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Department of the Treasury
Washington, DC 20224

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Date:
May 15, 2015

Legend:

Taxpayer =

OP =

LP =

TRS =

LLC =

Company =

Manager =

State =

a =

b =

c =

d =

e =

Dear :

This responds to a letter dated August 25, 2014, and subsequent correspondence, submitted on behalf of Taxpayer. Taxpayer requests rulings with respect to the qualification of its taxable REIT subsidiary (“TRS”) under section 856(l) of the Internal Revenue Code ("Code") where the TRS will own an interest in an LLC that is the lessee of real property that will be used as a lodging facility and operated and managed by an “independent contractor” within the meaning of section 856(d)(3) with respect to Taxpayer.

FACTS

Taxpayer is a domestic corporation that has elected under section 856(c) to be treated as a real estate investment trust (“REIT”) for federal income tax purposes, is the managing general partner of OP, and owns approximately a percent of the outstanding common units of OP. OP, through separate limited liability companies, partnerships, and REITs, owns and operates numerous real properties.

TRS is a State corporation and a “taxable REIT subsidiary” (“TRS”) of Taxpayer. OP owns all of the interests in TRS. TRS has made a loan to LLC; the loan is outstanding and guaranteed by Company. Company is a State corporation and the parent of an affiliated group of corporations that provide “co-working” collaborative office rental space to entrepreneurs, startups, and small businesses. TRS proposes to make an equity investment to obtain a b percent interest in LLC. TRS will not be a managing member of LLC.

LLC is a limited liability company that will be classified as a partnership for federal tax purposes after TRS’s investment. Company currently owns c percent of LLC and, after TRS’s proposed equity investment, will own a b percent interest and be the managing member.

LLC has leased real property from LP, an entity wholly owned by OP that is disregarded as an entity separate from OP for federal income tax purposes. The real property is currently being used as an office building, and LLC will convert the property into an establishment that may fall within the definition of a “lodging facility” under section 856(d)(9)(D)(ii) (“Facility”).

Manager, a wholly owned subsidiary of Company, will manage and operate Facility pursuant to a management agreement between LLC and Manager. Manager will employ the persons providing services at Facility and will receive an arm’s-length fee from LLC for managing Facility.

Taxpayer represents that Manager is an “independent contractor” within the meaning of section 856(d)(3) with respect to Taxpayer. Taxpayer does not derive or receive any income from Manager. Taxpayer's common shares are publicly traded on

the New York Stock Exchange. Section 16(a) of the Securities Exchange Act of 1934 requires Taxpayer's trustees, executive officers, and persons who own more than ten percent of a registered class of securities to annually file reports of ownership with the SEC and furnish copies of such reports to Taxpayer. Based on such reports, Taxpayer represents that there are only d shareholders of Taxpayer that own ten percent or more of the Taxpayer's shares directly, indirectly, or constructively, and that such shareholders own approximately e percent of Taxpayer's shares.

Manager will have the sole right to operate and manage Facility. TRS will not have any ability to control, nor will it participate in, the operation or management of Facility. Moreover, TRS will not have any authority over the persons providing services at Facility. Under the proposed management agreement, Manager will have exclusive responsibility for the selection, hiring, employment, retention, training, control, determination of benefits and compensation, discharge, and other terms of employment of all the individuals providing services at Facility.

Taxpayer makes the following additional representations:

1. Company does not directly or indirectly own shares of Taxpayer.

2. Manager does not directly or indirectly own shares of Taxpayer.

3. Persons owning directly, indirectly, or constructively ten percent or more of Company do not as a group own 35 percent or more of Taxpayer's shares directly, indirectly, or constructively.

4. In applying the 35 percent limitation in section 856(d)(3)(B), the last sentence (the “flush language”) at the end thereof has been taken into account, and the stock ownership of all persons owning 5 percent or more of the Taxpayer’s shares has been taken into account.

5. TRS does not have any employees, and will not have any employees, who perform any services for, or relating to, the Facility.

LAW AND ANALYSIS

Section 318 generally provides that for the purposes of certain provisions of the Code, the stock owned by a taxpayer includes stock constructively owned by such taxpayer (the "attribution rules").

Section 318(a)(2)(A) provides that stock owned, directly or indirectly, by or for a partnership is considered as owned proportionately by its partners.

Section 318(a)(2)(C) provides that if 50 percent or more in value of the stock in a corporation is owned, directly or indirectly, by or for any person, such person is

considered as owning the stock owned, directly or indirectly, by or for such corporation, in that proportion which the value of the stock which such person so owns bears to the value of all the stock in such corporation.

Section 318(a)(3)(A) provides that stock owned, directly or indirectly, by or for a partner is considered as owned by the partnership.

Section 318(a)(3)(C) provides that if 50 percent or more in value of the stock in a corporation is owned, directly or indirectly, by or for any person, such corporation is considered as owning the stock owned, directly or indirectly, by or for such person.

Under section 856(d)(5), the section 318 attribution rules are applicable in determining the ownership of stock, assets, or net profits for purposes of section 856(d). However, section 856(d)(5) modifies the operation of section 318 for purposes of section 856(d) in two significant ways. First, the "50 percent" threshold for the attribution of corporate stock ownership in sections 318(a)(2)(C) and 318(a)(3)(C) is lowered to ten percent. Second, in the case of a partnership, attribution via section 318(a)(3)(A) applies only to partners who own 25 percent or more of the capital interest or the profits interest in the partnership.

Section 856(c)(4)(B)(iii) provides that a corporation shall not be considered a REIT for any taxable year unless at the close of each quarter of the taxable year, except with respect to a TRS, (i) not more than 5 percent of the value of its total assets is represented by securities of any one issuer, (ii) the trust does not hold securities possessing more than 10 percent of the total voting power of the outstanding securities of any one issuer, and (iii) the trust does not hold securities having a value of more than 10 percent of the total value of the outstanding securities of any one issuer.

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. The flush language of section 856(d)(3) provides further that in the event that any class of stock of either the real estate investment trust or such person is regularly traded on an established securities market, only persons who own, directly or indirectly, more than 5 percent of such class of stock shall be taken into account as owning any of the stock of such class for purposes of applying the 35 percent limitation set forth in subparagraph (B) (but all of the outstanding stock of such class shall be considered outstanding in order to compute the denominator for purpose of determining the applicable percentage of ownership). Thus, section 856(d)(3) imposes two tests that Manager must pass in order to qualify as an independent contractor: (A) Manager does not own directly, indirectly, or constructively, 35 percent or more of Taxpayer's shares, and (B) a person or group of persons owning directly, indirectly, or

constructively 35 percent or more of Manager do not also own 35 percent or more of Taxpayer's shares.

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 or through a TRS of the REIT shall not be treated as furnished, rendered, or provided by the REIT.

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 healthcare facility. Section 856(l)(4)(A) gives “lodging facility” the same meaning given to the term in section 856(d)(9)(D)(ii). A “lodging facility” is defined in section 856(d)(9)(D)(ii) as a hotel, motel, or other establishment more than one-half of the dwelling units of which are used on a transient basis. Section 856(d)(9)(D)(iii) provides that a “lodging facility” also includes customary amenities and facilities operated as part of, or associated with, the lodging facility so long as such amenities and facilities are customary for other properties of a comparable size and class owned by other owners unrelated to such REIT.

Under the proposed structure, Facility will be managed and operated by Manager, an “independent contractor” within the meaning of section 856(d)(3) with respect to Taxpayer. Manager will manage and operate Facility, and will have exclusive authority over the persons providing services at Facility. TRS will not participate in the operation or management of Facility and will have no control over the employment of the individuals providing services. TRS has no employees. Accordingly, TRS will not be considered to be directly or indirectly operating or managing a lodging facility in violation of section 856(l)(3)(A).

1. Manager Does Not Own 35 Percent or More of Taxpayer's Shares

a. Manager does not actually own 35 percent or more of Taxpayer's shares because Manager does not directly or indirectly own any of Taxpayer's shares.

b. Manager does not constructively own any of Taxpayer's shares. In order for Manager to constructively own Taxpayer's shares, such shares would need to be attributed to Manager under section 318(a)(3)(C)

from a person owning stock in Manager ("downward attribution") or under sections 318(a)(2)(A) or 318(a)(2)(C) from an entity in whom Manager owns an interest ("upward attribution").

Manager does not constructively own Taxpayer's shares by downward attribution because Company, Manager's parent, does not own any shares of Taxpayer, and, as discussed below, no shareholders of Company own 35 percent or more of Taxpayer's shares. Additionally, Manager does not constructively own any shares of Taxpayer by upward attribution because it does not own any interests in other entities. Thus, Manager does not constructively own Taxpayer's shares under section 318(a)(3)(C). Accordingly, Manager does not fail to qualify as an independent contractor by reason of section 856(d)(3)(A).

2. A Person or Group of Persons Owning 35 Percent or More of Manager Does Not Also Own 35 Percent or More of Taxpayer's Shares

No person or persons owning 35 percent or more of Manager actually own 35 percent or more of Taxpayer's shares. Therefore, in order for Manager to fail to qualify as an independent contractor under section 856(d)(3)(B), either (1) the shareholders of Company would have to own 35 percent or more of Taxpayer's shares actually or constructively, and those shares would have to be attributed down to Company, or (2) 35 percent or greater ownership of the Taxpayer's shares would have to be attributed down to LLC.

a. Company Does Not Constructively Own 35 Percent of Taxpayer's Shares

Section 856(d)(5) requires stock ownership of at least ten percent before a shareholder or group of shareholders' stock ownership can be attributed down to a corporation. Thus, any ownership of shares of Taxpayer by Company shareholders owning individually or collectively less than ten percent of Company cannot be attributed down to Company; only ten percent or more shareholders of Company can affect the determination under section 856(d)(3)(B).

Because persons owning ten percent or more of Company do not as a group own 35 percent or more of Taxpayer's shares either actually or constructively, an amount of shares of Taxpayer that would disqualify Manager as an independent contractor under section 856(d)(3)(B) cannot be attributed down to Company.

b. Thirty-Five Percent of Taxpayer's Shares Cannot Be Attributed Down to Company

Manager would not qualify as an “independent contractor” if any other person or persons were to constructively own 35 percent or more of both Manager and Taxpayer. In this case, the only potential person for such constructive ownership would be LLC.

Company's c percent ownership of Manager is attributed down to LLC under section 318(a)(3)(A) because Company owns b percent of LLC. Therefore, if 35 percent or more of Taxpayer's shares can be attributed down to LLC, LLC would constructively own more than 35 percent of both Manager and Taxpayer. However, only d shareholders of Taxpayer own more than ten percent of Taxpayer's shares, and those shareholders own only approximately e percent of Taxpayer's shares; no other shares of Taxpayer can be attributed down to LLC. Accordingly, it is not possible for LLC to constructively own 35 percent or more of Taxpayer's shares. Therefore, there is no person or entity that constructively owns 35 percent or more of both Manager and Taxpayer.

CONCLUSIONS

Accordingly, based on the facts submitted and representations made, we conclude that under the circumstances described above in which Taxpayer represents that Manager will qualify as an "independent contractor" within the meaning of section 856(d)(3) with respect to Taxpayer, TRS will not be considered to be directly or indirectly operating or managing a lodging facility in violation of section 856(l)(3)(A), even assuming that Facility qualifies as a "lodging facility" within the meaning of section 856(d)(9). Therefore, TRS will not fail to qualify as a TRS under section 856(l) of Taxpayer by reason of TRS's acquisition of a b percent ownership interest in LLC.

Except as expressly provided herein, no opinion is expressed or implied concerning the tax consequences of any aspect of any transaction or item discussed or referenced in this letter. In particular, no opinion is expressed as to whether Taxpayer otherwise qualifies as a REIT or whether TRS otherwise qualifies as a TRS of Taxpayer under part II of subchapter M of Chapter 1 of the Code. Furthermore, no opinion is expressed as to whether the Facility qualifies as a "lodging facility" within the meaning of section 856(d)(9), and no opinion is expressed as to whether, under section 856(d)(2), amounts received by Taxpayer from LLC are excluded from "rents from real property" for purposes of sections 856(c)(2) and (3).

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.

The ruling contained in this letter is based upon information and representations submitted by the taxpayer and accompanied by a penalty of perjury statement executed by an appropriate party. While this office has not verified any of the material submitted in support of the request for a ruling, it is subject to verification on examination.

In accordance with the Power of Attorney on file with this office, copies of this letter are being sent to your authorized representatives.

Sincerely,

_____

Robert A. Martin
Senior Technician Reviewer, Branch 1
Office of Associate Chief Counsel
(Financial Institutions & Products)

Enclosures (2):
A copy of this letter
A copy for section 6110 purposes