

Internal Revenue Service

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March 24, 2023

Legend

Taxpayer =
State =
Subsidiary =
Country =
Facilities =
Year 1 =
Year 2 =
Year 3 =
Year 4 =
Year 5 =
Year 6 =
Month 1 =
Date 1 =
Date 2 =
Date 3 =
Date 4 =
Date 5 =

Dear :

This ruling responds to a letter dated September 2, 2022, submitted on behalf of Taxpayer and Subsidiary. Taxpayer and Subsidiary request an extension of time under sections 301.9100-1 and 301.9100-3 of the Procedure and Administration Regulations to make a joint election under section 856(l) of the Internal Revenue Code ("Code") to treat Subsidiary as a taxable REIT subsidiary ("TRS") of Taxpayer effective as of Date 2.

FACTS

Taxpayer is a publicly traded State corporation that has elected to be taxed as a real estate investment trust ("REIT") under sections 856 through 859 of the Code, beginning with its Year 1 tax year. Subsidiary is a Country limited liability company that is an indirect subsidiary of Taxpayer. Taxpayer and Subsidiary represent that Subsidiary is a corporation for federal income tax purposes under section 301.7701-3(b)(2)(i)(B) and a foreign corporation under section 7701(a)(5).

Taxpayer is a calendar-year, accrual-basis taxpayer that owns, acquires, leases from others, develops, and builds Facilities throughout the United States and in several foreign countries. In addition, Taxpayer leases space within those Facilities to tenants, and provides certain related services to such tenants.

Taxpayer makes elections on Form 8875, *Taxable REIT Subsidiary Election* for certain domestic and foreign subsidiaries to be treated as TRSs. Taxpayer has filed numerous TRS elections for subsidiaries to each be treated as a TRS of Taxpayer. The elections are made once Taxpayer is satisfied that sufficient diligence and operational controls are in place. Taxpayer's tax department believed that a TRS election for Subsidiary was timely filed in order for Subsidiary to be treated as a TRS of Taxpayer effective as of Date 2.

Taxpayer represents that, at all times from and after Subsidiary's formation on Date 2, Subsidiary was: (i) an entity classified as a corporation for federal income tax purposes, (ii) not operating or managing a health care facility or lodging facility within the meaning of section 856(l)(3), and (iii) jointly owned by Taxpayer (which owned 50% indirectly through a qualified REIT subsidiary) and an unrelated third party. Since Date 2, Taxpayer's tax reporting has reflected Taxpayer's intent that its Country operations be conducted through a subsidiary taxed as a corporation for federal income tax purposes (for which a TRS election would be necessary in order for Taxpayer to comply with the requirements of section 856(c)(4)). Taxpayer's return for the Year 3 tax year was prepared and filed in the same manner as if the TRS election had been timely made.

Taxpayer's tax department experienced staff turnover in Year 3, including the period from and after Date 2. On or before Date 1, an employee that ordinarily assisted in the preparation of the Forms 8875 announced her intent to end her employment with Taxpayer on Date 3. This employee was not replaced until Date 4. Before the due date for the intended TRS election for Subsidiary, Taxpayer's tax department was short-staffed and overwhelmed by the tasks of (a) preparing and filing Year 2 tax returns on extension and (b) preparing Taxpayer's quarter 2 Year 3 global tax provisions. Also, the employee with primary oversight responsibility of the TRS election for Subsidiary was focused on a serious family matter. These factors caused the TRS election for Subsidiary to be inadvertently missed. The subsequent Covid-19 pandemic put further strains on Taxpayer's tax department so that the failure could not be easily identified.

Contemporaneous with increased internal control procedures implemented by Taxpayer's tax department, Taxpayer discovered in Month 1 of Year 6 the failure of Taxpayer and Subsidiary to file Form 8875. On Date 5, Taxpayer and Subsidiary filed by certified mail, a joint election on Form 8875 for Subsidiary to be treated as a TRS of Taxpayer intended to be effective as of Date 2. An election effective as of Date 2 should have been filed prior to Date 5. Taxpayer and Subsidiary represent that they have not received any notice of communication from the Service regarding the TRS election for which relief has been requested.

Taxpayer and Subsidiary make the following additional representations in connection with this 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 Subsidiary having a lower 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 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 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 Subsidiary did not choose to not file the election.
5. Taxpayer and Subsidiary are not using hindsight in requesting relief. 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 expired for the taxable year in which the election should have been filed. However, pursuant to section 301.9100-3(c)(1)(ii), Taxpayer has provided a certificate from an independent auditor (other than an auditor providing an affidavit pursuant to section 301.9100-3(e)(3)) certifying that the interests of the Government would not be prejudiced under the standards set forth in section 301.9100-3(c)(1)(i) if relief were granted as requested by Taxpayer and Subsidiary. Furthermore, granting the relief will not result in Taxpayer or Subsidiary having increased gross income, lower deductions, or increased tax liability allocated to taxable years that are closed by the period of limitations on assessment under section 6501(a) before receipt of a favorable ruling from the Service.

In addition, affidavits on behalf of Taxpayer and Subsidiary have been provided as required by section 301.9100-3(e)(2) and (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*. 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 section 301.9100-3 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 generally is 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. 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 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 section 301.9100-3. The Service may condition a grant of relief on the taxpayer providing the Service with a statement from an independent auditor (other than an auditor providing an affidavit pursuant to section 301.9100-3(e)) certifying that the interests of the Government are not prejudiced under the standards set forth in section 301.9100-3(c)(1)(i).

CONCLUSION

Based on the information submitted and the representations made, we conclude that Taxpayer and Subsidiary have satisfied the requirements for granting a reasonable extension of time to jointly elect under section 856(l) to treat Subsidiary as a TRS of Taxpayer, effective as of Date 2. Accordingly, the election made on Date 5 to treat Subsidiary as a TRS of Taxpayer will be treated as effective as of Date 2.

CAVEATS

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 or implied regarding whether Taxpayer otherwise qualifies as a REIT or whether Subsidiary otherwise qualifies as a TRS of Taxpayer under part II of subchapter M of chapter 1 of the Code.

The ruling contained in this letter is based upon information submitted and representations made by Taxpayer and Subsidiary and accompanied by penalties 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 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, a copy of this letter is being sent to your authorized representatives.

Sincerely,

K. Scott Brown
Senior Technician Reviewer, Branch 2
Office of Associate Chief Counsel
(Financial Institutions & Products)

cc: