

**Internal Revenue Service**

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Department of the Treasury  
Washington, DC 20224

Person To Contact:

, ID No.

Telephone Number:

Refer Reply To:

CC:PSI:3 – PLR-155845-03

Date:

January 29, 2004

Company:

Shareholders:

Manager:

Properties - 1:

2:

Business:

State:

a:

b:

c:

d:

e:

f:

g:

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

This letter responds to your letter dated September 9, 2003, as well as subsequent correspondence, submitted on behalf of Company, 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, a State corporation, elected under § 1362(a) to be an S corporation in a. Company has accumulated earnings and profits.

Company is engaged in Business as well as owning, leasing, and managing the Properties.

Through its b full-time employees (Company officers and employees who spend most of their time on the Business), as well as through independent contractors and, for Property 2, an unrelated property manager (Manager), Company provides various services to the Properties in its real estate leasing and management activities. Regarding Property 1, these services include regular property monitoring and inspection; common area maintenance; maintenance and repair of the exterior roof, side walls, structural supports, and foundation of the building; and maintenance and

repair of the grounds, parking area, and fences. Regarding Property 2, the services provided by Company include regular property inspections (at least weekly); common area maintenance; maintenance and repair of building structural components and systems, including roofs, foundations, and plumbing and electrical systems; parking lot, sidewalk, and fence maintenance and repair; maintenance of building exteriors, including painting; maintenance and repair of fire sprinklers; pest control; security services; and supervision of tenant improvements. In addition to the services provided to tenants, Company handles the usual leasing and administrative functions involved in managing rental real estate.

Company received or accrued approximately c in rents and paid or incurred approximately d in relevant expenses for e on Property 1. The rental income and expense figures for the same year on Property 2 are f and g, respectively. (The expense figures do not include employee compensation since Company does not allocate this expense between the Business and its rental activities.)

#### 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 solely on the facts and representations submitted, we conclude that the rents Company receives from the Properties are not passive investment income under § 1362(d)(3)(C)(i).

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 an S corporation. Further, the passive investment income rules of § 1362 are 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,

/s/

JEANNE SULLIVAN  
Senior Technician Reviewer, Branch 3  
Office of Associate Chief Counsel  
(Passthroughs and Special Industries)

enclosures: copy for § 6110 purposes

cc: