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Department of the Treasury
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PLR-147892-12

Date:
April 23, 2013

Legend:

Taxpayer =

Dear

This is in reply to a letter dated November 5, 2012, requesting rulings on behalf of Taxpayer, a corporation that has elected to be treated as a real estate investment trust ("REIT") for federal income tax purposes. Taxpayer has requested rulings that (1) the cross-connectivity services furnished by Taxpayer will not cause any amounts received from tenants of the buildings to be treated as other than "rents from real property" under section 856(d) of the Internal Revenue Code of 1986, as amended (the "Code") and (2) amounts received by a taxable REIT subsidiary ("TRS") for TRS-provided services (as defined below) do not give rise to impermissible tenant service income and do not cause any portion of the amounts received by Taxpayer to fail to qualify as "rents from real property" under section 856(d) of the Code.

This letter supplements a prior ruling concerning requests under section 856 ("Prior Ruling"). The Prior Ruling was issued in a private letter ruling (PLR-108715-10), which was dated May 12, 2010, and numbered as PLR 201034010. The facts and representations submitted in the Prior Ruling are incorporated into this letter by reference.

Facts:

In addition to the services that will be provided by Taxpayer as described in the Prior Ruling, Taxpayer will provide tenants the service of telecommunication cross-connectivity using wires, cables and other transmission equipment to provide tenants connectivity to carriers, their own servers, and directly with each other. Taxpayer will

provide all the space within the buildings necessary to accommodate cross-connectivity and may also provide any installation, maintenance, and technical support services. Taxpayer represents that all of these services are ordinary, necessary, usual, and customary services in connection with the operation and maintenance of the buildings and will not constitute services rendered primarily for the convenience of a particular tenant.

Taxpayer will not repair, replace, or operate the tenants' equipment, nor will it provide network or IT management services ("remote hands"). A TRS or independent contractor will furnish all noncustomary services as well as services primarily for the convenience of tenants, including all additional equipment, remote hands services, and tenant build-out services (the "TRS-provided services").

Taxpayer expects to collect all or nearly all the amounts owing from tenants. Some TRS-provided services, such as set-up and installation, technical support, remote hands services, and build-out services may be listed as separate line items on invoices to tenants.

Law and Analysis:

Section 856(d)(1) of the Code 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 1.856-4(b)(1) of the Income Tax Regulations provides that, for purposes of sections 856(c)(2) and (c)(3), the term "rents from real property" includes charges for services customarily furnished or rendered in connection with the rental of real property, whether or not the charges are separately stated. Services rendered to tenants of a particular building will be considered customary if, in the geographic market in which the building is located, tenants in buildings of a similar class are customarily provided with the service. In particular geographic areas where it is customary to furnish electricity or other utilities to tenants in buildings of a particular class, the submetering of those utilities to tenants in the buildings will be considered a customary service. Section 1.856-4(b)(5)(ii) of the regulations 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.

Section 856(d)(2)(C) of the Code provides that any impermissible tenant service income is excluded from the definition of “rents from real property”. Section 856(d)(7)(A) of the Code defines “impermissible tenant service income” to mean, with respect to any real or personal property, any amount received or accrued directly or indirectly by the REIT for services furnished or rendered by the REIT to tenants at the property, or for managing or operating the property.

Section 856(d)(7)(B) of the Code provides that if the amount of impermissible tenant service income exceeds one percent of all amounts received or accrued during the tax year directly or indirectly by the REIT with respect to the property, the impermissible tenant service income of the REIT will include all of the amounts received or accrued with respect to the property. Section 856(d)(7)(D) of the Code provides that the amounts treated as received by a REIT for any impermissible tenant service shall not be less than 150 percent of the direct cost of the REIT in furnishing or rendering the service.

Section 856(d)(7)(C) of the Code provides certain exclusions from impermissible tenant service income. Section 856(d)(7)(C) of the Code provides that for purposes of section 856(d)(7)(A), services furnished or rendered, or management or operation provided, through an independent contractor from whom the REIT does not derive or receive any income shall not be treated as furnished, rendered, or provided by the REIT, and there shall not be taken into account any amount which would be excluded from unrelated business taxable income under section 512(b)(3) of the Code if received by an organization described in section 511(a)(2) of the Code.

Section 512(b)(3) of the Code provides, in part, that there shall be excluded from the computation of unrelated business taxable income all rents from real property and all rents from personal property leased with such real property, if the rents attributable to such personal property are an incidental amount of the total rents received or accrued under the lease, determined at the time the personal property is placed in service.

Section 1.512(b)-1(c)(5) provides that payments for the use or occupancy of rooms and other space where services are also rendered to the occupant, such as 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.

The telecommunication cross-connectivity services described above that Taxpayer will provide to tenants are either usual or customary services that are rendered in connection with the operation or maintenance of the buildings and are not rendered primarily for the convenience of tenants, or they will be provided by an independent contractor or through a TRS. Accordingly, the cross-connectivity services furnished by Taxpayer in connection with the leasing of the buildings will not cause any amounts received from tenants of the buildings to be treated as other than "rents from real property" under section 856(d) of the Code.

In Rev. Rul. 2002-38, 2002-2 C.B. 4, a REIT pays its TRS to provide noncustomary services to tenants. The REIT does not separately state charges to tenants for the services. Thus, a portion of the amounts received by the REIT from tenants represents an amount received for services provided by the TRS. TRS employees perform all of the services and TRS pays all of the costs of providing the services. The TRS also rents space from the REIT for carrying out its services to tenants. The revenue ruling concludes that the services provided to the REIT's tenants are considered to be rendered by the TRS, rather than the REIT, for purposes of section 856(c)(7)(i). Accordingly, the services do not give rise to impermissible tenant service income and do not cause any portion of the rents received by the REIT to fail to qualify as "rents from real property" under section 856(d) of the Code.

As noted above, Taxpayer expects to collect all, or nearly all, of the amounts owing from tenants. Some TRS-provided services, such as set-up and installation, technical support, remote hands services, and build-out services may be listed as separate line items on invoices to tenants. Some of these services may not be customary services within the meaning of section 1.856-4(b)(1). However, employees of a TRS will perform all of the services and a TRS will pay all costs of providing the services. A TRS will rent space from Taxpayer to carry out its operations and will make no payment to Taxpayer other than its rental or reimbursement payments for the space and for shared employees. In addition, the TRS will receive arm's length fees from Taxpayer for providing these services. Consequently, the TRS is the provider of the impermissible services. As a result, the amounts received by the TRS for the TRS-provided services do not give rise to impermissible tenant service income and do not cause any portion of the amounts received by Taxpayer to fail to qualify as "rents from real property" under section 856(d) of the Code.

Conclusion:

Based on the facts as represented, we rule that the cross-connectivity services furnished by Taxpayer will not cause any amounts received from tenants of the buildings to be treated as other than "rents from real property" under section 856(d) of the Code. We further rule that the amounts received by the TRS for the TRS-provided services do not give rise to impermissible tenant service income and do not cause any

portion of the amounts received by Taxpayer to fail to qualify as “rents from real property” under section 856(d) of the Code.

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. In particular, with respect to amounts collected by the Taxpayer from tenants for noncustomary TRS-provided services that are not paid to the TRS, no opinion is expressed as to whether such amounts constitute “rents from real property” under section 856(d) 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,

Diana Imholtz
Diana Imholtz
Branch Chief, Branch 1
Office of Associate Chief Counsel
(Financial Institutions and Products)