Internal Revenue Service

Department of the Treasury
Washington, DC 20224

Number: **201333005**
Release Date: 8/16/2013

Index Number: 162.00-00

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CC:ITA:B02
PLR-148739-12

Date:
May 02, 2013

Taxpayer =

State =

Date 1 =

Advisor =

Date 2 =

Sponsor =

Date 3 =

B =

C =

D =

E =

F =

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Dear :

This is in reply to a letter dated November 7, 2012, requesting a ruling on behalf of Taxpayer that distribution fees and dealer manager fees will be deductible under §162 of the Internal Revenue Code.

FACTS

Taxpayer is a corporation organized under the laws of State and elected to be taxed as a real estate investment trust (REIT) for federal income tax purposes for its taxable year ended Date 1. Taxpayer is externally managed by Advisor.

Previously, shares of a single class of common stock of Taxpayer were issued to "accredited investors" in a private offering that was exempt from registration under the Securities Act of 1933. The first of several closings occurred in Date 2. Through Date 3, Taxpayer raised an aggregate of approximately $B in gross proceeds through the private offering of shares of its common stock to unaffiliated investors.

Taxpayer owns and manages a diversified portfolio of retail, office, industrial and multifamily properties located primarily in the United States. As of Date 3, Taxpayer's real estate portfolio was composed of interests in C properties located in D states and E property in Canada.

In order to raise additional capital to grow Taxpayer's real estate portfolio, reduce its leverage and provide liquidity to existing investors, Taxpayer filed a registration statement on Form S-11 to offer and sell to the public two new classes of shares of common stock, the Class A shares ("Class A Shares") and the Class M shares ("Class M Shares") (the "Public Offering").

As of Date 3, Taxpayer had F shares of common stock outstanding, held by a total of G stockholders, and no other class of common stock outstanding. Taxpayer will reclassify its existing outstanding shares of common stock as Class E shares ("Class E Shares"). Taxpayer will not issue additional Class E Shares.

Class A Shares will be available to any investor meeting the applicable suitability standards. Class M Shares will be available for purchase in the offering only (i) through fee-based programs, also known as wrap accounts, of investment dealers, (ii) through participating broker-dealers that have alternative fee arrangements with their clients, (iii) through certain registered investment advisors, (iv) through bank trust departments or any other organization or person authorized to act in a fiduciary capacity for its clients or customers, (v) by endowments, foundations, pension funds and other institutional investors or (iv) by Taxpayer's executive officers and directors and their immediate family members, as well as officers and employees of Taxpayer's advisor or other affiliates and their immediate family members, and, if approved by the Taxpayer's board of directors, joint venture partners, consultants and other service providers.

Taxpayer intends to continuously offer Class A Shares and Class M Shares in multiple back-to-back offerings, with no predetermined date on which Taxpayer would cease offering such shares.

None of the shares of any class will be listed on a securities exchange. Instead, Class A Shares and Class M Shares will be offered for sale on a daily basis at the net asset value ("NAV") for shares of such class plus, with respect to Class A Shares, applicable selling commissions and will be repurchased on a daily basis by Taxpayer at the NAV for such share class. Subject to certain limitations, the share repurchase plan is intended to allow holders of Class A Shares and Class M Shares to request that Taxpayer repurchase their shares in an amount up to approximately H% of Taxpayer's NAV per year after such shares have been outstanding for at least one year. In addition, until Taxpayer's total NAV has first reached $J, repurchases of shares of all classes in the aggregate may not exceed K% of the gross proceeds Taxpayer receives from the commencement of the Public Offering through the last day of the prior calendar quarter.

Class E Shares are not eligible for repurchase but will automatically convert to Class M Shares one year after escrow release date for the offering. After the Class E Shares convert to Class M Shares, they will be eligible for repurchase, subject to the one year waiting period.

Taxpayer will make ongoing payments to the dealer manager of distribution fees and dealer manager fees with respect to the Class A Shares and of dealer manager fees with respect to the Class M Shares. Taxpayer will not pay any distribution or dealer manager fees with respect to Class E Shares.

The broker-dealers receiving the distribution fees will be purchasing Class A shares on behalf of their clients. The broker-dealers will receive an up-front selling commission of L% and ongoing distribution fees. Class A Shares will be allocated Distribution Fees, which are a daily accrual of M of N% of the NAV of the Class A Shares for such day.

