

**Internal Revenue Service**

Department of the Treasury

Washington, DC 20224

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Person to Contact:

Telephone Number:

Refer Reply To:  
CC:PSI:3 PLR-126956-01  
Date:  
August 21, 2001

Company:

Corp:

Trust:

Properties:

State:

- a:
- b:
- c:
- d:
- e:
- f:
- g:
- h:
- i:
- k:

This letter responds to a letter from your authorized representative dated May 2, 2001, as well as subsequent correspondence, submitted on behalf of Company. We have been asked to rule that the rental income received by Company from the Properties is not passive investment income within the meaning of § 1362(d)(3)(C)(i) of the Internal Revenue Code. Company represents the following facts.

FACTS

PLR-126956-01

Company was incorporated under the laws of State on a and elected under § 1362(a) to be an S corporation effective b. It elected under § 1361(b)(3) to treat Corp as a qualified subchapter S subsidiary, also effective b. Company has accumulated earnings and profits.

Trust, the sole shareholder of Company, elected under § 1361(e)(3) to be an electing small business trust.

Company is a real estate developer whose operations include the leasing and managing of self-developed residential and commercial real estate (the Properties).

Company employs approximately c persons, of whom d are dedicated full time to providing various services to the Properties in its real estate leasing and management business. These services include regular property inspection; common area maintenance; maintenance and repair of principal building structural components and systems; repair work scheduling and contracting; property design and renovation; janitorial services; painting; window washing; grounds maintenance and landscaping; snow and rubbish removal; and 24-hour emergency services. In addition to the services provided to tenants, Company handles the usual leasing and administrative functions involved in managing real estate.

Company received or accrued approximately e in rents and paid or incurred approximately f in relevant expenses for g on the Properties. The rental income and expense figures for h are i and k, respectively.

## LAW AND ANALYSIS

Except as provided in § 1362(g), § 1362(a)(1) provides that a small business corporation may elect, in accordance with the provisions of § 1362, to be an S corporation.

Section 1362(d)(3)(A)(i) provides that an election under § 1362(a) terminates whenever the corporation (I) has accumulated earnings and profits at the close of each of three consecutive tax years, and (II) has gross receipts for each of such tax years more than 25 percent of which are passive investment income.

Except as otherwise provided in § 1362(d)(3)(C), § 1362(d)(3)(C)(i) provides that the term "passive investment income" means gross receipts derived from royalties, rents, dividends, interest, annuities, and sales or exchanges of stock or securities.

Section 1.1362-2(c)(5)(ii)(B)(1) of the Income Tax Regulations provides that "rents" means amounts received for the use of, or the right to use, property (whether real or personal) of the corporation.

PLR-126956-01

Section 1.1362-2(c)(5)(ii)(B)(2) provides that "rents" does not include rents derived in the active trade or business of renting property. Rents received by a corporation are derived in an active trade or business of renting property only if, based on all the facts and circumstances, the corporation provides significant services or incurs substantial costs in the rental business. Generally, significant services are not rendered and substantial costs are not incurred in connection with net leases. Whether significant services are performed or substantial costs are incurred in the rental business is determined based upon all the facts and circumstances including the number of persons employed to provide the services and the types and amounts of costs and expenses incurred (other than depreciation).

Based solely on the facts submitted and the representations made, we conclude that the rents Company receives from the Properties are not passive investment income under § 1362(d)(3)(C)(i).

Except for the specific ruling above, no opinion is expressed or implied concerning the federal tax consequences of the facts of this case under any other provision of the Code. Specifically, no opinion is expressed or implied regarding Company's election to be treated as an S corporation. Further, the passive investment income rules of § 1362 are completely independent of the passive activity rules of § 469; unless an exception under § 469 applies, the rental activity remains passive for purposes of § 469.

Under a power of attorney on file with this office, we are sending a copy of this letter to your authorized representative.

This ruling is directed only to the taxpayer who requested it. According to § 6110(k)(3), this ruling may not be used or cited as precedent.

Sincerely,  
MARY BETH COLLINS  
Senior Technician Reviewer, Branch 3  
Office of Associate Chief Counsel  
(Passthroughs and Special Industries)

enclosure: copy for § 6110 purposes