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Date:
April 24, 2014

Legend:

Taxpayer =

Date 1 =

Year 1 =

Tax Consultant 1 =

Tax Consultant 2 =

Year 2 =

Dear :

This is in reply to a ruling request dated December 5, 2013, and subsequent correspondence, submitted on behalf of Taxpayer. Taxpayer requests a ruling that its election to be treated as a real estate investment trust (REIT), which was made on a Form 1120-REIT that was inadvertently filed for Year 1, be treated as never having been made, and that the filing of an amended Form 1120 for Year 1 be accepted in its place.

FACTS

Taxpayer was incorporated on Date 1. Taxpayer was formed to invest in interests in real estate, and anticipated making a REIT election when it met the

qualifications allowing it to do so. Tax Consultant 1 informed Taxpayer's CEO that taxpayer should file as a C corporation for Year 1, and that a REIT election should not be made for that year. Tax Consultant 2 was subsequently hired to prepare Taxpayer's Year 1 tax return, and the agreement between Taxpayer and Consultant 2 provided that Consultant 2 would prepare a Form 1120, U.S. Corporation Tax Return, for Taxpayer for Year 1.

Despite Taxpayer's intent to file a Form 1120 for Year 1, Consultant 2 prepared a Form 1120-REIT, U.S. Income Tax Return for Real Estate Investment Trusts, for that year. Taxpayer represents that it executed and filed that return, not realizing it had made a REIT election with the filing of the return. Taxpayer represents that upon becoming aware that an inadvertent REIT election had been made, it filed an amended Form 1120-X as a C corporation for Year 1 and filed a Form 1120 for Year 2, since Taxpayer was not organized to qualify as a REIT for Year 2 either.

Taxpayer represents that it is not seeking to alter a return position. Taxpayer further represents that, while it intended to elect to be a REIT once it was eligible to do so, it knew that it would not qualify as a REIT in Year 1 and Year 2 and, therefore, did not intend to make a REIT election in Year 1.

LAW AND ANALYSIS

Section 856(c)(1) of the Code provides that a corporation, trust or association shall not be considered a REIT for any taxable year unless it files with its return for the taxable year an election to be a REIT or has made such election for a previous taxable year.

Section 856(g)(1)provides that an election under section 856(c)(1) made by a corporation shall terminate if the corporation is not a real estate investment trust to which the provisions of section 856 et. seq. apply for the taxable year with respect to which the election is made, or for any succeeding taxable year. Such termination shall be effective for the taxable year for which the corporation is not a real estate investment trust to which the provisions of section 856 et. seq. apply, and for all succeeding taxable years.

Section 856(g)(2) provides that an election under section 856(c)(1) made by a corporation may be revoked by it for any taxable year after the first taxable year for which the election is effective. Such revocation shall be effective for the taxable year in which made and for all succeeding taxable years.

Section 856(g)(3) provides, in general, that if a corporation has made a REIT election and such election has been terminated or revoked, such corporation or any successor corporation, shall not be eligible to make an election under section 856(c)(1)

for any taxable year prior to the fifth taxable year which begins after the first taxable year for which such termination or revocation is effective.

In Rev. Rul. 83-74, 1983-1 C.B. 112, a homeowners association sought permission in 1980 to revoke an election made for its 1979 tax year to be taxed as a tax-exempt organization under section 528. It based the request upon an inaccurate audit performed by a professional tax advisor which understated the interest income of the association (nonexempt income under section 528), and inadequate tax advice provided by the advisor, which denied the association the use of a net operating loss carryover that could have been used if the association had filed as a corporation instead of electing to be taxed under section 528. In holding that under the facts and circumstances of the revenue ruling a revocation of the election would be permissible, the revenue ruling analogizes to situations in which taxpayers fail to make a particular election because of inadequate or incorrect tax advice provided by an attorney or accountant and subsequently seek extensions of time under section 1.9100-1 of the Income Tax Regulations in which to make the election.

Under section 301.9100-1 of the regulations, the Commissioner has discretion, upon good cause shown by the taxpayer, to grant a reasonable extension of time fixed by the regulations for making an election, provided certain conditions are met. Section 301.9100-3 provides that requests for extensions of time for regulatory elections will be granted when the taxpayer provides evidence (including affidavits described in the regulations) to establish to the satisfaction of the Commissioner that the taxpayer acted reasonably and in good faith and granting relief will not prejudice the interest of the government.

Section 301.9100-3(b)(1) states that a taxpayer will be deemed to have acted reasonably and in good faith if the taxpayer—

(i) requests relief before the failure to make the regulatory election is discovered by the Service;

(ii) failed to make the election because of intervening events beyond the taxpayer's control;

(iii) failed to make the election because, after exercising due diligence, the taxpayer was unaware of the necessity for the election;

(iv) reasonably relied on the written advice of the Service; or

(v) reasonably relied on a qualified tax professional, and the tax professional failed to make, or advise the taxpayer to make, the election.

Under section 301.9100-3(b)(3), a taxpayer will not be considered to have acted reasonably and in good faith if the taxpayer—

(i) seeks to alter a return position for which an accuracy-related penalty has been or could be imposed under section 6662 at the time the taxpayer requests relief (taking into account any qualified amended return filed within the meaning of section 1.6664-2(c)(3)) and the new position requires a regulatory election for which relief is requested;

(ii) was informed in all material respects of the required election and related tax consequences, but chose not to file the election; or

(iii) uses hindsight in requesting relief. If specific facts have changed since the original deadline that make the election advantageous to a taxpayer, the Service will not ordinarily grant relief.

The Taxpayer's situation in this case is similar to Rev. Rul. 83-74, and analogous to situations concerning taxpayers who have not made a particular election provided in the regulations because of inadequate or incorrect advice from knowledgeable tax professionals and are subsequently seeking extensions of time under section 301. 9100-1 of the regulations.

CONCLUSION

Based upon the facts and representations submitted, consent is granted for Taxpayer to be treated as if it had not made the REIT election on the Form 1120-REIT filed for Year 1 and the filing of the amended Form 1120 for Year 1 is effective in place of the Form 1120-REIT originally filed. The foregoing shall not be treated as a termination or revocation for purposes of section 856(g).

This ruling's application is limited to the facts, representations, Code sections, and regulations cited herein. Except as specifically provided otherwise, no opinion is expressed on the federal income tax consequences of the transaction described above.

This ruling is directed only to the taxpayer that requested it. Section 6110(k)(3) of the Code provides that it may not be used or cited as precedent.

In accordance with the terms of a power of attorney on file in this office, a copy of this letter is being sent to your authorized representative.

Sincerely,

Jonathan D. Silver
Jonathan D. Silver
Assistant to the Branch Chief, Branch 2
Office of Associate Chief Counsel
(Financial Institutions & Products)