Internal Revenue Service

Number: **202111003**
Release Date: 3/19/2021

Index Number: 9100.00-00, 856.00-00

Department of the Treasury
Washington, DC 20224

Third Party Communication: None
Date of Communication: Not Applicable

Person To Contact:
, ID No.

Telephone Number:

Refer Reply To:
CC:FIP:B02
PLR-110921-20

Date:
October 16, 2020

Legend:

Taxpayer =

Parent =

AdvisorCo =

Subsidiary =

Predecessor Corporation =

Date 1 =

Date 2 =

Date 3 =

Date 4 =

Date 5 =

Date 6 =

Date 7 =

Date 8 =

Firm 1 =

Firm 2 =

Investment Advisor =

Senior Manager =

State A =

State B =

Year 1 =

Year 2 =

Year 3 =

Year 4 =

Dear :

This letter responds to a letter dated April 10, 2020, as supplemented by subsequent correspondence, that was submitted on behalf of Taxpayer and Subsidiary. Taxpayer and Subsidiary request a ruling under sections 301.9100-1 and 301.9100-3 of the Procedure and Administration Regulations to extend the time to file an election to treat Subsidiary as a taxable REIT subsidiary ("TRS") of Taxpayer under section 856(l) of the Internal Revenue Code ("Code") effective as of Date 5.

FACTS

Taxpayer is a State A Corporation that was originally formed as Predecessor Corporation on Date 1. Taxpayer adopted its current name on Date 2 by filing Articles of Amendment with State A. Taxpayer's tax year is a calendar year.

Taxpayer's operations have involved the acquisition of and investment in multifamily and hotel properties. Taxpayer, at formation, intended to elect to be treated as a Real Estate Investment Trust ("REIT") upon meeting all REIT qualification requirements of section 856. However, prior to Year 4, Taxpayer was closely held for purposes of section 856(a)(6) and thus did not qualify as a REIT.

Subsidiary, which is wholly owned by Taxpayer, was formed on Date 3 as a State B corporation. Subsidiary's purpose is to serve as a TRS of Taxpayer and to perform tenant services or other impermissible activities that are incident to Taxpayer's investment in multifamily assets. A Form 8875, Taxable REIT Subsidiary Election, was filed jointly by Taxpayer and Subsidiary on Date 4, to be effective Date 3 (the "Initial TRS Election"). Taxpayer believed that the Initial TRS Election was valid. However, Taxpayer did not make an election under section 856(c)(1) to be treated as a REIT in Year 3 because it was still closely held at that time.

Taxpayer was indirectly acquired by Parent on Date 7, with the result that Taxpayer was no longer closely held for purposes of section 856(a)(6) for Year 4. Taxpayer represents that it will elect REIT status for Year 4 under section 856(c)(1) as of Date 5 by filing an election to be a REIT with its Year 4 return (which will be filed by Date 8).[1] Taxpayer and Subsidiary, however, did not file the Form 8875 by Date 6, the last day to file to be effective as of Date 5.

Taxpayer utilizes both internal and external advisers to assist in tax compliance matters. Specifically, AdvisorCo engaged Firm 1, a law firm, to give advice on Federal income tax matters, including REIT issues generally and, in particular, REIT issues arising in Year 4. At no point in Year 4 did Firm 1 inform Taxpayer of the necessity of filing Form 8875 to treat Subsidiary as a TRS of Taxpayer effective Date 5.

In the summer of Year 4, a Senior Manager at Investment Advisor, who was acting as a tax advisor to Taxpayer, discovered that a valid TRS election to allow Subsidiary to be treated as a TRS of Taxpayer, effective Date 5, had not been made. At that time, it was too late to file a Form 8875 to be effective Date 5.

After realizing it had been receiving inadequate tax advice and that the Initial TRS Election was invalid, Taxpayer sought additional advice from new outside counsel. Taxpayer retained Firm 2 in the summer of Year 4 for the purpose of determining Taxpayer's eligibility to elect REIT status. In the fall of Year 4, the Senior Manager at Investment Advisor informed Firm 2 of the invalid Initial TRS Election. Firm 2 submitted a request on behalf of Taxpayer and Subsidiary for relief under sections 301.9100-1 and 301.9100-3 for an extension of time to file a Form 8875 and jointly elect under section 856(l) to treat Subsidiary as a TRS of Taxpayer effective Date 5.

REPRESENTATIONS

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

[1] Taxpayer further represents that it satisfies all other requirements to make a valid REIT election under section 856(c)(1) for Year 4.

1. The request for relief was filed by Taxpayer and Subsidiary before the failure to make the regulatory election was discovered by the Internal Revenue Service.

2. Granting the relief requested will not result in either Taxpayer or Subsidiary 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).

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

5. Taxpayer and Subsidiary 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 Subsidiary.

6. The period of limitations on assessment under section 6501(a) has not expired for either Taxpayer or Subsidiary 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 have been provided as required by sections 301.9100-3(e)(2) and 301.9100-3(e)(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 new 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 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 regulations or by a revenue ruling, a revenue procedure, a notice, or an 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 representations made, including that the Taxpayer will file its return and make the election to be a REIT by Date 8, we conclude that Taxpayer and Subsidiary have satisfied the requirements for granting a reasonable extension of time to elect under section 856(l) to treat Subsidiary as a TRS of Taxpayer, effective Date 5. Accordingly, Taxpayer and Subsidiary have 90 calendar days from the date of this letter to make the intended election to treat Subsidiary as a TRS of Taxpayer, effective Date 5.

CAVEATS

This ruling is limited to the timeliness of filing 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. No opinion is expressed as to whether Taxpayer otherwise qualifies as a REIT, or whether Subsidiary otherwise qualifies as a TRS, under part II of subchapter M of chapter 1 of the Code. More specifically, no opinion is expressed as to whether Taxpayer at any time was closely held within the meaning of section 856(a)(6).

No opinion is expressed with regard to whether the tax liability of Taxpayer and Subsidiary 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 submitted and representations made by the Taxpayer and accompanied by statements executed under the penalties of perjury by 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 taxpayer who requested it. Section 6110(k)(3) 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,

John W. Rogers III

John W. Rogers III
Senior Technician Reviewer, Branch 2
Office of Associate Chief Counsel
(Financial Institutions & Products)

cc: