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Date: February 10, 2020

LEGEND:

Taxpayer =

OP =

Company =

Property A =

Property B =

Property C =

Property D =

Property E =

State A =

State B =

State C =

Date 1 =

a =

b =

c =

d =

e =

f =

g =

h =

i =

i =

k =

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Dear :

This ruling responds to a letter dated August 5, 2019, and subsequent correspondence, requesting rulings on behalf of Taxpayer. Specifically, you have requested the following rulings:

- (1) The floating docks described below at Properties A, B, C, D, and E (collectively, the "Properties") are real property for purposes of section 1.856-10(b), and are real estate assets for purposes of section 856(c)(4) and (5).

- (2) Amounts received for racking structure space in dry dock storage facilities described below will not be considered as other than rents from real property for purposes of section 856(d).
- (3) The presence of cabins at Property C will not cause the assets at Property C other than the cabins and any areas reserved for cabin guests to be treated as lodging facilities within the meaning of section 856(d)(9)(D)(ii).

FACTS

Taxpayer is a State A corporation and elected to be taxed as a real estate investment trust ("REIT") for its tax year ended Date 1. Taxpayer currently owns and operates its properties and assets through OP, a State B limited partnership treated as a partnership for federal income tax purposes.

Taxpayer intends to acquire an interest in Company through OP. Company is a State C limited liability company treated as a partnership for federal income tax purposes. Company owns and leases, or leases and subleases, the Properties, which are located on inland lakes or coasts. The Properties contain boat slips, floating docks, storage facilities, boat servicing facilities, and support facilities such as laundry facilities and restaurants. Property C also contains cabins that are made available to guests for one-week or shorter stays.

a. Floating Docks

The Properties' boat slips are bound by floating docks. The floating docks have a limited range of vertical movement as necessary for tidal and weather conditions, and are affixed to the lake bed or sea bottom using either pilings or winches and cables. Taxpayer represents that the floating docks provide a conduit or route for tenants to access their boat slips, delineate the area of the slips, and protect the boats from damage from the elements. Taxpayer further represents that the floating docks serve no active function within the meaning of section 1.856-10(d)(2)(iii)(A).

Taxpayer's floating docks are generally attached to poured concrete walkways on land and, in the case of floating docks located on coasts, are also attached to concrete, timber, or steel bulkheads that retain contact with the land. The configuration of each floating dock is determined during the original design of each of the Properties, and the sections of the dock bounding the boat slips are not interchangeable among the floating docks. If a floating dock needs to be reconfigured, the sections of the dock bounding the boat slips are destroyed; Company has never moved or reused these sections. The floating docks weigh hundreds of thousands to millions of pounds, and cannot be towed on the water. Taxpayer represents that the floating docks have a useful life expectancy of greater than a years.

Properties A, D, and E

The piling method of affixation is present at Property A, Property D, and Property E. The pilings are made of steel, timber, or concrete, and are driven into the seabed or lake bottom to a depth of between b and c feet. Taxpayer represents that the pilings are inherently permanent structures for purposes of section 1.856-10(d)(2). The floating docks are permanently affixed to the pilings by steel pile guides that affix the docks to the pilings in a manner that allows the docks to float on the top of the water's surface as the tide ebbs and flows but keeps the docks affixed to the pilings. The pile guides contain rollers that surround and always touch the pilings and at no time is there space between the rollers and the pilings. The steel pile guides are connected to the docks with at least d mechanical fasteners (steel or aluminum bolts or brackets) per piling. The floating docks are built around or surrounded by the pilings, and are not designed to be removed from the pilings. Between d and e pilings bound each boat slip. Company generally employs the piling method of affixation if the water level is expected to fluctuate between f and g feet.

Taxpayer represents that the floating docks affixed to pilings are designed to remain in place indefinitely. Company has never moved a floating dock, and does not intend to ever do so. Removing a floating dock from its pilings would require total deconstruction of the floating dock, and would require cutting the pilings down to the surface level of the water thereby destroying the pilings as well.

In rare and extraordinary circumstances, a governmental body may close a marina (for example, due to a violation of the lease or willful neglect of the premises). In that case, all buildings and structures would be completely demolished and removed, and the land restored to its natural condition. Taxpayer represents that this has never happened with respect to a marina held by Company, and Company does not expect this to ever occur. Taxpayer further represents that, with respect to the floating docks affixed using the piling method, no other circumstances suggest that the expected period of affixation is not indefinite. Taxpayer further represents that removing the floating dock from its pilings would be extremely time-consuming and expensive, exceeding the cost of new construction.

Properties B and C

The winch and cable method of affixation is present at Property B and Property C. Under the winch and cable method of affixation, the floating docks are attached to the seabed by a system of wire rope cables, concrete anchors, and winches. The cables are between h and i inches in diameter and attach the winches on the docks to the anchors on the seabed or lake bottom. The cables are the same type used to support suspension bridges, and are attached to the winches and concrete anchors in the same manner as cables are attached to suspension bridges. The anchors weigh approximately j pounds and are embedded in the seabed or lake bottom. Galvanized anchor bolts affix the winches to winch stands that are affixed to the floating docks using industrial steel mounting bolts. The winch and cable method allows the floating

dock to move when water levels fluctuate and when affected by natural occurrences such as tides, although the concrete anchors never move as they are permanently affixed to a specific point in the seabed or lake bottom. The winch and cable method generally is used when the water level is expected to fluctuate by g feet or more.

Taxpayer represents that the floating docks affixed using the winch and cable method are designed to remain in place indefinitely. The docks are constructed in a particular manner based on the area in which they are located in order to withstand particular wind, current, and wave conditions of the area, and would not be removed and reused in another location. Similarly, the winches and winch stands are designed and constructed to be used in a particular location on a dock due to prevailing conditions unique to the area, such as wind and tides, and are not removed unless they are damaged or have reached the end of their useful lives.

In rare and extraordinary circumstances, a governmental body may close a marina (for example, due to a violation of the lease or willful neglect of the premises). In that case, all buildings and structures would be completely demolished and removed, and the land restored to its natural condition. Taxpayer represents that this has never happened with respect to a marina held by Company, and Company does not expect this to ever occur. Taxpayer further represents that, with respect to the floating docks affixed using the winch and cable method, no other circumstances suggest that the expected period of affixation is not indefinite.

Removing a dock affixed by the winch and cable method generally requires between i and j months, depending on the size of the dock, and the cost of building a new dock is less than the cost of moving an existing dock. Cutting the cables from the winches requires the use of specialized industrial tools and the employment of certified divers to remove bolts and to connect the crane/lifting cables to trussing frames. The anchors, embedded into the seabed or lake bottom upon installation, tend to burrow deeper into the sea bed or lake bottom over time, exponentially increasing the force required to dislodge them. The depth of the anchors can exceed m feet, such that removal requires highly specialized scuba equipment and poses great risk to divers employed to assist with removal. The weight of the anchors typically exceeds the lifting capacity of available barge or crane equipment. For these reasons, the anchors and cables are generally abandoned in place rather than removed from the seabed.

In terms of removing winches from the docks, the weight of the winch system typically requires removal by crane. The removal of a winch and winch stand damages the dock to which it is attached, and renders it unsafe for use. Removal of the floating docks themselves would require Taxpayer to demolish the docks, send certain scrap materials to a recycling center, and haul the remainder to a landfill.

b. Dry Dock Storage Facilities

The Properties contain dry dock storage facilities, which Taxpayer represents are inherently permanent structures for purposes of section 1.856-10(d)(2). The dry dock storage facilities contain steel racking structures arranged into vertical bays measuring several feet high to accommodate several tiers of boats. Company leases space in the racking structures to tenants for terms of at least c days. The dry dock storage leases do not allow the tenant to enter the facilities, nor do they allocate to the tenant a specifically identified spot in a racking structure, but they do guarantee the tenant a specified amount of storage space in a dry dock storage facility for the dry dock storage of the tenant's boat. Taxpayer represents that a taxable REIT subsidiary ("TRS") of Taxpayer or an independent contractor from whom Taxpayer derives no income will move the tenants' boats into and out of the dry dock storage facilities. Taxpayer further represents that this is a service customarily performed at dry dock storage facilities in each of the geographic areas in which Company's marinas are located. No other services will be provided in connection with the storage fee for leasing space in the dry dock storage facilities.

Tenants of Company's dry dock storage facilities may request services such as boat maintenance or repairs prior to storage ("Dry Dock Services"). The storage fees for leasing space in the dry dock storage facilities will not include fees for these requested services, and Taxpayer represents that the Dry Dock Services will be performed by a TRS of Taxpayer or by an independent contractor from whom Taxpayer derives no income.

c. Cabins

Property C contains n cabins generally used by guests for stays of less than one week. Company owns d cabins and manages o cabins. Company provides cabin guests with linens and basic toiletries at the beginning of their stay, and cleans the cabin when the guests vacate the premises. The cabin guests are generally not the same parties that lease boat slips or dry dock storage space from Company. The income generated by the cabins represents less than p percent of Company's revenues. Taxpayer represents that the income it receives attributable to the cabins will be treated as non-qualifying income for purposes of section 856(c)(2) and (3).

LAW AND ANALYSIS

Ruling 1:

Section 856(c)(4)(A) of the Code provides that, at the close of each quarter of its taxable year, at least 75 percent of the value of a REIT's total assets must be represented by real estate assets, cash and cash items (including receivables), and Government securities.

Section 856(c)(5)(B) defines the term "real estate assets," in part, to mean real property (including interests in real property). Section 1.856-3(b)(1) of the regulations

provides that the term “real estate assets” means real property, interests in mortgages on real property (including interests in mortgages on leaseholds of land or other improvements thereon), and shares in other qualified REITs.

Section 1.856-10(b) provides that the term “real property” means land and improvements to land. Local law definitions are not controlling for purposes of determining the meaning of the term real property. Section 1.856-10(d)(1) provides that the term “improvements to land” generally means inherently permanent structures and their structural components. Section 1.856-10(d)(2)(i) provides that the term “inherently permanent structure” means any permanently affixed building or other permanently affixed structure. Affixation may be to land or to another inherently permanent structure, and may be by weight alone. If the affixation is reasonably expected to last indefinitely based on all the facts and circumstances, the affixation is considered permanent. A distinct asset that serves an active function, such as an item of machinery or equipment, is not a building or other inherently permanent structure.

Section 1.856-10(d)(2)(iii)(A) provides that, in general, other inherently permanent structures serve a passive function, such as to contain, support, shelter, cover, protect, or provide a conduit or a route, and do not serve an active function, such as to manufacture, create, produce, convert, or transport. Section 1.856-10(d)(2)(iii)(B) provides a list of distinct assets that may qualify as other inherently permanent structures if they are permanently affixed. Stationary wharves and docks are included in the list of inherently permanent structures found in section 1.856-10(d)(2)(iii)(B).

Section 1.856-10(d)(2)(iv) provides facts and circumstances that must be considered in determining if a distinct asset that serves a passive function and is not otherwise listed in section 1.856-10(d)(2)(ii)(B) or (iii)(B) is an inherently permanent structure. The factors that must be taken into account include:

- (A) The manner in which the distinct asset is affixed to real property;
- (B) Whether the distinct asset is designed to be removed or to remain in place indefinitely;
- (C) The damage that removal of the distinct asset would cause to the item itself or to the real property to which it is affixed;
- (D) Any circumstances that suggest the expected period of affixation is not indefinite (for example, a lease that requires or permits removal of the distinct asset upon the expiration of the lease); and
- (E) The time and expense required to move the distinct asset.

Because only stationary wharves and docks are included in the list of inherently permanent structures under section 1.856-10(d)(2)(iii)(B), floating docks that do not

serve an active function must be analyzed based on all the facts and circumstances pursuant to section 1.856-10(d)(2)(iv) to determine if they are inherently permanent structures.

Properties A, D, and E

Taxpayer represents that the pilings at Property A, Property D, and Property E are inherently permanent structures for purposes of section 1.856-10(d)(2)(i). With regard to the floating docks affixed to pilings at these properties, Taxpayer represents that (A) the floating docks are affixed to the pilings by steel pile guides containing rollers that always touch the pilings, and that the pile guides are permanently connected to the docks with at least d steel or aluminum bolts or brackets; (B) the floating docks are designed to remain in place indefinitely; (C) removal of the floating docks from the pilings would require total deconstruction of the floating docks as well as the destruction of the pilings; (D) no circumstances suggest that the expected period of affixation is not indefinite; and (E) moving a floating dock would be time-consuming and more expensive than building a new one. Taxpayer represents that the floating docks provide a conduit or route to tenants' boat slips, delineate the area of the slips, and protect the boats from damage from the elements. Taxpayer further represents that the floating docks serve no active function within the meaning of section 1.856-10(d)(2)(iii)(A).

Based on the information submitted and representations made, we conclude that the floating docks at Property A, Property D, and Property E affixed using the piling method are inherently permanent structures that are permanently affixed to other inherently permanent structures for purposes of section 1.856-2(d)(2)(i). Accordingly, the floating docks at Property A, Property D, and Property E are real property within the meaning of section 1.856-10(b) and, therefore, are real estate assets for purposes of section 856(c)(4) and (5).

Properties B and C

With regard to the floating docks affixed to the seabed by winch and cable at Property B and Property C, Taxpayer represents that (A) the floating docks are permanently attached to concrete anchors weighing in excess of j pounds that are embedded in the seabed or lake bottom; (B) the floating docks are designed and intended to remain in place indefinitely; (C) removal of the floating docks would require their demolition and the abandonment of the anchors in the seabed or lake bottom; (D) no circumstances suggest that the expected period of affixation is not indefinite; and (E) removing the floating docks requires specialized industrial tools and certified divers, bears a cost higher than that of new construction, and would take between k and l months. Taxpayer further represents that the floating docks provide a conduit or route to tenants' boat slips, delineate the area of the slips, and protect the boats from damage from the elements. Additionally, Taxpayer represents that the floating docks serve no active function within the meaning of section 1.856-10(d)(2)(iii)(A).

Based on the information submitted and representations made, we conclude that the floating docks at Property B and Property C affixed by the winch and cable method are inherently permanent structures that are permanently affixed to the ground for purposes of section 1.856-2(d)(2)(i). Accordingly, the floating docks at Property B and Property C are real property within the meaning of section 1.856-10(b) and, therefore, are real estate assets for purposes of section 856(c)(4) and (5).

Ruling 2:

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 1.856-4(a) provides, in relevant part, that the term "rents from real property" means, generally, the gross amounts received for the use of, or right to use, real property of the REIT.

Taxpayer represents that its dry dock storage facilities are inherently permanent structures for purposes of section 1.856-10, and that it leases racking structure space in the facilities for terms of at least c days. Additionally, Taxpayer represents that while dry dock storage leases do not allocate to the tenant a specifically identified spot in the racking structure, they do guarantee the tenant a specified amount of storage space in a dry dock storage facility for the dry dock storage of the tenant's boat. Taxpayer further represents that the service of moving boats into and out of the dry dock storage facilities is the only service provided in connection with amounts received for the use of racking structure space in the dry dock storage facilities, is customarily provided to tenants of similar dry dock storage facilities in the geographic area, and is being provided by a TRS of the Taxpayer or an independent contractor from whom Taxpayer derives no income. Based on the information submitted and representations made, we conclude that the amounts received for the use of racking structure space in dry dock storage facilities will not be considered as other than rents from real property for purposes of section 856(d) by reason of the storage leases' failure to convey to tenants a right of entry or a right to use specifically enumerated space within the dry dock storage facilities.

Ruling 3:

Section 856(l)(1) defines a TRS as a corporation that is directly or indirectly owned in whole or in part by a REIT, and that makes a joint election with the REIT to treat the corporation as a TRS of the REIT.

Section 856(l)(3) provides that the term TRS shall not include any corporation that directly or indirectly manages a lodging facility.

Section 856(d)(9)(D)(ii) provides that the term “lodging facility” means a hotel, motel, or other establishment more than one-half of the dwelling units in which are used on a transient basis.

The Properties contain separately identifiable items of property that are rented and used independently of each other, such as floating docks, dry dock facilities, and restaurants. The characterization of a separately identifiable item of property that is rented and used independently of the greater property on which the item of property is physically located should not dictate the characterization of the greater property – for example, the presence of a restaurant on a marina property should not automatically render the entire marina property a restaurant. Company provides linens, basic toiletries, and cleaning services to the cabin guests, who stay for short periods of time. Additionally, Taxpayer represents that the cabin guests are generally not tenants of the marina boat slips or dry dock storage facilities, and that income from the cabins comprises less than p percent of Company’s revenues.

The cabins at Property C are dwelling units used on a transient basis; together with any areas reserved for cabin guests, they are an establishment that is a lodging facility for purposes of section 856(d)(9)(D)(ii). However, based on the information submitted and representations made, including the fact that the income from the cabins comprises less than p percent of Company’s revenues, the presence of the cabins at Property C will not cause the assets at Property C other than the cabins and any areas reserved for cabin guests to be treated as lodging facilities for these purposes.

CONCLUSIONS

Based on the information submitted and representations made by Taxpayer, we rule that:

- (1) The floating docks described above at Properties A, B, C, D, and E are real property for purposes of section 1.856-10(b) and, therefore, are real estate assets for purposes of section 856(c)(4) and (5).
- (2) Amounts received for racking structure space in dry dock storage facilities described above will not be considered as other than rents from real property for purposes of section 856(d).
- (3) The presence of cabins at Property C will not cause the assets at Property C other than the cabins and any areas reserved for cabin guests to be treated as lodging facilities within the meaning of section 856(d)(9)(D)(ii).

This ruling’s application is limited to the facts, representations, Code sections, and regulations cited herein. 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 concerning whether any asset described herein constitutes real property for purposes of any section of the Code other than section 856. Additionally, except as expressly provided herein, no opinion is expressed or implied concerning whether any income is qualifying income for purposes of section 856(c)(2) and (3). Furthermore, no opinion is expressed concerning any services performed by Taxpayer, Company, any TRS, or any other party. Finally, no opinion is expressed whether Taxpayer otherwise qualifies as a REIT under subchapter M, part II of Chapter 1 of the Code.

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 Martin
Senior Technical Reviewer, Branch 1
Office of Associate Chief Counsel
(Financial Institutions & Products)

Enclosure:
Copy of this for section 6110 purposes

cc: