Internal Revenue Service

Department of the Treasury
Washington, DC 20224

Number: **201147015**
Release Date: 11/25/2011

Index Number: 856.00-00

Person To Contact:
, ID No.
Telephone Number:

Refer Reply To:
CC:FIP:B01
PLR-117638-11
Date: November 1, 2011

Legend:

Taxpayer =

Properties =

State =

Tax Year =

Dear :

This is in response to your letter dated April 21, 2011, and supplemental submission dated June 2, 2011, requesting a ruling on behalf of Taxpayer. Taxpayer has requested a ruling regarding the definition of "qualified health care property" under section 856(e)(6)(D) of the Internal Revenue Code, as amended (the "Code"), for purposes of the related-party rent exception of § 856(d)(8)(B).

Facts:

Taxpayer is a State corporation that elected to be taxed as a real estate investment trust ("REIT") under sections 856 through 860 of the Code in Tax Year. Taxpayer uses the overall accrual method of accounting and the calendar year for its taxable year.

Taxpayer has acquired a number of Properties from unrelated third parties. Pursuant to the structure permitted by the Housing and Economic Recovery Act of

2008, Pub. L. No. 110-289, § 3061, 122 Stat. 2654, 2901-02 (2008) ("RIDEA") [1], Taxpayer intends to lease all the Properties to a taxable REIT subsidiary ("TRS") of Taxpayer, which will, in turn, enter into an arm's length management contract with an eligible independent contractor ("EIK") within the meaning of section 856(d). In order to properly lease and contract the Properties under section 856(d)(8)(B), each Property must be a "qualified health care property" within the meaning of section 856(e)(6)(D).

Taxpayer is seeking a ruling on those Properties that are unlicensed age-restricted residential facilities that provide living quarters and significant congregate services to residents ("Facilities") to ensure they meet the definition of a "qualified health care property." The Facilities are marketed as "Senior Independent Living Facilities" and provide a service-intensive living environment for seniors who are able to physically care for themselves. Residents of the Facilities must provide for their own medical needs, but their ability to do so is monitored by the management of the facility. In the event that the facility management (often in consultation with the resident's physician) determines that a resident is no longer able to care for himself, that resident must move out of the facility. In the event that a resident is required to move out because he can no longer care for himself, the lease provides for a reduced notice of termination.

Taxpayer represents that the Facilities offer services that are not commonly offered by a typical apartment building or complex. The Facilities provide congregate dining, housekeeping, social and recreational services, and transportation services to all residents. The living quarters in all Facilities contain emergency call systems specifically designed for elderly residents and most Facilities provide for in-person status checks. In addition, the residency agreements contain or will contain provisions that expressly authorize the staff to obtain emergency medical services or supplies for residents. In the event of a medical emergency, staff at the facility call 911, escort the emergency medical team to the resident, contact the resident's family, and act as first responders while waiting for the emergency medical team to arrive by providing basic first aid and comfort to the resident in distress. In addition, the Facilities keep current "Do Not Resuscitate" forms ("DNR") for residents and in the event of an emergency the facility's staff will inform medical personnel if the resident in distress has a DNR on file.

Other services offered by the Facilities include the availability of emergency call pendants that can be worn by residents. Companions are also available for residents to assist the resident with transportation or shopping off-site. Sharps containers are provided by the Facilities for medical biohazard disposal (i.e., syringes and medical piercing devices). All oxygen use and equipment must be reported to the facility

[1] Sections 3031-3071 of the Housing and Economic Recovery Act incorporated significant portions of proposed legislation introduced as the REIT Investment Diversification and Empowerment Act of 2007, or "RIDEA". See H.R. 1147 and S. 2002, 100th Cong. (1st Sess. 2007). The portions of the Housing and Economic Recovery Act that incorporated H.R. 1147 and S. 2002 are still commonly referred to as RIDEA. See generally Tony M. Edward & Dara F. Bernstein, REITs Empowered, 24 BNA Tax Mgmt. Real Estate Jn'l No. 11 , Nov. 5, 2008, at 1-3.

director so the director can determine the equipment's compliance with applicable regulations, and if in compliance, the resident must maintain an "oxygen in use" sign on the entrance to his unit. In addition, consent is required from management to receive in-home health care services from a third party health care provider. This consent is conditioned, in part, on proof of the provider's proper licensure and adequate insurance.

In addition to the included services, the EIK operating the Facilities will make a health program available to residents on a voluntary basis, for an additional fee. These services will be provided on-site by an affiliate of the facility's managing EIK. These health programs will offer Medicare-certified physical, occupational and speech therapy, medication management, and skilled nursing services administered by licensed professionals. The purpose of the health program is to help minimize the effects of aging by providing treatments promoting functional independence, improving overall health, and teaching techniques for preventing pain and disability. The program will also offer participants health education and individualized health and wellness programs.

Law and Analysis:

Section 856(c)(2) provides that at least 95 percent of a REIT's gross income must be derived from sources that include rents from real property.

Section 856(c)(3) provides that at least 75 percent of a REIT's gross income must be derived from sources, that likewise include, 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 the personal property for the taxable year does not exceed 15 percent of the total rent for the tax year attributable to both the real and personal property leased under, or in connection with, the lease.

Section 856(d)(2)(B) provides that rents from real property do not include amounts received directly or indirectly from a corporation if the REIT owns 10 percent or more of the total combined voting power or 10 percent or more of the total value of the shares of the corporation.

Section 856(d)(8)(B) provides that amounts paid to a REIT by a TRS shall not be excluded from rents from real property by reason of section 856(d)(2)(B) when a REIT leases a qualified lodging facility or qualified health care property to a TRS, and the facility or property is operated on behalf of the TRS by a person who is an eligible independent contractor.

Section 856(d)(9)(A) provides that the term “eligible independent contractor” with respect to any qualified lodging facility or qualified health care property (as defined in section 856(e)(6)(D)(i)) means any independent contractor if, at the time such contractor enters into a management agreement or other similar service contract with the TRS to operate such qualified lodging facility or qualified health care property, such contractor (or any related person) is actively engaged in the trade or business of operating qualified lodging facilities or qualified health care properties, respectively, for any person who is not a related person with respect to the real estate investment trust or the taxable REIT subsidiary.

Section 856(e)(6)(D)(i) defines qualified health care property as any real property which is a health care facility.

A “health care facility” is defined in section 856(e)(6)(D)(ii) as a hospital, nursing facility, assisted living facility, congregate care facility, qualified continuing care facility (as defined in section 7872(g)(4)), or other licensed facility which extends medical or nursing or ancillary services to patients and which was operated by a provider of such services that is eligible for participation in the Medicare program under Title XVII of the Social Security Act [subchapter XVIII of chapter 7 of Title 42 (42 U.S.C.A. § 1395 et seq.)] with respect to the facility.

In the present case, residents are physically independent, but the EIK at the Facilities actively monitors the resident’s health and provides services to help improve the health and wellbeing of its elderly residents. The EIK at the Facilities monitors the residents and those who are not healthy enough to take care of themselves are required to leave the Facility and move to a more suitable living environment. In addition, the EIK at the Facilities provides all residents with emergency call systems, meals, transportation, and housekeeping. Management at the Facilities supervises health-related activities of the residents, such as in-home health care and oxygen equipment, and even maintains a file of DNR forms. Additionally, the Facility management provides optional health care services on-site for residents. These healthcare services are not typically available in general apartment buildings and offer services for residents in a manner that provides for congregate care.

Conclusion:

Based on the facts as represented, we rule that the Facilities are congregate care facilities within the meaning of section 856(e)(6)(D), and therefore, constitute “qualified health care properties” within the meaning of section 856(e)(6)(D). Accordingly, amounts paid to the Taxpayer by the TRS shall not be excluded from rents from real property by reason of section 856(d)(2)(B) so long as the Facilities are operated and managed by an eligible independent contractor.

Except as specifically ruled upon above, no opinion is expressed concerning any federal income tax consequences relating to the facts herein under any other provision of the Code. Specifically, we do not rule whether Taxpayer otherwise qualifies as a REIT under part II of subchapter M of Chapter 1 of the Code.

This ruling is directed only to the taxpayer requesting it. Taxpayer should attach a copy of this ruling to each tax return to which it applies. Section 6110(k)(3) of the Code provides that this ruling 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
Senior Technician Reviewer, Branch 1
Office of Associate Chief Counsel
(Financial Institutions & Products)