Department of the Treasury
Washington, DC 20224

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April 06, 2011

**Legend:**

Taxpayer =

State =

Country A =

Country B =

Country C =

Subsidiary A =

Subsidiary B =

Subsidiary C = .

Date 1 =

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Company A =

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Dear :

This is in reply to a letter in which Taxpayer requests certain rulings in connection with its intent to elect to be taxed as a real estate investment trust ("REIT") under sections 856-860 of the Internal Revenue Code of 1986, as amended (the "Code").

**Facts:**

Taxpayer, a State corporation, is a wireless and broadcast communication infrastructure company with over a communication sites, including wireless communication towers, broadcast communication towers, and distributed antenna system networks, in the United States and in foreign countries. Taxpayer also leases, markets, and/or manages a number of rooftop installations on properties owned by third parties in the United States, Country A, and Country B.

Taxpayer conducts its operations through directly and indirectly owned subsidiaries. In the United States, its principal operating subsidiaries are Subsidiary A and Subsidiary B. Abroad, Taxpayer conducts its operations principally through Subsidiary C, which in turn conducts operations through its various foreign subsidiaries.

Taxpayer's primary business is leasing antenna space on its multi-tenant communication sites. Taxpayer leases its cellular tower sites out to major cell phone operators and leases its broadcast towers to radio and television broadcast companies. Taxpayer operates in two business segments: 1) Rental and Management which relates to its communication site leasing business, and 2) Network Development Services which relates to its tower-related services. The Rental and Management segment accounted for approximately b% of Taxpayer's total annual revenues as of Date 1. The Network Development Services accounted for the remaining c% of

Taxpayer's annual revenues. As part of the plan to elect and operate as a REIT, the Network Development Services will be performed by a separate corporate subsidiary which will elect to be taxed as a taxable REIT subsidiary ("TRS") under section 856(l).

Taxpayer owns communication towers that it operates pursuant to long-term lease and license arrangements. Taxpayer's interests in its sites are comprised of a variety of ownership interests, including fee interests, leaseholds created by long-term ground lease agreements, easements, licenses, and rights-of-way. Approximately d% of the communication sites in Taxpayer's portfolio are located on land that Taxpayer does not own. Ground lease agreements for land underlying its towers generally have an initial term of e years, with f or g additional automatic renewal periods of e years, for a total of h-i years.

On Taxpayer's sites, there are two forms of communication towers: 1) wireless communication towers, also known as cell towers, and 2) broadcast towers. A typical tower site consists of a compound enclosing the tower site, a tower structure, and one or more equipment shelters that house transmitting, receiving, and switching equipment. It may also include a backup generator that is permanently installed at the tower site. The base of the tower is bolted and welded to a concrete base set upon pilings driven deep into the ground for anchoring. Most of the personal property at a tower site, such as antennas, wiring, power supply, switching equipment, etc. is owned by the tenants and is maintained and serviced by the tenants. The tower compound includes fences and buildings that house tenants' transmission equipment. Taxpayer's cell towers have the ability to handle both microwave and cellular communication equipment. Broadcast towers are taller and more structurally complex than cell towers.

Taxpayer also leases and manages a number of rooftop installations (each a "Rooftop Site"). Taxpayer's interests in Rooftop Sites are either in the nature of a leasehold interest or a license interest. In exchange for Taxpayer's right to use a Rooftop Site, Taxpayer pays a monthly rent to the building owner. The Rooftop Sites consist of physical space on the building rooftop together with rights to the use of the air space above the surface of the roof and ancillary space within the building for storage. Tenants on a rooftop may install a small guyed or self-supporting tower on the roof from which they transmit, but more commonly tenants affix transmitting/receiving antennae to a platform, which functions as a horizontal tower (a "Platform"). Platforms are heavy duty steel structures in the form of a grid that are specially constructed and permanently affixed into the infrastructure of the roof and building structure with bolts and welds. A Platform is primarily used to facilitate the installation and removal of the telecommunication equipment of multiple tenants without compromising the integrity of the building roof. The method of construction and incorporation of a Platform into a building structure is labor intensive and costly.

Additionally, at a Rooftop Site Taxpayer may be granted a leasehold interest or other right to use of certain storage space. The storage space is generally within a maintenance or electrical room either on the building rooftop or within the building. The storage space may include ducts, vents, or other space for wiring and cabling. Similar to towers, a Rooftop Site may include tenants providing cellular, microwave, broadcast, or data services.

Taxpayer typically leases space on a tower to a tenant pursuant to a Master Tower Space License Agreement ("MLA") and an associated License of Space Schedule (each a "Site License"). The MLA embodies a set of standard pricing and other terms between Taxpayer and a tenant that are incorporated by reference into each Site License but a Site License may contain additional terms not addressed by the MLA. Each Site License typically covers one tower site. During the MLA's term, each time the tenant wants to lease space at a particular tower site it submits an application to Taxpayer as to that particular site. Taxpayer and a tenant then enter into a Site License for the particular tower site. A typical MLA may have several hundred Site Licenses associated with it. On the date that Taxpayer enters into an MLA with a tenant, there may be no associated Site Licenses. The Site Licenses are entered into, on a site-by-site basis, after application by the tenant and acceptance by Taxpayer.

In leasing tower space, Taxpayer receives monthly payments from tenants with initial non-cancellable lease terms ranging from j-h years. When leasing space on a tower to a tenant, Taxpayer offers to tenants, and in some instances requires that tenants accept, tower-related services (the "Services"). Taxpayer represents that the Services are usual and customary for similar tower companies in the various geographic markets in which the Taxpayer operates. Specifically, Taxpayer and its employees perform Services at or in respect of tower sites, as follows:

1) Application approval: Taxpayer may receive a fee for reviewing a tenant's application for a lease of space.
2) Site inspection: In connection with a tenant's installation of new equipment, or reconfiguration or relocation of existing equipment, Taxpayer will inspect the site and supervise work performed by the tenant and contractors, to ensure that work is performed according to Taxpayer's standards and to maintain control over site configuration so as to preserve both structural integrity and tenant capacity.
3) Structural analysis and tower improvement costs: As part of the site application review process, Taxpayer will determine whether a structural analysis is needed to evaluate the proposed placement of tenant's desired equipment on the tower. If a structural analysis is needed, Taxpayer will perform it. Under some MLAs, the tenant is required to reimburse Taxpayer for reasonable costs and expenses, or alternatively pay a flat fee, for the structural analysis; under other MLAs the cost of the structural analysis is included in the site application fee. If tower modifications or reinforcements are required to accommodate the tenant's equipment, the tenant is required to bear a portion of the tower facility improvement costs pursuant to a formula that is based on the needed capital expenditures.

**4)** Utilities, property taxes, and sales and use taxes: Taxpayer provides tenants with access to telephone or other utility services at the tower facility at the tenant's expense. Taxpayer may be responsible for billing, collecting, reporting, and remitting certain taxes and utility charges. Tenants would reimburse Taxpayer for their share of these amounts, generally without mark-up but sometimes with a minimal mark-up. In some cases these charges are factored into the tenant's initial recurring rent payment and as such Taxpayer absorbs the actual charges.

5) As-built and site drawings: Taxpayer may generate as-built drawings of the tenant's equipment installed at the tower facility and a site drawing precisely identifying the location of the tenant's shelter, cabinets, cable runs, generators, utility lines and other pertinent installations. In such cases, Taxpayer will charge the tenant for the cost of preparing the drawings, plus a minimal percentage mark-up.

6) Labeling and identification of equipment: If the tenant does not properly label its equipment, Taxpayer may provide proper labels and charge a fixed administrative labeling fee.

7) Maintenance and modification in exclusive use areas and common areas: Taxpayer provides for the operation, maintenance, replacement and repair of towers and tower facilities, including: structural modifications, the maintenance and repair of fences, gates, and access roads at the tower; and the maintenance and repair of any building or shelter that Taxpayer owns and leases to tenants. Tenants may reimburse Taxpayer for associated costs.

8) Incidental costs: Taxpayer has the right to pay certain of the tenant's costs and expenses if the tenant has failed to do so. In such case, Taxpayer is entitled to reimbursement from the tenant. Under some MLAs, Taxpayer charges the tenant a mark-up on such outlays.

9) Site reservations: Some MLAs provide that the tenant may reserve space on Taxpayer's towers for a period of time, during which time the Taxpayer will not lease space to another if doing so would preclude the tenant from later occupying the reserved space. The tenant sometimes, but not always, is required to pay a fee to effect a reservation.

Taxpayer also owns and leases space on towers in other countries, principally Country A, Country B, and Country C. Taxpayer's business model and operations outside the United States are substantially the same as its core tower rental business in the United States. Taxpayer operates in foreign countries through one or more foreign subsidiaries and associated intermediate holding companies (each, a "Foreign Sub"). A Foreign Sub may be partially owned by Taxpayer and its affiliates, or k% owned by Taxpayer and its affiliates. Taxpayer is expected to jointly elect TRS status with each Foreign Sub that is a corporation for federal income tax purposes (each, a "Foreign TRS"). The Foreign TRSs, and any domestic TRSs, will together come within the 25% limitation of section 856(c)(4)(B)(ii). Taxpayer makes loans to its domestic and Foreign

TRSs that are secured by towers, tower sites, or other section 856 “real estate assets” of that domestic or Foreign TRS.

On Date 2, Taxpayer acquired cellular and broadcast towers as part of a section 368(a) acquisition of Subsidiary B. Because of the merger and other acquisitions, Taxpayer was required for generally accepted accounting principle (“GAAP”) purposes to allocate purchase price to the acquired physical assets based on replacement cost, with the excess required to be treated as one or more intangible assets or goodwill (“real estate intangibles”). The following real estate intangibles were created by GAAP as part of the acquisitions:

1) Network location: This intangible represents the value to Taxpayer of revenue growth which could potentially be obtained from leasing the excess capacity on acquired towers. For GAAP purposes, Taxpayer assigns value to this intangible by determining the value of future benefits of cash flows ultimately generated from leasing the unutilized space on each tower, similar to unrented apartments in a building.
2) Customer base: This intangible represents the value to Taxpayer of existing tenant contracts in place at the time of acquisition, including assumptions regarding estimated renewals. This intangible is recorded where an asset acquisition does not meet the criteria of a business combination under GAAP. This intangible is not based on a relationship Taxpayer may have with tenants, but is rather derived from the existing leases.
3) Customer relationships: This intangible is the value to Taxpayer of tenant contracts and relationships in place at the time of acquisition. This intangible is recorded when resulting from an acquisition which meets the criteria of a business combination under GAAP. Similar to customer base, this intangible is derived from existing leases, and includes assumptions regarding estimated lease renewals.
4) Licenses and other intangibles: This category of intangibles is primarily comprised of the Company A Economic Rights, which are in one of the Country A subsidiaries and relate to the ability of Taxpayer to market available space on towers owned by Company A. The remainder is comprised of various other intangibles, acquired from Subsidiary B and in other tower company acquisitions.
5) Goodwill: Goodwill is the premium above the amounts allocated to the physical structures of the towers and the other identified intangible assets and represents what Taxpayer is willing to pay for the future anticipated leases or other similar cash flows that it expects to generate on the acquired towers.

**Law and Analysis:**

Issue 1: Real Estate Assets

Section 856(c)(4)(A) provides that at the close of each quarter of its tax year, at least 75 percent of the value of a REIT's total assets must be represented by real estate assets, cash, and cash items (including receivables), and Government securities.

Section 856(c)(5)(B) provides that the term "real estate assets," for purposes of section 856, means real property (including interests in real property and interests in mortgages on real property) and shares (or transferable certificates of beneficial interest) in other REITs that meet the requirements of sections 856 through 859.

Section 856(c)(5)(C) provides that the term "interests in real property" includes fee ownership and co-ownership of land or improvements thereon, leaseholds of land or improvements thereon, options to acquire land or improvements thereon, and options to acquire leaseholds of land or improvements thereon, but does not include mineral, oil, or gas royalty interests.

Section 1.856-3(b) of the Income Tax Regulations provides, in part, that the term "real estate assets" means real property. Section 1.856-3(d) provides that "real property" includes land or improvements thereon, such as buildings or other inherently permanent structures thereon (including items which are structural components of such buildings or structures). In addition, the term "real property" includes interests in real property. Local law definitions will not be controlling for purposes of determining the meaning of "real property" for purposes of section 856 and the regulations thereunder. Under the regulations, "real property" includes, for example, the wiring in a building, plumbing systems, central heating or central air-conditioning machinery, pipes or ducts, elevators or escalators installed in a building, or other items which are structural components of a building or other permanent structure. The term does not include assets accessory to the operation of a business, such as machinery, printing press, transportation equipment which is not a structural component of the building, office equipment, refrigerators, individual air-conditioning units, grocery counters, furnishings of a motel, hotel, or office building, etc. even though such items may be termed fixtures under local law.

Rev. Rul. 71-286, 1971-2 C.B. 263, considers whether air rights over real property are considered "interests in real property" and "real estate assets" within the meaning of section 856(c). The term "air rights" is defined as the long-term leasehold or fee simple ownership of the space above the ground that a landowner can occupy or use in connection with the land, plus necessary easements on the surface for support of structures erected in such air space. The revenue ruling holds that such air rights are considered "interests in real property" and "real estate assets" within the meaning of section 856(c).

Rev. Rul. 75-424, 1975-2 C.B. 269, concerns whether various components of a microwave transmission system are real estate assets for purposes of section 856. The system consists of transmitting and receiving towers built upon pilings or foundations, transmitting and receiving antennae affixed to the towers, a building, equipment within the building, and waveguides. The waveguides are transmission lines from the receivers or transmitters to the antennae, and are metal pipes permanently bolted or welded to the tower and never removed or replaced unless blown off by weather. The transmitting, multiplex, and receiving equipment is housed in the building. Prewired modular racks are installed in the building to support the equipment that is installed upon them. The racks are completely wired in the factory and then bolted to the floor and ceiling. They are self-supporting and do not depend upon the exterior walls for support. The equipment provides for transmission of audio or video signals through the waveguides to the antennae. Also installed in the building is a permanent heating and air conditioning system. The transmission site is surrounded by chain link fencing. The revenue ruling holds that the building, the heating and air conditioning system, the transmitting and receiving towers, and the fence are real estate assets. The ruling further holds that the antennae, waveguides, transmitting, receiving, and multiplex equipment, and the prewired modular racks are assets accessory to the operation of a business and therefore not real estate assets.

As described above, Taxpayer acquired either leasehold interests or license interests in Rooftop Sites, Platforms on certain Rooftop Sites, and storage space at Rooftop Sites. Rooftop Sites, comprised of physical space on the building rooftops together with rights to use of the air space above the surface of the roof, constitute “interests in real property” within the meaning of section 856(c)(5)(C) and “real estate assets” within the meaning of section 856(c)(5)(B). Rev. Rul. 71-286. Taxpayer’s storage space is also considered “interests in real property” and “real estate assets.”

Taxpayer’s towers are large steel structures that extend high above and deep below the ground. They are constructed to remain permanently in place, cannot be readily moved, are unlikely to be moved, and are not intended to be moved. Further, Taxpayer represents that its towers are generally constructed and installed to the same rigorous standards and specifications that govern the construction of the towers that were the subject of Rev. Rul. 75-424. Because the method of construction of the towers and the permanency of such towers are substantially similar to the transmitting and receiving towers in Rev. Rul. 75-424, they are inherently permanent structures. Further, the towers are not assets accessory to the operation of a business. Therefore, the towers constitute “real estate assets” within the meaning of section 856(c)(5)(B).

Based on the facts as represented by Taxpayer, we conclude that Taxpayer’s wireless communication towers, broadcast communication towers, and the sites on which such towers are located, including fencing, shelters, and permanently installed backup generators, will be treated as “real estate assets” and “interests in real property” for purposes of sections 856(c)(5)(B) and (C).

Issue 2: Goodwill and Other Intangibles

Section 1.856-2(d)(3) provides that in determining the investment status of a REIT, the term “total assets” means the gross assets of the REIT determined in accordance with GAAP.

In this case, the existence of the real estate intangibles is a function of a GAAP rule that provides that in business combinations such as this one, the allocation of value to assets in excess of replacement cost must be attributed to goodwill or another intangible asset. The facts and representations in this case indicate that Taxpayer holds only real property, so all of the intangibles derived from the GAAP rule must be treated as a function of that real estate. Therefore, the real estate intangibles in the present case qualify as real estate assets and interests in real property for purposes of section 856.

Issue 3: Rents from Real Property

Section 856(c)(2) provides that at least 95 percent of a REIT’s gross income must be derived from, among other sources, “rents from real property.” Section 856(c)(3) provides that at least 75 percent of a REIT’s gross income must be derived from, among other sources, “rents from real property.”

Section 856(d)(1) provides that rents from real property include (subject to exclusions provided in section 856(d)(2)): (A) rents from interests in real property, (B) charges for services customarily furnished or rendered in connection with the rental of real property, whether or not such charges are separately stated, and (C) rent attributable to personal property leased under, or in connection with, a lease of real property, but only if the rent attributable to such personal property for the taxable year does not exceed 15 percent of the total rent for the taxable year attributable to both the real and personal property leased under, or in connection with, such lease.

Section 1.856-4(a) provides, in part, that the term “rents from real property” means, generally, the gross amounts received for the use of, or the right to use, real property of the REIT.

Based on the facts as represented by Taxpayer, we conclude that amounts received by Taxpayer from a tenant under a license or lease for space on its wireless communication towers or broadcast towers and at its tower sites will qualify as “rents from real property” for purposes of section 856(c)(2) and (c)(3). Furthermore, to the extent that the real estate intangibles constitute real estate assets, any rent payments attributable to real estate intangibles will be treated as "rents from real property" within the meaning of section 856(d).

Issue 4: Separate Leases

As noted above, section 856(d)(1)(C) provides that rents from real property include rent attributable to personal property leased under, or in connection with, a lease of real property, but only if the rent attributable to such personal property for the taxable year does not exceed 15 percent of the total rent for the taxable year attributable to both the real and personal property leased under, or in connection with, such lease. For purposes of subparagraph (C), with respect to each lease of real property, rent attributable to personal property for the taxable year is that amount which bears the same ratio to total rent for the taxable year as the average of the fair market values of the personal property at the beginning and at the end of the taxable year bears to the average of the aggregate fair market values of both the real property and the personal property at the beginning and at the end of such taxable year.

Section 1.856-4(b)(2)(ii) provides that, in general, the 15-percent test in section 856(d)(1)(C) is applied separately to each lease of real property. However, where the REIT rents all (or a portion of all) the units in a multiple unit project under substantially similar leases (such as the leasing of apartments in an apartment building or complex to individual tenants), the 15-percent test may be applied with respect to the aggregate rent received or accrued for the taxable year under the similar leases of the property.

In this case, even though a particular tenant may have many Site Licenses with respect to a particular MLA, each Site License is for a tower in a different location and has its particular terms and conditions. Therefore, each Site License may be treated as a separate lease for purposes of section 856(d).

The multiple Site Licenses that relate to a particular tower site are analogous to multiple apartment leases applicable to a particular apartment building. Therefore, for purposes of determining whether income from the rental of personal property does not exceed 15 percent of the total rent for purposes of section 856(d)(1)(C), Taxpayer may attribute rent to personal property and real property according to the fair market values of the real property and personal property either on a Site License by Site License basis or on a tower by tower basis pursuant to section 1.856-4(b)(2)(ii).

Issue 5: Services performed by Taxpayer

Section 856(d)(1) defines the term "rents from real property" to include, among other things, charges for services customarily rendered in connection with the rental of real property (whether or not such charges are separately stated). Section 1.856-4(b)(1) provides, in part, that services furnished to tenants of a particular building will be considered customary if, in the geographic market in which the building is located, tenants in buildings that are of a similar class are customarily provided with the service.

Section 856(d)(2)(C) excludes from the definition of “rents from real property” any “impermissible tenant service income” as defined under section 856(d)(7). Section 856(d)(7)(A) defines impermissible tenant service income to include, with respect to any real or personal property, any amount received or accrued directly or indirectly by a REIT for services furnished or rendered by the REIT to tenants of the property. Section 856(d)(7)(B) provides that if “impermissible tenant service income” exceeds 1 percent of all the income from the property during the tax year, then none of the income from the property qualifies as “rents from real property.”

Section 856(d)(7)(C)(i) excludes from the definition of impermissible tenant service income amounts received for services furnished or rendered through an independent contractor from whom the REIT does not derive or receive any income. Section 856(d)(7)(C)(ii) excludes amounts that would be excluded from unrelated business taxable income (“UBTI”) under section 512(b)(3) if received by an organization described in section 511(a)(2).

Section 512(b)(3) provides, in relevant part, that rents from real property are excluded from the computation of UBTI. Section 1.512(b)-1(c)(5) provides that payments for the use or occupancy of rooms or other quarters in hotels, boarding houses, or apartment houses furnishing hotel services, or in tourist camps or tourist homes, motor courts or motels, or for the use or occupancy of space in parking lots, warehouses, or storage garages, do not constitute rent from real property. Generally, services are considered rendered to the occupant if they are primarily for his convenience and are other than those usually or customarily rendered in connection with the rental of rooms or other space for occupancy only. The supplying of maid service, for example, constitutes such service; whereas the furnishing of heat and light, the cleaning of public entrances, exits, stairways and lobbies, and the collection of trash are not considered as services rendered to the occupant.

Section 1.856-4(b)(5)(ii) provides that the trustees or directors of a REIT are not required to delegate or contract out their fiduciary duty to manage the trust itself, as distinguished from rendering or furnishing services to the tenants of its property or managing or operating the property. Thus, the trustees or directors may do all those things necessary, in their fiduciary capacities, to manage and conduct the affairs of the trust itself. The trustees or directors may also make capital expenditures with respect to the REIT’s property and may make decisions as to repairs of the property the cost of which may be borne by the REIT.

In this case, the Services performed by Taxpayer are either services that are not rendered primarily for the convenience or benefit of tenants within the meaning of section 1.512(b)-1(c)(5), or are among the fiduciary duties described in section 1.856-

4(b)(5)(ii). In addition, Taxpayer represents that the Services are customary services provided to such telecommunication carriers and tenants in the same geographical areas in which Taxpayer's towers are located. Therefore, any income derived from the Services is not treated as impermissible tenant service income under sections 856(d)(2)(C) and (d)(7)(A). Accordingly, the income derived by Taxpayer from the Services does not cause the amounts received under leases of the properties to be excluded from treatment as "rents from real property" under section 856(d).

Issue 6: Loans to a TRS

Section 856(c)(4)(A) provides that at the close of each quarter of the taxable year at least 75 percent of a REIT's total assets must be represented by real estate assets, cash and cash items (including receivables), and Government securities.

Section 856(c)(4)(B) provides, in relevant part, that at the end of each quarter of a taxable year, (i) not more than 25 percent of the value of a REIT's total assets may be represented by securities; (ii) not more than 25 percent of the value of its total assets may consist of securities of TRSs (the "25% Value Test"); (iii) not more than 5% percent of the REIT's total assets may be represented by securities of any one issuer; and (iv) a REIT may not hold securities possessing more than 10% of the total voting power or value of the outstanding securities of a single issuer.

Section 856(c)(5)(B) defines the term "real estate assets," in part, to mean real property (including interests in real property and interests in mortgages on real property) and shares (or transferable certificates of beneficial interest) in other REITs. Section 1.856-3(d) provides that local law definitions are not controlling for purposes of determining the meaning of the term "real property" as used in section 856 and the regulations thereunder. Section 1.856-3(e) provides that the term "securities" does not include "real estate assets" as defined in sections 856 and 1.856-3.

Under section 856(c)(4)(B)(ii), a REIT is permitted to hold the securities of one or more TRSs as long as such securities do not exceed 25% of the value of the REIT's total assets. The question presented in this ruling request is whether, for purposes of the 25% Value Test under section 856(c)(4)(B)(ii), the term "security" includes a loan to a TRS that qualifies as a real estate asset under section 856(c)(5)(B).

There is nothing in the statute or legislative history to indicate that Congress intended that the definition of securities in section 1.856-3(e) not apply for purposes of the 25% Value Test under section 856(c)(4)(B)(ii). Thus, in applying the 25% Value Test under section 856(c)(4)(B)(ii), the term "securities" does not include real estate assets as defined in sections 856 and 1.856-3.

Although section 856(c)(5)(B) provides that loans secured by real property are real estate assets, that rule is only applicable to loans that are held directly or indirectly by a REIT. In the present case, the loans are held directly by a REIT. Therefore, the loans from Taxpayer to its TRSs that are secured by real property and qualify as real estate assets within the meaning of section 856(c)(5)(B) will not be treated as securities for purposes of the 25% Value Test under section 856(c)(4)(B)(ii).

Issue 7: Subpart F and PFIC Inclusions

As noted earlier, Taxpayer owns, either partially or wholly, Foreign Subs for which TRS elections will be made. Such Foreign Subs are either controlled foreign corporations within the meaning of section 957(a) ("CFCs") with respect to which Taxpayer is a United States Shareholder within the meaning of section 951(a), or passive foreign investment companies under section 1297(a) ("PFICs"), for which Taxpayer intends to make elections under section 1295(a) to treat as qualified electing funds ("QEFs").

Taxpayer expects that CFCs will earn the following types of income: (a) interest income on working capital; (b) rental income from leasing space on towers if the employees who perform the leasing activity belong not to the relevant CFC but instead to an affiliate or to an independent contractor; and (c) interest, dividend, or rental income from an affiliate that is not excepted from foreign personal holding company income within the meaning of section 954(c) ("FPHCI") under sections 954(c)(3) or (c)(6).

As a result of being a United States shareholder with respect to CFCs, Taxpayer is required by section 951(a)(1)(A)(i) to include in its gross income its pro rata share of the subpart F income, as defined in section 952(a), of any such CFCs (the "Subpart F Inclusions").

As a result of being a shareholder in PFICs for which Taxpayer makes QEF elections, Taxpayer will be required under section 1293(a) to include in its gross income its pro rata share of the ordinary earnings and net capital gain income of each such QEF (the "QEF Inclusions"). As a result of being a shareholder in PFICs for which Taxpayer has not made any elections, Taxpayer is required to include amounts in income (as ordinary income) pursuant to section 1291 (the QEF Inclusions, along with amounts included in income pursuant to section 1291(a), all together referred to as the "PFIC Inclusions").

Section 856(c)(5)(J) provides that to the extent necessary to carry out the purposes of Part II of Subchapter M of the Code, the Secretary is authorized to determine, solely for purposes of such part, whether any item of income or gain which – does not otherwise qualify under section 856(c)(2) or (3) may be considered as not constituting gross income for purposes of section 856(c)(2) or (3) or may be considered as gross income which qualifies under section 856(c)(2) or (3).

The legislative history underlying the tax treatment of REITs indicates that the central concern behind the gross income restrictions is that a REIT's gross income should largely be composed of passive income. For example, H.R. Rep. No. 2020, 86th Cong., 2d Sess. 4 (1960) at 6, 1960-2 C.B. 819, at 822-823 states, "[o]ne of the principal purposes of your committee in imposing restrictions on types of income of a qualifying real estate investment trust is to be sure the bulk of its income is from passive income sources and not from the active conduct of a trade or business."

Section 957 defines a CFC as a foreign corporation in which more than 50 percent of the total combined voting power of all classes of stock entitled to vote, or the total value of the stock is owned by United States shareholders on any day during the corporation's taxable year. A United States shareholder is defined in section 951(b) as a United States person who owns 10 percent or more of the total voting power of the foreign corporation.

