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:FIP:B03
PLR-100297-20

Date:
July 2, 2020

LEGEND:

REIT 1 =

REIT 2 =

Subsidiary A =

Subsidiary B =

Subsidiary C =

Company X =

Operating Partnership 1 =

Operating Partnership 2 =

Partnership A =

Partnership B =

Property A =

Property B =

Property C =

State X =

State Y =

Firm X =

Firm Y =

Date 1 =

Date 2 =

Date 3 =

Date 4 =

Date 5 =

Date 6 =

Date 7 =

Date 8 =

Date 9 =

Date 10 =

Date 11 =

Date 12 =

Date 13 =

Year 1 =

Year 2 =

Year 3 =

Year 4 =

Year 5 =

a =

b =

c =

Dear :

This ruling responds to a letter dated December 12, 2019, as supplemented by subsequent correspondence, that was submitted on behalf of REIT 2, Subsidiary A, Subsidiary B, and Subsidiary C (the "Taxpayers"). Taxpayers request an extension of time under sections 301.9100-1 and 301.9100-3 of the Procedure and Administration Regulations to make elections under section 856(l) of the Internal Revenue Code (the "Code") to treat each of Subsidiary A, Subsidiary B, and Subsidiary C as a taxable REIT subsidiary ("TRS") of REIT 2 effective Date 7, Date 9, and Date 12, respectively.

FACTS

Company X is a publicly traded sponsor and manager of Real Estate Investment Trusts ("REITs"). Its first REIT was REIT 1, which invested in hotel properties. REIT 2 is the second REIT sponsored by Company X that focuses on investing in hotel properties. REIT 2 was organized on Date 1. REIT 2 represents that it elected under part II of subchapter M of chapter 1 of the Code to be treated as a REIT beginning with its taxable year that ended Date 11.

The same Company X managers were operating both REIT 1 and REIT 2 and made multiple acquisitions of hotel properties during the time period from Year 1 through Year 3. Taxpayers represent that at times hotel properties and hotel operations were transferred, either by sale or allocation, between REIT 1 and REIT 2, and sometimes REIT 1 and REIT 2 entered into joint ventures with respect to hotel leases and operations. REIT 1 owns a a% interest in Operating Partnership 1, and REIT 2 owns a a% interest in Operating Partnership 2.

Subsidiary A was formed on Date 2, and at that time was indirectly but wholly owned by Operating Partnership 1. Subsidiary A was formed to lease Property A, a resort located in State X, from a wholly owned disregarded entity of Partnership A, which in turn was wholly owned by Operating Partnership 1. Subsidiary A then entered into an agreement with a third-party hotel management company to operate Property A. A Form 8875, *Taxable REIT Subsidiary Election*, was filed jointly by REIT 1 and Subsidiary A on Date 4, to be effective on Date 3. On Date 7, Operating Partnership 2 acquired a b% interest in Property A through Partnership A. The intent was for REIT 2

and Subsidiary A to jointly file a Form 8875 in a timely manner after the acquisition by REIT 2, but because of the change in plans regarding investment ownership, discussed below, the TRS election was inadvertently not made. However, Subsidiary A has been reported on appropriate federal income tax returns starting with Year 2 as being owned by both REIT 1 and REIT 2 as a TRS. In addition, starting with its Year 2 federal income tax return, Subsidiary A has filed as a taxable corporation that was owned by both REIT 1 and REIT 2.

Subsidiary B was formed on Date 5 and was indirectly but wholly owned by Operating Partnership 1. Subsidiary B was formed to lease Property B, a hotel located in State X, from a wholly owned disregarded entity of Partnership B, which in turn was wholly owned by Operating Partnership 1. Subsidiary B then entered into an agreement with a third-party hotel management company to operate Property B. A Form 8875 was filed jointly by REIT 1 and Subsidiary B on Date 6, to be effective on Date 5. On Date 9, Operating Partnership 2 acquired a c% interest in Property B through Partnership B. The intent was for REIT 2 and Subsidiary B to jointly file a Form 8875 in a timely manner after the acquisition by REIT 2, but because of the change in plans regarding investment ownership, discussed below, the TRS election was inadvertently not made. However, Subsidiary B has been reported on appropriate federal income tax returns beginning with Year 2 as being owned by both REIT 1 and REIT 2 as a TRS. In addition, starting with its Year 2 federal income tax return, Subsidiary B has filed as a taxable corporation that was owned by both REIT 1 and REIT 2.

Subsidiary C was formed on Date 8 and was indirectly owned by Operating Partnership 1. At the time, it was contemplated that Operating Partnership 1 would indirectly own and would lease Property C, a hotel located in State Y, to Subsidiary C under a structure similar to that of Property A and Property B. A Form 8875 was filed jointly by REIT 1 and Subsidiary C on Date 10. However, REIT 1 never acquired Property C. Instead, on Date 12, Operating Partnership 2 indirectly acquired Subsidiary C and Property C, and the name of Subsidiary C was changed to its current name. Subsidiary C operates Property C through a third-party hotel management company on behalf of REIT 2. Because of the change in plans regarding investment ownership, there was an error made regarding exactly which entities had to make the TRS election. Thus, REIT 2 and Subsidiary C should have jointly filed a Form 8875 effective Date 12, but this was inadvertently not done. However, beginning with Year 3, Subsidiary C has been reported on appropriate tax returns as being owned by REIT 2 as a TRS, and Subsidiary C has filed federal income tax returns as a taxable corporation that was owned by REIT 2.

The tax department of Company X (“the Tax Department”) is responsible for tax compliance and tax oversight for many REIT structures and operations within Company X’s REIT holdings, including REIT 1 and Taxpayers. Members of the Tax Department are familiar with the formation of REIT tax structures and the operation of REITs, including the necessity of the timely filing of TRS elections.

REIT 2 engaged Firm X, a law firm, to give advice on contemplated tax-related REIT transactions, including the design of holding structures and the creation of appropriate entities. Proposed deal structures were discussed with Company X to ensure REIT tax compliance. Firm X formed the legal entities, and Company X provided ongoing support functions. Typically, Company X would be the entity responsible to obtain Employer Identification Numbers from the Internal Revenue Service (the "Service") for the entities involved, and to make all necessary tax elections, including TRS elections.

REIT 1 and REIT 2 lease and operate Property A, Property B, and Property C under structures described by section 856(d)(8)(B). Taxpayers represent that it was commonly understood by all parties involved that TRS elections would be made with respect to the operating companies. Members of the Tax Department were responsible for the preparation, execution, and timely filing of all necessary TRS elections for Subsidiaries A, B, and C.

When preparing and filing Forms 8875 for appropriate entities, members of the Tax Department filed a paper copy of each Form 8875, via certified mail, with the Service. At the same time, scanned copies of the forms and mail receipts were saved on Company X's data system and added to a master spreadsheet for quick reference. However, as members of the Tax Department later determined, the Excel spreadsheet only indicated that a TRS election had been submitted for a particular TRS. The spreadsheet did not indicate the identity of the REIT or REITs that jointly filed the election with a particular TRS, and it did not indicate when or whether additional TRS elections (with other REITs) were necessary or were filed**.** Consequently, the spreadsheet failed to alert members of the Tax Department whether an additional TRS election was necessary or properly filed for a specific entity.

During Year 5, the boards of directors of REIT 1 and REIT 2 determined to merge the two REITs. As part of the REIT tax matters due diligence process for REIT 2, outside counsel requested a copy of all TRS election filings for REIT 2. While gathering the requested information, members of the Tax Department discovered on Date 13 that although they could locate Forms 8875 jointly filed by REIT 1 and Subsidiaries A, B, and C, respectively, they could not locate the Forms 8875 jointly filed by REIT 2 and Subsidiaries A, B, and C, respectively.

Upon this discovery, members of the Tax Department immediately contacted Firm Y to discuss the best course of action to rectify the situation. Firm Y advised members of the Tax Department to have Taxpayers request an extension of time under sections 301.9100-1 and 301.9100-3 of the Procedure and Administration Regulations to make elections under section 856(l) of the Code to treat each of Subsidiaries A, B, and C as a TRS of REIT 2.

