Internal Revenue Service

Number: **200518064**
Release Date: 5/6/2005
Index Number: 9100.00-00

Department of the Treasury
Washington, DC 20224

Third Party Communication: None
Date of Communication: Not Applicable

Person To Contact:
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Refer Reply To:
CC:FIP:B1
PLR-161388-04
Date:
January 10, 2005

Legend:

Taxpayer =

Subsidiary =

LLP =

LLC =

Firm =

State =

Date 1 =

Date 2 =

Date 3 =

Date 4 =

Date 5 =

Year 1 =

Year 2 =

Year 3 =

a =

b =

c =

Dear

This is in reply to a letter dated November 23, 2004, requesting an extension of time under §§ 301.9100-1 and 301.9100-3 of the Procedure and Administration regulations for Taxpayer to file an election under § 856(l) of the Internal Revenue Code to treat Subsidiary as a taxable REIT subsidiary ("TRS").

Facts:

Taxpayer is a domestic corporation that elected to be taxed as a real estate investment trust ("REIT") under Subchapter M of Chapter 1 of the Code. Taxpayer is a calendar year taxpayer and uses the accrual method of accounting.

Subsidiary is a domestic corporation formed on Date 2. Its first corporate tax return, for the Year 2 taxable year, is required to be filed in Year 3.

Taxpayer is structured as an UPREIT, with real property holdings in several states. Title to the real property is held by LLP, a State limited partnership. All of the shares of Subsidiary are owned by LLP. At all times since the formation of Subsidiary, Taxpayer has owned about a% of the interests in LLP and has served as the sole general partner in the partnership.

Subsidiary was formed to provide property management services to shopping malls. Prior to the formation of Subsidiary, management services were performed by LLC, which is owned b% by LLP and c% by Taxpayer.

During Year 1, Taxpayer's advisor, Firm, noted that the amount of management fee income earned by LLC had gradually increased as a result of an acquisition by LLP. To avoid any future REIT qualification problem for Taxpayer, Firm recommended that Taxpayer either (i) "check the box" to treat LLC as an association taxable as a corporation and then elect TRS status for LLC, or (ii) form a new entity, transfer some of LLC's employees to it, and then elect TRS status for the new entity.

A partner at Firm advised Taxpayer that an election for TRS status could be made retroactively for 2 months and 15 days after the desired effective date. Thus, if

taxpayer opted to “check the box” with regard to LLC by Date 3, then it could make a TRS election for LLC at that time, which would be effective Date 1. If a new entity was formed, then so long as it elected TRS status within 2 months and 15 days of its formation, it could be a TRS from the date of its formation.

An officer of Taxpayer who was responsible for supervising the formation of the TRS misunderstood this advice by not realizing that a TRS election would have to be filed within 2 months and 15 days even if a new entity were formed. The officer understood the advice as requiring that the decision whether to “check the box” for LLC or form a new entity had to be made within 75 days of the start of the year to be retroactive to Date 1. The officer believed that the TRS election would not have to be filed until the REIT and the subsidiary filed their Forms 1120 for the Year 2 taxable year. A filing requirement for the TRS election at the time of corporate return filing would be consistent with most other elections with which the officer was familiar.

Taxpayer opted to form a new entity, Subsidiary, to serve as the TRS. The entity was formed on Date 2, within 2 months and 15 days of the start of the Year 2 taxable year, consistent with the officer’s understanding of Firm’s advice. Taxpayer represents that it always intended that a TRS would be formed by this transaction. Taxpayer has submitted documentary evidence and affidavits in support of its representation that Subsidiary was intended to be a TRS of Taxpayer. However, because of the misunderstanding about the required timing for the TRS election, no TRS election was filed by Taxpayer and Subsidiary within 2 months and 15 days of the formation of Subsidiary.

On Date 4, Taxpayer began contemplating a transaction with a public REIT partner. In connection with the transaction, independent legal counsel for Taxpayer sent a due diligence checklist of items which a public REIT partner might require, including the production of any Forms 8875 supporting Taxpayer’s holding of interests in any TRS. After receipt of this request, on Date 5, Taxpayer’s officer discovered that his understanding of when the TRS election should be made was not correct and that the Form 8875 for Subsidiary was past due. This request for relief originated immediately after that discovery.

Taxpayer has submitted the affidavit of its Director of Tax, LLC’s Chief Accounting Officer and Vice President-Tax, and Subsidiary’s Vice President-Tax, and the affidavit of Firm’s financial services tax partner who advised Taxpayer regarding the formation of a TRS, in support of this requested ruling.

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 with respect to a REIT, § 856(l) 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. Both the election, and the revocation, of TRS status may be made without the consent of the Secretary.

Section 856(l) provides that the term "taxable REIT subsidiary" includes any corporation (other than a REIT) with respect to which a TRS of such REIT owns directly or indirectly securities possessing more than 35 percent of the total voting power or total value of the outstanding securities of such corporation.

In Announcement 2001-17, 2001-1 C.B. 716, the Internal Revenue Service ("Service") announced the availability of Form 8875, Taxable REIT Subsidiary Election. Pursuant to the Announcement, this form is to be used for tax 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 tax year. The effective date of the election, however, depends on when the Form 8875 is filed. Specifically, the instructions provide that the effective date of the election cannot be more than 2 months and 15 days prior to the date of the filing of the election, or more than 12 months after the date of the filing of 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 (defined in § 301.9100-1(b) 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), 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 301.9100-3(a) through (c)(1)(i) sets forth rules that the Internal Revenue 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 § 301.9100-2. Section 301.9100-3(b) provides that subject to paragraphs (b)(3)(i) through (iii) of § 301.9100-3, when a taxpayer applies for relief under this section before the failure to make the regulatory election is discovered by the Service, the taxpayer will be deemed to have acted reasonably and in good faith; and § 301.9100-3(c) 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 years to which the regulatory election applies than the taxpayer would have had if the election had been timely made (taking into account the time value of money).

Conclusion:

Based on the information submitted and representations made, we conclude that Taxpayer has satisfied the requirements for granting a reasonable extension of time to

elect under section 856(l) to treat Subsidiary as a TRS of Taxpayer as of Date 2. Therefore, Taxpayer, together with Subsidiary, is granted a period of time not to exceed 30 days from the date of this letter to submit Form 8875.

This ruling is limited to the timeliness of the filing of the Form 8875. This ruling's application is limited to the facts, representations, Code sections, and regulations cited herein. No opinion is expressed with regard to whether Taxpayer otherwise qualifies as a REIT under subchapter M of the Code.

No opinion is expressed with regard to whether the tax liability of Taxpayer and Subsidiary 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.

This ruling is directed only to the taxpayer requesting it. Section 6110(k)(3) of the Code 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,

/S/

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Elizabeth A. Handler
Chief, Branch 1
Office of Associate Chief Counsel
(Financial Institutions and Products)

Enclosures:
Copy of this letter
Copy for § 6110 purposes