Internal Revenue Service

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Department of the Treasury
Washington, DC 20224

Person To Contact:
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Refer Reply To:
CC:FIP:B03
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Date:
September 10, 2004

Legend:

Taxpayer =

Corporation =

Subsidiary A =

Subsidiary B =

Subsidiary C =

Subsidiary D =

Subsidiary E =

Subsidiary F =

Subsidiary G =

Subsidiary H =

Subsidiary I =

Date 1 =

Date 2 =

Date 3 =

Date 4 =

Date 5 =

Dear :

This is in reply to a letter requesting an extension of time under sections 301.9100-1 and 301.9100-3 of the Procedure and Administration regulations for Taxpayer and Subsidiaries A-I (collectively, the "Subsidiaries") to file an election under section 856(l) of the Internal Revenue Code to treat each of the Subsidiaries 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 for the taxable year beginning Date 1. Taxpayer is a calendar year taxpayer and uses the accrual method of accounting.

Taxpayer is engaged primarily in the business of acquiring, developing, managing, and leasing income producing real estate projects. Taxpayer indirectly operates a diversified portfolio of retail projects, office building projects, mixed-use projects, and other properties located throughout the United States.

Taxpayer indirectly holds, or held[1], interests in the Subsidiaries through its interest in Corporation. Taxpayer owns all of the outstanding shares of Corporation, and Corporation holds, or held, more than 35 percent of the total voting power or value of the outstanding shares of each of the Subsidiaries, each of which is a domestic corporate entity.

Subsidiary I and Subsidiary D are wholly owned directly by Corporation. Subsidiary A, Subsidiary B, Subsidiary C, Subsidiary E, Subsidiary F, Subsidiary G, and Subsidiary H are, or were, as the case may be, wholly-owned by Subsidiary I.

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[1] Subsidiary A was dissolved on Date 2. Subsidiary B was dissolved on Date 3. Subsidiary C was dissolved on Date 4.

In 1999, The Ticket to Work and Work Incentives Improvement Act of 1999, P.L. 106-170, was enacted and contained the REIT Modernization Act ("RMA"), which included a number of modifications to the rules governing REITs. The RMA, which is effective for tax years beginning after December 31, 2000, allows a REIT to own up to 100 percent of the stock of a TRS. A TRS can perform activities that otherwise would result in impermissible income if performed by a REIT. As provided by the RMA, a corporation automatically is treated as a TRS with respect to a REIT if another TRS holds more than 35 percent of the total voting power or value of the outstanding shares of such corporation.

To make an election to treat a corporation held by the REIT as a TRS, the corporation and the REIT use a Form 8875, Taxable REIT Subsidiary Election ("Form 8875"). The instructions to Form 8875 provide that a TRS that owns 35 percent of the total voting power or value of the outstanding securities of a corporation must attach a statement to Form 8875 with the name and employer identification number of each such corporation.

Following the enactment of the RMA, Taxpayer and Corporation timely filed a Form 8875 to treat Corporation as a TRS with respect to Taxpayer with an effective date of Date 5. At the time the election was filed, Taxpayer, indirectly through Corporation, owned greater than 35 percent of the total voting power or value of the outstanding shares of each of the Subsidiaries. Accordingly, as provided in the instructions to Form 8875, Taxpayer attached a statement to the Form 8875 that included the name and employer identification number of each Subsidiary.

As a result of the due diligence undertaken in connection with a proposed merger agreement between Taxpayer and another entity, it was discovered that certain activities performed by another entity in which Corporation holds an interest call into question the validity of Corporation's TRS election. This caused Taxpayer and Taxpayer's counsel to reassess each Subsidiary's status as a TRS and, as a result, Taxpayer's counsel determined that each Subsidiary should have made an independent TRS election on Form 8875.

Following this discovery, Taxpayer immediately requested an extension of time under sections 301.9100-1 and -3 to make an election to treat each Subsidiary as a TRS, effective Date 5.

Taxpayer submitted the affidavit of its Senior Vice President and Director of Taxes in support of this requested ruling. At all times from Date 5 through the present, Taxpayer intended for each Subsidiary to qualify as a TRS. Taxpayer has at all times treated each Subsidiary as a TRS.

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, section 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. Corporation's Form 8875, as filed, contained an effective date of Date 5.

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 section 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 section 301.9100-2. Section 301.9100-3(b) provides that subject to paragraphs (b)(3)(i) through (iii) of section 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 section 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 and Subsidiaries have satisfied the requirements for granting a reasonable extension of time to elect under section 856(l) to treat each Subsidiary as a TRS of Taxpayer as of Date 5. Therefore, Taxpayer, together with each of the Subsidiaries, 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 each of the Subsidiaries 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 representative.

Sincerely,

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Alice M. Bennett
Branch Chief, Branch 3
Office of Associate Chief Counsel
(Financial Institutions & Products)

Enclosures:
Copy of this letter
Copy for section 6110 purposes