

**Internal Revenue Service**

Department of the Treasury

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Person to Contact:

Telephone Number:

Refer Reply To:  
CC:PSI:3 PLR-103316-03  
Date:  
May 9, 2003

Company:

Properties:

State:

a:

b:

c:

d:

e:

f:

Dear \_\_\_\_\_ :

This letter responds to your letter dated December 7, 2002, as well as subsequent correspondence, submitted on behalf of Company, requesting a ruling 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.

PLR-103316-03

## FACTS

Company was incorporated under the laws of State on a and anticipates electing under § 1362(a) to be an S corporation. It owns, leases, and manages commercial real estate (the Properties).

Through its sole officer-employee, as well as independent contractors, Company provides various services to the Properties in its real estate leasing and management business. For Properties 1-3, Company is responsible for maintaining exterior walls (including painting), roofs (including gutters and downspouts), foundations, asphalt parking lots and concrete traffic areas, fire sprinklers, and drainage systems. For Property 3, Company also maintains a private access road (including shoulder posts) and the adjacent green area and is responsible for enforcing a court order prohibiting parking and standing along the road. For Property 4, Company is responsible for maintaining building structural components (the roof, walls, and foundation) and systems (heating and air conditioning), the grounds and lawn (including tree trimming), the asphalt parking lot and concrete curbing, exterior lighting, an exterior sign and pylon, and canopies; it provides an alarm service, pest control, and tenant buildout. In addition to the services provided to tenants, Company handles the usual leasing and administrative functions involved in managing real estate.

The annual rentals for the Properties are b. Company received or accrued relevant rental expenses of approximately c for d and approximately e for f.

## 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.

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

PLR-103316-03

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).

#### CONCLUSION

Based solely on the facts and representations submitted, 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, we express or imply no opinion concerning the federal tax consequences of the facts of this case under any other provision of the Code. Specifically, we express or imply no opinion regarding Company's eligibility to elect 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.

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 yours,

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

Enclosure: copy for § 6110 purposes

cc: