

**Internal Revenue Service**

Number: **202149005**

Release Date: 12/10/2021

Index Number: 856.00-00, 9100.00-00

Department of the Treasury

Washington, DC 20224

Third Party Communication: None

Date of Communication: Not Applicable

Person To Contact:

, ID No.

Telephone Number:

Refer Reply To:

CC:FIP:B02

PLR-106719-21

Date:

September 13, 2021

Fax:

Legend:

Taxpayer =

Subsidiary =

Entity A =

Entity B =

Accounting Firm =

Individual =

State A =

State B =

State C =

Hotel =

Date 1 =

Date 2 =

Date 3 =

Date 4 =

Date 5 =

Date 6 =

Date 7 =

Date 8 =

Date 9 =

Date 10 =

Date 11 =

Date 12 =

Month 1 =

Year 1 =

x =

y =

Dear :

This ruling responds to a letter dated March 17, 2021, submitted on behalf of Taxpayer and Subsidiary. Taxpayer and Subsidiary request an extension of time under sections 301.9100-1 and 301.9100-3 of the Procedure and Administration Regulations (the "Regulations") to make an election under section 856(l) of the Internal Revenue Code (the "Code") to treat Subsidiary as a taxable REIT subsidiary ("TRS") of Taxpayer effective as of Date 1.

#### FACTS

Taxpayer is a State A statutory trust that elected to be classified as a corporation for U.S. federal income tax purposes effective Date 2. Taxpayer elected to be taxed as a real estate investment trust (REIT) under section 856 through 859 of the Code commencing with its taxable year that ended on Date 3. Taxpayer uses an accrual method as its overall method of accounting, and Taxpayer's taxable year is the calendar year.

Taxpayer is owned by one common shareholder (“Owner”) and  $x$  preferred shareholders. Taxpayer established Entity A and Entity B, two wholly owned U.S. limited liability companies, in connection with the acquisition of a hotel in State C. Taxpayer is the sole owner of Entity A, which in turn is the sole owner of Entity B.

Subsidiary is a State B limited liability company. Subsidiary uses an accrual method as its overall method of accounting, and its taxable year is the calendar year. Subsidiary was formed on Date 4 and has been indirectly but wholly owned by Taxpayer through Entity B since it was formed. As a U.S. disregarded limited liability company, Subsidiary was an entity that was eligible to elect its classification status for U.S. federal income tax purposes pursuant to Treas. Reg. § 301.7701-3. Subsidiary filed a Form 8832, *Entity Classification Election* after its formation electing to change its initial default classification from a disregarded entity to classification as an association taxable as a corporation, with an effective date of Date 5. Before Date 5, Subsidiary was treated as a disregarded entity for U.S. federal income tax purposes, and no inconsistent tax or information returns have been filed.

Taxpayer engaged Accounting Firm to advise on tax matters and to assist with tax compliance for Taxpayer and for Subsidiary. Individual is the Chief Financial Officer for each of Taxpayer and Subsidiary. Individual has overall responsibility for tax compliance and planning for Taxpayer and Subsidiary.

Entity B entered into a purchase and sale agreement on Date 6 to acquire Hotel. Taxpayer informed Accounting Firm that it intended to own Hotel in a REIT and lease Hotel to Subsidiary. On Date 7, Accounting Firm provided a memorandum that advised that Taxpayer, a statutory trust, and Subsidiary, a disregarded limited liability company, each file a Form 8832 to elect to be classified as a corporation for U.S. federal income tax purposes. Additionally, Accounting Firm advised that Taxpayer and Subsidiary should jointly file Form 8875, *Taxable REIT Subsidiary Election* to treat Subsidiary as a TRS of Taxpayer for the year ended Date 3.

Entity B acquired Hotel on Date 8. Entity B and Subsidiary entered into a  $y$  year operating lease of Hotel immediately after the acquisition as landlord and tenant, respectively. Subsidiary entered into an agreement with a third-party hotel management company to operate Hotel as an eligible independent contractor pursuant to section 856(d)(8)(B).

In Month 1, Accounting Firm was working to complete the Year 1 tax compliance for Taxpayer and Subsidiary. Accounting Firm requested a copy of Forms 8832 filed by each of Taxpayer and Subsidiary so that the forms could be attached to their respective federal tax returns for the year ended Date 3. Accounting Firm also requested for its records a copy of Form 8875 jointly filed by Taxpayer and Subsidiary. Individual is responsible for tax compliance and oversight for Taxpayer and Subsidiary. Owner’s accounting department provides support with tax compliance and oversight for Taxpayer and Subsidiary to Individual.

During a conference call with Accounting Firm on Date 9, to discuss the status of the Forms 8832 and 8875, Individual confirmed that he mistakenly believed he had delegated the responsibility for filing Forms 8832 and 8875 to someone in Owner's accounting department. As a result of this mistake, Forms 8832 and 8875 had inadvertently not been filed.

Based on advice from Accounting Firm, Individual agreed that each of the forms would be filed as soon as possible. Taxpayer and Subsidiary filed Forms 8832 on Date 10 pursuant to the late classification relief provided for in Rev. Proc. 2009-41, 2009-39 I.R.B. 439, for Taxpayer and Subsidiary each to elect to be classified as an association taxable as a corporation, effective Date 2 and Date 5, respectively. On Date 11, Taxpayer and Subsidiary filed a Form 8875 that listed what was at that point in time the earliest possible effective date permitted under Form 8875, Date 12, although Taxpayer and Subsidiary desired an effective date of Date 1.

### REPRESENTATIONS

Taxpayer makes the following representations in connection with this request for an extension of time:

1. The request for relief was filed by Taxpayer and Subsidiary before the failure to make the regulatory election was discovered by the Service.
2. Granting the relief will not result in Taxpayer and Subsidiary having a lower tax liability in the aggregate for all years to which the regulatory election applies than they would have had if the election had been timely made (taking into account the time value of money).
3. Taxpayer and Subsidiary did not seek to alter a return position for which an accuracy-related penalty has been or could have been imposed under section 6662 of the Code at the time they requested relief and the new position requires or permits a regulatory election for which relief is requested.
4. Being fully informed of the required regulatory election and related tax consequences, Taxpayer and Subsidiary did not choose to not file the election.
5. Taxpayer and Subsidiary are not using hindsight in requesting this relief. No specific facts have changed since the due date for making the election that make this election advantageous to Taxpayer and Subsidiary.
6. The period of limitations on assessment under section 6501(a) of the Code has not expired for Taxpayer and Subsidiary for the taxable year for which the election should have been filed, nor for any taxable years that would have been affected by the election had it been timely filed.

In addition, affidavits on behalf of Taxpayer and Subsidiary have been provided as required by section 301.9100-3(e)(2) and (3).

### LAW AND ANALYSIS

Section 856(l) provides that a REIT and a corporation (other than a REIT) may jointly elect to treat such corporation as a TRS. To be eligible for treatment as a TRS, section 856(l)(1) provides that the REIT must directly or indirectly own stock in the corporation, and the REIT and the corporation must jointly elect such treatment. The election is irrevocable once made, unless both the REIT and the subsidiary consent to its revocation. In addition, section 856(l) specifically provides that the election, and any revocation thereof, may be made without the consent of the Secretary.

In Announcement 2001-17, 2001-1 C.B. 716, the Service announced the availability of new Form 8875, *Taxable REIT Subsidiary Election*. According to the Announcement, this form is to be used for taxable years beginning after 2000 for eligible entities to elect treatment as a TRS. The instructions to Form 8875 provide that the subsidiary and the REIT can make the election at any time during the taxable year. However, the effective date of the election depends on when the Form 8875 is filed. The instructions further provide that the effective date cannot be more than 2 months and 15 days prior to the date of filing the election, or more than 12 months after the date of filing the election. If no date is specified on the form, the election is effective on the date the form is filed with the Service.

Section 301.9100-1(c) provides that the Commissioner has discretion to grant a reasonable extension of time to make a regulatory election, or a statutory election (but no more than 6 months except in the case of a taxpayer who is abroad), under all subtitles of the Code except subtitles E, G, H, and I. Section 301.9100-1(b) defines a regulatory election as an election whose due date is prescribed by regulations or by a revenue ruling, a revenue procedure, a notice, or an announcement published in the Internal Revenue Bulletin.

Section 301.9100-3(a) through (c)(1) sets forth rules that the Service generally will use to determine whether, under the particular facts and circumstances of each situation, the Commissioner will grant an extension of time for regulatory elections that do not meet the requirements of section 301.9100-2. Section 301.9100-3(a) provides that requests for relief subject to this section will be granted when the taxpayer provides the evidence (including affidavits described in section 301.9100-3(e)) to establish to the satisfaction of the Commissioner that the taxpayer acted reasonably and in good faith, and the grant of relief will not prejudice the interests of the Government.

Section 301.9100-3(b) provides that a taxpayer is deemed to have acted reasonably and in good faith if the taxpayer (i) requests relief under this section before the failure to make the regulatory election is discovered by the Service; (ii) failed to

make the election because of intervening events beyond the taxpayer's control; (iii) failed to make the election because, after exercising reasonable diligence (taking into account the taxpayer's experience and the complexity of the return or issue), the taxpayer was unaware of the necessity for the election; (iv) reasonably relied on the written advice of the Service; or (v) reasonably relied on a qualified tax professional, including a tax professional employed by the taxpayer, and the tax professional failed to make, or advise the taxpayer to make, the election. A taxpayer will be deemed to have not acted reasonably and in good faith if the taxpayer (i) seeks to alter a return position for which an accuracy-related penalty has been or could be imposed under section 6662 at the time the taxpayer requests relief and the new position requires or permits a regulatory election for which relief is requested; (ii) was informed in all material respects of the required election and related tax consequences, but chose not to file the election; or (iii) uses hindsight in requesting relief.

Section 301.9100-3(c)(1) provides that a reasonable extension of time to make a regulatory election will be granted only when the interests of the Government will not be prejudiced by the granting of relief. Section 301.9100-3(c)(1)(i) provides that the interests of the Government are prejudiced if granting relief would result in the taxpayer having a lower tax liability in the aggregate for all taxable years affected by the election than the taxpayer would have had if the election had been timely made (taking into account the time value of money). Section 301.9100-3(c)(1)(ii) provides that the interests of the Government are ordinarily prejudiced if the taxable year in which the regulatory election should have been made or any taxable years that would have been affected by the election had it been timely made are closed by the period of limitations on assessment under section 6501(a) before the taxpayer's receipt of a ruling granting relief under this section.

### CONCLUSION

Based on the information submitted and representations made, we conclude that Taxpayer and Subsidiary have satisfied the requirements for granting a reasonable extension of time to elect under section 856(l) to treat Subsidiary as a TRS of Taxpayer effective Date 6. Accordingly, Taxpayer and Subsidiary have 90 calendar days from the date of this letter to make the intended election to treat Subsidiary as a TRS of Taxpayer effective Date 6.

### CAVEATS

This ruling is limited to the timeliness of the filing Form 8875. This ruling's application is limited to the facts, representations, and Code and regulation sections cited herein. Except as 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 or implied regarding whether Taxpayer otherwise qualifies as a REIT, or whether Subsidiary otherwise qualifies as a TRS of Taxpayer under part II of subchapter M of chapter 1 of the Code.

No opinion is expressed with regard to whether the tax liability of Taxpayer is not lower in the aggregate for all years to which the election applies than such tax liability would have been if the election had been timely made (taking into account the time value of money). Upon audit of the U.S. federal income tax returns involved, the director's office will determine such tax liability for the years involved. If the director's office determines that such tax liability is lower, that office will determine the federal income tax effect.

The ruling contained in this letter is based upon information submitted and representations made by Taxpayer and Subsidiary and accompanied by penalties of perjury statements executed by the appropriate parties. While this office has not verified any of the material submitted in support of the request for ruling, it is subject to verification on examination.

This ruling is directed only to the taxpayer who requested 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 representatives.

Sincerely,

Matthew Howard  
Matthew Howard  
Senior Counsel, Branch 2  
Office of the Associate Chief Counsel  
(Financial Institutions & Products)