

Internal Revenue Service

Department of the Treasury

Washington, DC 20224

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Person to Contact:

Telephone Number:

Refer Reply To:

CC:TEGE:EOEG:ET1 PLR-118016-99

Date:

May 12, 2000

Taxpayer:
EIN:

Legend

Firm =

Dear . :

This is in reply to a letter from your authorized representative, dated November 5, 1999, and subsequent correspondence, requesting rulings under § 3508 of the Internal Revenue Code. In particular, a ruling was requested that certain real estate brokers ("subject brokers") will not be considered employees by reason of § 3508.¹ In addition, a ruling was requested that certain individuals providing dual services as a real estate broker and as an officer manager for the Firm will not be considered employees with regard to their real estate brokerage services by reason of § 3508, and their status will be determined according to the common-law rules as regards to their management services.

The information submitted by the Firm indicates that it is in the business of leasing and selling commercial real property. Typically, a subject broker of the Firm represents either a tenant (or sub-tenant) or a landlord with respect to a leasing transaction, or a buyer or seller with regard to an investment sale transaction. A subject broker is required to be licensed to sell real estate by the state in which the broker works. It is represented that more than 90 percent of a subject broker's compensation will be in the form of commissions which are directly related to leasing and sales activities. Appraisal activities of a subject broker (if any) are incidental to the lease or sale of real property. A subject broker is paid on a commission basis according to the value of sales, leases and other transactions made (including consulting assignments), rather than by the number of hours worked. A subject broker's services are provided pursuant to a written

¹ In addition to the brokers that are the subject of this ruling request, the Firm hires other individuals to act as brokers. These individuals sign a different contract with the Firm. No ruling is requested regarding the status of these brokers and this ruling does not apply to them.

PLR-118016-99

contract with the Firm which specifically states that the broker will not be treated as an employee, for Federal tax purposes ("Section 3508 Broker Contract").

The dual service manager/broker is a licensed real estate agent who performs real estate brokerage services and management services for the Firm. In regard to real estate brokerage services, some of these individuals sign a Section 3508 Broker Contract and are compensated as provided above in the discussion of the subject brokers. In regard to their management services, compensation varies depending on the office being managed.

Section 3508 sets forth the tax treatment of services performed as a qualified real estate agent or a direct seller. Section 3508(a) provides that in the case of services performed as a "qualified real estate agent," the individual performing such services will not be treated as an employee, and the person for whom the services are performed shall not be treated as an employer. While § 3508 deals with both qualified real estate agents and direct sellers, the provisions dealing with direct sellers are not applicable here.

Section 3508(b) defines a qualified real estate agent as any individual who is a sales person if –

- (A) such individual is a licensed real estate agent,
- (B) substantially all of the remuneration for the services performed by such individual as a real estate agent is directly related to sales or other output (including the performance of services) rather than to the number of hours worked ("substantially-all-remuneration" requirement), and
- (C) the services performed by the individual are performed pursuant to a written contract between such individual and the person for whom the services are performed and such contract provides that the individual will not be treated as an employee with respect to such services for federal tax purposes.

Proposed regulations under § 3508 were issued in 1986. While proposed regulations cannot be relied upon in the same manner as temporary and final regulations, they can provide guidance. Proposed regulation § 31.3508-1(b)(2) defines services performed as a real estate agent to include any activities that customarily are performed in connection with the sale of an interest in real property. These include the advertising or showing of real property, the acquisition of a lease to real property, and the recruitment, training, or supervision of other real estate sales persons as well as the appraisal activities of a licensed real estate agent in connection with the sale of real property. Services performed as a real estate agent do not include the management of property.

Proposed regulation § 31.3508-1(d)(1) provides that the "substantially-all-remuneration"

PLR-118016-99

requirement is satisfied for any calendar year if at least 90 percent of the total remuneration received by the individual from the service-recipient for performing such services during that calendar year is directly related to sales or other output rather than to the number of hours worked. Under proposed regulation § 31.3508-1(g)(5), the term "service-recipient" means the person (other than a client or customer) for whom the services as a qualified real estate agent are performed (e.g., a real estate firm).

Proposed regulation § 31.3508-1(j)(1), regarding dual services, provides that § 3508 shall apply only with respect to services performed as a qualified real estate agent and that whether an individual is treated as an employee or as a self-employed individual with respect to services other than those performed as a qualified real estate agent shall be determined under common-law principles. Example (1) of proposed regulation § 31.3508-1(j)(2) provides an example of a licensed real estate agent who performs services as a real estate agent and also performs services as a bookkeeper for the same service-recipient as an illustration of a dual-service individual.

Based on the information submitted and representations made, we conclude that a subject broker who performs real estate brokerage services as a sales person for the Firm under the circumstances described in your request and who is licensed by the appropriate state as a real estate agent, meets the substantially-all-remuneration requirement, and performs services for the Firm pursuant to a Section 3508 Broker Contract, is a "qualified real estate agent" within the meaning of § 3508. Accordingly, we hold that such broker will not be treated as the Firm's employee, for federal tax purposes, and the Firm will not be treated as the employer.

We also conclude that a dual-service manager/broker who performs real estate brokerage services for the Firm under the circumstances described in your request and who is licensed by the appropriate state as a real estate agent, meets the substantially-all-remuneration requirement, and performs services for the Firm pursuant to a Section 3508 Broker Contract, is a "qualified real estate agent" within the meaning of § 3508 with respect to real estate brokerage services. Accordingly, we hold that such broker will not be treated as the Firm's employee with regard to real estate brokerage services, for federal tax purposes, and the Firm will not be treated as the employer with regard to real estate brokerage services. Whether the manager/broker is treated as an employee or as a self-employed individual with respect to the management services will be determined under common-law principles.

Temporary or final regulations pertaining to one or more of the issues addressed in this ruling have not yet been adopted. Therefore, this ruling will be modified or revoked by adoption of temporary or final regulations, to the extent the regulations are inconsistent with any conclusion in the letter ruling. See section 12.04 of Rev. Proc. 2000-1, 2000-1 I.R.B. 4, 46. However, when the criteria in section 12.05 of Rev. Proc. 2000-1 are satisfied, a ruling is not revoked or modified retroactively, except in rare or unusual circumstances.

PLR-118016-99

The rulings contained in this letter are based upon information and representations submitted by the taxpayer and accompanied by penalty of perjury statements executed by an appropriate party.

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. No opinion was requested and none is given regarding the status of the manager/brokers under the common-law rules as regards to their management services or the status of brokers other than the subject brokers.

This ruling is directed only to the taxpayer requesting 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 representative.

Sincerely yours,
Patricia M. McDermott
PATRICIA M. McDERMOTT
Branch Chief
Office of the Associate Chief Counsel
(Tax Exempt & Government Entities)

Enclosures(2):
Copy of this letter
Copy for section 6110 purposes