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Legend:

Taxpayer =

State A =

Area A =

County A =

Date 1 =

a =

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Dear :

This responds to a letter dated September 30, 2014, and subsequent correspondence, submitted on behalf of Taxpayer. Taxpayer requests rulings that (1) the rental income from the boat slips and storage spaces at Marina (as defined below) constitutes rents from real property within the meaning of section 856(d)(1) of the Internal Revenue Code ("Code"), and (2) the income from the services provided at Marina is not impermissible tenant service income and, therefore, will not cause any portion of the rents received by Taxpayer from tenants of the Marina to fail to qualify as rents from real property under section 856(d).

FACTS

Taxpayer is a State A limited liability company that has elected to be treated as a real estate investment trust ("REIT") for federal income tax purposes beginning with its initial taxable year ended Date 1. Taxpayer owns, through various wholly owned subsidiary entities and partnership joint ventures, a portfolio of real estate assets consisting of office, retail, hotel, industrial, and apartment properties. Taxpayer indirectly owns substantially all of the interests in a limited liability company that is classified as a partnership for federal income tax purposes ("Partnership"), which, in turn, owns a single member, limited liability company that is classified as a disregarded entity for federal income tax purposes ("DE"), which, in turn, owns an interest in a property consisting of a ground lease, an apartment building, and a marina in Area A.

Taxpayer, acting through Partnership and DE, leases the land and adjacent water space of the property in Area A from County A under a long-term ground lease. The ground lease makes no distinction between parcels of water space and parcels of dry land.

With respect to the property, Taxpayer, acting through Partnership and DE, has demolished the existing apartment building, substantially developed a new approximately a-unit apartment community ("Apartments"), and redeveloped the marina to contain approximately b boat slips (as redeveloped, "Marina"). Apartments and Marina will be held for lease to tenants and for long-term investment by Taxpayer, through Partnership and DE.

By law, Marina is required to make boat slips available for lease to the public, without discriminating in favor of residents of Apartments. Taxpayer expects that the overwhelming majority of tenants at Marina will not reside in Apartments.

Marina includes c floating piers that extend from the seawall into the water, with individual boat slips arrayed alongside each pier. Each individual boat slip is a space on the water to moor a watercraft. The boat slips will be demarcated either by floating "fingers" attached to the piers or by an end tie at the end of each pier. The piers will be kept in place by pylons. Taxpayer will make dock carts available for Marina tenants to move items around the piers, and from their cars to the piers and their boats; the dock carts will be self-service items, and Taxpayer will not charge for their use. Marina will also have ice machines and bike racks available for use by tenants. Taxpayer intends to treat the dock carts, ice machines, bike racks, piers, and fingers (but not the pylons and boat slips) as personal property for purposes of the REIT gross income and asset tests of section 856(c)(2) and (3) and section 856(c)(4), respectively. Taxpayer represents that the pylons are inherently permanent structures within the meaning of section 1.856-10(d)(2) of the Income Tax Regulations and, thus, real property. Additionally, the boat slips are water space superjacent to land and, thus, land within the meaning of section 1.856-10(c).

Marina will include restrooms and showers (together, the "Shower Facilities"). The Shower Facilities will be located in a permanently affixed building on the shore and will be available to all Marina tenants without an additional fee. The Shower Facilities will be unattended and will not provide towel service.

Each boat slip will be leased to a tenant pursuant to a wharfage contract ("Wharfage Contract"). Marina will also have storage in slips on the water for a limited number of dinghies and jet skis, and will lease such a slip to a tenant pursuant to a Wharfage Contract. Under the terms of a Wharfage Contract, a tenant will be assigned a specific slip for the purpose of mooring a specifically identified boat. Taxpayer will have the right to reassign a tenant to another slip, either permanently or as needed in the case of emergency or operational necessity.

Wharfage Contracts are entered into on a month-to-month basis, with the minimum term of a Wharfage Contract being one month. Taxpayer will have the right to temporarily assign another boat to a tenant's slip during periods when the tenant's boat is absent. During such periods, the tenant will remain obligated to pay slip fees (as described below). The Wharfage Contract authorizes certain persons to board a tenant's boat to relocate it in the case of emergency or operational necessity.

The rental charge, or slip fee, under a Wharfage Contract will be a fixed monthly amount based on the length of the slip. The tenant will also pay a security deposit, generally equal to one month's slip fee. The tenant will be required to maintain liability and property insurance for the boat moored in the slip. A Wharfage Contract cannot be assigned or sublet. Although a tenant must register the specific boat to be moored in the slip it is renting, the tenant may change the registration to that of a different boat that then may be moored in the slip without entering into a new Wharfage Contract. Taxpayer represents that the fair market value of the personal property that will be leased under, or in connection with, a lease of a boat slip will represent no more than 15 percent of the fair market value of both the real and personal property leased under, or in connection with, such lease.

Marina will also have limited areas for storage that is not on the water. These areas are leased under storage contracts described below ("Storage Contracts"). Storage will include individual spaces within cages that are in locked rooms in a permanently affixed building on the shore. The term of a Storage Contract will be monthly for a fixed amount. No services will be provided in connection with these areas. Taxpayer represents that the fair market value of the personal property that will be leased under, or in connection with, a lease of a storage space will represent no more than 15 percent of the fair market value of both the real and personal property leased under, or in connection with, such lease.

Taxpayer will provide utilities to tenants of Marina through utility hookups at each boat slip. Each boat slip at Marina will have self-service utility hookups to connect a boat to sewage facilities, electricity, cable TV/phone/internet, and water. Taxpayer will not impose a separate charge for tenants to use the utility hookups. Charges for the utilities will either be included in the monthly slip fee or billed directly to the tenant by the utility company.

Taxpayer will contract with service providers to provide a dock master, porters, a courtesy officer, and a vessel recovery specialist at Marina. The dock master will manage all aspects of Marina, such as leasing, collecting rents, enforcing rules, serving late rent notices, filing unlawful detainer actions, advertising, maintaining income receipts and other documentation, and managing tenant relationships. The porters will perform routine maintenance and janitorial activities for Marina, including the Shower Facilities, and also will ensure that utility hookups at the boat slips are properly connected by the tenants. The courtesy officer will regularly patrol Marina. The vessel recovery specialist will provide salvage services at Marina. Taxpayer represents that each service provider will be either an independent contractor within the meaning of section 856(d)(3) from whom Taxpayer will not derive or receive any income ("IK") or a taxable REIT subsidiary of Taxpayer within the meaning of section 856(l) ("TRS").

Taxpayer represents that all of the services performed at Marina will be usual and customary for marinas in the geographic market where Marina will be located. Taxpayer further represents that any persons performing services at Marina not previously described herein will be employees of an IK or TRS. Additionally, Taxpayer represents that the utility services rendered by Taxpayer at Marina are available to all tenants and do not constitute personal services rendered to any particular tenant.

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 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, such lease.

Section 1.856-4(a) defines the term “rents from real property” generally as the gross amounts received for the use of, or the right to use, real property of the REIT. Section 1.856-10(b) provides, in part, that the term real property means land and improvements to land. Section 1.856-10(c) provides that land includes, among other things, water and air space superjacent to land. Section 1.856-10(d)(1) provides that the term improvements to land means inherently permanent structures and their structural components, and section 1.856-10(d)(2) provides, in part, that the term inherently permanent structure means any permanently affixed building or other permanently affixed structure. Section 1.856-10(g) provides examples that demonstrate the rules of section 1.856-10. Example 2, which illustrates the definition of land as provided in section 1.856-10(c), provides, as follows:

Water space superjacent to land. REIT B leases a marina from a governmental entity. The marina is comprised of U-shaped boat slips and end ties. The U-shaped boat slips are spaces on the water that are surrounded by a dock on three sides. The end ties are spaces on the water at the end of a slip or on a long, straight dock. REIT B rents the boat slips and end ties to boat owners. The boat slips and end ties are water space superjacent to land that is land within the meaning of paragraph (c) of this section and, therefore, are real property.

Section 1.856-4(b)(1) provides that, for purposes of section 856(c)(2) and (3), the term rents from real property includes charges for services customarily furnished or rendered in connection with the rental of real property, whether or not the charges are separately stated. 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 of a similar class are customarily provided with the service. In particular geographic areas where it is customary to furnish electricity or other utilities to tenants in buildings of a particular class, the submetering of those utilities to tenants in the buildings will be considered a customary service.

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 the tenants of such property, or for managing or operating such property.

Section 856(d)(7)(C) provides certain exclusions from impermissible tenant service income. Section 856(d)(7)(C)(i) 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 such REIT shall not be treated as furnished, rendered, or provided by the REIT. Section 856(d)(7)(C)(ii) provides that 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) is not impermissible tenant service income.

Section 512(b)(3) provides, in part, that there shall be excluded from the computation of unrelated business taxable income all rents from real property and all rents from personal property leased with such real property, if the rents attributable to such personal property are an incidental amount of the total rents received or accrued under the lease, determined at the time the personal property is placed in service.

Section 1.512(b)-1(c)(5) provides that payments for the use or occupancy of rooms and other space where services are also rendered to the occupant, such as for the use or occupancy of rooms or other quarters in hotels, boarding houses, or apartment houses furnishing hotel services, or in tourist camps or tourist homes, motor courts or motels, or for the use or occupancy of space in parking lots, warehouses, or storage garages, do not constitute rent from real property. Generally, services are considered rendered to the occupant if they are primarily for his convenience and are other than those usually or customarily rendered in connection with the rental of rooms or other space for occupancy only. The supplying of maid service, for example, constitutes such service; whereas the furnishing of heat and light, the cleaning of public entrances, exits, stairways, and lobbies, and the collection of trash are not considered as services rendered to the occupant.

Ruling Request 1

The rights to use a boat slip to moor a boat under a Wharfage Contract and to use a storage space under a Storage Contract are rights to use and occupy the space above the seabed or in buildings permanently affixed to the shore. Taxpayer represents that the fair market value of the personal property that will be leased under, or in connection with, a lease of a boat slip or storage space will represent no more than 15 percent of the fair market value of both the real and personal property leased under, or in connection with, such lease. Taxpayer further represents that all of the services performed at Marina will be usual and customary for marinas in the geographic market where Marina will be located.

Therefore, the income received by Taxpayer from its tenants for the use of the boat slips and storage spaces constitute rents from real property within the meaning of section 856(d)(1).

Ruling Request 2

In determining whether a taxpayer has income that is impermissible tenant service income, only the income that is attributable to a provision of a service is analyzed. Although services may be provided in the Shower Facilities, the Shower

Facilities themselves are not services. Income that is attributable to making available to all tenants at no additional cost a space such as the Shower Facilities is not income from the provision of a service and is therefore not impermissible tenant service income. Any services that are provided in or with respect to the Shower Facilities are analyzed as any other service provided to tenants.

Taxpayer has represented that all of the services that will be performed at Marina will be usual and customary for marinas in the geographic area where Marina will be located. Taxpayer further represents that the provision of utilities to tenants of boat slips at Marina are available to all boat slip tenants and do not constitute personal services rendered to any particular tenant.

The income from the provision of utilities is, for purposes of determining whether the income is qualifying income for REIT qualification purposes, income that would be excluded from unrelated business taxable income under section 512(b)(3) if received by an organization described in section 511(a)(2). Taxpayer represents that all other services that will be provided at Marina will be provided through either an IK or a TRS.

Accordingly, income from the services that will be provided at Marina is not impermissible tenant service income and, therefore, will not cause any portion of the rents received by Taxpayer from the tenants of Marina to fail to qualify as rents from real property under section 856(d).

CONCLUSION

Based on the facts submitted and representations made, we rule that (1) the rental income from the boat slips and storage spaces at Marina constitutes rents from real property within the meaning of section 856(d)(1), and (2) the income from the services provided at Marina is not impermissible tenant service income and, therefore, will not cause any portion of the rents received by Taxpayer from the tenants of Marina to fail to qualify as rents from real property under section 856(d).

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. Specifically, no opinion is expressed or implied on whether Taxpayer otherwise qualifies as a REIT under subchapter M, part II of Chapter 1 of the Code.

Furthermore, the ruling herein related to whether income from services that will be performed by Taxpayer at Marina is impermissible tenant service income is specifically limited to whether the income is qualifying income for REIT qualification purposes. The definition of rents from real property under section 856(d) differs in scope and structure from the definition of rents from real property under section 512(b)(3), which applies to exempt organizations described in section

511(a)(2). Therefore, an exempt organization providing the same services may have unrelated business taxable income because the income may not be excluded under section 512(b)(3) as rents from real property.

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.

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,

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

Enclosure:

A copy of this letter for section 6110 purposes