Internal Revenue Service

Department of the Treasury
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Refer Reply To:
CC:FIP:B03 – PLR-126408-11
Date:
November 17, 2011

RE:

LEGEND:

Trust =

Company A =

Company B =

Company C =

Company D =

Accounting Firm =

State X =

Date 1 =

Date 2 =

Date 3 =

Date 4 =

Date 5 =

Year 1 =

Year 2 =

Year 3 =

Dear :

This responds to a letter dated June 22, 2011, that was submitted on behalf of Company A, Company B, Company C, and Company D (collectively, the Companies), requesting an extension of time under § 301.9100-1 and § 301.9100-3 of the Procedure and Administration Regulations to make an election under § 856(c) of the Internal Revenue Code to treat each of the Companies as a real estate investment trust (REIT).

FACTS

The Companies are each State X corporations. Trust owns all of the common stock of each of the Companies. Trust is a State X corporation that made an election to be treated as a real estate investment trust ("REIT") on its federal income tax return filed for the tax year that ended on Date 1.

In late Year 1, Trust formed Company A and Company B, each of which was a qualified REIT subsidiary ("QRS") during Year 1. During Date 2, Company A and

Company B each issued preferred stock to third parties. During Year 2, Trust formed Company C and Company D, each of which was a QRS during Year 2. During Date 3, Company C and Company D each issued preferred stock to third parties. Trust and the Companies represent that it has always been the intention of Trust and the Companies that each of the Companies would make an election under § 856(c) of the Code to become a REIT for federal income tax purposes.

Accounting Firm was retained to provide tax advice and tax compliance services for Trust and Companies. Various personnel of Accounting Firm were provided information indicating the existence of the preferred shareholders of Companies, although some information provided to Accounting Firm regarding the share ownership structure was inconsistent and erroneous. The personnel of Accounting Firm that were advised of the presence of the preferred shareholders were not familiar with the nuances of a multi-tier REIT structure or the significance of the existence of these preferred shareholders. As a result, the existence of the preferred shareholders was not communicated by these persons to the Accounting Firm Senior Director who signed Trust's tax returns on behalf of Accounting Firm.

Trust's Year 1 federal income tax return properly treated Company A and Company B as QRSs and included the results of their operations. Trust's Year 2 return properly treated Company C and Company D as QRSs and included the results of their operations. Trust's Year 2 return, however, continued to treat Company A and Company B as QRSs for the entire year. Trust's Year 3 return similarly treated all four companies as QRSs throughout the entire year. Beginning with the time each of the Companies first had preferred shareholders, the Company should have filed its own separate federal income tax return as a REIT and should not have been included on Trust's returns.

Trust's returns were signed by an officer of Trust who was not familiar with multi-tier REIT structures. Furthermore, the same officer had signed the Year 1 Trust return, which correctly treated Company A and Company B as QRSs. He saw that the Year 2 and Year 3 Trust returns included the operations of the entire group, but he failed to notice that the Companies were improperly included as QRSs in the Year 2 and Year 3 Trust returns or that they should have filed their own separate REIT returns for the tax years beginning when they were no longer QRSs. He relied upon Accounting Firm as to what returns were necessary to be filed by Trust and the Companies.

During Date 4, Trust entered into negotiations regarding the possible sale of the stock of Company B. While performing preliminary due diligence activities, the Accounting Firm Senior Director discovered that the Companies had preferred shareholders. He notified the officer of Trust about the situation and began preparing amended returns for Trust and initial returns for the Companies. He also recommended

to the officer of Trust that relief should be requested from the Service pursuant to § 301.9100-3 of the regulations. Trust agreed with these recommendations.

On Date 5, Trust filed amended returns for Year 2 and Year 3; these amended returns included the operations of the Companies only for the periods in which the Companies actually were QRSs. On the same date, Company A and Company B filed late returns as REITs for Year 2 and Year 3, and Company C and Company D filed returns as REITs for Year 3. All of the returns for Trust and the Companies reported net losses for those years.

Furthermore, each of the Companies makes the following additional representations:

1. The request for relief was filed by each of the Companies before the failure to make the regulatory election was discovered by the Service.

2. Granting the relief will not result in each of the Companies having a lower tax liability in the aggregate for all years to which the regulatory election applies than each of the Companies would have had if the election had been timely made (taking into account the time value of money).

3. Each of the Companies did not seek to alter a return position for which an accuracy-related penalty has been or could have been imposed under § 6662 of the Code at the time the Companies requested relief and the new position requires or permits a regulatory election for which relief is requested.

4. Being fully informed of the required regulatory election and related tax consequences, each of the Companies did not choose to not file the election.

LAW AND ANALYSIS

Section 856(c)(1) of the Code provides that a corporation, trust, or association shall not be considered a REIT for any taxable year unless it files with its return for the taxable year, an election to be a REIT or has made such election for a previous taxable year, and such election has not be terminated or revoked. Pursuant to § 1.856-2(b) of the Income Tax Regulations, the election shall be made by computing taxable income as a REIT in its return for the first taxable year for which it desires the election to apply.

Section 301.9100-1(c) of the Procedure and Administration Regulations 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 each of the Companies has satisfied the requirements for granting a reasonable extension of time to elect under § 856(c) of the Code to be treated as a REIT. Accordingly, the election of REIT status made on the Forms 1120-REIT that were filed on Date 5 for the Year 2 tax year by Company A and Company B, and for the Year 3 tax year by Company C and Company D, will be considered as timely made.

No opinion is expressed with regard to whether the tax liability of Trust or each of the Companies 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 limited to the timeliness of the election to be treated as a REIT made by each of the Companies. This ruling's application is limited to the facts, representations, Code sections, and regulations cited herein. No opinion is expressed with regard to whether Trust or each of the Companies otherwise qualifies as a REIT under subchapter M of the Code.

This ruling is directed only to the taxpayer 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 representative.

Sincerely,

Alice M. Bennett
Chief, Branch 3
Office of Associate Chief Counsel
(Financial Institutions & Products)

Enclosures:
Copy of this letter
Copy for section 6110 purposes

cc: