Internal Revenue Service

Number: **202314010**
Release Date: 4/7/2023

Index Number: 856.00-00, 9100.00-00

Department of the Treasury
Washington, DC 20224

Third Party Communication: None
Date of Communication: Not Applicable

Person To Contact:
, ID No.

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Refer Reply To:
CC:FIP:B02
PLR-113723-22

Date:
January 09, 2023

Legend

Taxpayer =

Subsidiary =

Corporation =

LLC =

Fund =

Investment Advisor =

Accounting Firm =

Taxpayer Law Firm =

Advisor Law Firm =

State =

Hotel =

Date 1 =

Date 2 =

Date 3 =

Date 4 =

Date 5 =

Date 6 =

Date 7 =

Month =

Year =

a =

b =

Dear :

This letter responds to a letter dated July 12, 2022, and supplemental correspondence, submitted on behalf of Taxpayer and Subsidiary. Taxpayer and Subsidiary request an extension of time under sections 301.9100-1 and 301.9100-3 of the Procedure and Administration Regulations to file an election to treat Subsidiary as a taxable REIT subsidiary ("TRS") of Taxpayer under section 856(l) of the Internal Revenue Code (the "Code") effective Date 6.

FACTS

Taxpayer is a State corporation that has elected to be taxed as a real estate investment trust ("REIT") under Subchapter M of the Code. Taxpayer was formed on Date 1 to indirectly own and operate the Hotel. Taxpayer formed Corporation and LLC as subsidiaries to own and operate the Hotel.

Corporation is a wholly owned subsidiary of Taxpayer. Corporation was formed on Date 3. Corporation is a C corporation for federal income tax purposes. Taxpayer treats Corporation as a qualified REIT subsidiary which is disregarded as an entity separate from its owner pursuant to section 856(i).

LLC is a limited liability company. LLC was formed on Date 2. LLC is treated as a disregarded entity for federal income tax purposes. LLC owns title to the real property

where the Hotel is located. Taxpayer owns a percent of the membership interest in LLC. Corporation owns the remaining b percent of the membership interest in LLC. The entire ownership of LLC is attributed to Taxpayer for federal income tax purposes because Corporation is a disregarded entity.

On Date 6, Taxpayer converted to a REIT. As part of the restructuring associated with the REIT conversion, Taxpayer formed Subsidiary, a State corporation, as a wholly owned subsidiary of Taxpayer on Date 4, with the intention that Taxpayer and Subsidiary would jointly make an election to treat Subsidiary as a TRS under section 856(l) beginning Date 6. Subsidiary began leasing the Hotel from LLC on Date 5. On Date 5, Subsidiary entered into a management agreement with an eligible independent contractor to manage the Hotel. Corporation and LLC stopped participating in the operation of the Hotel on Date 5. Because Taxpayer and Subsidiary wanted TRS treatment for Subsidiary beginning Date 6, they were required to make the election by Date 7.

As a result of miscommunication among Taxpayer's advisors, Taxpayer and Subsidiary did not make a timely TRS election for Subsidiary. Taxpayer used Accounting Firm as its accounting firm. Accounting Firm represented Taxpayer and certain of its subsidiaries for many years, including the years before the conversion of Taxpayer to a REIT. Taxpayer uses Taxpayer Law Firm as its primary law firm with respect to real estate matters. Taxpayer engaged Taxpayer Law Firm to assist with the REIT conversion. The primary shareholder of Taxpayer is Fund. Fund has engaged Investment Advisor as its qualified professional asset manager. Investment Advisor engaged Advisor Law Firm as its primary law firm to assist with its role as the qualified professional asset manager to Fund.

Accounting Firm handled certain of Taxpayer's tax filings and, with data provided by Taxpayer, compliance review (including ascertaining compliance with the quarterly and annual REIT qualification requirements), including handling Taxpayer's final Form 1120, *U.S. Corporation Income Tax Return*, for the tax year ended Date 5. Accounting Firm was aware of the formation of Subsidiary. The recollection of Taxpayer, Taxpayer Law Firm, and Advisor Law Firm is that a discussion was held with Accounting Firm where a determination was made that Accounting Firm would handle any REIT related filings for Taxpayer consistent with Accounting Firm's historic practice of filing tax forms on behalf of Taxpayer. Accounting Firm does not recall this discussion or agreeing to handle the REIT related filings. Accounting Firm also did not believe that it was engaged as the REIT's accounting firm. Accounting Firm did not know that Taxpayer Law Firm and Advisor Law Firm expected Accounting Firm to make the TRS election for Subsidiary. Accounting Firm did not make the TRS election for Subsidiary.

Taxpayer Law Firm and Advisor Law Firm were involved with the formation of Subsidiary and the decision to have Subsidiary lease and operate the Hotel. Taxpayer Law Firm and Advisor Law Firm did not expressly state their intention to prepare any tax filings as part of this transaction. Neither Taxpayer Law Firm nor Advisor Law Firm

have submitted tax filings for Taxpayer in the past (and do not generally submit tax filings for clients). Taxpayer Law Firm and Advisor Law Firm mistakenly assumed that Accounting Firm would file the TRS election, in Accounting Firm's capacity as the accounting firm that prepared and submitted the tax filings for Taxpayer and Subsidiary. Taxpayer Law Firm and Advisor Law Firm also believed that Accounting Firm had been assigned to make general REIT filings.

Taxpayer relied on its various advisors, including experienced tax professionals, who advised Taxpayer regarding the REIT conversion and the formation of Subsidiary, to handle any compliance obligations, including the filing of the TRS election for Subsidiary. Taxpayer did not have any reason to suspect that the TRS election would not be filed.

The failure to file the TRS election was discovered in late Month of Year by Taxpayer Law Firm in its role as the legal advisor to Taxpayer in connection with a routine diligence review of the quarterly and annual REIT compliance testing performed by Taxpayer and Accounting Firm (the "REIT Testing"). The REIT Testing consolidated the operations of the TRS with the REIT rather than correctly treating each as a separate corporate entity, which caused Taxpayer Law Firm to question whether the TRS election had been made. Taxpayer Law Firm thereafter contacted Accounting Firm. Accounting Firm confirmed that it had not made the TRS election. Accounting Firm was unaware that it was expected to make the election. Taxpayer Law Firm promptly notified Taxpayer that the TRS election had not been made. Thereafter, this request was filed for an extension of time to file the TRS election.

REPRESENTATIONS

Taxpayer and Subsidiary make the following representations in connection with this 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 Taxpayer or Subsidiary having a lower U.S. federal 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. Taxpayer and Subsidiary do not seek to alter a return position for which an accuracy-related penalty has been or could have been imposed under section 6662 of the Code 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, Taxpayer and Subsidiary did not choose to not file the election.

5. Taxpayer and Subsidiary 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 Taxpayer or Subsidiary.

6. The period of limitations on assessment under section 6501(a) has not expired for Taxpayer or Subsidiary 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.

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

LAW AND ANALYSIS

Section 856(l) 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 the corporation, and the REIT and the corporation must jointly elect such treatment. The election is irrevocable once made, unless both the REIT and the subsidiary 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 new 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 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) 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 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, a revenue procedure, a notice, or an 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 generally 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, however, 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 representations made, we conclude that Taxpayer and Subsidiary have satisfied the requirements for granting a reasonable extension of time to elect under section 856(l) to treat Subsidiary as a TRS of Taxpayer effective Date 6. Accordingly, Taxpayer and Subsidiary have 90 calendar days from the date of this letter to make the intended election to treat Subsidiary as a TRS of Taxpayer effective Date 6.

CAVEATS

This ruling is limited to the timeliness of the filing of the Form 8875. 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 or implied regarding whether Taxpayer otherwise qualifies as a REIT or whether Subsidiary otherwise qualifies as a TRS of Taxpayer under part II of subchapter M of chapter 1 of the Code.

The ruling contained in this letter is based upon information submitted and representations made by Taxpayer and Subsidiary and accompanied by penalties of perjury statements executed by the appropriate parties. While this office has not verified any of the material submitted in support of the request for a ruling, it is subject to verification on examination.

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

In accordance with the power of attorney on file with this office, a copy of this letter is being sent to your authorized representatives.

Sincerely,

K. Scott Brown
Senior Technician Reviewer, Branch 2
Office of the Associate Chief Counsel
(Financial Institutions & Products)

cc: