Internal Revenue Service

Department of the Treasury
Washington, DC 20224

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Person To Contact:
, ID No.
Telephone Number:

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CC:FIP:2
PLR-109652-22

Date:
November 4, 2022

Legend:

Taxpayer	=
Tax Consultant	=
Legal Counsel	=
VP/Corporate Controller	=
Managing Director	=
Year 1	=
Year 2	=
Year 3	=
Year 4	=
Month 1	=
Month 2	=
Date 1	=
Date 2	=
State	=

Dear :

This is in reply to a ruling request dated March 21, 2022. Taxpayer requests a ruling that it is treated as if it had not made an election to be a real estate investment trust (REIT) on its Form 1120-REIT, *U.S. Income Tax Return for REITs*, inadvertently filed for Year 2. Taxpayer further requests that the filing of the Form 1120-X, *Amended U.S. Corporation Income Tax Return*, for Year 2 not be treated as a termination or revocation of its REIT status for purposes of section 856(g) of the Internal Revenue Code (Code).

FACTS:

Taxpayer was formed on Date 1 as a State corporation. Taxpayer acquires and leases single family residential properties and manufactured homes with the objective of receiving income from the leased property activity. Taxpayer represents that it was formed to invest in single family residences and anticipated making a REIT election when it met the requirements to be treated as a REIT.

In Year 1, Taxpayer determined through discussions with Tax Consultant and Legal Counsel that Taxpayer did not meet the requirements to qualify as a REIT. Therefore, a Form 1120, *U.S. Corporation Income Tax Return*, was filed for Year 1. In Year 2, Legal Counsel advised Managing Director not to make the REIT election because Taxpayer still did not meet the REIT requirements for Year 2. However, VP/Corporate Controller was not made aware of Legal Counsel's advice regarding the REIT election.

Tax Consultant prepared and filed an automatic extension of time for Taxpayer's Year 2 return and subsequently prepared the Year 2 return on Form 1120-REIT. In Month 1 of Year 3, VP/Corporate Controller reviewed the Year 2 tax return for reasonableness and accuracy. Taxpayer represents that VP/Corporate Controller, Tax Consultant's main contact, was not aware that filing a Form 1120-REIT constitutes making a REIT election. VP/Corporate Controller also did not realize Taxpayer must meet the REIT qualification requirements prior to making the REIT election.

On Date 2, Managing Director discovered the REIT election had been made and immediately contacted Tax Consultant and Legal Counsel to affect the filing of an amended return. In Month 2 of Year 4, Tax Consultant filed a Form 1120-X, a non-REIT amended return for Year 2.

Taxpayer makes the following representations:

1. The error in filing a Form 1120-REIT was contrary to Taxpayer's intent to make a REIT election only after it knew it would be able to meet all requirements for REIT qualification;

2. The error was inadvertent, due in part to miscommunication regarding filing the Form 1120-REIT contrary to Taxpayer's intent to not elect REIT status until it was certain to meet all requirements for REIT qualification;

3. Taxpayer acted to rectify the erroneous filing before the error was discovered by the Service by contacting the Service and subsequently filing an amended return;

4. Taxpayer relied upon outside experts who were qualified in REIT-related matters;

5. Taxpayer did not alter in its amended return any tax treatment or position on its original Year 2 return, other than the REIT election; and

6. Taxpayer is not taking advantage of hindsight in asking the Service for relief.

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 election for a previous taxable year, and such election has not been terminated or revoked under section 856(g).

Section 856(g)(1) provides that an election under section 856(c)(1) made by a corporation shall terminate if the corporation is not a REIT to which the provisions of part II of subchapter M of chapter 1 of the Code apply for the taxable year with respect to which the election is made, or for any succeeding taxable year. Such termination shall be effective for the taxable year for which the corporation is not a REIT to which the provisions of part II of subchapter M of chapter 1 of the Code apply, and for all succeeding taxable years.

Section 856(g)(2) provides that an election under section 856(c)(1) made by a corporation may be revoked by it for any taxable year after the first taxable year for which the election is effective. Such revocation shall be effective for the taxable year in which made and for all succeeding taxable years.

Section 856(g)(3) provides, in general, that if a corporation has made a REIT election and such election has been terminated or revoked, such corporation or any successor corporation, shall not be eligible to make an election under section 856(c)(1)

for any taxable year prior to the fifth taxable year which begins after the first taxable year for which such termination or revocation is effective.

In Rev. Rul. 83-74, 1983-1 C.B. 112, a homeowners association sought permission in 1980 to revoke an election made for its 1979 tax year to be taxed as a tax-exempt organization under section 528. It based the request upon an inaccurate audit performed by a professional tax advisor which understated the interest income of the association (nonexempt income under section 528), and inadequate tax advice provided by the advisor, which denied the association the use of a net operating loss carryover that could have been used if the association had filed as a corporation instead of electing to be taxed under section 528. In holding that a revocation of the election would be permissible, the revenue ruling analogizes to situations in which taxpayers fail to make a particular election because of inadequate or incorrect tax advice provided by an attorney or accountant and subsequently seek extensions of time to make the election.

Under section 301.9100-1 of the Procedure and Administration Regulations, the Commissioner has discretion, upon good cause shown by the taxpayer, to grant a reasonable extension of time fixed by the regulations for making an election, provided certain conditions are met. Section 301.9100-3 provides that requests for extensions of time for regulatory elections will be granted when the taxpayer provides evidence (including affidavits described in the regulations) to establish to the satisfaction of the Commissioner that the taxpayer acted reasonably and in good faith and granting relief will not prejudice the interest of the government.

Section 301.9100-3(b)(1) states that a taxpayer generally will be deemed to have acted reasonably and in good faith if the taxpayer (i) requests relief under section 301.9100-3 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.

Under section 301.9100-3(b)(3), a taxpayer will be deemed to have not acted reasonably and in good faith, however, 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 (taking into account any qualified amended return filed within the meaning of section 1.6664-2(c)(3)) 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. If specific facts have

changed since the due date for making the election that makes the election advantageous to a taxpayer, the Service will not ordinarily grant 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 a 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 section 301.9100-3.

Taxpayer's situation in this case is similar to Rev. Rul. 83-74, and analogous to situations concerning taxpayers who have not made a particular election provided in the regulations because of inadequate or incorrect advice from knowledgeable tax professionals and are subsequently seeking extensions of time under section 301.9100-1.

CONCLUSION:

Based upon the facts and representations submitted, and assuming the Year 2 Form 1120-X was properly filed, consent is granted for Taxpayer to be treated as if it had not made the REIT election on the Form 1120-REIT filed for Year 2, and the filing of Form 1120-X for Year 2 is effective in place of the Form 1120-REIT originally filed for purposes of the REIT election. The foregoing shall not be treated as a termination or revocation of a REIT election for purposes of section 856(g).

This ruling's application is limited to the facts, representations, Code sections, and regulations cited herein. Except as specifically provided otherwise, no opinion is expressed on the federal income tax consequences of the transaction described above. No opinion is expressed regarding the validity of the Form 1120-X or whether it was correctly completed or properly filed. Additionally, except with respect to the REIT election, no opinion is expressed regarding the consequences of filing the Form 1120-X.

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, a copy of this letter is being sent to your authorized representatives.

Sincerely,

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Andrea M. Hoffenson
Chief, Branch 2
Office of Associate Chief Counsel
(Financial Institutions & Products)

cc: