Internal Revenue Service

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Department of the Treasury
Washington, DC 20224

Person To Contact:
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Refer Reply To:
CC:FIP:B01 – PLR-163834-03
Date:
January 12, 2004

Legend:

Company =

Year 1 =

Properties =

QRS =

OP =

a =

Sub 1 =

Date 1 =

Sub 2 =

Date 2 =

Sub 3 =

Sub 4 =

Sub 5 =

Corporation A =

Corporation B =

Corporation C =

Date 3 =

Date 4 =

Date 5 =

Law Firm =

Month 1 =

Date 6 =

Date 7 =

Date 8 =

Dear :

This is in reply to a letter dated October 30, 2003, requesting a ruling on behalf of Company and Subs 1-5 (collectively, the Subs). The letter requests an extension of time under section 301.9100-3 of the Procedure and Administration regulations to make an election under section 856(l) of the Internal Revenue Code to treat each of the Subs as a taxable REIT subsidiary (TRS) of Company commencing as of the date that each of the Subs was formed.

Facts:

Company was organized in Year 1 and made an election to be taxed as a real estate investment trust (REIT) on its federal income tax return for Year 1. Company is the largest REIT owner of Properties in the United States. Company's stock is traded on the New York Stock Exchange.

Company owns approximately a percent general and limited partnership interest in an operating partnership, OP, through its wholly-owned subsidiary, QRS. Company owns the Properties through its interest in OP.

The Subs are wholly-owned subsidiaries of OP. Sub 1, Sub 3, and Sub 4 were incorporated on Date 1. Sub 2 and Sub 5 were incorporated on Date 2. It is represented that OP formed each of the Subs to be a TRS of Company and lease certain properties from OP, either directly or through a subsidiary partnership.

OP or its subsidiary partnerships historically have leased the Properties to either Corporation A, or affiliated entities and affiliates of Corporation B. Corporation A or its affiliates operate the Properties that they lease. Corporation B has entered into management agreements with its affiliates for the Properties that it leases. Additionally, one Property is currently leased to Sub 1, and it is operated by Corporation C pursuant to a management agreement.

Following the enactment of the Ticket to Work and Work Incentives Improvement Act of 1999, P.L. 106-170 (the "REIT Modernization Act"), Company investigated the adoption of a TRS lessee structure in which it would lease its Properties to wholly-owned TRSs and the TRSs, in turn, would engage "eligible independent contractors", as defined in section 856(d)(9), to operate and manage the Properties. On Date 3, Company's Board of Trustees formed a special committee (the Special Committee) of disinterested trustees to review Company's strategic alternatives in light of the REIT Modernization Act, including converting to a TRS lessee structure.

On Date 4, the Special Committee authorized the negotiation of a transaction in which Company would convert to a TRS lessee structure (the Conversion Transactions) that would include: (i) Company acquiring or terminating existing leases of the Properties; (ii) the formation of TRSs of Company; and (iii) leasing the Properties to the TRSs. On Date 5, the Special Committee authorized Company's management and counsel to work toward final documentation of the Conversion Transactions. In anticipation of the Conversion Transactions, the Subs were formed.

Although the Subs applied for and received employee identification numbers after formation, they engaged only in ministerial activities until approximately Month 1. At that time the Conversion Transactions were approved and the Subs began to enter into leases with OP under the TRS lessee structure. The leases include references to the lessees being TRSs of Company.

Company represents that at all times before and after the formation of the Subs, the Subs were intended to be TRSs of Company. Company has submitted documentary evidence and affidavits in support of its representation that the Subs were intended to be TRSs of Company. However, despite Company's intention for the Subs

to be TRSs from the date of their formation, a taxable REIT subsidiary election (Form 8875) was not filed within 2 months and 15 days of each Sub's formation.

An officer of Company who was responsible for supervising the formation of the Subs represents that he did not recall the requirement to file a Form 8875 or the need to file such form no later than 2 months and 15 days after the intended effective date. That officer represents that he believed the election would be filed with Company's Form 1120-REIT for the year in which the Subs were formed.

As part of a tax due diligence on an aspect of the Conversion Transactions, a Law Firm attorney was asked to obtain copies of the Forms 8875 for the Subs' TRS elections. On Date 6, the attorney discovered that the elections had not been made when he requested copies of the Forms 8875 from the aforementioned Company officer. Upon learning of the error, the Company officer immediately asked the attorney to prepare the elections. The attorney prepared and filed the Forms 8875 on Date 7. The Forms 8875 have an effective date of Date 8.

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.

In Announcement 2001-17, 2001-8 I.R.B. 716, the Internal Revenue Service (Service) announced the availability of Form 8875, Taxable REIT Subsidiary Election. The Announcement provides that this form is to be used for tax 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 tax year. However, the effective date of the election depends upon when the Form 8875 is filed. The instructions further provide that the effective date on the form cannot be more than two months and 15 days prior to the date of filing the election, or twelve months after the date of filing the election. In addition, 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 (defined in section 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 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(b) provides that subject to paragraphs (b)(3)(i) through (iii) of section 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 section 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).

Based on the information and representations submitted, we conclude that Company and the Subs have satisfied the requirements for granting a reasonable extension of time to jointly elect under section 856(l) to treat each Sub as a TRS of Company as of the date of formation of the respective Sub. Therefore, Sub 1, Sub 3, and Sub 4 will each be treated as a TRS of Company as of Date 1. Sub 2 and Sub 5 will each be treated as a TRS of Company as of Date 2.

This ruling is limited to the timeliness of the filing of the Forms 8875. This ruling's application is limited to the facts, representations, Code sections, and regulations cited herein. No opinion is expressed concerning whether Company qualifies as a REIT under subchapter M of Chapter 1 of the Code.

No opinion is expressed concerning whether the tax liability of Company and each of the Subs is not lower in the aggregate for all years to which the elections apply than such liability would have been if the elections 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 taxpayer requesting it. Section 6110(k)(3) of the Code provides that this ruling may not be used or cited as precedent.

Sincerely,

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Kate Sleeth
Assistant to the Chief, Branch 1
Office of Associate Chief Counsel
(Financial Institutions and Products)

Enclosures:

Copy of this letter
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Cc: