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Date:
August 24, 2010

Taxpayer: =

Business =

State X =

Type A =

Type B =

Type C =

Type D =

Type E =

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Dear :

This is in reply to a letter dated March 22, 2010, and subsequent submissions, requesting rulings on behalf of Taxpayer. You have requested rulings addressing whether an operator ("Manager") of Business facilities leased by Taxpayer and certain of its taxable REIT subsidiaries ("TRSs") will fail to qualify as an eligible independent contractor under section 856(d)(9) of the Internal Revenue Code solely as a result of certain income earned by Taxpayer or its TRSs from affiliates of Manager, including affiliates that are organized as partnerships, and whether Manager will fail to qualify as

an eligible independent contractor solely as a result of income earned by a TRS from Manager or from affiliates of Manager. Additionally, you have requested a ruling addressing whether certain investments by a TRS in Manager or its affiliates or other operators of Business facilities, will disqualify TRS as a "taxable REIT subsidiary" within the meaning of section 856(l) or Manager as an "eligible independent contractor" within the meaning of section 856(d)(9).

Facts:

Taxpayer is a publicly traded State X corporation that invests primarily in real estate servicing the Business industry in the United States. Taxpayer conducts its business through a number of subsidiaries which are treated, for federal income tax purposes, as partnerships and disregarded entities, and through a number of TRSs. Both Taxpayer and its TRSs acquire, develop, lease, and dispose of Business real estate and provide mortgage and specialty financing to Business providers. The Company and its TRSs' portfolio includes investments in Type A, Type B, Type C, Type D, and Type E properties.

Taxpayer has elected to be taxed as a real estate investment trust ("REIT") under sections 856 through 860, commencing with the taxable year ended a. Taxpayer represents that all dealings and transactions between and among Taxpayer and each of its TRSs have been conducted at arm's-length.

Manager is a member of an affiliated group of corporations (collectively with any partnership or disregarded entities owned by such corporations, "Manager Group") with a common parent corporation ("Parent"). Parent directly or indirectly owns all of the stock of Manager. In addition to the stock of Manager, Parent owns, directly or indirectly, all of the stock of another domestic corporation ("Brother"). Manager does not directly or indirectly own any of the stock of Brother or Parent (i.e. neither Parent nor Brother are a direct or indirect subsidiary of Manager). Manager keeps its own separate books and records and has its own separate employees and officers from Parent and Brother. Manager may, however, have overlapping officers, employees, and directors with other members of Manager Group.

Parent is organized as a domestic corporation. Parent, directly or through other members of the Manager Group, is engaged in the business of operating and managing Business facilities for itself and for third parties. Parent does not operate or manage any Business facilities for either the Taxpayer or its TRSs.

Parent keeps its own separate books and records and has its own separate employees and officers. Parent may, however, also have overlapping officers, employees, and directors with other members of Manager Group. In addition, neither

Taxpayer nor its TRSs own an interest in Parent or any other member of Manager Group.

Like Parent, Brother is in the business of operating and managing Business facilities for itself and others. Brother, through a subsidiary that is a disregarded entity, currently leases Business facilities from Taxpayer pursuant to lease agreements with market terms. Other than through these leases, Brother does not operate or manage any Business facilities for either Taxpayer or its TRSs. Brother keeps its own separate books and records and has its own employees and officers. Brother may, however, also have overlapping officers, employees, and directors with other members of Manager Group.

Neither Taxpayer nor any of its TRSs has any management contracts with Manager or any member of Manager Group. Historically, Taxpayer has leased its properties directly to third party operators and has not (directly or through a subsidiary) engaged a manager to operate its properties (other than properties for which a foreclosure election under section 856(e) has been made). The economy, however, has had an adverse effect on the operation of Business facilities. The poor performance of these facilities has been especially harsh for lessees of Business facilities. Many of the properties at issue have had a period of financial distress, and a third party operator may not be willing to lease the properties on terms that are acceptable to Taxpayer.

As a result of these adverse economic conditions, Taxpayer proposes to lease the properties, which Taxpayer has represented constitute “qualified health care properties” within the meaning of section 856(e)(6)(D), to one or more TRSs. These TRSs plan to hire Manager to operate and manage these properties. The management agreement between Manager and a TRS for the operation and management of these facilities will reflect market terms, and Manager will be paid a market rate fee for its services.

Brother currently leases multiple properties from Taxpayer. Taxpayer expects to acquire additional properties in the future and would prefer to lease these properties directly to third party operators. The number of potential third party operators is finite and Taxpayer would like to have the ability to lease some of these newly acquired properties to Parent or Brother. Similarly, as certain existing leases of property expire, Taxpayer would like to lease some of these properties to Parent or Brother on terms that may include market rent that is substantially higher than the rent previously received by Taxpayer with respect to such properties.

Taxpayer may make loans to Parent or Brother at market interest rates or sell certain of its real property to Parent or Brother, causing Taxpayer to derive income from Parent or Brother, respectively.

Taxpayer's TRSs could derive income or gains from Manager or other members of the Manager Group. Such income may be comprised of rent, interest or gain from the sale of real property. Such income may also be in the nature of fees or indemnity payments made by Manager to the TRS, such as in connection with a management agreement.

One or more of Taxpayer's TRSs intends to purchase stock or securities of one or more members of Manager Group, including Manager. Another TRS is also negotiating to purchase stock of a corporation unrelated to Manager ("Operator") that operates and manages health care facilities, as defined in section 856(e)(6)(D)(ii), and may provide to other persons rights to a brand name under which such facilities are operated. These investments would not cause the relevant TRS to own, directly or indirectly, securities possessing more than 35 percent of the total voting power or value of the outstanding securities of Manager, any other member of Manager Group, or Operator.

Taxpayer has represented that while Taxpayer's TRSs may purchase up to 35 percent (by vote or value) of the stock or other securities of Manager, Parent, Brother, or Operator, Taxpayer either (i) will not own, directly or indirectly, 10 percent or more (by vote or value) of the stock of any such entity; or (ii) if the acquisition described above causes Taxpayer to acquire, directly or indirectly, 10 percent or more (by vote or value) of the stock of Manager, Parent, Brother, or Operator, any rent received by Taxpayer from such entity will not, pursuant to section 856(d)(2)(B), be treated as "rents from real property" within the meaning of section 856(d) for the year during which Taxpayer owns, directly or indirectly, 10 percent or more (by vote or value) of the stock of such entity.

Law and Analysis:

Section 856(c)(2) provides that at least 95 percent of a REIT's gross income must be derived from, among other sources, rents from real property.

Section 856(c)(3) provides that at least 75 percent of a REIT's gross income must be derived from, among other sources, rents from real property.

Section 856(d)(1) 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 which is leased under, or in connection with, a lease of real property, but only if the rent attributable to such personal property for the taxable

year does not exceed 15 percent of the total rent for the taxable year attributable to both the real and personal property leased under, or in connection with, such lease.

Section 856(d)(2)(B) provides, in part, that the term “rents from real property” does not include any amount received or accrued directly or indirectly from any person if the REIT owns, directly or indirectly: (i) in the case of any person which is a corporation, stock of such person possessing 10 percent or more of the total combined voting power of all classes of stock entitled to vote, or 10 percent or more of the total value of shares of all classes of stock of such person; or (ii) in the case of any person which is not a corporation, an interest of 10 percent or more in the assets or net profits of such person.

Section 856(d)(2)(C) provides that any impermissible tenant service income is excluded from the definition of rents from real property. Section 856(d)(7)(A) 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)(C) provides certain exclusions from impermissible tenant service income. Section 856(d)(7)(C) 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) if received by an organization described in section 511(a)(2).

Section 856(d)(8)(B) provides that amounts paid to a REIT by a TRS shall not be excluded from rents from real property by reason of section 856(d)(2)(B) when a REIT leases a qualified lodging facility or qualified health care facility to a TRS, and the facility or property is operated on behalf of the TRS by a person who is an eligible independent contractor.

Section 856(d)(3) defines an independent contractor as any person who does not own, directly or indirectly, more than 35 percent of the REIT's shares and, if such person is a corporation, not more than 35 percent of the total combined voting power of whose stock (or 35 percent of the total shares of all classes of whose stock) is owned directly or indirectly, by one or more persons owning 35 percent or more of the shares of the REIT.

Section 856(d)(9)(A) provides that the term eligible independent contractor means, with respect to any qualified lodging facility or qualified health care property, any independent contractor if, at the time such contractor enters into a management agreement or similar service contract with the TRS to operate the facility or property, the

contractor (or any related person) is actively engaged in the trade or business of operating qualified lodging facilities or qualified health care properties for any person who is not a related person with respect to the REIT or the TRS.

Section 856(d)(9)(B)(iii) provides that solely for purposes of section 856(d)(8)(B), a person shall not fail to be treated as an independent contractor with respect to any qualified lodging facility or qualified health care property (as so defined) because the REIT receives income from such person with respect to another property that is attributable to a lease of such other property to such person that was in effect as of the later of January 1, 1999, or the earliest date that any TRS of such REIT entered into a management agreement or other similar service contract with such person with respect to such qualified lodging facility or qualified health care property.

Section 856(l) provides that a REIT and a corporation (other than a REIT) may jointly elect to treat such corporation as a TRS. To be eligible for treatment as a TRS, section 856(l)(1) provides that the REIT must directly or indirectly own stock in the corporation, and the REIT and the corporation must jointly elect such treatment.

Section 856(l)(2) provides that any corporation in which a TRS owns directly or indirectly more than 35 percent of the total voting power or value of the outstanding securities shall be treated as a TRS. Section 856(l)(3)(A) provides that a TRS cannot directly or indirectly operate or manage a lodging facility or a health care facility. A “healthcare facility” is defined in section 856(e)(6)(D)(ii) as a hospital, nursing facility, assisted living facility, congregate care facility, qualified continuing care facility (as defined in section 7872(g)(4)), or other licensed facility which extends medical or nursing or ancillary services to patients, and which was operated by a provider of such services that is eligible for participation in the Medicare program under Title XVIII of the Social Security Act with respect to the facility.

Rev. Rul. 75-136, 1975-1 C.B. 195 concerns whether a wholly owned subsidiary of a REIT's corporate investment adviser can serve as an independent contractor to manage the REIT's property, as required under section 856(d)(3). In determining that the subsidiary may qualify as an independent contractor, the ruling states that it is the relationship of the entity or individual (such as an employee or trustee) to the trust itself that precludes the entity from qualifying as an independent contractor for the management of the property. A relationship between the entity or individual and the trustee, or employee, or investment adviser of the REIT would not in itself disqualify the entity, assuming the other requirements for qualification as an independent contractor are met. Accordingly, the ruling holds that the wholly owned subsidiary of the investment adviser is not precluded from qualifying as an independent contractor if it operates as a separate entity with its own separate officers and employees and keeps its own separate books and records that clearly reflect its activities in the management of the property.

In Rev. Rul. 73-194, a REIT entered into a partnership with X corporation to construct and hold apartment buildings for investment. The partnership agreement provided that the partners would engage a management company to manage an apartment building. The management company was employed in an arm's length transaction and was paid a market rate for its services. X corporation was a wholly-owned subsidiary of Y corporation, which owned a substantial percentage of the stock of the management company. In concluding that the income received by the REIT from the partnership will not be disqualified as rents from real property due to the relationship between X, Y, and the management company, the ruling cites the legislative history underlying section 856(d), which states that the restrictions imposed by that section were intended to prevent income from active business operations from being included in a REIT's income. The legislative history indicates that for this requirement to be satisfied, the REIT and the independent contractor must have an arm's-length relationship. See H.R. No. 2020, 86th Cong., 2d Sess.6, 1960-2 C.B. 819, 825.

