

Internal Revenue Service

Department of the Treasury
Washington, DC 20224

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Person To Contact:

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Refer Reply To:

CC:FIP:2 – PLR-111317-06

Date:

September 20, 2006

In Re:

Legend:

Fund A =

Fund B =

Trustee =

Agreement =

Holder =

Date 1 =

Lender =

Borrower =

PSA =

Date 2 =

Year 1 =

Year 2 =

Year 3 =

Date 3 =

Dear :

This is in reply to a letter dated January 31, 2006, requesting on behalf of Funds A and B (the "Funds") an extension of time under section 301.9100-1 of the Procedure and Administration Regulations to file an income tax return in order to make an election under section 860D(b)(1) of the Internal Revenue Code to be treated as regulated mortgage investment conduits ("REMICs").

FACTS

The Funds were formed to qualify as REMICs under Subchapter M (sections 860A et seq.) of the Code.

Funds were formed pursuant to the Agreement. They were formed in connection with the transaction described below.

Lender made a mortgage loan (the "Loan") to Borrower, which is evidenced by a promissory note (the "Note"). The Loan is secured by a first lien deed of trust, security agreement, assignment of rents and fixture filing (the "Mortgage") on parcels of real property described in the Mortgage.

Lender desired to create four separate participation interests in the Loan: a senior participation ("Participation A"), a subordinate participation ("Participation B"), an interest-only participation ("Participation IO"), and a residual participation ("Participation R").

Lender desired to sell the Participation B to the Participation B holder in accordance with the Agreement. The sale entailed the creation of REMIC A, which

would be referred to as a lower-tier REMIC, and REMIC B, which would be referred to as an upper-tier REMIC.

REMIC A issued uncertificated REMIC regular interest classes to REMIC B and a residual class. REMIC B then issued three REMIC regular interest classes, comprised of Participation A, Participation B and Participation IO. REMIC B also issued a residual class.

The Agreement provides that the Holder of an interest, or a trustee acting on its behalf, shall make elections to treat the Mortgage Loan and all proceeds thereof, or any real or personal property acquired with respect thereto, as a REMIC designated as REMIC A, and to treat the regular interests in REMIC A as a second REMIC designated as REMIC B. The Agreement further provides that such elections shall be made on the first federal income tax return of each such REMIC with respect to the calendar year ending Date 1, Year 1.

The issuance of the REMIC participation interests closed on Date 2, Year 2. Pursuant to the PSA dated Date 2, Year 2, Trustee assumed certain responsibilities. These responsibilities included tax reporting with respect to REMICs established in the transactions. Such tax reporting included making elections to be treated as REMICs for federal tax purposes.

Trustee is typically provided with all documents to a transaction to which Trustee is a party. In this transaction, however, Trustee was not a party prior to the Agreement, and thus did not review the Agreement prior to Date 2, Year 2. In addition, Trustee was not provided with the Agreement during the course of review of transaction documents for the PSA transaction of Date 2, Year 2.

Documents like the PSA are the primary source for determining the startup date for REMICs. Typically, the REMIC startup date is defined to be the closing date of documents such as the PSA.

Trustee relied on the PSA to determine the closing dates for Funds. The only closing date reflected was Date 2, Year 2. Trustee accordingly relied upon that date for purposes of making REMIC elections. Trustee reported that date in filing a taxpayer identification number with the Internal Revenue Service (the "Service").

Believing that Funds began their existence in Year 2 and would have to file their first income tax returns in Year 3, Trustee filed timely extensions for Funds' due date for Year 3.

In Year 3, while performing tax reporting obligations on the Funds, Trustee identified the need for a separate agreement on the Funds and requested a copy of the

Agreement. Upon review, Trustee realized that the startup date for Funds was in Year 1, rather than Year 2 as Trustee had believed.

Trustee promptly contacted Holder. Pursuant to the Agreement, Holder was an alternative tax preparer. It was possible that Holder might have already filed a timely return for Year 1 making elections to treat Funds as REMICs. Holder investigated the status of tax filings. Trustee filed second extensions for Funds' initial income tax returns.

On Date 3, Year 3, Trustee followed up with Lender and determined that the tax returns for Year 1 had not been filed, nor had any extensions been prepared for tax filings for the initial taxable year for Funds.

The Funds have submitted the affidavit of Trustee's officer in support of this requested ruling.

Funds make the following representations:

1. The request for relief was filed by Funds before the failure to make the regulatory election was discovered by the Service.
2. Granting the relief will not result in Funds having a lower tax liability in the aggregate for all years to which the regulatory election applies than Funds would have had if the election had been timely made (taking into account the time value of money).
3. Funds 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 Funds 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, Funds did not choose to not file the election.

LAW AND ANALYSIS

Under section 860D(a)(5) of the Code, a REMIC must use the calendar year as its taxable year.

Under section 860D(a)(2) of the Code, a REMIC may only have regular and residual interests.

Under section 860D(a)(2) of the Code, as of the close of the third month beginning after the startup day, substantially all of a REMIC's assets must be qualified mortgages and permitted investments.

Under section 860G(a)(9) of the Code, the term "startup date" means the day on which the REMIC issues all of its regular and residual interests. Thus, the startup date occurs within the first calendar year, which is the taxable year, of the REMIC.

Section 860D(b)(1) of the Code provides that an entity otherwise meeting the requirements of a REMIC under section 860D(a) may elect to be treated as a REMIC for its first taxable year by making an election on its return for that year. Section 1.860D-1(d) of the regulations provides that a qualified entity elects REMIC status by timely filing a Form 1066, U.S. Real Estate Mortgage Investment Conduit Income Tax Return, by the 15th day of the fourth month following the close of the first tax year of its existence. This regulation also provides a reference to section 301.9100-1 for rules regarding extensions of time for making elections.

Section 1.860F-4(b)(1) of the regulations provides that the due date and any extensions for filing a REMIC's annual tax return are determined as if the REMIC were a partnership. Therefore, pursuant to section 1.6031-1(e)(2), a REMIC's annual return must be filed on or before the 15th day of the fourth month following the close of the taxable year, unless an extension is granted.

Section 301.9100-1(c) of the regulations 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 deadline 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 Code except subtitles E, G, H, and I.

Section 301.9100-3(a) through (c)(1)(i) of the regulations sets forth rules that the Service generally will use to determine whether, under the 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 upon the facts and representations submitted, we conclude that Funds have shown good cause for granting a reasonable extension of time to elect under section 860D(b)(1).

Accordingly, the Funds are granted 30 days from the date of the issuance of this letter to file returns for their initial year to make elections to be treated as REMICs.

This ruling is limited to the timeliness of the filing of the Funds' income tax returns for purposes of the election under section 860D(b)(1) of the Code. This ruling's application is limited to the facts, representations, Code sections, and regulations cited herein. No opinion is expressed with regard to whether Funds otherwise qualify as REMICs under subchapter M of the Code.

No opinion is expressed with regard to whether the tax liability of the Funds 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.

Except as specifically provided otherwise, no opinion is expressed on the federal income tax consequences of the transaction described above.

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 yours,

David B. Silber
David B. Silber
Senior Technician Reviewer, Branch 2
Office of Associate Chief Counsel
(Financial Institutions & Products)