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Legend:

- Taxpayer =
- PropCo =
- Domestic TRS =
- Partner =
- OpCo =
- Country =
- Foreign TRS =
- Manager A =
- Manager B =
- State =
- Date 1 =
- Date 2 =
- Date 3 =

Facility A =

a =

b =

c =

d =

e =

f =

g =

h =

i =

j =

k =

Dear :

This is in reply to a letter dated September 28, 2017, and supplemental correspondence requesting rulings on behalf of Taxpayer. Taxpayer has requested rulings regarding i) the definition of “qualified health care property” under section 856(e)(6)(D) of the Internal Revenue Code (“Code”), for purposes of the related-party rent exception of section 856(d)(8)(B); ii) whether the rents received by Taxpayer qualify as rents from real property for purposes of section 856(d); iii) whether, pursuant to section 856(c)(5)(J), certain income inclusions under Subpart F of the Code are qualifying income under section 856(c)(2); and iv) whether certain foreign currency gain is excluded from income for purposes of section 856(c)(2).

Facts:

Taxpayer was incorporated under the laws of State on Date 1. Taxpayer intends to qualify and elect to be taxed as a real estate investment trust (“REIT”) under sections 856 through 859 of the Code beginning with its taxable year ended Date 2.

The Facilities

Taxpayer's primary business is the acquisition, ownership, and leasing of independent living ("IL") and assisted living ("AL") facilities. Taxpayer recently acquired fee ownership of a portfolio of a IL facilities (b in the U.S. and c in Country) and a leasehold interest in d IL facilities (e in the U.S. and f in Country) that are currently under construction or in the leasing stage, subject to Taxpayer's option to purchase these facilities. Taxpayer also acquired an AL facility ("AL Facility") located in Country. The IL facilities, with the exception of Facility A, ("IL Facilities") and the AL Facility are intended to qualify as qualified health care properties within the meaning of section 856(e)(6)(D).

Domestic Holding Structure

Taxpayer holds its U.S. facilities through PropCo, a State limited partnership that is treated as a partnership for U.S. federal income tax purposes. PropCo, in turn, holds its interests in the U.S. facilities through subsidiary entities ("PropCo Subs") that are disregarded for U.S. federal income tax purposes. Taxpayer formed Domestic TRS, a State limited liability company that will jointly elect with Taxpayer to be treated as a taxable REIT subsidiary ("TRS") effective Date 3. Domestic TRS and Partner, an entity unrelated to Taxpayer or Domestic TRS within the meaning of section 856(d)(2)(B) formed OpCo, a State limited liability company that is taxed as a partnership for U.S. federal income tax purposes. Pursuant to the structure permitted by the Housing and Economic Recovery Act of 2008, Pub. L. No. 110-289, § 3061, 122 Stat. 2654, 2901-02 (2008) ("RIDEA"),¹ each PropCo Sub that holds a U.S. IL Facility leases the IL Facility to a subsidiary of OpCo (each, an "OpCo Sub") that is disregarded as a separate entity from OpCo for U.S. federal income tax purposes. Each OpCo Sub has entered into a management contract with Manager A to operate its IL Facility. Taxpayer represents that Manager A satisfies the requirements for an independent contractor within the meaning of section 856(d)(3). Taxpayer also represents that Manager A currently operates g third-party owned facilities similar to the IL Facilities and a third-party owned AL facility and that Manager A currently seeks to manage additional facilities owned by unrelated parties.

Foreign Holding Structure

Taxpayer holds each of its foreign IL Facilities and its AL Facility in Country (each a "Foreign IL Facility" or "Foreign AL Facility," and together the "Foreign Facilities") through a separate limited partnership in Country that is treated as a partnership for U.S. federal income tax purposes (each, a "Foreign PropCo"). Each Foreign PropCo is h percent owned by a different Country GP TRS of Taxpayer (each, a "Foreign GP TRS") whose only asset is the h percent ownership in a Foreign PropCo.

¹ Sections 3031-3071 of the Housing and Economic Recovery Act incorporated significant portions of proposed legislation introduced as the REIT Investment Diversification and Empowerment Act of 2007, or "RIDEA". See H.R. 1147 and S. 2002, 100th Cong. (1st Sess. 2007).

Taxpayer holds the balance of each Foreign PropCo through a qualified REIT subsidiary (“QRS”) in Country.

Consistent with the structure permitted by RIDEA, each Foreign PropCo holding a Foreign IL Facility leases its facility to Foreign TRS, a TRS of Taxpayer located in Country. Foreign TRS has entered into a management contract with Manager B, a subsidiary of Manager A, to manage and operate the Foreign IL Facilities. Manager B is a disregarded entity with respect to Manager A for U.S. federal income tax purposes.

Due to Country licensing requirements, the Foreign PropCo holding the Foreign AL Facility has leased the facility to a nominee corporation (“Nominee Corp TRS”), which is wholly owned by Foreign TRS and is also a TRS of Taxpayer. Nominee Corp TRS holds the lease as bare trustee for the benefit of Foreign TRS. Nominee Corp TRS has also entered into a management contract with Manager B to operate the Foreign AL Facility.

IL Facilities

The IL Facilities are unlicensed, senior residential facilities located in various geographic markets throughout the U.S. and Country. There are an average of i units per IL Facility. At the U.S. IL Facilities, the minimum age for entry is j. The Foreign IL Facilities do not have an express age limitation due to Country age-discrimination laws, but are marketed to seniors. The average age of residents at all IL Facilities is approximately k years old. The units are leased on a month-to-month basis for a fixed monthly fee. The monthly fee includes the rental of a unit, cable television, all utilities other than phone service, and access to all services and amenities described below.

The IL Facilities provide congregate dining for three meals per day. Most individual units have a sink and refrigerator but not a full kitchen; however, a few of the units do have a full kitchen. Dining meals are prepared by Manager A employees. Menus are planned with a focus on nutrition, reviewed and approved by a nutritionist, and provide options tailored to meet common dietary restrictions. Fruit and snacks are provided 24 hours a day.

The IL Facilities provide weekly housekeeping and linen service, laundry machines for resident use at no additional cost, and general maintenance service for all units. The IL Facilities have architectural modifications designed for an aging population, including bathroom grips, wide hallways with handrails, and places to stop and rest. Doors to the facilities are locked at night for security.

The IL Facilities provide social and recreational services designed to improve residents’ well-being, social gatherings and outings, and transportation services for shopping and medical appointments. Planned activities may include speakers

regarding wellness and health issues common to seniors. The IL Facilities have common areas, activity rooms, lounges, exercise equipment, and a hairdressing salon.

All IL Facilities are equipped with an emergency call system with pull-cords or call buttons that immediately alert on-call staff. Personal emergency pendants are available at most facilities for an additional charge. In the event of an emergency, on-site staff will call 911, facilitate the entry of the emergency medical team to the resident's location, and contact the resident's family. IL Facilities provide each resident with a "file of life" for important medical records and, if residents want them, Do Not Resuscitate ("DNR") forms to be kept in the unit for emergencies.

Resident managers live at the IL Facilities. At least one staff member is on-call 24 hours a day. Resident managers interact with residents on a daily basis and informally observe resident behavior and well-being, alerting emergency contacts or adult protective services when necessary. Resident managers will work with the resident and the resident's family or adult protective services in the event they believe the resident requires a higher level of care than is available at the IL Facilities. Vaccinations are available at the facilities from a third party provider for an additional fee. Information about third party care providers are provided to residents upon request. Residents unable to come to the dining hall may have meals delivered for up to three days without incurring an additional fee.

A small number of IL Facilities have a small percentage of units that are cottages, which are separate buildings having two to four units, typically occupied by married couples. The cottages are adjacent to the main IL Facilities and have full kitchens. Cottage residents have one meal per day included in their monthly fee and may add other meals for an additional fee. Cottage residents receive the same housekeeping and linen services as other residents and may participate in all facility activities and health and wellness services.

Facility A

Facility A consists of multiple buildings each with townhome-type apartment units. The lease term is typically 12 months. Facility A does not provide housekeeping or linen service. Each apartment unit has a full kitchen and an open layout. Facility A has a club house with a dining room but only provides daily continental breakfast and lunch available for an additional fee, which only a minority of residents choose to purchase. The dining room cannot accommodate all residents at the same time. There is no emergency pull-cord call system within Facility A. Each unit has its own separate exterior entrance and residents are responsible for locking their own units. Facility A provides many of the same amenities and activities that the IL Facilities provide, such as a game room and transportation options. Taxpayer has formed a separate TRS for the management and operation of Facility A.

Foreign Activities

Foreign TRS and Nominee Corp TRS lease the Foreign Facilities from each Foreign PropCo and, in turn, lease the individual units at the Foreign Facilities to residents for a flat fee on a long-term basis—typically month-to-month leases for use of the units and facilities and access to the care and services provided at those Foreign Facilities. Taxpayer represents that the rental income received from residents that is attributable to personal property does not exceed 15 percent of the total rent for the taxable year attributable to both the real and personal property under the leases. Taxpayer further represents that the rental income does not depend upon the income or profits of any person or subtenant. Additionally, Taxpayer represents that all services provided to tenants at the Foreign Facilities are customarily provided to residents at AL facilities or IL facilities, as applicable, in the geographic market in which the Foreign Facilities are respectively located. Taxpayer also represents that Manager B is an independent contractor within the meaning of section 856(d)(3), and that all services at the Foreign Facilities will be provided by Manager B.

Foreign TRS, the Foreign GP TRSs, and Nominee Corp TRS will be controlled foreign corporations (“CFCs”) within the meaning of section 957(a) with respect to which Taxpayer will be a U.S. shareholder within the meaning of section 951(b). Taxpayer expects to report section 951(a)(1)(A) inclusions attributable to one or more CFC's foreign personal holding company income (“FPHCI”) as defined in section 954(c). These inclusions are attributable to rental income, interest, dividends, and gain from the sale of property that gives rise to dividend, interest, or rental income. The section 951(a)(1)(A) inclusions attributable to rental income result from Foreign TRS and Nominee Corp TRS earning rental income from the aforementioned leasing of units to residents at the Foreign Facilities. By virtue of its partnership with each Foreign PropCo, each Foreign GP TRS will also earn a share of section 951(a)(1)(A) inclusions attributable to rent paid by Foreign TRS.

In addition, with regard to foreign TRSs that are CFCs, Taxpayer may be required by section 951(a)(1)(B) to include in its gross income amounts that arise in connection with the pledge of a foreign TRS's assets to secure a debt incurred by Taxpayer (or by PropCo or a PropCo Sub) to finance the acquisition of real estate assets that produce qualifying income under section 856(c)(2) (“Section 956 Inclusions”). Taxpayer also expects to recognize foreign currency gains with respect to distributions of previously taxed earnings and profits as described in section 986(c)(1) attributable to the section 951(a)(1)(A) inclusions.

Law & Analysis:The Facilities

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 leased under, or in connection with, a lease of real property, but only if the rent attributable to the 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, the lease.

Section 1.856-4(b)(1) provides that services furnished to tenants of a particular building will be considered customary if, in the geographic market in which the building is located, tenants in buildings that are of a similar class are customarily provided with the service.

Section 856(d)(2)(A) provides that rents from real property do not include any amount received or accrued, directly or indirectly, with respect to any real or personal property, if the determination of such amount depends in whole or in part on the income or profits derived by any person from such property.

Section 856(d)(2)(C) excludes impermissible tenant service income from the definition of rents from real property. Section 856(d)(7)(A) defines impermissible tenant service income to include, with respect to any real or personal property, any amount received or accrued directly or indirectly by a REIT for services furnished or rendered by the REIT to tenants of the property, or for managing or operating such property.

Section 856(d)(7)(C)(i) excludes from the definition of impermissible tenant service income amounts received for services furnished or rendered, or management or operating provided, through an independent contractor from whom the REIT does not derive or receive any income or through a TRS of the REIT.

Section 856(d)(3) defines an independent contractor as any person who does not own directly or indirectly, more than 35 percent of the shares or certificates of beneficial interest in the REIT, and if such person is a corporation, not more than 35 percent of the total combined voting power of whose stock, or if such person is not a corporation, not

more than 35 percent of the interest in whose assets or net profits is owned, directly or indirectly, by one or more persons owning 35 percent or more of the shares or certificates of beneficial interest in the trust.

Section 856(d)(2)(B) provides that rents from real property do not include amounts received directly or indirectly from a corporation if the REIT owns 10 percent or more of the total combined voting power or 10 percent or more of the total value of the shares of the corporation. 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 property 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)(9)(A) provides that the term “eligible independent contractor” (“EIK”) with respect to any qualified lodging facility or qualified health care property (as defined in section 856(e)(6)(D)(i)) means any independent contractor if, at the time such contractor enters into a management agreement or other similar service contract with the TRS to operate such qualified lodging facility or qualified health care property, such contractor (or any related person) is actively engaged in the trade or business of operating qualified lodging facilities or qualified health care properties, respectively, for any person who is not a related person with respect to the REIT or the TRS.

Section 856(e)(6)(D)(i) defines qualified health care property as any real property that is a health care facility.

A “health care 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 XVII of the Social Security Act (42 U.S.C.A. § 1395 et seq.) with respect to such facility.

Ruling Request #1: Whether each of the IL Facilities is a congregate care facility within the meaning of section 856(e)(6)(D) and therefore constitutes a “qualified health care property” within the meaning of section 856(e)(6)(D).

In the present case, each IL Facility is located in one building or on the same campus and is operated as an integrated facility with an emphasis on health and wellness of seniors. The average age of residents at all IL Facilities is k years old, and each IL Facility either has a minimum age or is marketed to seniors. Residents receive regular linen and housekeeping services, eat meals in a community dining hall that are planned for the dietary needs of seniors, and are offered a variety of activities and events regarding health and wellness issues common to seniors. The IL Facilities are equipped with wide hallways, handrails, bathroom grips, and other architectural features

useful to an aging resident population. Every unit is equipped with an emergency call system and emergency pendants are available for residents. Residents are provided a “file of life” containing important medical documents, including DNR forms if applicable, to post within their unit for use during emergencies. Twenty-four hour on-call staffing includes a resident manager that eats with, interacts with, and informally observes resident behavior. The exterior doors to the building are locked at night for resident security.

Based on the facts as represented, we rule that each of the IL Facilities are congregate care facilities within the meaning of section 856(e)(6)(D)(ii) and, therefore, each IL Facility constitutes a “qualified health care property” within the meaning of section 856(e)(6)(D).

Ruling Request #2: Whether Facility A is a congregate care facility within the meaning of section 856(e)(6)(D) and therefore constitutes a “qualified health care property” within the meaning of section 856(e)(6)(D).

Facility A is made up of multiple buildings with townhome apartment units. The units have full kitchens and individual exterior doors that must be locked by the resident. Although Facility A provides some of the same amenities as the IL Facilities, it does not focus on the health and well-being of its residents and does not offer the emergency call systems, a resident manager that interacts with and observes the residents, or a meal plan with a congregate dining room that accommodates all residents.

Although Facility A is comprised of age-restricted multifamily residential housing buildings, it does not provide for congregate living with a focus on the health and well-being of the residents. Accordingly, based on the facts as represented, we rule that Facility A does not constitute a health care facility within the meaning of section 856(e)(6)(D)(ii), and, as a result, Facility A may be operated or managed by a TRS of Taxpayer.

Ruling Request #3: Whether rental income received directly or indirectly by PropCo from the lease (or sublease) of an IL Facility to a disregarded subsidiary of OpCo or a partnership subsidiary of OpCo will qualify as “rents from real property” for purposes of section 856(d).

Taxpayer represents that Manager A is an independent contractor within the meaning of section 856(d)(3). Taxpayer further represents that Manager A manages a third-party owned AL facility and g third-party owned facilities that are similar in all respects to the IL Facilities and is currently seeking to manage additional facilities owned by unrelated parties. Therefore, Manager A is actively engaged in the trade or business of operating qualified health care properties for persons unrelated to Taxpayer or any TRS of Taxpayer, and Manager A qualifies as an EIK within the meaning of

section 856(d)(9) with respect to the IL Facilities it manages and operates for the OpCo Subs.

The related-party rent exception of section 856(d)(8)(B) is only available for amounts paid by a TRS to the REIT and only when the facility is operated on behalf of a TRS by an EIK. In this case, the amounts are not paid by a TRS directly. Instead, the amounts are paid by OpCo and OpCo Subs, which each constitute a partnership that is owned by Domestic TRS and one unrelated party, Partner. Therefore, the question here is whether the related-party rent exception can apply to amounts paid by a partnership where the partners are a TRS and only one other unrelated party.

Under the facts as represented, the amounts paid by OpCo and OpCo Subs may qualify as rents from real property for purposes of section 856(d) by analyzing the income attributable to the partnership interest held by a TRS separately from the income attributable to any remaining partnership interest. If Domestic TRS were the sole, direct lessee of each IL Facility, the related-party rent exception of section 856(d)(8)(B) would apply to amounts received directly from Domestic TRS. Therefore, in this case, amounts attributable to the partnership interest held by Domestic TRS satisfy the requirements of section 856(d)(8)(B) so long as an EIK continues to manage and operate the IL Facility rented by the partnership. If Partner, which Taxpayer represents is not related to Taxpayer within the meaning of section 856(d)(2)(B), were the sole direct lessee of each IL Facility, the amounts would also qualify as rents from real property (without the need for any exception). Therefore, in this case, amounts attributable to the partnership interest held by Partner qualify as rents from real property.

In conclusion, rental income received directly or indirectly by PropCo from the lease of an IL Facility to a partnership between Domestic TRS and a single partner unrelated to Taxpayer within the meaning of section 856(d)(2)(B), shall not be excluded from rents from real property by reason of section 856(d)(2)(B) so long as the facility continues to be operated by an EIK.

Foreign Activities

Section 856(c)(5)(J) provides that to the extent necessary to carry out the purposes of Part II of subchapter M of the Code, the Secretary is authorized to determine, solely for purposes of such part, whether any item of income or gain which (i) does not otherwise qualify under sections 856(c)(2) or (3) may be considered as not constituting gross income for purposes of sections 856(c)(2) or (3), or (ii) otherwise constitutes gross income not qualifying under sections 856(c)(2) or (3) may be considered as gross income which qualifies under sections 856(c)(2) or (3).

The legislative history underlying the tax treatment of REITs indicates that a central concern behind the gross income restrictions is that a REIT's gross income

should largely be composed of passive income. For example, H.R. Rep. No. 86-2020, 2d Sess. 4, at 6 (1960), 1960-2 C.B. 819, at 822-23 states, “[o]ne of the principal purposes of your committee in imposing restrictions on types of income of a qualifying real estate investment trust is to be sure the bulk of its income is from passive income sources and not from the active conduct of a trade or business.”

Subpart F Inclusions

Section 957 defines a CFC as a foreign corporation in which more than 50 percent of the total combined voting power of all classes of stock entitled to vote, or the total value of the stock, is owned by United States Shareholders on any day during the corporation’s taxable year. A United States Shareholder is defined in section 951(b) as a United States person who owns 10 percent or more of the total voting power of the foreign corporation. Taxpayer represents that it is a United States Shareholder within the meaning of section 951(b) with respect to certain subsidiaries that are CFCs.

Section 951(a)(1)(A)(i) generally provides that if a foreign corporation is a CFC for an uninterrupted period of 30 days or more during a taxable year, every person who is a United States Shareholder of the corporation and who owns stock in the corporation on the last day of the taxable year in which the corporation is a CFC shall include in income the shareholder’s pro rata share of the CFC’s subpart F income for the taxable year.

Section 952 defines subpart F income to include foreign base company income, as determined under section 954. Under section 954(a)(1), foreign base company income includes FPHCI. Section 954(c)(1)(A) generally defines FPHCI to include (among other things) dividends, interest, royalties, rents, and annuities. Section 954(c)(1)(B) also includes gain from the sale or exchange of property which (among other things) gives rise to income described in section 954(c)(1)(A) (after application of paragraph (2)(A)) other than property which gives rise to income not treated as FPHCI by reason of section 954(h) or (i) for the taxable year.

Section 956 Inclusions

Section 951(a)(1)(B) provides that if a foreign corporation is a CFC for an uninterrupted period of 30 days or more during a taxable year, every person who is a United States shareholder of the corporation and who owns stock in the corporation on the last day of the taxable year in which the corporation is a CFC shall include in gross income the amount determined under section 956 with respect to the shareholder for such year (but only to the extent not excluded from gross income under section 959(a)(2)).

Section 956(a) provides that in the case of a CFC, the amount determined under section 956 with respect to any United States shareholder for any taxable year is the

lesser of – (1) the excess (if any) of – (A) such shareholder’s pro rata share of the average of the amounts of United States property held (directly or indirectly) by the CFC as of the close of each quarter of such taxable year, over (B) the amount of earnings and profits described in section 959(c)(1)(A) with respect to such shareholder, or (2) such shareholder’s pro rata share of the applicable earnings of such CFC. In general, the amount taken into account in the preceding sentence under (1) with respect to any property shall be its adjusted basis as determined for purposes of computing earnings & profits, reduced by any liability to which the property is subject.

Section 956(c) provides that United States property includes an obligation of a United States person. Section 956(d) states that a CFC shall, under regulations prescribed by the Secretary, be considered as holding an obligation of a United States person if such CFC is a pledgor or guarantor of such obligation. Section 1.956-2(c)(1) provides that except as provided in section 1.956-2(c)(4), any obligation (as defined in section 1.956-2(d)(2)) of a United States person (as defined in section 957(d)) with respect to which a CFC is a pledgor or guarantor shall be considered for purposes of section 956(a) and section 1.956-2(a) to be United States property held by such CFC. Section 1.956-2(c)(2) provides that if the assets of a CFC serve at any time, even though indirectly, as security for the performance of an obligation of a United States person, then the CFC will be considered a pledgor or guarantor of that obligation.

Foreign Currency Gain

In general, section 959(d) provides that when a United States shareholder of a CFC includes in income a Subpart F Inclusion, the subsequent distribution to the shareholder of the previously taxed income attributable to the inclusion is not treated as a dividend for purposes of chapter 1 of the Code.

Section 986(c)(1) provides that foreign currency gain or loss with respect to distributions of previously taxed earnings and profits (as described in section 959) attributable to movements in exchange rates between the times of the deemed and actual distribution shall be recognized and treated as ordinary income or loss from the same source as the associated income inclusion.

Section 856(n)(1)(A) provides that “passive foreign exchange gain” for any taxable year shall not constitute gross income for purposes of section 856(c)(2).

Section 856(n)(3) defines passive foreign exchange gain as: (A) real estate foreign exchange gain (as defined in section 856(n)(2)); (B) foreign currency gains (as defined in section 988(b)(1)) which is not real estate foreign exchange gain and is attributable to (i) any item of income or gain described in section 856(c)(2), (ii) the acquisition or ownership of obligations (other than foreign currency gains attributable to any item of income or gain described in clause (i)), or (iii) becoming or being the obligor under obligations (other than foreign currency gain attributable to any item of income or

gain described in clause (i)); and (C) any other foreign currency gains determined by the Secretary.

Ruling Request # 4: Whether Subpart F Inclusions and Section 956 Inclusions of Taxpayer with respect to the Foreign TRS, Nominee Corp TRS, or a Foreign GP TRS may be treated as qualifying income under section 856(c)(2).

Taxpayer represents that it is a United States shareholder within the meaning of section 951(b) with respect to Foreign TRS, the Foreign GP TRSs, and Nominee Corp TRS all of which Taxpayer represents are CFCs. Taxpayer's CFCs earn subpart F income attributable to foreign base company income that is FPHCI that consists of rental income, interest, dividends and gain from the sale of property that gives rise to dividend, interest or rental income.

Taxpayer represents that the rental income received by the CFCs from the residents at the Foreign Facilities is for the month-to-month use of space at the Foreign Facilities, is for a flat fee, and is not based on the income or profits of any person. Taxpayer also represents that all services provided to residents of the Foreign Facilities are provided by Manager B and are customarily provided to tenants of similar IL or AL facilities, as applicable, in the geographic regions in which the Foreign Facilities are respectively located. Taxpayer further represents that the rental income received from residents which is attributable to personal property does not exceed 15 percent of the total rent for the taxable year attributable to both the real and personal property under the leases. Taxpayer also represents that Manager B is an independent contractor as defined in section 856(d)(3) and is providing all services at the Foreign Facilities. Manager B, a disregarded entity with respect to Manager A for federal income tax purposes, is also an EIK by virtue of its subsidiary relationship to Manager A, an EIK.

Therefore, if the Taxpayer were in the TRS's place and receiving the rental income from the Foreign Facility residents directly, the rental income would not be impermissible tenant services income. Based upon the representations made by Taxpayer, the items of rental income underlying the subpart F income would be qualifying rents from real property if Taxpayer were earning the income directly rather than leasing the Foreign Facilities to its TRSs. Therefore, the subpart F income attributable to qualifying rents from real property, dividends, interest, and gain from the sale or property that gives rise to dividend, interest, or qualifying rents from real property ("Subpart F Inclusions"), is passive income and treating such income as qualifying income for purposes of section 856(c)(2) does not interfere with or impede the policy objectives of Congress in enacting the income test under section 856(c)(2). Accordingly, we rule that under section 856(c)(5)(J)(ii), Subpart F Inclusions of Taxpayer with respect to Foreign TRS, Nominee Corp TRS, or a Foreign GP TRS are considered as gross income that qualifies for purposes of section 856(c)(2).

Taxpayer has represented that assets of one of its CFCs may be pledged as collateral for certain debt of Taxpayer that was incurred to finance Taxpayer's acquisition of real estate assets. This pledge may cause Taxpayer to recognize Section 956 Inclusions. Taxpayer represents that any Section 956 Inclusions will occur as a result of debt of Taxpayer that arises in connection with the acquisition, improvement, or development of interests in real estate assets that produce qualifying income under section 856(c)(2). To the extent Taxpayer recognizes Section 956 Inclusions as a result of a CFC's pledge of assets that secures debt of the Taxpayer that is used to finance the acquisition, improvement, or development of real property from which income is derived that qualifies under section 856(c)(2), treating such income as qualifying income for purposes of section 856(c)(2) would not interfere with or impede the policy objectives of Congress in enacting the income test under section 856(c)(2). Accordingly, we rule that under section 856(c)(5)(J)(ii), Taxpayer's Section 956 Inclusions are considered as gross income that qualifies for purposes of section 856(c)(2).

Ruling Request # 5: Whether foreign currency gains under section 986(c)(1) with respect to the Foreign TRS, Nominee Corp TRS, or a Foreign GP TRS are excluded from income for purposes of section 856(c)(2).

While the section 986(c) gains are not foreign currency gains defined in section 988(b)(1), such section 986(c) gains are attributable to the Subpart F Inclusions, items of income that we determine are qualifying income for purposes of section 856(c)(2). This section 986(c) gain is substantially similar to passive foreign exchange gain described in section 856(n)(3)(B)(i) that is excluded from gross income for purposes of section 856(c)(2). Therefore, pursuant to section 856(n)(3)(C), the section 986(c) gains with respect to Foreign TRS, Nominee Corp TRS, or a Foreign GP TRS are excluded from gross income for purposes of section 856(c)(2) because these foreign currency gains are considered passive foreign exchange gain that is excluded from gross income for purposes of section 856(c)(2).

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 Code. Specifically, we do not rule whether Taxpayer otherwise qualifies as a REIT under part II of subchapter M of Chapter 1 of the Code.

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) of the Code provides that this ruling 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 representatives.

Sincerely,

Andrea M. Hoffenson
Andrea M. Hoffenson
Chief, Branch 2
Office of Associate Chief Counsel
(Financial Institutions & Products)-