Internal Revenue Service

Number: **201901001**
Release Date: 1/4/2019

Index Number: 856.01-00, 856.04-00

Department of the Treasury
Washington, DC 20224

Third Party Communication: None
Date of Communication: Not Applicable

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PLR-102771-18

Date:
July 10, 2018

LEGEND:

Taxpayer	=
Date	=
a	=
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Dear :

This ruling responds to a letter dated January 11, 2018, and subsequent correspondence, submitted on behalf of Taxpayer. Taxpayer requested a ruling that amounts received by Taxpayer with respect to the use of Taxpayer's Real Property Assets, as defined below, including amounts attributable to activities and services described below, are rents from real property for purposes of sections 856(c)(2) and 856(c)(3) of the Internal Revenue Code.

FACTS

Taxpayer is a corporation and represents that it elected to be taxed as a real estate investment trust ("REIT") under sections 856 through 859 of the Code beginning with its taxable year that ended on Date. Taxpayer leases systems composed of permanently affixed coaxial and fiber optic cable, and the associated conduit piping (together, the "Real Property Assets"), among other assets. Taxpayer also leases indoor and outdoor distributed antenna systems or small cell systems ("DAS"), which are composed of Real Property Assets, among other assets. Taxpayer represents that the Real Property Assets are real property for purposes of section 856 of the Code. Taxpayer's customers are wireless carriers, other telecommunication providers, and private companies ("Tenants").

A. DAS Installations and Fiber Optic Cables

Some of Taxpayer's fiber optic cables are connected to and are associated with DAS installations, while other fiber optic cables form independent networks that are connected to cell towers or utility poles or are buried under the ground. A fiber optic cable is composed of ultra-thin strands of glass surrounded by layers of insulating materials, including cladding (together, "strands"). Many strands are aggregated into a single fiber optic cable. Multiple fiber optic cables are combined and contained in rigid conduit piping, and are typically buried between two and four feet underground, or are attached to above ground structures (e.g. utility poles).

A single strand of fiber has two glass components – the core and the cladding, which together are about as thin as a typical human hair. An optical converter projects a beam of light down the glass core; the light reflects off the glass cladding as it travels down the fiber strand. Since each strand can transport signals of different wavelengths simultaneously, multiple customers can use the same strand by having separately designated wavelengths.

A DAS installation is a system for the transmission of telecommunication signals through fiber optic and coaxial cables. Wireless carriers supplement their antennas mounted on cell towers with DAS installations to improve capacity and signal strength in certain densely populated areas (e.g., a college campus, a sports stadium, or a convention center) and hard-to-reach areas (e.g., an underground transportation system). A DAS installation may be located outdoors ("Outdoor DAS") or inside a structure ("Indoor DAS"). In an Outdoor DAS, cables are buried in the ground in conduit piping or strung between utility poles. In an Indoor DAS, Real Property Assets are embedded in, or affixed to, walls or ceilings of a building or other structure.

With respect to DAS installations, Taxpayer represents that a taxable REIT subsidiary ("TRS") will own and operate all of the equipment that receives, amplifies, converts, and returns a signal originated by a Tenant, including optical converters, lasers, transponders, amplifiers, and regeneration equipment (the "DAS Equipment").

The Tenants will own the equipment located at the base stations, which will be stored in metal equipment cabinets owned by Taxpayer. Taxpayer represents that the TRS will receive arm's length compensation from Taxpayer for owning, operating, monitoring, maintaining, repairing, and replacing all of the DAS Equipment. Taxpayer represents that it will treat the DAS Equipment as personal property for purposes of section 856(d)(1)(C), and that the fair market value of personal property leased under or in connection with the lease of Real Property Assets of a DAS installation is less than 15% of the fair market value of the DAS installation of which it is a part.

With respect to systems that are not associated with a DAS installation, Taxpayer represents that either a TRS or the Tenant will own and operate all of the equipment that receives, amplifies, regenerates, converts, and returns a signal originated by a Tenant, including optical converters, filters, lasers, transponders, amplifiers, and regeneration equipment (the "Signal Equipment"). Taxpayer represents that the TRS will receive arm's length compensation from Taxpayer for owning, operating, monitoring, maintaining, repairing, and replacing all of its Signal Equipment. Taxpayer represents that it will treat the Signal Equipment as personal property for purposes of section 856(d)(1)(C), and that the fair market value of the personal property leased under or in connection with the lease of Real Property Assets of a system that is not associated with a DAS installation is less than 15% of the fair market value of the system of which it is a part.

B. Agreements for the Use of Real Property Assets

Taxpayer enters into five types of contractual agreements with Tenants. These agreements are DAS Agreements, Indefeasible Rights of Use Agreements ("IRUs"), Capacity Leases, Wave Leases, and Backhaul Leases, each described below (together, "Agreements"). Only DAS Agreements relate to Real Property Assets associated with DAS installations. Each type of Agreement typically involves a term of a to b years, and no Agreement is for less than c year. In all of the Agreements, the Tenant is required to pay for the contracted usage, regardless of the Tenant's actual usage. Under each type of Agreement, the Tenant is required to pay a fixed, recurring amount that may be subject to periodic escalation. Under DAS Agreements, as well as under certain IRUs and Capacity Leases, the Tenant generally pays an upfront amount in addition to a recurring amount. Taxpayer represents that it will not receive any amounts under any Agreement that is based on a percentage of the income or profits of the Tenant, or any other person.

1. *DAS Agreement*

Under a DAS Agreement, the Tenant has the exclusive right to use either a designated number of individual strands within the fiber optic pathway, or a dedicated wavelength within the fiber optic pathway of a DAS installation.

2. *IRU*

Under an IRU, the Tenant has the exclusive right to use all of the wavelengths (or capacity) in one or more specified strands within a fiber optic cable over a specified route for the term of the lease.

3. *Capacity Lease*

Under a Capacity Lease, the Tenant has an exclusive right to use a specified subset of all the wavelengths (or capacity) within a strand located in a fiber optic cable over a specified route for the term of the lease.

4. *Wave Lease*

Under a Wave Lease, the Tenant has an exclusive right to use a dedicated wavelength in a strand within the fiber optic cable over a specified route for the term of the lease. The Tenant under a Wave Lease, however, does not have a right to a specifically identified strand, or wavelength within a strand, in a fiber optic cable, unlike a Tenant of an IRU or a Capacity Lease.

5. *Backhaul Lease*

Under a Backhaul Lease, the Tenant has an exclusive right to use all or a dedicated portion of the capacity of an identifiable fiber optic cable over a specifically identified route from a cell tower to a collection point for the term of the lease. Under certain Backhaul Leases, the Tenant does not have an exclusive right to a specifically identified wavelength on a strand within the fiber optic cable; however, the Tenant has the exclusive right to either all of the capacity of a particular number of unidentified strands or to a dedicated portion of the capacity within a strand of a fiber optic pathway. Signals of different Tenants are not intermingled. The Tenant will own and operate a mobile switching center and base station equipment for the generation of the initial digital signal as well as the ultimate receipt of the signal.

C. Services and Activities

Taxpayer represents that it is obligated to undertake certain activities and to render certain services that Taxpayer represents are usually and customarily provided in connection with the lease of Real Property Assets. Taxpayer will provide electricity to its Tenants. Taxpayer represents that any other service rendered to a Tenant under an Agreement will be performed either by a TRS of Taxpayer, or by an independent contractor, as defined in section 856(d)(3), from whom Taxpayer derives no income (an "IK"). Furthermore, Taxpayer represents that any service that will be provided or rendered to a Tenant under each of the five types of Agreements is a service that is customarily furnished to tenants of Real Property Assets of a similar class in the same geographic area.

Taxpayer will perform certain activities including designing the DAS installation or system, constructing the DAS installation or system, installing the components of the DAS (including antennas, fiber optic and coaxial cables, amplifiers, optical converters, and other equipment), and providing ongoing monitoring and maintenance of the Real Property Assets. In addition, if any scheduled excavation work is to take place near its fiber optic cable, Taxpayer will mark the cable's location with flags or paint. Taxpayer will also move and relocate its cable when necessary due to construction activity (e.g. a road being widened, utility poles being relocated, etc.). Furthermore, Taxpayer will repair the fiber optic cable if it is cut or otherwise damaged, which can occur from storms, earthquakes, water incursions, fire, unauthorized digging, animal activity, etc. Taxpayer will not monitor, repair or maintain any equipment owned by a Tenant, a TRS, or an IK.

LAW AND ANALYSIS

Section 856(c)(2) provides that at least 95 percent of a REIT's gross income must be derived from, among other sources, rents from real property. Section 856(c)(3) provides that at least 75 percent of a REIT's gross income must be derived from, among other sources, rents from real property.

Section 856(d)(1) provides that "rents from real property" include (subject to exclusions provided in section 856(d)(2)): (A) rents from interests in real property; (B) charges for services customarily furnished or rendered in connection with the rental of real property, whether or not such charges are separately stated; and (C) rent attributable to personal property leased under, or in connection with, a lease of real property, but only if the rent attributable to the personal property for the taxable year does not exceed 15 percent of the total rent for the taxable year attributable to both the real and personal property leased under, or in connection with, the lease.

Section 856(d)(2)(C) provides that any impermissible tenant service income is excluded from the definition of "rents from real property." Section 856(d)(7)(A) defines "impermissible tenant service income" to mean, with respect to any real or personal property, any amount received or accrued directly or indirectly by the REIT for services furnished or rendered by the REIT to tenants at the property, or for managing or operating the property.

Section 856(d)(7)(C) provides as exceptions from impermissible tenant service income (i) services furnished or rendered, or management or operation provided, through an independent contractor from whom the REIT does not derive or receive any income or through a taxable REIT subsidiary of the REIT shall not be treated as furnished, rendered, or provided by the REIT, and (ii) there shall not be taken into account any amount which would be excluded from unrelated business taxable income under section 512(b)(3) if received by an organization described in section 511(a)(2).

Section 512(b)(3) provides, in part, that there shall be excluded from the computation of unrelated business taxable income all rents from real property and all rents from personal property leased with such real property, if the rents attributable to such personal property are an incidental amount of the total rents received or accrued under the lease, determined at the time the personal property is placed in service.

Section 1.512(b)-1(c)(5) of the Income Tax Regulations provides that payments for the use or occupancy of rooms and other space where services are also rendered to the occupant, such as for the use or occupancy of rooms or other quarters in hotels, boarding houses, or apartment houses furnishing hotel services, or in tourist camps or tourist homes, motor courts or motels, or for the use or occupancy of space in parking lots, warehouses, or storage garages, do not constitute rent from real property. Generally, services are considered rendered to the occupant if they are primarily for the occupant's convenience and are other than those usually or customarily rendered in connection with the rental of rooms or other space for occupancy only. The supplying of maid service, for example, constitutes such service; whereas the furnishing of heat and light, the cleaning of public entrances, exits, stairways and lobbies, and the collection of trash are not considered as services rendered to the occupant, and there shall not be taken into account any amount which would be excluded from unrelated business taxable income under section 512(b)(3) if received by an organization described in section 511(a)(2).

Section 1.856-4(a) defines the term “rents from real property” generally as the gross amounts received for the use of, or the right to use, real property of the REIT. Section 1.856-4(b)(1) provides that the term “rents from real property” includes charges for services customarily furnished or rendered in connection with the rental of real property, whether or not the charges are separately stated. Services furnished to tenants of a particular building will be considered as customary if, in the geographic market in which the building is located, tenants in buildings of similar class are customarily provided with the service. Where it is customary, in a particular geographic marketing area, to furnish electricity or other utilities to tenants in buildings of a particular class, the submetering of utilities to tenants in such buildings will be considered a customary service.

Section 1.856-4(b)(5)(ii) provides that the trustees or directors of a trust are not required to delegate or contract out their fiduciary duty to manage the trust itself, as distinguished from rendering or furnishing services to the tenants of its property or managing or operating the property. Thus, the trustees or directors may do all those things necessary, in their fiduciary capacities, to manage and conduct the affairs of the trust itself. For example, the trustees or directors may establish rental terms, choose tenants, enter into and renew leases, and deal with taxes, interest, and insurance relating to the trust’s property. The trustees may also make capital expenditures with respect to the trust’s property (as defined in section 263) and may make decisions as to repairs of the trust’s property (of the type that would be deductible under section 162),

the cost of which may be borne by the trust. See also Rev. Rul. 67-353, 1967-2 C.B. 252.

Taxpayer represents that the Real Property Assets are real property for purposes of section 856. Under each of the five types of Agreements, the Tenant has a right to use or to occupy space on the Real Property Assets. Each of the five types of Agreements typically involves a term of a to b years; and no Agreement is for less than c year. Each Agreement requires a fixed, recurring amount to be paid by the Tenant during the term of the Agreement. In addition, under DAS Agreements, as well as under certain IRUs and Capacity Leases, the Tenant generally pays an upfront amount in addition to a recurring amount. The Tenant is required to pay for the contracted usage, regardless of the Tenant's actual usage. Taxpayer represents that it will not receive any amounts under any Agreement that is based on a percentage of the income or profits of the Tenant, or any other person. Accordingly, amounts received by Taxpayer for right to use or to occupy space on the Real Property Assets qualify as "rents from interests in real property" under section 856(d)(1)(A).

Taxpayer represents that any service that will be furnished or rendered to a Tenant under each of the five types of Agreements is a service that is customarily furnished to tenants of Real Property Assets of a similar class to that of Taxpayer in the same geographic area and, except for the provision of electricity, are performed by either a TRS or an IK. In addition, Taxpayer's performance of the activities described above represents an exercise of the fiduciary duties of the Taxpayer's directors in accordance with section 1.856-4(b)(5)(ii), and are not services rendered to a Tenant in connection with the rental of real property. Therefore, the furnishing of services to Tenants and the provision of the activities described above by Taxpayer under each of the five types of Agreements detailed above does not give rise to impermissible tenant service income, and will not cause any portion of the rents received by Taxpayer from Tenants for use of Taxpayer's Real Property Assets to fail to qualify as rents from real property under section 856(d).

CONCLUSION

Based on the facts and representations submitted by Taxpayer and subject to section 856(d)(1)(C), we rule that amounts received by Taxpayer from Tenants for the use of Taxpayer's Real Property Assets qualify as rents from real property for purposes of sections 856(c)(2) and 856(c)(3) of the Code. Furthermore, the provision of the services listed above that are performed by either a TRS or an IK and the performance of the activities described above do not give rise to impermissible tenant service income, and will not cause any portion of the rents received by Taxpayer under each of the five types of Agreements to fail to qualify as rents from real property under section 856(d).

This ruling's application is limited to the facts, representations, Code sections, and regulations cited herein. Except as expressly 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 concerning whether Taxpayer's Real Property Assets are real property for purposes of section 856, whether services are of the type that are customarily furnished to tenants of real property of a similar class to that of Taxpayer in the same geographic area, or whether the income attributable to the personal property leased in connection with such real property exceeds 15 percent of the total rent as required by section 856(d)(1)(C). No opinion is expressed concerning whether Taxpayer otherwise qualifies as a REIT under subchapter M, part II of Chapter 1 of the Code.

Furthermore, the ruling herein related to whether income from services and activities performed by Taxpayer is impermissible tenant service income is specifically limited to whether the income is qualifying income for REIT qualification purposes. The definition of rents from real property under section 856(d) differs in scope and structure from the definition of rents from real property under section 512(b)(3), which applies to exempt organizations described in section 511(a)(2). Therefore, an exempt organization providing the same services may have unrelated business taxable income because the income may not be excluded under section 512(b)(3) as rents from real property.

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,

_____

Julanne Allen
Assistant Branch Chief, Branch 3
Office of the Associate Chief Counsel
(Financial Institutions & Products)

Enclosure:
Copy for section 6110 purposes

cc: