

Internal Revenue Service

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Department of the Treasury

Washington, DC 20224

Third Party Communication: None

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CC:FIP:B02

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Date:

December 15, 2020

Legend:

Taxpayer =

Entity A =

Entity B =

Entity C =

Entity D =

Entity E =

Entity F =

Entity G =

Entity H =

Advisor 1 =

Advisor 2 =

Advisor 3 =

Advisor 4 =

Date 1 =

Date 2 =

Date 3 =

Date 4 =

Date 5 =

Date 6 =

Date 7 =

Date 8 =

Date 9 =

State A =

State B =

Year 1 =

Year 2 =

Year 3 =

Year 4 =

Year 5 =

a =

b =

c =

d =

Dear :

This ruling responds to a letter dated May 22, 2020, and subsequent correspondence, submitted on behalf of Taxpayer and its subsidiaries, Entity A and Entity B. Taxpayer and Entity A and B, respectively, request extensions of time under sections 301.9100-1 and 301.9100-3 of the Procedure and Administration Regulations to make elections under section 856(l) of the Internal Revenue Code to treat Entity A and Entity B each as a taxable REIT subsidiary (“TRS”) of Taxpayer effective as of Date 4 for Entity A and as of Date 6 for Entity B.

FACTS

Taxpayer is a State A corporation and represents that it made an election to be treated as a real estate investment trust (“REIT”) under sections 856 through 859 commencing with its taxable year that ended on Date 2. Taxpayer uses the accrual method as its overall method of accounting, and Taxpayer’s taxable year is the calendar year. Taxpayer directly or indirectly holds assets related to senior housing facilities with a focus on assisted living and memory care units.

Entity A Facts:

Entity A is a limited liability company formed under the laws of the State A on Date 3. All of Entity A’s membership interests are owned by Entity C, a State A limited liability company. Taxpayer owns a percent of the limited partnership interests in Entity D, a State B limited partnership which owns b of the membership interests in Entity C. The remaining membership interests in Entity C are owned by Entity E, a State limited liability company. Entity C is classified as a partnership for federal income tax purposes.

In Year 1, Advisor 1 advised Taxpayer and certain of its affiliates with respect to an investment structure for senior living facilities. In particular, Advisor 1 advised Taxpayer and its affiliates with respect to an Investment Agreement dated as of Date 1. The Investment Agreement along with an Operating Agreement dated as of Date 1, provided that Entity A would make a joint TRS election with Taxpayer. In order for Entity A to be treated as a TRS of Taxpayer, it first had to be classified as a corporation for federal income tax purposes. Entity A was eligible to elect to be treated as an association taxed as a corporation and to make a TRS election effective as of Date 4. It was intended that Entity A would file Form 8832, Entity Classification Election, with the Internal Revenue Service to be effective as of Date 4, to elect to be classified as an association taxed as a corporation for federal income tax purposes. In addition, in conjunction with the filing of Form 8832, and after giving effect to such election, Form 8875, Taxable REIT Subsidiary Election, was to be filed jointly by Entity A and Taxpayer to treat Entity A as a TRS of Taxpayer effective Date 4.

Advisor 2, the historic tax accounting firm providing services to Entity F, the management company of Entity C and its affiliates, was engaged to prepare the federal income tax return of Entity C for the calendar Year 2. In order to discharge its federal

and state tax compliance obligations for the calendar year 2016, and to ensure that its REIT status would be maintained, Taxpayer itself engaged Advisor 3.

Because Advisor 2 did not have a copy of relevant agreements prepared by Advisor 1, it did not understand the importance of making a TRS election for Entity A or the importance of classifying Entity A as a corporation for federal income tax purposes. Advisor 2, having not been familiar with the tax-law limitations applicable to a REIT, did not review (or inquire of its client regarding) the REIT related issue related to an indirect partner of its client. Due to the lack of understanding and communication regarding the applicable TRS election requirements, Entity A was treated as a disregarded entity of Entity C, and the federal income tax returns for Entity C for the taxable years ended December 31, Year 2, Year 3 and Year 4, included the activity for Entity A. As a result, Entity A has not filed a separate federal income tax return for Year 2 (or any subsequent taxable year) on the basis of its unintended treatment as an entity disregarded as separate from its owner.

On or about Date 7, during due diligence procedures in connection with a potential sale of Taxpayer and other entities, it was discovered that neither the entity classification election nor the TRS election was filed for Entity A. When the matter was investigated, it became apparent that the oversight was due to a lack of communication between the representatives of the various entities.

Once it became clear to Taxpayer that the appropriate entity classification and TRS elections were not made, Taxpayer engaged Advisor 3 and Advisor 4 to determine options for requesting relief for the missed elections. Advisor 3 advised Taxpayer and Entity A that the only available option to make the late entity classification and TRS elections was to file a request for a private letter ruling. Once the failure to make these elections was discovered, Taxpayer and Entity A took prompt action to gather the facts and to authorize Advisor 3 to submit this ruling request. Entity A was granted an extension of time to make the entity classification election effective Date 4 in a private letter ruling dated Date 9. On Date 8, consents were submitted by the appropriate parties to extend the period of limitations on assessment.

Taxpayer and Entity A make the following additional representations in connection with their request for an extension of time:

1. Entity A intends to elect to be treated as a corporation for federal income tax purposes effective Date 4 and will be an eligible entity within the meaning of Treas. Reg. section 301.7701-3(a) on the date the retroactive election to treat Entity as a TRS of Taxpayer becomes effective.
2. The request for relief was filed before the failure to make the regulatory election was discovered by the Service.
3. Granting the relief will not result in Taxpayer or Entity A having a lower tax liability in

the aggregate for all years to which the regulatory election applies than they would have had if the election had been timely made (taking into account the time value of money).

4. Taxpayer and Entity A do not seek to alter a return position for which an accuracy-related penalty has been or could be imposed under section 6662 as of the date of this letter.
5. Being fully informed of the required regulatory election and related tax consequences, Taxpayer and Entity A did not choose to not file the election.
6. Taxpayer and Entity A 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 makes the election advantageous to Taxpayer or Entity A.
7. The period of limitations on assessment under Code section 6501(a) has not expired for Taxpayer and Entity A 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 Entity A have been provided as required by section 301.9100-3(e).

Entity B Facts:

Entity B is a limited liability company formed under the laws of State A on Date 5. All of its membership interests are owned by Entity G, a State A limited liability company. Taxpayer own c percent of the limited partnership interests in Entity H, a State B limited partnership which owns d percent of the membership interests in Entity G. Entity G is classified as a partnership for federal income tax purposes.

As discussed above, in Year 1, Advisor 1 advised Taxpayer and certain of its affiliates with respect to an investment structure for senior living facilities and with respect to the Investment Agreement. The Investment Agreement along with an Operating Agreement dated as of Date 5, provided that Entity B would make a joint TRS election with Taxpayer. In order for Entity B to be treated as a TRS of Taxpayer, it first had to be classified as a corporation for federal income tax purposes. Entity B was eligible to elect to be treated as an association taxed as a corporation and to make a TRS election effective as of Date 6. It was intended that Entity B would file Form 8832, Entity Classification Election, with the Internal Revenue Service to be effective as of Date 6, to elect to be classified as an association taxed as a corporation for federal income tax purposes. In addition, in conjunction with the filing of Form 8832, and after giving effect to such election, Forms 8875, Taxable REIT Subsidiary Election, were to be filed jointly by Entity B and Taxpayer to treat Entity B as a TRS of Taxpayer effective Date 6.

Entity F was also the manager of Entity G and engaged Advisor 2 to prepare the federal income tax return of Entity G for Year 5. As discussed above, in order to discharge its federal and state tax compliance obligations for Year 5, and to ensure that its REIT status would be maintained, Taxpayer engaged Advisor 3.

Because Advisor 2 did not have a copy of relevant agreements prepared by Advisor 1, it did not understand the importance of making a TRS election for Entity B or of classifying Entity B as a corporation for federal income tax purposes. Advisor 2, having not been familiar with the tax-law limitations applicable to a REIT, did not review, or inquire of its client regarding the REIT related issue related to an indirect partner of its client. Due to the lack of communication regarding the applicable REIT election requirements, Entity B treated itself as a disregarded entity of Entity G and no federal income tax return was filed for Entity B for the taxable year ended December 31, Year 5.

On or about Date 7, during due diligence procedures in connection with a potential sale of Taxpayer and other entities, it was discovered that neither the entity classification election nor the TRS election was filed for Entity B. When the matter was investigated, it became apparent that the oversight was due to a lack of communication between the representatives of the various entities.

Once it became clear to Taxpayer that the appropriate entity classification and TRS elections were not made, Taxpayer engaged Advisor 3 and Advisor 4 to determine options for requesting relief for the missed elections. Advisor 3 advised Taxpayer and Entity B that the only available option to make the late entity classification and TRS elections was to file a request for a private letter ruling. Once the failure to make these elections was discovered, Taxpayer and Entity B took prompt action to gather the facts and to authorize Advisor 3 to submit this ruling request. Entity B represents that it intends to file a late entity classification election under Rev. Proc. 2009-41, 2009-39 I.R.B. 439, to be taxed as a Corporation for federal income tax purposes effective Date 6.

Taxpayer and Entity B make the following additional representations in connection with their request for an extension of time:

1. Entity B intends to elect to be treated as a corporation for federal income tax purposes effective Date 6 and will be an eligible entity within the meaning of Treas. Reg. section 301.7701-3(a) on the dated the retroactive election to treat Entity as a TRS of Taxpayer becomes effective.
2. The request for relief was filed before the failure to make the regulatory election was discovered by the Service.

3. Granting the relief will not result in Taxpayer or Entity B having a lower tax liability in the aggregate for all years to which the regulatory election applies than they would have had if the election had been timely made (taking into account the time value of money).
4. Taxpayer and Entity B do not seek to alter a return position for which an accuracy-related penalty has been or could be imposed under section 6662 as of the date of this letter.
5. Being fully informed of the required regulatory election and related tax consequences, Taxpayer and Entity B did not choose to not file the election.
6. Taxpayer and Entity 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 election that makes the election advantageous to Taxpayer or Entity B.
7. The period of limitations on assessment under Code section 6501(a) has not expired for Taxpayer and Entity B 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 Entity B have been provided as required by section 301.9100-3©.

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, section 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, section 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, Taxable REIT Subsidiary Election. 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© 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 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©) 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©(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©(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©(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 Entity A and Entity B, respectively, have satisfied the requirements for granting a reasonable extension of time to jointly elect under section 856(l) to treat Entity A as a TRS of Taxpayer, effective Date 4, and Entity B as a TRS of Taxpayer, effective Date 6. Accordingly, Taxpayer and Entity A and Entity B, respectively, have 90 calendar days from the date of this letter to make the intended elections to treat Entity A as a TRS of Taxpayer effective Date 5, and Entity B as a TRS of Taxpayer effective Date 6.

This ruling is limited to the timeliness of the filing of the Forms 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 qualifies as a REIT, or whether Entity A or Entity B 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, Entity A or Entity B 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, Entity A and Entity B, 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 power of attorney on file with this office, a copy of this letter is being sent to your authorized representative.

Sincerely,

Matthew Howard
Senior Counsel, Branch 2
Office of the Associate Chief Counsel
(Financial Institutions & Products)

Enclosure:

Copy of this letter for section 6110 purposes

cc: