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Date:
March 31, 2022

Legend

Taxpayer =

PropCo =

Partner =

Subsidiary =

State =

Date =

a =

b =

c =

Dear :

This is in reply to a letter dated September 29, 2021, and supplemental correspondence requesting rulings on behalf of Taxpayer. Taxpayer has requested rulings with respect to the independent retirement living facilities described below.

FACTS

Taxpayer is a State limited liability company that elected to be a real estate investment trust ("REIT") under sections 856 through 860 of the Internal Revenue Code ("Code"). Taxpayer primarily invests in independent living and assisted living facilities.

Independent Living Facilities

Taxpayer holds (through entities described later) interests in age-restricted, senior residential facilities in various markets in the United States (the "Facilities"). Currently, a Facilities are operational and b Facilities are under construction. The Facilities require that one resident living in each unit be at least the age of c. The marketing materials and resident leases specifically state that the Facilities do not provide any health care services, and the Facilities are not licensed health care facilities. Each Facility generally offers amenities such as a common dining area, beauty salon, a theatre room, bistro, and enhanced fitness and workout rooms. Hallways and bathrooms of the Facilities are equipped with handrails.

Taxpayer will make changes in the management and operation of the Facilities upon a date as soon as feasible after receiving the requested rulings set forth below (the "Effective Date"), which will be no later than Date. This description of the Facilities pertains to periods beginning on or after the Effective Date.

Resident Agreements

A resident of a Facility (a "Resident") will enter into a month-to-month lease agreement (a "Resident Agreement"). The Resident Agreement will entitle the Resident to individual living quarters within a Facility and certain services in exchange for fixed monthly payments (the "Monthly Rent").

The living quarters will include a kitchenette, bathroom, and living room area and at least one bedroom (or a combined bedroom/living area). Taxpayer represents that the amount of rent attributable to personal property leased under, or in connection with, a Resident Agreement will not, for any taxable year, exceed 15 percent of the total rent attributable to both the real and personal property leased under, or in connection with, such Resident Agreement within the meaning of section 856(d)(1)(C).

Each Resident Agreement will specifically stipulate that the Resident is responsible for his or her own personal and health care needs and that the relevant facility is not licensed as a nursing or health care facility. Thus, the Resident must be capable of providing for his or her own health care and personal care needs and is responsible for the provision of such care for the duration of the Resident Agreement.

Resident Services

The following services will be provided at the Facilities and included in the Monthly Rent: (1) a specified number of meals per day, generally three, at a central dining facility; (2) light housekeeping including linen service; (3) scheduled transportation to appointments, shopping and social activities; (4) social events, community activities, and exercise classes; (5) an emergency call system; (6) utilities except for personal phones and others expressly listed in the Resident Agreement; and (7) upon a Resident's request, provision of hard plastic containers for disposal of hypodermic needles and other sharp medical instruments (together, the "Resident Services"). There generally will be no separately stated charge for the Resident Services. From time to time, an activity or service may have an additional fee, and Residents will be given notice. Most Facilities will have open parking lots that can be used without charge. Some Facilities will have carports or garages, for which a monthly fee will be charged. All parking facilities will be unattended. The emergency call system will include pull cords or call buttons in the units that enable Residents to contact a third-party operator who can contact the resident manager or concierge or emergency services.

The Facilities are intended to provide amenities and services to Residents for their living convenience and social purposes. The Facilities will not provide health care related services. They will not employ licensed nurses or other healthcare professionals as on-site staff. They will not conduct preventative health screening, monitor the Residents' medical needs, or provide for a streamlined resident transfer program to a facility with higher health care options. The Facilities will provide a program for flu shots, which will be administered by a third party and will be for the convenience of the residents, who will pay for the service. Before moving in, residents will represent that they are capable of providing for all of their health care and personal needs. The Facilities will not require a Resident to obtain consent from the Facility to contract with third parties for in-home or other health care services. The Facilities also will not provide for supervision of a Resident's oxygen equipment. The Facilities will not keep "do not resuscitate" forms or any Residents' health records on file. The Facilities generally will have 24-hour staffing, with either a resident manager or concierge who will perform duties typical of those of a resident manager in an apartment building. The resident managers, concierges and other staff will undertake no health monitoring, but in the event of an emergency, they will be allowed to call 911.

Taxpayer represents that the services that will be provided to tenants of the Facilities, including the Resident Services, are customarily furnished or rendered to tenants of age-restricted, non-healthcare independent living facilities in the geographic markets in which the Facilities are located.

Operating Structure

Taxpayer owns a majority interest in PropCo, a limited partnership treated as a partnership for federal income tax purposes. Partner owns the remaining interest in PropCo. Propco holds its interest in each of the Facilities through a separate limited liability company treated as a partnership for federal income tax purposes (each, a "PropCo Sub"). PropCo holds all of the interests in each PropCo Sub other than small profits interests held by individuals. Taxpayer also owns all of the interests in Subsidiary, a taxable REIT subsidiary ("TRS") of Taxpayer.

Each PropCo Sub will be the lessor under the Resident Agreements for units in its Facility. Each PropCo Sub will also enter into a contract with a third party (an "Operator") under which the Operator will provide the Resident Services in the PropCo's Facility (a "Management Contract"). The Operator for a Facility may be Subsidiary, an independent contractor from whom Taxpayer derives or receives no income (an "IK"), or a partnership between Subsidiary and an IK. In the case of a Management Contract with Subsidiary, Subsidiary may subcontract with a third party to provide the Resident Services.

Under each Management Contract, the Operator will be compensated at an arm's length rate for the Resident Services, applying principles described under section 482.

Rulings Requested

Taxpayer requests rulings that, beginning with the Effective Date: (1) the Facilities will not meet the definition of health care facilities under section 856(e)(6)(D)(ii), and, as a result, the direct or indirect operation or management of the Facilities by Subsidiary will not prevent Subsidiary from being treated as a TRS under section 856(l)(3)(A); and (2) the provision of services described in this ruling letter, including the Resident Services, by the Operator will not give rise to impermissible tenant service income, and will not cause any portion of the rents received by Taxpayer to fail to qualify as rents from real property under section 856(d).

LAW & ANALYSIS

Section 856(c) provides that a corporation is not treated as a REIT for a taxable year unless at least 95 percent of its gross income is derived from sources listed in section 856(c)(2) and at least 75 percent of its gross income is derived from sources listed in section 856(c)(3) (excluding from both computations any gross income from prohibited transactions). Section 856(c)(2) and (3) both list rents from real property.

Section 856(d)(1) provides that rents from real property include (subject to exclusions provided in section 856(d)(2)): (A) rents from interests in real property; (B) charges for services customarily furnished or rendered in connection with the rental

of real property, whether or not such charges are separately stated; and (C) rent attributable to personal property leased under, or in connection with, a lease of real property, but only if the rent attributable to the personal property for the taxable year does not exceed 15 percent of the total rent for the taxable year attributable to both the real and personal property leased under, or in connection with, such lease.

Section 1.856-4(b)(1) provides that services furnished to tenants of a particular building will be considered customary if, in the geographic market in which the building is located, tenants in buildings that are of a similar class are customarily provided with the service.

Section 856(d)(2)(C) excludes impermissible tenant service income from the definition of rents from real property. Section 856(d)(7)(A) defines impermissible tenant service income to mean, with respect to any real or personal property, any amount received or accrued directly or indirectly by a REIT for services furnished or rendered by the REIT to tenants of such property, or for managing or operating such property.

Section 856(d)(7)(C)(i) provides that, for purposes of section 856(d)(7)(A), services furnished or rendered, or management or operation provided, through an independent contractor from whom the REIT does not derive or receive any income or through a TRS of the REIT is not treated as furnished, rendered, or provided by the REIT.

Section 856(e)(6)(D)(i) defines qualified health care property as any real property (including interests therein), and any personal property incident to such real property, which is a health care facility or is necessary or incidental to the use of a health care facility.

Section 856(e)(6)(D)(ii) defines health care facility as a hospital, nursing facility, assisted living facility, congregate care facility, qualified continuing care facility (as defined in section 7872(g)(4)), or other licensed facility which extends medical or nursing or ancillary services to patients and which, immediately before the termination, expiration, default, or breach of the lease of or mortgage secured by such facility, was operated by a provider of such services which was eligible for participation in the Medicare program under Title XVII of the Social Security Act with respect to such facility.

Section 856(l)(1) defines TRS to mean, with respect to a REIT, a corporation (other than a REIT) if (A) such REIT directly or indirectly owns stock in such corporation, and (B) such REIT and such corporation jointly elect that such corporation shall be treated as a TRS of such REIT.

Section 856(l)(3)(A) provides that any corporation that directly or indirectly operates or manages a lodging facility or a health care facility is not a TRS. Section

856(l)(4)(B) provides that the term “health care facility” has the meaning given such term in section 856(e)(6)(D)(ii).

In Rev. Rul. 2002-38, 2002-2 C.B. 4, a REIT pays its TRS an arm’s length rate to provide noncustomary services to tenants. The REIT does not separately state charges to tenants for the services. Thus, a portion of the amounts received by the REIT from tenants represents an amount received for services provided by the TRS. The TRS employees perform all of the services and the TRS pays all of the costs of providing the services. The revenue ruling concludes that the services provided to the REIT’s tenants are considered to be rendered by the TRS, rather than the REIT, for purposes of section 856(d)(7).

In Rev. Rul. 2003-86, 2003-2 C.B. 290, a REIT owned all of the stock of a TRS. The TRS was a partner in a partnership with a corporation that qualified as an independent contractor with respect to the REIT. The partnership provided non-customary services to the REIT's tenants that were contracted and paid for separately from the rent. The REIT did not receive income directly from the partnership or the independent contractor but did receive quarterly dividends from the TRS. The ruling notes that the REIT's only interest in the partnership was through the TRS and that services furnished or rendered through a TRS are not treated as rendered by a REIT. Therefore, the ruling concluded that the services provided by the partnership were treated as provided by the TRS to the extent of its interest in the Partnership, and the REIT would not be treated as providing impermissible tenant services to its tenants. The ruling held that, under these circumstances, the services provided by the partnership between the TRS and the independent contractor would not cause the rents paid to the REIT to fail to qualify as rents from real property.

While the Facilities will offer amenities and services found in congregate care facilities, the emphasis of the amenities and services provided at the Facilities is the Residents’ convenience and social lives. The absence of nurses, other medical personnel, health screenings, monitoring of medical needs, or transfer programs suggests that the Facilities will not have a health care focus. The terms of the Resident Agreements will place responsibility for health care on the Residents. Considering all the facts and circumstances, the services provided at the Facilities are not focused on the health and well-being of the Residents.

The Resident Services are services that will be furnished to the tenants of the Facilities, the Residents. Based on Taxpayer’s representations that Operator will be Subsidiary (a TRS), an IK, or a partnership between Subsidiary and an IK and will be compensated at an arm’s-length rate for the provision of the Resident Services, the Resident Services will not be considered to be rendered by Taxpayer for purposes of section 856(d)(7). The inclusion of charges for the Resident Services in Monthly Rent, with no separately stated charge, does not cause the Resident Services to be considered rendered by the REIT.

CONCLUSION

Accordingly, based on the facts as represented, we rule that, beginning with the Effective Date: (1) the Facilities will not be health care facilities within the meaning of section 856(e)(6)(D)(ii), and, as a result, the direct or indirect operation or management of the Facilities by Subsidiary will not prevent Subsidiary from being treated as a TRS under section 856(l)(3)(A); and (2) the provision by the Operator of the services described above, including the Resident Services for which fees are not separately stated, will not give rise to impermissible tenant service income and will not cause any portion of the rents received by the Taxpayer (through the PropCo Subs) to fail to qualify as rents from real property under section 856(d).

Except as expressly 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. Specifically, no opinion is expressed or implied (1) whether Taxpayer otherwise qualifies as a REIT, (2) whether Subsidiary otherwise qualifies as a TRS of Taxpayer, (3) whether any services provided at the Facilities are customary services within the meaning of section 1.856-4(b)(1), or (4) whether the Monthly Rents otherwise qualify as rents from real property within the meaning of section 856(d). In addition, no opinion is expressed or implied on the treatment of any amounts received or accrued by Taxpayer with respect to the Facilities for periods ending before the Effective Date.

This ruling is directed only to the taxpayer requesting 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 representatives.

Sincerely,

____

Steven Harrison
Chief, Branch 1
Office of Associate Chief Counsel
(Financial Institutions & Products)

cc: