Internal Revenue Service

Department of the Treasury
Washington, DC 20224

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Legend:

Taxpayer =

Date 1 =

Company A =

Company B =

Company C =

Subsidiary =

Business =

LP1 =

Year 1 =

Trust =

LP2 =

a =

Date 2 =

b =

c =

d =

e =

f =

g =

Law Firm =

Date 3 =

Date 4 =

Month 1 =

h =

LLC =

Date 5 =

i =

Date 6 =

Date 7 =

j =

k =

LLC2 =

l =

Date 8 =

Date 9 =

Date 10 =

Date 11 =

Date 12 =

m =

Date 13 =

Dear :

This is in reply to a letter dated May 18, 2004, requesting an extension of time for Taxpayer to file joint elections with Company A, Company B, Company C, and Subsidiary (the Trust TRSs) for each entity to be treated as a taxable REIT subsidiary (TRS) of Taxpayer under section 856(l) of the Internal Revenue Code.

Facts:

Taxpayer is a domestic corporation that elected to be taxed as a real estate investment trust (REIT) under subchapter M of Chapter 1 of the Code in its initial tax return for the taxable year ended Date 1.

Taxpayer specializes in the acquisition of Business properties for long-term investment.

Prior to the enactment of section 856(l) under the Ticket to Work and Work Incentives Improvement Act of 1999, P.L. 106-170 (the "REIT Modernization Act"), all of Taxpayer's properties were leased out to third-party tenants. Because the REIT Modernization Act permitted a REIT to form a TRS and lease qualifying Business properties to the TRS without violating the related party tenant rules under section 856(d)(2)(B) (subject to the requirements under sections 856(d)(8) and (d)(9)), Taxpayer formed several TRSs for this purpose and properly filed TRS elections with respect to those entities.

In Year 1, Taxpayer, indirectly through an operating partnership in which Taxpayer is a member, LP1, entered into negotiations with Trust, and LP2, Trust's operating partnership, for Taxpayer to purchase up to a preferred limited partnership units in LP2. Taxpayer and Trust also agreed to enter into a joint venture agreement to acquire and operate real estate projects. On Date 2, Taxpayer, Trust, and LP2 entered into an agreement (the Securities Purchase Agreement) for Taxpayer to acquire b preferred units of LP2, representing an approximate c percent capital interest in LP2. Subsequently in Year 1, Taxpayer acquired an additional d preferred LP2 units, resulting in Taxpayer having an approximate e percent interest in the total capital of LP2. In addition, Taxpayer invested f dollars in the joint venture in

exchange for a g percent interest in the joint venture. In connection with this contribution, the joint venture acquired a single Business property.

Prior to entering into the Securities Purchase Agreement, Taxpayer performed extensive diligence with respect to Trust's qualification as a REIT and method of operations. In connection with entering into the Securities Purchase Agreement, Taxpayer received written assurances relating to Trust's legal structure and operations in an "Officer's Certification" containing representations in support of a REIT tax opinion written by Law Firm, Trust's tax counsel.

The Securities Purchase Agreement includes a "TRS Restructuring Covenant", which required Trust to negotiate with LP2 to assign its leases of the Trust properties to a newly-formed TRS of Trust in compliance with the REIT Modernization Act. The Securities Purchase Agreement also includes a provision that requires Trust to provide Taxpayer with copies of quarterly income and asset testing and have Law Firm review certain proposed investments prior to execution. Trust also must provide Taxpayer notice of intended acquisitions.

Unbeknownst to Taxpayer, Trust owned an interest in one of the Trust TRSs at the time that the Securities Purchase Agreement was executed, and thereafter acquired interests in the other Trust TRSs.

As a result of its c percent ownership interest in LP2 acquired in connection the execution of the Securities Purchase Agreement on Date 2, Taxpayer owned a corresponding c percent indirect interest in Company A on that date. Accordingly, in the absence of a timely election by Taxpayer and Company A to treat Company A as a TRS of Taxpayer, Taxpayer's indirect interest in Company A caused Taxpayer to fail to satisfy the ten percent asset test under section 856(c)(4)(B)(iii) for the calendar quarter ended Date 4.

Trust did not disclose to Taxpayer the existence of Company A during negotiations or subsequent to entering into the Securities Purchase Agreement. Also, Taxpayer relied on written information provided by Trust indicating that Taxpayer would not acquire an indirect interest in an entity taxable as a corporation as a consequence of its acquisition of an interest in LP2.

In Month 1, LP2 acquired a h percent joint venture interest in LLC, which owned a Business property. On Date 5, Company C was formed as a wholly-owned subsidiary of LLC in order to lease the Business property from LLC. Trust and Company C elected to have Company C treated as a TRS of Trust.

As a result of its e percent interest in LP2, and LP2's interest in LLC at the time of the incorporation of Company C, Taxpayer owned approximately an i indirect interest in Company C. In the absence of a timely election by Taxpayer and Company C to treat Company C as a TRS of Taxpayer, Taxpayer's indirect interest in Company C did not satisfy the requirements of the ten percent asset test under section 856(c)(4)(B)(iii), as of the calendar quarter ended Date 6.

In breach of its obligations under covenants set forth in the Securities Purchase Agreement, Trust failed to inform Taxpayer of the acquisition of LLC, the lease agreement, and the formation of Company C. Because Taxpayer did not know of the existence of Company C, Taxpayer did not and could not file a timely election to treat Company C as its TRS.

On Date 7, LP2 acquired a j percent joint venture interest in LLC2. LLC2 owned a k percent interest in Company B. An election was made on Date 7 to treat Company B as an association taxable as a corporation for federal income tax purposes. Also, effective as of Date 7, Trust and Company B made an election to treat Company B as a TRS of Trust.

As a result of Taxpayer's e percent interest in LP2, and LP2's approximately j percent interest in Company B, Taxpayer owned an approximate l percent indirect interest in Company B. As was the case with Company A and Company C, Trust failed to notify Taxpayer of its acquisition of an interest in Company B, despite the covenant in the Security Purchase Agreement requiring such disclosure. Taxpayer did not become aware of the existence of Company B until on or about Date 8

Taxpayer did not make a TRS election with Company B at that time due to an apparent error

that indicated that LLC2 was acquired on Date 9. As a result of the error, Taxpayer thought that it had until Date 10 to file a TRS election for Company B. Taxpayer was unaware of the error until Date 11, when it was notified by Law Firm, Trust's counsel, that the acquisition was actually made on Date 7. Consequently, Taxpayer's ability to make a timely TRS election for Company B effective as of Date 7 had already passed.

On Date 12, the joint venture between Taxpayer and LP2 formed a wholly-owned subsidiary, Subsidiary. The joint venture leased a single Business property to Subsidiary. As a result of its ownership interests in the joint venture and LP2, Taxpayer owns an approximate m percent interest in Subsidiary. This ownership interest would have caused Taxpayer to fail the asset test under section 856(c)(4)(B)(iii) as of the

calendar quarter ended Date 13 if Taxpayer and Subsidiary did not make a timely election to treat Subsidiary as a TRS of Taxpayer.

Taxpayer is unable to locate a copy of its TRS election that it believed was filed with respect to Subsidiary. However, an officer of Taxpayer recalls requesting confirmation of his staff that the election had been filed and was told that Trust had made the filing. The officer recalls explaining that Taxpayer was obligated to make its own filing and instructing a member of the in-house tax department to prepare and file the election. However, due to time constraints, the officer recalls that he personally prepared the Form 8875 and had it sent to the IRS Service Center in Ogden, Utah.

Taxpayer has been unable to confirm that the TRS election was filed. It has submitted a request for written confirmation that the Internal Revenue Service is in receipt of the election, but requests an extension of time to file such election pending the outcome of the written confirmation request.

Taxpayer maintains an internal staff of tax professional and also relies on nationally recognized tax, accounting, and legal firms to advise it on tax and related issues. Taxpayer has sought to make a timely TRS election with respect to every one of the direct and indirect subsidiaries that it has formed and with respect to which TRS status was necessary either to protect the status of the income received from such subsidiaries as “rents from real property” or to prevent Taxpayer’s ownership of such subsidiaries to cause to fail to satisfy the ten percent asset test under section 856(c)(4)(B)(iii).

Taxpayer, Company A, Company B, Company C, and Subsidiary (the Companies) make the following representations. The granting of relief under section 301.9100-3 would not result in Taxpayer or the Companies having a lower tax liability in the aggregate for all years to which the election applies than each would have had if the election had been timely made (taking into account the time value of money). Neither Taxpayer nor any of the Companies was informed in all material respects of the required election and related tax consequences, but chose not to file the election. Neither Taxpayer nor any of the Companies used hindsight in requesting relief. Finally, Taxpayer and the Companies represent that they are not seeking to alter a return position for which an accuracy-related penalty has been or could be imposed under section 6662.

Taxpayer has submitted the affidavit of its Executive Vice-President and Chief Financial Officer in support of this requested ruling. Taxpayer and the Companies have also submitted an affidavit by the Treasurer of Trust in support of the representations made in the ruling request.

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 taxable REIT subsidiary. To be eligible for treatment as a taxable REIT subsidiary, 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, the election and the revocation may be made without the consent of the Secretary.

In Announcement 2001-17, 2001-1 C.B. 716, the Internal Revenue Service (Service) announced the availability of Form 8875, Taxable REIT Subsidiary Election. According to the Announcement, this form is to be used for tax years beginning after 2000 for eligible entities to elect treatment as a taxable REIT subsidiary. The instructions to Form 8875 provide that the subsidiary and the REIT can make the election at any time during the tax year. The instructions further provide that the effective date of the election 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. Officers of both the REIT and the taxable REIT subsidiary must jointly sign the form, which is filed with the IRS Service Center in Ogden, Utah.

Section 301.9100-1(c) provides that the Commissioner has discretion to grant a reasonable extension of time to make a regulatory election (defined in § 301.9100-1(b) 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), 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 Internal Revenue Code except subtitles E, G, H, and I.

Section 301.9100-3(a) through (c)(1)(i) sets forth rules that the Internal Revenue 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 § 301.9100-2. Section 301.9100-3(b) provides that subject to paragraphs (b)(3)(i) through (iii) of § 301.9100-3, when a taxpayer applies for relief under this section before the failure to make the regulatory election is discovered by the Service, the taxpayer will be deemed to have acted reasonably and in good faith; and § 301.9100-3(c) 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 years to which the regulatory election applies than the taxpayer would have had if the election had been timely made (taking into account the time value of money).

Conclusion

Based on the information submitted and representations made, we conclude that Taxpayer, Company A, Company B, Company C, and Subsidiary have each satisfied

the requirements for granting a reasonable extension of time to elect under section 856(l) to treat each Company and Subsidiary as a taxable REIT subsidiary of Taxpayer as of the date that Taxpayer acquired a direct or indirect interest in each of the entities. Therefore, Taxpayer, together with each of the respective entities is granted a period of time not to exceed 30 days from the date of this letter to submit Form 8875.

This ruling is limited to the timeliness of the filing of the Form 8875. This ruling's application is limited to the facts, representations, Code sections, and regulations cited herein. No opinion is expressed with regard to whether either Taxpayer or Trust otherwise qualifies as a REIT under subchapter M of the Code.

No opinion is expressed with regard to whether the tax liability of Taxpayer and each of the Companies is not lower in the aggregate for all years to which the election applies than such tax liability would have been if the election had been timely made (taking into account the time value of money). Upon audit of the federal income tax returns involved, the director's office will determine such tax liability for the years involved. If the director's office determines that such tax liability is lower, that office will determine the federal income tax effect.

This ruling is directed only to the taxpayers 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 yours,

William E. Coppersmith
Chief, Branch 2
Office of Associate
Chief Counsel
(Financial Institutions & Products)

Enclosures:
Copy of this letter
Copy for section 6110 purposes