The dealer manager fee is paid to the dealer manager in consideration of the distribution, marketing and stockholder services the dealer manager provides to Taxpayer in connection with the continuous offerings. A portion of the dealer manager fee may be reallowed to participating broker-dealers as payment to the participating broker-dealers based on certain asset thresholds of shares under management, to compensate the participating broker-dealers for their role in distributing and marketing Taxpayer's shares and for providing services to those stockholders who invest through that particular broker-dealer, thus saving the dealer manager that expense. Class A Shares and Class M Shares will be allocated dealer manager fees calculated at the same rate, which are a daily accrual of M of O% of the NAV of the share class for such day.

Taxpayer represents that the distribution and dealer manager fees are comparable to fees paid by open-end regulated investment companies (RICs) pursuant to Rule 12b-1 (17 C.F.R. §270.12b-1).

LAW AND ANALYSIS

Section 162(a) provides generally that there is allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business.

In general, a taxpayer must capitalize amounts paid to facilitate a stock issuance. Section 1.263(a)-5(a)(8) of the Income Tax Regulations. The regulations provide an exception to this general rule by providing that amounts paid by an open-end RIC to facilitate an issuance of its stock are treated as amounts that do not facilitate a transaction unless the amounts are paid during the initial stock period. Section 1.263(a)-5(c)(5). The exception is based upon Revenue Ruling 94-70, 1994-2 C.B. 17, which amplifies Revenue Ruling 73-463, 1973-2 C.B. 34. Notice of proposed rulemaking and notice of public hearing , REG-125638-01, 2003-1 C.B. 373, 377.

Rev. Rul. 73-463 holds that stock issuance expenses of an open-end RIC, except those incurred during the initial stock offering period, a 90-day period after the

day its registration statement is first declared effective, are deductible under § 162(a). Rev. Rul. 73-463 distinguishes an open-end RIC from other corporations in that there is a constant possibility of withdrawal of all or part of the capital by means of redemption. It was these "unique circumstances" which led to the revenue ruling's conclusion that the continuous capital-raising efforts after the initial stock offering period are an essential part of the company's day-to-day business operations, and, thus, the stock issuance expenses incurred with these efforts are deductible under § 162.

Rev. Rul. 94-70, which amplifies Rev. Rul. 73-463, holds that fees incurred by an open-end RIC pursuant to a Rule 12b-1 plan are indistinguishable from the stock issuance expenses deductible under Rev. Rul. 73-463. Fees that are incurred under a Rule 12b-1 plan include advertising expenses, compensation of underwriters, dealers, and sales personnel, the expenses for printing and mailing prospectuses to other than current shareholders, and the expenses of printing and mailing sales literature. 17 C.F.R. § 270.12b-1(a)(2).

In general, the distribution and dealer manager fees at issue are not deductible under § 162 as stock issuance expenses. Section 1.263(a)-5(a)(8). Further, the fees do not clearly fall under the holding of Rev. Rul. 73-463 because Taxpayer is not an open-end RIC.

Congress and the Service have acknowledged similarity between RICs and REITs in many areas and have afforded them similar treatment in many situations. The legislative history underlying the tax treatment of REITs indicates Congress generally intended to equate the tax treatment of REITs with the treatment accorded RICs. REITs were created to provide an investment vehicle similar to the RIC for small investors to invest in real estate and real estate mortgages. See H.R. Rep. No. 2020, 86th Cong., 2d Sess. 3 (1960).

Taxpayer operates in a manner similar to an open-end RIC, in that there is the possibility that Taxpayer's capital will be withdrawn by redemptions of shares pursuant to Taxpayer's daily offers to repurchase a portion of the outstanding shares after the one-year holding period. Also, Taxpayer does continuously offer its shares and does not list its shares on an exchange. Furthermore, Taxpayer offers its shares on a daily basis to replace shares that have been repurchased.

Additionally, Taxpayer represented that the distribution and dealer manager fees are equivalent to fees charged for activities described by Rule 12b-1. The distribution and dealer manager fees are similar to compensation paid to underwriters, dealers and sales personnel. Thus, we will treat the deferred dealer manager fees and distribution fees as comparable to the Rule 12b-1 Fees in Rev. Rul. 94-70.

Accordingly, based on the above facts and circumstances, we hold that the distribution and dealer manager fees, except those incurred by Taxpayer during the

one-year period after the dates of initial issuance of the Class A Shares and Class M Shares, respectively, are deductible under §162. Taxpayer must continue to capitalize the distribution and dealer manager fees incurred during the one-year period after the dates of the initial issuance of the Class A and Class M Shares.

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.

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 representative.

Sincerely,

Thomas D. Moffitt
Branch Chief, Branch 2
(Income Tax & Accounting)