

**Internal Revenue Service**

Department of the Treasury  
Washington, DC 20224

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Person To Contact:

, ID No.

Telephone Number:

Refer Reply To:

CC:PSI:3 – PLR-119875-04

Date:

August 03, 2004

Company:

Manager:

Shareholders:

Properties:

PLR-119875-04

State:

M:

a:

b:

c:

d:

e:

f:

g:

h:

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

This letter responds to your letter dated April 1, 2004, 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, incorporated under the laws of State in a, intends to elect under § 1362(a) to be an S corporation effective b. Before electing S status, Company will buy back the stock currently held by family trusts that are not eligible to be S corporation shareholders. Company has accumulated earnings and profits.

Company owns, develops, leases, and manages commercial real estate.

M is Company's president and sole salaried employee. Manager is an unrelated real estate brokerage that manages the routine affairs of Company's principal property and acts as leasing agent. M maintains an office at Company's principal property, which allows him to work in close daily coordination with Manager and independent

PLR-119875-04

contractors. In general, under the leases, tenants must maintain the interior space of their units, while Company is required to maintain the exterior space. The services Company provides in leasing and managing the Properties include common area maintenance; maintenance and repair of building structural components and systems (electrical, heating, and air conditioning); maintenance and repair of exterior water and sewer lines; landscaping and grounds maintenance, including retaining walls and fencing; service road, parking lot, and sidewalk maintenance, including associated lighting; trash and snow removal; and participation in various goodwill projects that benefit tenant businesses. 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 the Properties. The comparable figures for f are g and h, 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

PLR-119875-04

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.

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/

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

enclosures: copy for § 6110 purposes

cc: