Internal Revenue Service

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Department of the Treasury
Washington, DC 20224

Third Party Communication: None
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PLR-103128-23

Date:
August 08, 2023

Legend

Taxpayer =

State =

LP =

Investments =

Manager =

Firm =

Year 1 =

Year 2 =

Tax Consultant =

Month 1 =

Month 2 =

Date 1 =

Date 2 =

Date 3 =

Date 4 =

Date 5 =

Date 6 =

Date 7 =

Date 8 =

Date 9 =

Date 10 =

Dear :

This ruling responds to a letter dated February 3, 2023. Taxpayer requests the following rulings:

(1) Taxpayer will be treated as if it had not made an election to be a real estate investment trust ("REIT") through the filing of Form 1120-REIT, *U.S. Income Tax Return for REITs*, for the taxable year ended Date 1; and

(2) Taxpayer's filing of Form 1120-X, *Amended U.S. Corporation Income Tax Return*, for the taxable year ended Date 1 will not be treated as a termination or revocation of its REIT status for purposes of section 856(g) of the Internal Revenue Code (the "Code").

FACTS:

Taxpayer was formed on Date 2 as a State limited liability company. Taxpayer's sole member, LP, is a subsidiary partnership of a private equity real estate fund that targets Investments (the "Fund"). The Fund is managed by Manager, an affiliate of Firm. Taxpayer represents that it was formed with the intention of acquiring an indirect interest in real property and operating as a REIT within Fund. Taxpayer further represents that it was intended that Taxpayer would not elect to qualify as a REIT until Taxpayer acquired an interest in real property. Although Taxpayer sought potential properties in which to acquire an interest during Year 1, Taxpayer did not ultimately acquire any such property in Year 1.

On Date 3, Taxpayer timely filed Form 8832, *Entity Classification Election*, to elect to be treated as a domestic corporation effective Date 4. On Date 5, an employee of Firm and Senior Fund Tax Advisor to Manager (the "Advisor") discussed with Tax Consultant that Taxpayer had not acquired an interest in real property by the end of Year 1. Further, the Advisor and Tax Consultant determined that Taxpayer should not elect to be taxed as a REIT for the taxable year ended Date 1 and that Taxpayer would file Form 1120, *U.S. Corporation Income Tax Return*, for the taxable year ended Date 1. Consistent with this intention, Taxpayer did not make an offering to potential shareholders during Year 1 or in Month 1, Year 2, to satisfy the 100-shareholder requirement of section 856(a)(5).

As part of its engagement with Manager, Tax Consultant prepared and filed Form 7004, *Application for Automatic Extension of Time to File Certain Business Income Tax, Information, and Other Returns*, on behalf of Taxpayer for the taxable year ended Date 1 (the "Extension Request") on Date 6. The Extension Request extended the due date for Taxpayer's return for Year 1 from Date 7 to Date 8. The Extension Request was prepared consistently with the proposition that Taxpayer would eventually file Form 1120 for the taxable year ended Date 1 in that Part 1, Line 1 reflected that the Extension Request was with respect to Form 1120 rather than Form 1120-REIT or any other Form.

Subsequently, at the time Tax Consultant was preparing Taxpayer's federal income tax return, the Tax Consultant team member who was directly involved in discussions with Manager regarding the determination that Taxpayer should not make a REIT election was out of the office on parental leave. The remaining members of the Tax Consultant team inadvertently prepared Form 1120-REIT on behalf of Taxpayer for the taxable year ended Date 1 (the "Return"). Although these remaining team members reviewed the Extension Request, they believed the Extension Request had erroneously referenced Form 1120, rather than Form 1120-REIT. The remaining team members believed Taxpayer intended to file Form 1120-REIT because they reviewed certain books and records of Taxpayer that, in their view, were similar to other REITs affiliated with Manager. Shortly before the Date 8 extended deadline, Tax Consultant provided the Return, along with over 100 Federal, State, and local returns to the Advisor to review. As a result of the volume of returns and the short review period, the Advisor did not identify that the Return was not printed on the Service Form intended to be used by Taxpayer. On Date 8, Manager filed the Return with the Service.

In Month 2, Year 2, as part of due diligence for a transaction to acquire an interest in real property, the Advisor reviewed the Return. On Date 9, the Advisor discovered that Taxpayer had inadvertently filed Form 1120-REIT, rather than Form 1120, for the taxable year ended Date 1. As soon as the Advisor discovered the error, the Advisor contacted Tax Consultant to discuss the inadvertent election made to classify Taxpayer as a REIT. Tax Consultant advised Manager that Taxpayer should file Form 1120-X, a non-REIT amended return for the taxable year ended Date 1, and submit a request for a private letter ruling with respect to the inadvertent REIT election

(the “Request”). Manager immediately engaged Tax Consultant to assist in preparing the Request. On Date 10, Taxpayer filed Form 1120-X to take the place of the Return.

Taxpayer makes the following representations:

1. The error in filing the Return was contrary to Taxpayer’s intent to make a REIT election only after it had acquired an interest in real property;

2. The error was inadvertent, due in part to a miscommunication among the Tax Consultant team members working on Taxpayer’s federal income tax return at the time the Return was being prepared;

3. Taxpayer acted to rectify the erroneous filing before the error was discovered by the Service by contacting the Service to submit the Request and subsequently filing an amended return;

4. Taxpayer relied on external tax professionals who were qualified in REIT-related matters;

5. Taxpayer did not alter in its Form 1120-X any tax treatment or position on the Return, other than the REIT election; and

6. Taxpayer is not taking advantage of hindsight in asking the Service for relief.

LAW AND ANALYSIS:

Section 856(c)(1) provides that a corporation, trust or association shall not be considered a REIT for any taxable year unless it files with its return for the taxable year an election to be a REIT or has made such election for a previous taxable year, and such election has not been terminated or revoked under section 856(g).

Section 856(g)(1) provides that an election under section 856(c)(1) made by a corporation shall terminate if the corporation is not a REIT to which the provisions of part II of subchapter M of chapter 1 of the Code apply for the taxable year with respect to which the election is made, or for any succeeding taxable year. Such termination shall be effective for the taxable year for which the corporation is not a REIT to which the provisions of part II of subchapter M of chapter 1 of the Code apply, and for all succeeding taxable years.

Section 856(g)(2) provides that an election under section 856(c)(1) made by a corporation may be revoked by it for any taxable year after the first taxable year for which the election is effective. Such revocation shall be effective for the taxable year in which made and for all succeeding taxable years.

Section 856(g)(3) provides, in general, that if a corporation has made a REIT election and such election has been terminated or revoked, such corporation or any successor corporation, shall not be eligible to make an election under section 856(c)(1) for any taxable year prior to the fifth taxable year which begins after the first taxable year for which such termination or revocation is effective.

In Rev. Rul. 83-74, 1983-1 C.B. 112, a homeowners association sought permission in 1980 to revoke an election made for its 1979 tax year to be taxed as a tax-exempt organization under section 528. It based the request upon an inaccurate audit performed by a professional tax advisor which understated the interest income of the association (nonexempt income under section 528), and inadequate tax advice provided by the advisor, which denied the association the use of a net operating loss carryover that could have been used if the association had filed as a corporation instead of electing to be taxed under section 528. In holding that a revocation of the election would be permissible, the revenue ruling analogizes to situations in which taxpayers fail to make a particular election because of inadequate or incorrect tax advice provided by an attorney or accountant and subsequently seek extensions of time to make the election.

Under section 301.9100-1 of the Procedure and Administration Regulations, the Commissioner has discretion, upon good cause shown by the taxpayer, to grant a reasonable extension of time fixed by the regulations for making an election, provided certain conditions are met. Section 301.9100-3 provides that requests for extensions of time for regulatory elections will be granted when the taxpayer provides evidence (including affidavits described in the regulations) to establish to the satisfaction of the Commissioner that the taxpayer acted reasonably and in good faith and granting relief will not prejudice the interest of the government.

Section 301.9100-3(b)(1) states that a taxpayer generally will be deemed to have acted reasonably and in good faith if the taxpayer (i) requests relief under section 301.9100-3 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.

Under section 301.9100-3(b)(3), 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 (taking into account any qualified amended return filed within the meaning of section 1.6664-2(c)(3)) 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 makes the election advantageous to a taxpayer, the Service will not ordinarily grant 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 a 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 section 301.9100-3.

Taxpayer's situation in this case is similar to Rev. Rul. 83-74, and analogous to situations concerning taxpayers who have not made a particular election provided in the regulations because of inadequate or incorrect advice from knowledgeable tax professionals and are subsequently seeking extensions of time under section 301.9100-1.

CONCLUSION:

Based upon the facts and representations submitted, and assuming the Form 1120-X for the taxable year ended Date 1 was properly filed, consent is granted for Taxpayer to be treated as if it had not made the REIT election on the Return, and the filing of Form 1120-X for the taxable year ended Date 1 is effective in place of the Return for purposes of the REIT election. The foregoing shall not be treated as a termination or revocation of a REIT election for purposes of section 856(g).

This ruling's application is limited to the facts, representations, Code sections, and regulations cited herein. Except as specifically provided otherwise, no opinion is expressed on the federal income tax consequences of the transaction described above. No opinion is expressed regarding the validity of the Form 1120-X or whether it was correctly completed or properly filed. Additionally, except with respect to the REIT election, no opinion is expressed regarding the consequences of filing the Form 1120-X.

This ruling is directed only to the taxpayer 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, a copy of this letter is being sent to your authorized representatives.

Sincerely,

Bernard Audet
Chief, Branch 2
Office of the Associate Chief Counsel
(Financial Institutions & Products)

cc: