

**Internal Revenue Service**

Department of the Treasury

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Person to Contact:

Telephone Number:

Refer Reply To:  
CC:PSI:3 PLR-106359-03  
Date:  
May 2, 2003

Company:

Manager:

Properties:

Partnerships:

Shareholders:

Town:

a:

b:

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c:d:e:f:g:h:i:

Dear \_\_\_\_\_ :

This letter responds to your letter dated January 28, 2003, as well as subsequent correspondence, requesting a ruling that the rental income received by Company from the Properties is not passive investment income within the meaning of § 1362(d)(3)(C)(i) of the Internal Revenue Code.

#### FACTS

Company was incorporated in a and intends to elect under § 1362(a) to be an S corporation. It has subchapter C earnings and profits. Company's shareholders are listed in the legend.

Company owns, leases, and operates commercial real estate in Town (the Properties). It also owns commercial real estate indirectly through limited partnership interests in the Partnerships.

Company employs Manager, a related company, to manage the Properties. Manager employs b persons full-time, c of whom are officers of Company. Through Manager, which also uses independent contractors as needed, Company provides various services with respect to the Properties. These services include monitoring and inspecting the properties for structural problems; maintaining and repairing building structure and systems, such as exteriors, roofs, heating and air conditioning units, and sprinklers; maintaining parking lots and outside lighting; providing landscaping and grounds care; cleaning, repairing, and renovating spaces between leases; selecting and supervising subcontractor work; providing trash and snow removal; soliciting and responding to tenant suggestions and complaints; responding to tenant emergency calls around the clock; and monitoring overall building security. In addition to the services provided to tenants, Company handles the usual leasing and administrative functions involved in managing real estate.

Company received or accrued approximately d in rents and paid or incurred

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approximately e in relevant expenses for f on the Properties. The rental income and expense figures for g are h and i, respectively.

### LAW AND ANALYSIS

Except as provided in § 1362(g), § 1362(a)(1) provides that a small business corporation may elect, in accordance with the provisions of § 1362, to be an S corporation.

Section 1362(d)(3)(A)(i) provides that an election under § 1362(a) terminates whenever the corporation (I) has accumulated earnings and profits at the close of each of three consecutive tax years, and (II) has gross receipts for each of such tax years more than 25 percent of which are passive investment income.

Except as otherwise provided in § 1362(d)(3)(C), § 1362(d)(3)(C)(i) provides that the term "passive investment income" means gross receipts derived from royalties, rents, dividends, interest, annuities, and sales or exchanges of stock or securities.

Section 1.1362-2(c)(5)(ii)(B)(1) of the Income Tax Regulations provides that "rents" means amounts received for the use of, or the right to use, property (whether real or personal) of the corporation.

Section 1.1362-2(c)(5)(ii)(B)(2) provides that "rents" does not include rents derived in the active trade or business of renting property. Rents received by a corporation are derived in an active trade or business of renting property only if, based on all the facts and circumstances, the corporation provides significant services or incurs substantial costs in the rental business. Generally, significant services are not rendered and substantial costs are not incurred in connection with net leases. Whether significant services are performed or substantial costs are incurred in the rental business is determined based upon all the facts and circumstances including the number of persons employed to provide the services and the types and amounts of costs and expenses incurred (other than depreciation).

### CONCLUSION

Based on the facts and representations submitted by Company, we conclude that—

- 1) the rents Company receives from the Properties are not passive investment income under § 1362(d)(3)(C)(i); and
- 2) Company's allocable shares of the rental income received by the Partnerships are passive investment income.

Except for the specific ruling above, we express or imply no opinion concerning the federal tax consequences of the facts of this case under any other provision of the Code. Specifically, we express or imply no opinion regarding Company's eligibility to be

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an S corporation. Further, the passive investment income rules of § 1362 are completely independent of the passive activity rules of § 469; unless an exception under § 469 applies, the rental activity remains passive for purposes of § 469.

Under a power of attorney on file with this office, we are sending the original of this letter to you and a copy to Company.

This ruling is directed only to the taxpayer who requested it. According to § 6110(k)(3), this ruling may not be used or cited as precedent.

Sincerely,

JAMES A. QUINN  
Senior Counsel, Branch 3  
Office of Associate Chief Counsel  
(Passthroughs and Special Industries)

enclosure: copy for § 6110 purposes

cc: