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Department of the Treasury
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Date:
February 28, 2019

Legend

Taxpayer =

Operating Partnership =

Advisor =

Holdco =

Subsidiary A =

Subsidiary B =

Entities =

Date 1 =

Date 2 =

Date 3 =

Firm 1 =

Firm 2 =

X =

Y =

Z =

State A =

State B =

City =

Province =

Country A

Country B =

Year 1 =

Year 2 =

Dear :

This ruling responds to a letter dated August 23, 2018, submitted on behalf of Taxpayer. Taxpayer requests an extension of time under sections 301.9100-1 and 301.9100-3 of the Procedure and Administration Regulations to make an election under section 856(l) of the Internal Revenue Code ("Code") to treat Subsidiary A and Subsidiary B (the "Subsidiaries") as taxable REIT subsidiaries ("TRSs") of Taxpayer.

FACTS

Taxpayer was formed on Date 1 under the laws of State A. Taxpayer elected to be taxed as a real estate investment trust ("REIT") in Year 1 and represents that it has operated as such since that date. The overall business of Taxpayer's corporate group is the ownership and operation of self-storage facilities in Country A and Province.

Taxpayer owns X percent of Operating Partnership. The remaining Y percent is owned by Advisor. On Date 2, Holdco was contributed to Operating Partnership. Holdco, a disregarded entity, owns and operates five self-storage properties in City. Beneficial ownership of each of the aforementioned five properties is held by a separate, disregarded State B LLC that is wholly owned by Holdco. Legal title to each property is held by a separate Country B entity wholly owned by each of the respective disregarded State B LLCs. Three of the properties are held by Entities that are treated as disregarded entities for federal income tax purposes. Subsidiaries each hold title to one of the remaining two facilities.

Subsidiaries were incorporated under the laws of Province on Date 3 and are treated as corporations for federal income tax purposes. Subsidiaries were formed to hold legal title to and obtain financing, pursuant to Nominee Agreements, for the property held by the subsidiary. Subsidiaries are minimally capitalized and all of the beneficial interest in each property belongs to a State B LLC.

Taxpayer does not have its own internal tax staff. As a result Taxpayer relies on third party tax advisors for both legal advice and accounting services. From a time before Date 1 and through the present, Firm 1 has been engaged to provide legal advice, including matters related to REITs, to Taxpayer and its affiliates. Firm 1 advised Taxpayer regarding the contribution of Holdco to Taxpayer. Owing to Subsidiaries having minimal capitalization and a small role within the organization, Taxpayer’s tax advisors overlooked the need to file TRS elections for Subsidiaries. Further, Taxpayer was unaware that such elections were necessary.

In the beginning of Year 2, Firm 2, Taxpayer’s new return preparer, was performing year-end REIT testing and discovered that no TRS elections had been made for the Subsidiaries. Firm 2 contacted Firm 1 to discuss the organizational structure to determine if TRS elections were necessary. After determining that TRS elections were necessary, Firm 2 informed the Chief Financial Officer of Taxpayer of the possibility of obtaining relief for the missed TRS elections under section 301.9100-3.

Taxpayer makes the following additional representations:

1. The request for relief was filed before the failure to make the regulatory election was discovered by the Service.

2. Granting the relief requested will not result in Taxpayer, Subsidiary A, or Subsidiary B, having a lower tax liability in the aggregate for all years to which the elections apply than it would have had if the elections had been timely made (taking into account the time value of money).

3. Taxpayer, Subsidiary A, and Subsidiary B do not seek to alter return positions for which accuracy-related penalties have been or could have been imposed under

section 6662 of the Code at the time they requested relief, and the new positions require or permit the regulatory elections for which relief is requested.

4. Being fully informed of the required regulatory elections and related tax consequences, Taxpayer, Subsidiary A, and Subsidiary B did not choose to not file the elections.

5. Taxpayer, Subsidiary A, and Subsidiary B are not using hindsight in making the decision to seek the relief requested. No specific facts have changed since the due date for making the elections that make the elections advantageous.

6. The period of limitations on assessment under section 6501(a) has not expired for Taxpayer, Subsidiary A, and Subsidiary B for the taxable year in which the elections should have been filed, nor for any taxable year(s) that would have been affected by the elections had they been timely filed.

In addition, affidavits on behalf of Taxpayer, Subsidiary A, and Subsidiary B have been provided as required by sections 301.9100-3(e)(2) and (3) of the Procedure and Administrative Regulations.

LAW AND ANALYSIS

Section 856(l) of the Code 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, section 856(l)(1) provides that the REIT must directly or indirectly own stock in such corporation, and the REIT and such corporation must jointly elect such treatment. The election is irrevocable once made, unless both the REIT and the corporation consent to its revocation. In addition, section 856(l) specifically provides that the election, and any revocation thereof, may be made without consent of the Secretary.

In Announcement 2001-17, 2001-1 C.B. 716, the Service announced the availability of Form 8875, "Taxable REIT Subsidiary Election." According to the Announcement, this form is to be used for taxable 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 taxable year; however, the effective date of the election depends on when the Form 8875 is filed. The instructions further provide that the effective date of the election cannot be more than 2 months and 15 days prior to the date of filing the election, or more than 12 months after the date of filing 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) of the Procedure and Administration Regulations provides that the Commissioner has discretion to grant a reasonable extension of time to make a regulatory election, 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 301.9100-1(b) defines a regulatory election as an election whose due date is prescribed by regulations or by a revenue ruling, revenue procedure, notice, or announcement published in the Internal Revenue Bulletin.

Section 301.9100-3(a) through (c)(1) sets forth rules that the 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(a) provides that requests for relief subject to this section will be granted when the taxpayer provides the evidence (including affidavits described in section 301.9100-3(e)) to establish to the satisfaction of the Commissioner that the taxpayer acted reasonably and in good faith, and the grant of relief will not prejudice the interests of the Government.

Section 301.9100-3(b) provides that a taxpayer is deemed to have acted reasonably and in good faith if the taxpayer (i) requests relief under this section 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. A taxpayer will be deemed to have not acted reasonably and in good faith 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 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.

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 the 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 this section.

CONCLUSION

Based on the information submitted and the 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 Subsidiaries as TRSs of Taxpayer, effective as of Date 2. Accordingly, Taxpayer has 90 calendar days from the date of this letter to make the intended elections to treat Subsidiaries as TRSs of Taxpayer, effective as of Date 2.

This ruling is limited to the timeliness of filing Forms 8875. This ruling's application is limited to the facts, representations, Code sections, and regulations cited herein. Except as 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. No opinion is expressed as to whether Taxpayer otherwise qualifies as a REIT, or whether Subsidiaries otherwise qualify as TRSs, under part II of subchapter M of the Code.

No opinion is expressed with regard to whether the tax liability of Taxpayer and Subsidiaries is not lower in the aggregate for all years to which the elections apply than such tax liability would have been if the elections 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 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 Power of Attorney on file with this office, copies of the letter are being sent to your authorized representatives.

Sincerely,

Andrea M. Hoffenson
Branch Chief, Branch 2
(Financial Institutions & Products)
Office of Associate Chief Counsel