Section 951(a)(1)(A)(i) generally provides that, if a foreign corporation is a CFC for an uninterrupted period of 30 days or more during a taxable year, every person who is a United States shareholder of the corporation and who owns stock in the corporation on the last day of the taxable year in which the corporation is a CFC shall include in income the shareholder's pro rata share of the CFC's subpart F income for the taxable year.

Section 952 defines subpart F income to include foreign base company income, as determined under section 954. Under section 954(a)(1), foreign base company income includes FPHCI, as determined under section 954(c). Section 954(c)(1)(A) defines FPHCI to include (among other things) dividends, interest, royalties, rents, and annuities.

Taxpayer has represented that it is a United States shareholder within the meaning of section 951(b) with respect to certain of its subsidiaries that are CFCs. As Taxpayer's CFCs earn subpart F income attributable to foreign base company income that is FPHCI and such income is generally passive income, treatment of the section 951(a)(1)(A)(i) inclusion attributable to such income as qualifying income for purposes of section 856(c)(2) does not interfere with or impede the policy objectives of Congress in enacting the income test under section 856(c)(2). Accordingly, we rule that Subpart F Inclusions attributable to FPHCI earned by CFCs are qualifying income for purposes of section 856(c)(2), as provided in section 856(c)(5)(J)(ii).

Section 1297(a) defines a PFIC as a foreign corporation where either (1) 75 percent or more of the gross income of such corporation for the taxable year is passive income, or (2) the average percentage of assets (as determined in accordance with section 1297(e)) held by such corporation during the taxable year which produce passive income or which are held for the production of passive income is at least 50 percent. Section 1297(b) defines the term “passive income” as income of a kind that would be FPHCI under section 954(c), subject to certain exceptions.

Section 1291(a)(1) provides that if a United States person receives an excess distribution (as defined in section 1291(b)) in respect of stock in a PFIC, then – (A) the amount of the excess distribution shall be allocated ratably to each day in the shareholder’s holding period for the stock, (B) with respect to such excess distribution, the shareholder’s gross income for the current year shall include (as ordinary income) only the amounts allocated under section 1297(a)(1)(A) to – (i) the current year, or (ii) any period in the shareholder’s holding period before the 1st day of the 1st taxable year of the company which begins after December 31, 1986, and for which it was a PFIC, and (C) the tax imposed by this chapter for the current year shall be increased by the deferred tax amount (determined under section 1291(c)).

Section 1295(a) provides that a PFIC will be treated as a QEF with respect to a shareholder if (1) an election by the shareholder under section 1295(b) applies to such PFIC for the taxable year; and (2) the PFIC complies with such requirements as the Secretary may prescribe for purposes of determining the ordinary earnings and net capital gains of such company. Section 1293(a) provides that every United States person who owns (or is treated under section 1298(a) as owning) stock of a QEF at any time during the taxable year of such fund shall include in gross income – (A) as ordinary income, such shareholder’s pro rata share of the ordinary earnings of such fund for such year, and (B) as long-term capital gain, such shareholder’s pro rata share of the net capital gain of such fund for such year.

Taxpayer has represented that it is a shareholder of certain subsidiaries that are PFICs and that it intends to make QEF elections with respect to these PFICs. As Taxpayer’s PFICs earn income that is FPHCI and such income is generally passive income, treatment of such PFIC Inclusions as qualifying income for purposes of section 856(c)(2) does not interfere with or impede the policy objectives of Congress in enacting the income test under section 856(c)(2). Accordingly, we rule Taxpayer’s PFIC Inclusions are qualifying income for purposes of section 856(c)(2), as provided in section 856(c)(5)(J)(ii).

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.

This ruling is directed only to the taxpayer requesting it. Section 6110(k)(3) of the Code 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,

Robert A. Martin
Robert A. Martin
Sr. Tech. Reviewer, Branch 1
Office of Associate Chief Counsel
(Financial Institutions and Products)

Enclosures:
Copy of this letter
Copy for § 6110 purposes