In Rev. Rul. 76-534, 1976-2 C.B. 215, a REIT's property manager was a wholly-owned subsidiary of the REIT's investment advisor. While the management company was operated as a separate company with separate officers and employees, an employee of the investment advisor served as a director of both the investment advisor and the management company. The revenue ruling concludes that the relationship of the director to both the investment advisor and the management company does not preclude the property manager from qualifying as an independent contractor.

Rev. Rul. 77-23, 1977-2 C.B. 197, involves a situation in which an individual was both a trustee and a salaried employee of a REIT and was also the sole shareholder and a director of a corporation that served as the REIT's property manager. The ruling holds that although the property management company is directly related to the individual that is a trustee and employee of the REIT, the property manager is not precluded from qualifying as an independent contractor. The ruling explains that the proper relationship to be examined to determine independent contractor status is the relationship between the REIT and the property manager, and not the relationship between the property manager and the REIT trustee.

In Rev. Rul. 2003-86, 2003 C.B. 290, a REIT owned all of the stock of a TRS that owned an interest in a partnership. The partnership was an independent contractor under section 856(d). The partnership provided certain noncustomary services to the REIT's tenants. Although the REIT did not directly receive payments from the independent contractor, the REIT indirectly held an equity interest in the independent contractor through its ownership of the TRS. The revenue ruling states that section 856(d)(7)(C)(i) provides an exception for services furnished or rendered through a TRS. Noting that the REIT's only interest in the independent contractor is through the TRS, the ruling states that the services provided by the independent contractor are provided by the TRS to the extent of the TRS's interest in the independent contractor.

Accordingly, the ruling concludes that the REIT will not be treated as providing impermissible tenant services.

In the present case, Taxpayer may provide loans or lease or sell property to Parent or Brother. A TRS of Taxpayer may provide loans or lease or sell property to Manager. A TRS of Taxpayer may also receive fees or indemnity payments made by Manager. In each situation, the income received by Taxpayer or its TRS is not derived from or dependent upon its relationship with the company operating or managing any of the Business facilities. All of the agreements entered into by Taxpayer or its TRSs for the management or operation of the Business facilities are represented to be arm's length and reflecting market terms.

Additionally, while Taxpayer may enter into new leases with Parent or Brother with respect to certain properties currently leased to Parent or Brother, these leases are not with Manager, who acts as an eligible independent contractor with respect to Business facilities owned by or leased to Taxpayer's TRSs. Thus, these leases will not cause Manager to fail to qualify as an eligible independent contractor pursuant to section 856(d)(9)(B)(iii).

Accordingly, based on the information received and representations made, we conclude that:

1) Manager will not fail to qualify as an eligible independent contractor solely because Taxpayer derives income from Parent or Brother, including a subsidiary of Parent or Brother that is organized as a partnership for federal income tax purposes.

2) Manager will not fail to qualify as an eligible independent contractor solely because a TRS derives income from Manager.

3) A TRS's purchase of stock or other securities of Parent, Brother, Manager or any of their direct or indirect subsidiaries or of Operator will not cause the TRS to fail to qualify as a "taxable REIT subsidiary" within the meaning of section 856(l) or cause Parent, Brother, Manager or any of their direct or indirect subsidiaries or Operator to fail to qualify as an eligible independent contractor within the meaning of section 856(d)(9), provided TRS does not directly or indirectly own more than 35 percent (by vote or value) of the securities of any such corporation.

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 Internal Revenue Code. Specifically, we do not rule whether Taxpayer otherwise qualifies as a REIT under part II of subchapter M of Chapter 1. Also, no opinion is expressed concerning the treatment of payments between Taxpayer's TRSs and Taxpayer for purposes of section 857(b)(7).

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) provides that this ruling may not be used or cited as precedent.

Sincerely,

Alice M. Bennett

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Branch Chief, Branch 3
Office of Associate Chief Counsel
(Financial Institutions & Products)