Accordingly, Firm Y submitted a request on behalf of Taxpayers to the Service seeking a private letter ruling granting a reasonable extension of time for Taxpayers to elect under section 856(l) to treat each of Subsidiary A, Subsidiary B, and Subsidiary C as a TRS of REIT 2, effective Date 7, Date 9, and Date 12, respectively.

Taxpayers make the following additional representations in connection with their request for an extension of time:

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

2. Granting the relief requested will not result in any of Taxpayers having a lower tax liability in the aggregate for all years to which the election applies than they would have had if the election had been timely made (taking into account the time value of money).

3. Taxpayers do not seek to alter a return position for which an accuracy-related penalty has been or could have been imposed under section 6662 at the time they requested relief and the new position requires or permits a regulatory election for which relief is requested.

4. Being fully informed of the required regulatory election and related tax consequences, Taxpayers did not choose to not file the election.

5. Taxpayers 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 election that make the election advantageous to any of Taxpayers.

6. Regarding Year 3 and Year 4, the period of limitations on assessment under section 6501(a) has not expired for any of Taxpayers for the taxable year in which the election should have been filed, nor for any taxable year(s) that would have been affected by the election had it been timely filed.

7. Regarding Year 2, the period of limitations on assessment under section 6501(a) has expired for some of Taxpayers for the taxable year in which the election should have been filed. However, pursuant to section 301.9100-3(c)(1)(ii), Taxpayers have provided a certificate from an independent auditor (other than an auditor providing an affidavit pursuant to section 301.9100-3(e)(3)) certifying that the interests of the Government would not be prejudiced under the standards set forth in section 301.9100-3(c)(1)(i) if relief were granted as requested by Taxpayers.

In addition, affidavits on behalf of Taxpayers have been provided as required by sections 301.9100-3(e)(2) and (3).

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 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 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. The Service may condition a grant of relief on the taxpayer providing the Service with a statement from an independent auditor (other than an auditor providing an affidavit pursuant to section 301.9100-3(e)(3)) certifying that the interests of the Government are not prejudiced under the standards set forth in section 301.9100-3(c)(1)(i).

CONCLUSION

Based on the information submitted and representations made, we conclude that Taxpayers have satisfied the requirements for granting a reasonable extension of time to elect under section 856(l) of the Code to treat each of Subsidiary A, Subsidiary B, and Subsidiary C as a TRS of REIT 2, effective Date 7, Date 9, and Date 12, respectively. Accordingly, Taxpayers are granted 90 calendar days from the date of this letter to make the intended elections by jointly filing with REIT 2 a separate Form 8875 for each of Subsidiary A, Subsidiary B, and Subsidiary C.

This ruling is limited to the timeliness of the filing of the Forms 8875 to treat each of Subsidiary A, Subsidiary B, and Subsidiary C as a TRS of REIT 2. This ruling's application is limited to the facts, representations, and Code and regulation sections cited herein.

Except as 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 as to whether REIT 1 or REIT 2 otherwise qualifies as a REIT, or whether Subsidiary A, Subsidiary B, or Subsidiary C each otherwise qualifies as a TRS under part II of subchapter M of chapter 1 of the Code. Additionally, no opinion is expressed as to whether the structures used by REIT 1 and REIT 2 to lease and operate Property A, Property B, and Property C meet the requirements of section 856(d)(8)(B).

No opinion is expressed with regard to whether the tax liability of REIT 2, Subsidiary A, Subsidiary B, or Subsidiary C is not lower in the aggregate for all years to which the election applies than such tax liability would have been if the election 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.

The ruling contained in this letter is based upon information submitted and representations made by Taxpayers and accompanied by statements executed under the penalties of perjury by appropriate parties. 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.

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 terms of a power of attorney on file in this office, copies of this letter are being sent to your authorized representatives.

Sincerely,

_____

Grace Cho
Assistant to the Branch Chief, Branch 3
Office of the Associate Chief Counsel
(Financial Institutions & Products)

Enclosure:
Copy for section 6110 purposes

cc: