

Administration Regulations to make an election under section 856(c)(1) of the Internal Revenue Code (“Code”) to be treated as a real estate investment trust (“REIT”), effective Date 2.

FACTS

Fund formed LLC on Date 1 as a State limited liability company, and it was a disregarded entity for federal tax purposes under section 301.7701-(3)(a) and (b)(1)(ii) of the regulations because it had a single owner and did not elect a different status. On Date 3 LLC filed Form 8832, Entity Classification Election, electing to be treated as an association taxable as a corporation, effective Date 2.

Between Date 2 and Date 4, LLC received transfers of mortgage notes from Fund and recorded and recognized all interest and expenses related to the notes as owner of the mortgage notes. During the process of the transfers, Fund and LLC retained Firm and its certified public accountants to perform services, including financial statement audits and tax compliance, including preparing and reviewing all necessary federal income tax filings and extensions.

Midway through the Year tax compliance filings, the Firm team handling the filings for Fund was separated from the team handling the filings for LLC. Firm’s LLC team believed that the time for filing LLC’s Year 1120-REIT return had been extended to Date 6 by Firm. On or about Date 5, Firm’s LLC team discovered that for Year, no Form 7004, Application for Automatic Extension of Time to File Certain Business Income Tax, Information, and Other Returns, had been filed for LLC, although one had been filed for Fund by Firm. Firm and LLC gathered all remaining information to complete and accurately file LLC’s initial Form 1120-REIT for Year, which was filed on Date 6. Firm also advised LLC to seek an extension of time for that filing under section 301.9100-3 of the regulations.

Fund timely filed (including extensions) its Form 1065, U.S. Return of Partnership Income, treating income from LLC after Date 2 as REIT distributions. Thus, Fund acted consistent with the intent to treat LLC as a REIT beginning Date 2.

LLC makes the following additional representations in connection with its request for an extension of time:

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

3. LLC does not seek to alter a return position for which an accuracy-related penalty has or could have been imposed under section 6662 of the Code at the time it 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, LLC did not choose to not file the election.
5. LLC is not using hindsight in making the decision to seek the relief requested. No specific facts have changed since the due date for making the election that make the election advantageous to LLC.
6. The period of limitations on assessment under section 6501(a) has not expired for LLC for the taxable year for which the election should have been filed, nor for any taxable year(s) that would have been affected by the election had it been timely filed.

In addition, affidavits on behalf of LLC and Firm have been provided as required by section 301.9100-3(e)(2) and (3) of the Procedure and Administrative Regulations.

LAW AND ANALYSIS

Section 856(c)(1) of the Code provides that a corporation, trust, or association shall not be considered a REIT for any taxable year unless it files with its return for the taxable year an election to be a REIT or has made such an election for a previous taxable year, and such election has not been terminated or revoked. Pursuant to section 1.856-2(b) of the Income Tax Regulations, the election shall be made by computing taxable income as a REIT in its return for the first taxable year for which it desires the election to apply.

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 a regulation or 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 upon the facts and representations submitted, we conclude that LLC has shown good cause for granting a reasonable extension of time to elect under section 856(c)(1) to be treated as a REIT. Accordingly, due to the reasonable extension of time granted to LLC, LLC's Form 1120-REIT filed on Date 6 for LLC's first REIT taxable year is considered a timely election for Year under § 856(c) to be treated as a REIT under subchapter M of the Code.

This ruling is limited to the timeliness of the filing of LLC's election under section 856(c)(1) of the Code. 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 LLC otherwise qualifies as a REIT under part II of subchapter M of the Code.

No opinion is expressed with regard to whether the tax liability of LLC 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 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,

Andrea M. Hoffenson

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Branch Chief, Branch 2

Office of the Associate Chief Counsel

(Financial Institutions and Products)

Enclosure:

Copy for 6110 purposes

cc: