Internal Revenue Service

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Department of the Treasury
Washington, DC 20224

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Refer Reply To:
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Date:
April 22, 2004

Legend:

Taxpayer =

Date 1 =

Year 1 =

Trust =

Subsidiary =

Corporations A-G =

Accounting Firm =

Law Firm =

Date 2 =

Corporation H =

Date 3 =

Dear :

This is in reply to a letter requesting a ruling on behalf of Taxpayer and Subsidiary granting Taxpayer and Subsidiary an extension of time under sections 301.9100-1 and 301.9100-3 of the Procedure and Administration regulations to file an election for Subsidiary 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 hospitality 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 hospitality 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 entered into negotiations with Trust, a publicly traded REIT, to acquire all of the assets of Trust. Like Taxpayer, Trust had formed numerous TRSs to act as lessees of its hospitality properties. One of Trust's TRSs, Subsidiary, owned all of the stock and securities of seven lower-tier TRSs, Corporations A-G.

In connection with the planned merger, Taxpayer retained Accounting Firm to provide tax, accounting, and due diligence services. Accounting Firm provided their due diligence report and recommendations to Taxpayer in writing prior to execution of the merger agreement. The report contains a discussion of Trust TRSs and a recommendation that Taxpayer confirm that a valid TRS election was made with respect to those entities, but does not recommend or advise Taxpayer that new TRS elections should be filed by Taxpayer with respect to the acquired Trust TRSs.

Prior to the merger, Taxpayer also received an opinion of Law Firm, who was counsel to Trust, relating to Trust's qualification as a REIT. The tax opinion recites that

counsel has reviewed, in addition to other documents, the TRS elections for nine specified entities.

On Date 2, Taxpayer and Trust closed the transaction and Taxpayer acquired the assets of Trust in a forward cash merger in which the shareholders of Trust received cash in exchange for their Trust stock. Trust went out of existence in connection with the merger. Following the merger, Taxpayer continues to own indirectly, through one or more disregarded entities, all of the stock and securities of Subsidiary. Subsidiary continues to hold all of the stock and securities of Corporations A-G.

Although they employ internal financial and tax professionals, Taxpayer relies on sophisticated outside national accounting and law firms to advise them on the tax, accounting and securities issues concerning the operation of the REIT and its compliance obligations. Taxpayer represents that it was not aware of the necessity to file TRS elections for the entities acquired in the merger with Trust, and based upon its review of the report from Accounting Firm, the tax opinion of Law Firm, and other related materials, it believed that no additional filing was necessary. This fact is highlighted by the fact that subsequent to the merger, Taxpayer caused Subsidiary to form a new subsidiary, Corporation H, and Taxpayer and Corporation H made a joint election to treat Corporation H as a TRS of Taxpayer.

On Date 3,
it was determined that Taxpayer did not file a TRS election with respect to Subsidiary. Taxpayer immediately requested the relief sought in this private letter ruling request.

Taxpayer and Subsidiary make the following representations. The granting of relief under section 301.9100-3 would not result in Taxpayer or Subsidiary (or Corporations A-G) having a lower tax liability in the aggregate for all years to which the election applies than they would have had if the election had been timely made (taking into account the time value of money). Neither Taxpayer nor Subsidiary was informed in all material respects of the required election and related tax consequences, but chose not to file the election. Neither Taxpayer nor Subsidiary used hindsight in requesting relief. Finally, Taxpayer and Subsidiary 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 Principal Financial Officer in support of this requested ruling.

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 and Subsidiary have satisfied the requirements for granting a reasonable extension of time to elect under section 856(l) to treat Subsidiary as a taxable REIT subsidiary of Taxpayer as of Date 2. Therefore, Taxpayer and Subsidiary are granted a period of time not to exceed 30 days from the date of this letter to submit the 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 Taxpayer 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 Subsidiary 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
William E. Coppersmith
Chief, Branch 2
Office of Associate
Chief Counsel
(Financial Institutions & Products)

Enclosures:
Copy of this letter
Copy for section 6110 purposes