subsidiary B do not seek to alter return positions for which accuracy-related penalties have been or could have been imposed under section 6662 of the Code at the time they requested relief, and the new positions require or permit the regulatory elections for which relief is requested.

4. Being fully informed of the required regulatory elections and related tax consequences, Company, Subsidiary A, and Subsidiary B did not choose to not file the elections.

5. Company, Subsidiary A, and Subsidiary B are not using hindsight in making the decision to seek the relief requested. No specific facts have changed since the due date for making the elections that make the elections advantageous.

6. The period of limitations on assessment under section 6501(a) has not expired for Company, Subsidiary A, or Subsidiary B for the taxable year in which the elections should have been filed, nor for any taxable year(s) that would have been affected by the elections had they been timely filed.

In addition, affidavits on behalf of Company, Subsidiary A, and Subsidiary B have been provided as required by sections 301.9100-3(e)(2) and (3) of the Procedure and Administration Regulations.

LAW AND ANALYSIS

Section 856(l) of the Code provides that a REIT and a corporation (other than a REIT) may jointly elect to treat such corporation as a TRS. To be eligible for treatment as a TRS, section 856(l)(1) provides that the REIT must directly or indirectly own stock in such corporation, and the REIT and such corporation must jointly elect such treatment. The election is irrevocable once made, unless both the REIT and the corporation consent to its revocation. In addition, section 856(l) specifically provides that the election, and any revocation thereof, may be made without the consent of the Secretary.

In Announcement 2001-17, 2001-1 C.B. 716, the Service announced the availability of Form 8875, Taxable REIT Subsidiary Election. According to the Announcement, this form is to be used for taxable years beginning after 2000 for eligible

entities to elect treatment as a TRS. The instructions to Form 8875 provide that the subsidiary and the REIT can make the election at any time during the taxable year; however, the effective date of the election depends on when the Form 8875 is filed. The instructions further provide that the effective date of the election cannot be more than 2 months and 15 days prior to the date of filing the election, or more than 12 months after the date of filing the election. If no date is specified on the form, the election is effective on the date the form is filed with the Service.

Section 301.9100-1(c) of the Procedure and Administration Regulations provides that the Commissioner has discretion to grant a reasonable extension of time to make a regulatory election, or a statutory election (but no more than 6 months except in the case of a taxpayer who is abroad), under all subtitles of the Internal Revenue Code except subtitles E, G, H, and I. Section 301.9100-1(b) defines a regulatory election as an election whose due date is prescribed by regulations or by a revenue ruling, revenue procedure, notice, or announcement published in the Internal Revenue Bulletin.

Section 301.9100-3(a) through (c)(1) sets forth rules that the Service generally will use to determine whether, under the particular facts and circumstances of each situation, the Commissioner will grant an extension of time for regulatory elections that do not meet the requirements of section 301.9100-2. Section 301.9100-3(a) provides that requests for relief subject to this section will be granted when the taxpayer provides the evidence (including affidavits described in section 301.9100-3(e)) 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) provides that a taxpayer is deemed to have acted reasonably and in good faith if the taxpayer (i) requests relief under this section before the failure to make the regulatory election is discovered by the 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 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. A taxpayer will be 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 section 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.

Section 301.9100-3(c)(1) provides that a reasonable extension of time to make a regulatory election will be granted only when the interests of the Government will not be prejudiced by the granting of relief. Section 301.9100-3(c)(1)(i) 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 (taking into account the time value of money). Section 301.9100-3(c)(1)(ii) provides 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 section 6501(a) before the taxpayer's receipt of a ruling granting relief under this section.

CONCLUSION

Based on the information submitted and the representations made, we conclude that Company, Subsidiary A, and Subsidiary B have satisfied the requirements for granting a reasonable extension of time to elect under section 856(l) to treat Subsidiary A and Subsidiary B as TRSs of Company, effective as of Date 1. Accordingly, Taxpayers have 90 calendar days from the date of this letter to make the intended elections to treat Subsidiary A and Subsidiary B as TRSs of Company, effective as of Date 1.

This ruling is limited to Taxpayers' timeliness of filing Forms 8875. This ruling's application is limited to the facts, representations, Code sections, and regulations cited herein. No opinion is expressed as to whether Company otherwise qualifies as a REIT, or whether Subsidiary A or Subsidiary B otherwise qualify as TRSs, under part II of subchapter M of the Code. Additionally, this letter ruling does not address whether the payments received by Company from the leasing of the hotel, restaurants, and athletic club qualify for any related-party rent exception(s) under section 856(d)(8).

No opinion is expressed with regard to whether the tax liability of Taxpayers is not lower in the aggregate for all years to which the elections apply than such tax liability would have been if the elections had been timely made (taking into account the time value of money). Upon audit of the federal income tax returns involved, the director's office will determine such tax liability for the years involved. If the director's office determines that such tax liability is lower, that office will determine the federal income tax effect.

This ruling is directed only to the taxpayers that requested it. Section 6110(k)(3) of the Code provides that it may not be used or cited as precedent.

In accordance with the Powers of Attorney on file with this office, copies of this letter are being sent to your authorized representatives.

Sincerely,

Andrea M. Hoffenson
Andrea M. Hoffenson
Branch Chief, Branch 2
Office of Associate Chief Counsel
(Financial Institutions & Products)