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Person To Contact: _____, ID No.

Telephone Number:

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Date:
March 01, 2016

Legend

Bonds =

Manager =

Issuer =

Hotel =

a =

b =

c =

d =

e% =

Dear _____ :

This letter is in response to your request for a ruling that the management contract described herein will not result in private business use of the Hotel under Treas. Reg. §1.141-3(b)(4)(i).

Facts and Representations

The Issuer makes the following representations. The proceeds of the Bonds will be used to provide permanent financing for the Hotel. Pursuant to an executed contract between the Issuer and the Manager (the Management Contract), the Manager will manage the operations of the Hotel for a period of a years.

In compensation for its services, the Manager will receive a base fee equal to b percent of the gross revenue of the Hotel in each year. In addition, the Manager will receive an incentive fee equal to c percent of the gross revenue of the Hotel in any year in which both the RevPAR Test and the Margin Test are met. The RevPAR Test is met in any year in which the revenue per available room for the Hotel exceeds d percent of the average revenue per available room for a pre-determined group of hotels that are comparable to the Hotel. The Margin Test is met in any year in which the adjusted revenue margin for the Hotel meets or exceeds e%. The adjusted revenue margin is the percentage derived by dividing the Hotel's adjusted revenue by its gross revenue. The Hotel's adjusted revenue is a variant of net profits in which the Hotel's gross revenue is reduced only by major expenses under the control of the Manager.

None of the voting power of the governing body of the Issuer is vested in the Manager or its directors, officers, shareholders, or employees. There are no overlapping board members of the Issuer and the Manager, and the Issuer and the Manager are not related parties as defined in Treas. Reg. §1.150-1(b).

Law

Under §103(a) of the Internal Revenue Code (Code), gross income does not include interest on any state or local bond. Section 103(b) provides, however, that §103(a) shall not apply to any private activity bond which is not a qualified bond (within the meaning of §141).

Section 141(a) provides in part that the term "private activity bond" means any bond issued as part of an issue which meets the private business use test of §141(b)(1) and the private security or payment test of §141(b)(2). Section 141(b)(1) provides, in general, that an issue meets the private business use test if more than 10 percent of the proceeds of the issue are to be used for any private business use.

Section 141(b)(6) provides that, for purposes of §141(b), the term "private business use" means use (directly or indirectly) in a trade or business carried on by any person other than a governmental unit. For this purpose, any activity carried on by a person other than a natural person is treated as a trade or business.

Treas. Reg. §1.141-3(a)(1) provides that the private business use test relates to the use of the proceeds of an issue. The 10 percent private business use test of §141(b)(1) is met if more than 10 percent of the proceeds of an issue is used in a trade or business of

a nongovernmental person. For this purpose, the use of financed property is treated as the direct use of proceeds. Any activity carried on by a person other than a natural person is treated as a trade or business.

Treas. Reg. §1.141-3(b)(1) provides that both actual and beneficial use by a nongovernmental person may be treated as private business use. In most cases, the private business use test is met only if a nongovernmental person has special legal entitlements to use the financed property under an arrangement with the issuer. In general, a nongovernmental person is treated as a private business user of proceeds and financed property as a result of ownership; actual or beneficial use of property pursuant to a lease, or a management or incentive payment contract; or certain other arrangements such as a take or pay or other output-type contract.

Treas. Reg. §1.141-3(b)(4)(ii) defines a management contract as a management, service, or incentive payment contract between a governmental person and a service provider under which the service provider provides services involving all, a portion of, or any function of, a facility. For example, a contract for the provision of management services for an entire hospital, a contract for management services for a specific department of a hospital, and an incentive payment contract for physician services to patients of a hospital are each treated as a management contract.

Treas. Reg. §1.141-3(b)(4)(i) provides that, except as provided in Treas. Reg. §1.141-3(d), a management contract with respect to financed property may result in private business use of that property, based on all of the facts and circumstances. A management contract generally results in private business use of that property if the contract provides for compensation for services rendered with compensation based, in whole or in part, on a share of net profits from the operation of the facility.

Revenue Procedure 97-13, as modified by Revenue Procedure 2001-39, 2001-2 C.B. 38, and as amplified by Notice 2014-67, 2014-46 I.R.B. 822, (Rev. Proc. 97-13) sets forth in §5 conditions under which a management contract does not result in private business use under §141(b). Under §5.02(1), the management contract must provide for reasonable compensation for services rendered with no compensation based, in whole or in part, on a share of net profits from the operation of the facility. Under §5.02(2), for purposes of Treas. Reg. §1.141-3(b)(4)(i) and Rev. Proc. 97-13, compensation that is based on (a) a percentage of gross revenues (or adjusted gross revenues) of a facility or a percentage of expenses from a facility, but not both, (b) a capitation fee, or (c) a per-unit fee is generally not considered to be based on a share of net profits. Under §5.02(3), for purposes of Treas. Reg. §1.141-3(b)(4)(i) and Rev. Proc. 97-13, a productivity reward equal to a stated dollar amount based on increases or decreases in gross revenues (or adjusted gross revenues), or reductions in total expenses (but not both increases in gross revenues (or adjusted gross revenues) and reductions in total expenses) in any annual period during the term of the contract, generally does not cause the compensation to be based on a share of net profits.

Section 5.03 of Rev. Proc. 97-13 sets forth seven permissible arrangements that satisfy the requirements of §5. In one such permissible arrangement, found in §5.03(7) (added by Notice 2014-67), all of the compensation for services is based on a stated amount; periodic fixed fee; a capitation fee; a per-unit fee; or a combination of the preceding. The compensation for services also may include a percentage of gross revenues, adjusted gross revenues, or expenses of the facility (but not both revenues and expenses). The term of the contract, including all renewal options, does not exceed five years. Such contract need not be terminable by the qualified user prior to the end of the term. For purposes of §5.03(7), a tiered productivity award as described in §5.02(3) will be treated as a stated amount or a periodic fixed fee, as appropriate

Section 5.04(1) of Rev. Proc. 97-13 provides in general that a service provider must not have any role or relationship with the qualified user that substantially limits the qualified user's ability to exercise its rights, including cancellation rights, based on all the facts and circumstances. Under §5.04(2), the qualified user's rights are not substantially limited if the following requirements are satisfied: (1) not more than 20 percent of the voting power of the governing body of the qualified user in the aggregate is vested in the service provider and its directors, officers, shareholders, and employees; (2) overlapping board members do not include the chief executive officers of the service provider or its governing body or the qualified user or its governing body; and (3) the qualified user and the service provider under the contract are not related parties, as defined in Treas. Reg. §1.150-1(b).

Analysis

The Management Contract does not meet the requirements of §5 of Rev. Proc. 97-13. Therefore, under Treas. Reg. §1.141-3(b)(4)(i), whether it will result in private business use of the Hotel depends on all of the facts and circumstances. In determining whether the facts and circumstances relating to a management contract indicate private business use, the factors set forth in §5 of Rev. Proc. 97-13 are useful reference points. For the reasons described below, we conclude that the Management Contract will not result in private business use of the Hotel.

The amount of the Manager's base fee under the Management Contract is a percentage of the gross revenue of the Hotel. Although a management contract generally results in private business use of that property if the contract provides for compensation based on a share of net profits from the operation of the facility, compensation based on a percentage of gross revenue of a facility or a percentage of expenses from a facility (but not both) is generally not considered to be based on a share of net profits. See §5.02(2) of Rev. Proc. 97-13. Because the base fee is based on a percentage of gross revenue and takes no expenses into account, it is not based on a share of net profits.

The amount of the Manager's incentive fee under the Management Contract is similarly a percentage of the gross revenue of the Hotel. The incentive fee differs from the base fee in that payment is contingent on satisfaction of two metrics, one of which is a variant

of net profits. Given that, under both Treas. Reg. §1.141-3(b)(4)(i) and §5.02(1) of Rev. Proc. 97-13, compensation may not be based, in whole or in part, on a share of net profits from the operation of the financed facility, we must determine whether the incentive fee, receipt of which is partly contingent on a variant of net profits, is based on a share of net profits within the meaning of those provisions. In making this determination, we look to the facts and circumstances to see if the dollar amount to be paid represents a share of net profits. Here, the amount paid as incentive fee is a predetermined, fixed percentage of gross revenue. Despite being partly triggered by a variant of net profits (that is, the Margin Test), the incentive fee is not structured in such a way that its amount rises in proportion to increases in the Hotel's net profits or falls in proportion to decreases in the Hotel's net profits. The amount of the incentive fee is further distanced from net profits by the fact that the RevPAR Test, the other of the two metrics triggering payment of the incentive fee, is based solely on revenues. Thus, in years when the Hotel fails to satisfy the RevPAR Test because of insufficient revenues, the amount of the incentive fee will be zero dollars even if the Hotel satisfies the Margin Test with strong net profits. Based on these facts and circumstances, we conclude that the incentive fee is not based on a share of net profits and should be treated as a share of gross revenue.

The arrangement under the Management Contract closely resembles that of §5.03(7) of Rev. Proc. 97-13. As described above, the base fee and incentive fee are both based on a percentage of gross revenue. The only feature of the Management Contract that deviates from the arrangement in §5.03(7) is its term, which exceeds five years. We nevertheless conclude that the term is reasonable based on the facts and circumstances of this case.

None of the voting power of the governing body of the Issuer is vested in the Manager or its directors, officers, shareholders, or employees. There are no overlapping board members of the Issuer and the Manager, and the Issuer and the Manager are not related parties as defined in Treas. Reg. §1.150-1(b). Therefore, we conclude that the Manager has no role or relationship with the Issuer that substantially limits the Issuer's ability to exercise its rights under the Management Contract. See §5.04 of Rev. Proc. 97-13.

With the exception of its term, the Management Contract satisfies the requirements of §5 of Rev. Proc. 97-13. As stated above, we have determined that the term of the Management Contract is nevertheless reasonable in this case. We conclude, therefore, that the Management Contract will not result in private business use of the Hotel.

Conclusions

We conclude that the Management Contract will not result in private business use of the Hotel under Treas. Reg. §1.141-3(b)(4)(i).

The rulings contained in this letter are 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 rulings, it is subject to verification on examination.

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.

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

In accordance with the Power of Attorney on file with this office, a copy of this letter is being sent to your authorized representative.

Sincerely,
Associate Chief Counsel (Financial Institutions and Products)

/S/

By: _____
Timothy L. Jones
Senior Counsel
(Financial Institutions & Products)