**Internal Revenue Service**

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Department of the Treasury
Washington, DC 20224

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Person To Contact:
, ID No.
Telephone Number:

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CC:FIP:B3
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Date:
September 22, 2020

**LEGEND**:

Taxpayer:

Company:

OP:

Firm:

State:

Country X:

a:

b:

Year 1:

Year 2:

Date 1:

Date 2:

Date 3:

Date 4:

Date 5:

Date 6:

Date 7:

Senior Vice President Tax:

Regional Tax Director:

Dear :

This ruling responds to a letter dated March 31, 2020, submitted on behalf of Taxpayer and Company. Taxpayer and Company request an extension of time under §§ 301.9100-1 and 301.9100-3 of the Procedure and Administration Regulations to make an election under § 856(l) of the Internal Revenue Code to treat Company as a taxable REIT subsidiary ("TRS") of Taxpayer effective as of Date 3.

## FACTS

Taxpayer is a State corporation and represents that it made an election to be treated as a real estate investment trust ("REIT") under §§ 856 through 859 commencing with its taxable year that ended on Date 1. Taxpayer's overall method of accounting is an accrual method, and Taxpayer's taxable year is the calendar year. Taxpayer conducts data center leasing operations on an international scale, including in Country X.

Taxpayer performs substantially all its operations through its a percent interest in OP, a State limited partnership. Taxpayer is the sole general partner of OP. Unrelated parties hold the remaining b percent minority interest in OP. OP wholly owns Company through its wholly owned disregarded U.S. subsidiary. Company's overall method of accounting is an accrual method, and Company has a calendar tax year. Company is a regarded Country X tax entity and tax resident, and it has filed Country X corporate income tax returns since formation. Company had previously filed a Form 8832, *Entity Classification Election*, upon its formation electing to be classified as a disregarded entity for U.S. federal income tax purposes, effective on Date 2.

Taxpayer, through OP, established several wholly owned U.S. limited liability companies ("Property Companies") in connection with the acquisition of real estate in Country X. Property Companies have been capitalized with equity made available by Taxpayer and debt financing provided by Company. Company borrows money from third-party lenders to make loans to Property Companies. In connection with the borrowing from third-party lenders, OP guarantees Company's repayment obligations with respect to such loans. Company pays guarantee fees to OP as consideration for

the guarantees. For Country X income tax purposes, Company has been deducting the interest payments to third party lenders and the guarantee fees paid to OP.

Effective Date 3, Country X enacted a new law regarding the Country X taxation of hybrid mismatch transactions among members of a global group where there is a different tax treatment of the transaction in two or more countries (the "anti-hybrid rules"). The anti-hybrid rules operate to neutralize hybrid mismatches by disallowing deductions or by including amounts in Country X assessible income. The complex Country X rules required an understanding not only of the nuances of the developing Country X interpretations, but also, as applicable in this case, an understanding of the U.S. organization structure and the associated U.S. tax treatment of relevant interest and guarantee fee payments.

Taxpayer's global tax planning and compliance is overseen by Senior Vice President Tax. Regional Tax Director reports to Senior Vice President Tax and is responsible for tax matters for a geographic area that includes Country X. Regional Tax Director is not an expert in Country X tax law, but Regional Tax Director believed prior to Date 4 that Country X's anti-hybrid rules would not adversely impact Company. Taxpayer represents that, prior to Date 4, based on its initial analysis of the anti-hybrid rules as well as a belief that Taxpayer's organization structure did not create any tax avoidance under the anti-hybrid rules, Taxpayer understood that Company would meet the dual income inclusion exception to the Country X anti-hybrid rules regarding the interest and guarantee payments.

Taxpayer has engaged Firm to be its U.S. tax advisor since Year 1 and has engaged Firm on international tax matters since Year 2. In connection with further investment into Country X, Taxpayer sought specific advice from Firm on Date 4 to more closely consider the implications of the Country X anti-hybrid rules on the deductibility of the interest and guarantee payments made by Company. On Date 5, Taxpayer and Firm began to appreciate that the guarantee fees and interest paid by Company would not be deductible in Country X. Upon further investigation, Taxpayer realized that Company would not qualify for the dual income inclusion exception to the anti-hybrid rules because OP had issued b percent minority interests to unrelated parties.

After consulting with Firm, Taxpayer determined between Date 5 and Date 6 that Company would need to make an election to treat Company as a regarded entity for U.S. tax purposes as of Date 3 in order to meet the Country X dual income inclusion exception to the Country X anti-hybrid rules. Because Company was adopting as of Date 3 regarded entity (corporate) status, Taxpayer also determined at that time that it would need to make a TRS election as of Date 3. On Date 6, Company filed a Form 8832, pursuant to the late classification relief provided for in Rev. Proc. 2009-41, 2009-39 I.R.B. 439, for Company to elect to be classified as an association taxable as a corporation, effective Date 3. On the same date, Taxpayer and Company filed a Form 8875, *Taxable REIT Subsidiary Election*, effective for Date 7, the earliest possible effective date at that time for a TRS election. Because the desired effective date of the

TRS election was Date 3 (and not Date 7), Firm advised Taxpayer and Company to submit a request for relief under §§ 301.9100-1 and 301.9100-3 for an extension of time to file the election under § 856(l) to treat Company as a TRS of Taxpayer effective as of Date 3.

Taxpayer and Company make the following additional representations in connection with their 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 Service.

2. Granting the relief requested will not result in Taxpayer or Company having a lower U.S. federal tax liability in the aggregate for all years to which the election applies than they would have had if the election had been timely made (taking into account the time value of money).

3. Taxpayer and Company do not seek to alter a return position for which an accuracy-related penalty has been or could have been imposed under § 6662 at the time they 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, Taxpayer and Company did not choose to not file the election.

5. Taxpayer and Company 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 election that make the election advantageous to Taxpayer or Company.

6. The period of limitations on assessment under § 6501(a) has not expired for Taxpayer or Company for the taxable year in 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 Taxpayer and Company have been provided as required by § 301.9100-3(e).

## 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, § 856(l)(1) 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. In addition, § 856(l) specifically provides that the election, and any revocation thereof, may be made without the consent of the Secretary.

In Announcement 2001-17, 2001-1 C.B. 716, the Service announced the availability of Form 8875. The announcement provides that this form is to be used for taxable years beginning after 2000 for eligible entities to elect to be treated 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 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) 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 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 § 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 § 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 § 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 § 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 Company have satisfied the requirements for granting a reasonable extension of time to jointly elect under § 856(l) to treat Company as a TRS of Taxpayer, effective Date 3. Accordingly, the Form 8875 filed by Taxpayer and Company on Date 6 will be considered timely filed, effective as of Date 3.

This ruling is limited to the timeliness of the filing of Form 8875. This ruling's application is limited to the facts, representations, and Code and regulation sections 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. In particular, no opinion is expressed as to whether Taxpayer otherwise qualifies as a REIT, or whether Company otherwise qualifies as a TRS of Taxpayer under part II of subchapter M of the Code.

No opinion is expressed with regard to whether the tax liability of Taxpayer or Company 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 U.S. 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 U.S. federal income tax effect.

The ruling contained in this letter is based upon information and representations submitted by Taxpayer and Company and accompanied by penalty of perjury statements executed by the appropriate parties. While this office has not verified any of the material submitted in support of the request for rulings, it is subject to verification on examination.

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,

_____
Patrick E. White
Senior Counsel, Branch 3
Office of the Associate Chief Counsel
(Financial Institutions & Products)

Enclosure:

Copy of this letter for section 6110 purposes

cc: