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Person To Contact:
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Date:
March 17, 2022

LEGEND:

Taxpayer =

OP =

Property A =

Property B =

Property C =

Property D =

Property E =

State A =

State B =

State C =

Date 1 =

Year 1 =

Year 2 =

Event 1 =

Event 2 =

a =

b =

c =

d =

e =

f =

g =

h =

i =

j =

k =

l =

m =

n =

o =

Dear _____ :

This ruling responds to a letter dated September 16, 2021, 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, therefore, are real estate assets for purposes of section 856(c)(4) and (5);
- (2) Amounts received for the use of space in the indoor and outdoor dry dock storage facilities will not be treated 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);
- (4) Business interruption insurance (“BII”) proceeds received by OP resulting from the two natural events described below will be treated as qualifying income for purposes of section 856(c)(2) and (3); and
- (5) Neither income attributable to the Amenities themselves nor income attributable to the services provided at the Amenities constitute impermissible tenant service income and, therefore, will not cause any portion of the rents received by Taxpayer to fail to qualify as rents from real property under section 856(d).

FACTS

Taxpayer is a State A limited liability company and intends to elect to be taxed as a real estate investment trust (“REIT”) beginning with its taxable year ended Date 1. Taxpayer currently owns and operates its properties through OP, a State A limited liability company treated as a partnership for federal income tax purposes.

OP 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, pools, gyms, 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 seabed or lake 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; OP 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 steel 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 permanently 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. OP generally employs the piling method of affixation if the water level is expected to fluctuate by f feet or less.

Taxpayer represents that the floating docks affixed to pilings are designed to remain in place indefinitely. OP 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 that would require cutting the pilings down flush with the seabed or lake bottom, 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 OP, and OP 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 docks from their 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 or lake bottom by a system of wire rope cables, concrete anchors, and winches. The cables are between g and h 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 i 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 docks 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 is generally used when the water level is expected to fluctuate by f 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 OP, and OP 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 the dock affixed by the winch and cable method generally requires between j and k 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 seabed or lake bottom over time, exponentially increasing the force required to dislodge them. The depth of the anchors can exceed l 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 indoor and outdoor dry dock storage facilities. The indoor dry dock storage facilities consist of buildings with steel racking structures arranged into vertical bays to accommodate several tiers of boats. Taxpayer represents that both the building and the steel racking structures are inherently permanent structures for purposes of section 1.856-10(d)(2). The outdoor dry dock storage facilities consist of land on which to store tenants' boats either on affixed racking structures, movable racking structures, blocks, or tenant-owned boat trailers. Taxpayer represents that the affixed racking structures are inherently permanent structures for purposes of section 1.856-10(d)(2) and that the blocks and movable racking structures are personal property. Taxpayer further represents that the rent attributable to personal property, which is leased under, or in connection with, a lease of dry dock storage space, including blocks and movable racking structures, will 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.

OP leases space in the dry dock storage facilities to tenants for terms of at least c days. The dry dock storage leases do not allow the tenant to enter the indoor facilities or access the outdoor facilities except for certain instances of boats stored on tenant-owned trailers. The dry dock storage leases generally do not allocate a specifically identified spot in a racking structure or on the land, 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 (other than certain instances of boats stored on tenant-owned trailers). Taxpayer further represents that this is a service customarily performed at dry dock storage facilities in each of the geographic areas in which OP'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 OP's dry dock storage facilities may request services such as boat maintenance or repairs ("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 m cabins generally used by guests for stays of less than one week. OP holds and manages k cabins and manages an additional n cabins. OP 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 drydock storage space from OP. The income generated by the cabins represents less than o percent of OP'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).

d. Business Interruption Insurance

OP and its subsidiaries carry BII to replace lost revenue in the event a natural disaster damages a marina to such a degree that the marina must shut down temporarily for repairs. The BII policies are triggered by (i) damage to assets that generate revenue, (ii) blockage of ingress or egress to the property, and (iii) a blockage or interruption of the supply of critical utilities to the property. Taxpayer represents that the purpose of BII proceeds is to make the claimant whole by providing lost revenue caused by the triggering event; accordingly, the calculation of BII proceeds prevents a windfall by discounting from its sum the claimant's typical expenses which were not incurred because of the closure caused by the triggering event. Taxpayer represents that OP claims BII proceeds related only to lost revenue that would otherwise constitute qualifying income under section 856(c)(2) and (3), and that Taxpayer's TRSs separately claim BII proceeds related to lost revenue other than rental revenue. Taxpayer represents that it has BII proceeds resulting from two natural events.

In Year 1, Event 1 in State B damaged two of OP's marinas in that state. Additionally, in Year 2, Event 2 in State C caused significant damage to one of OP's marinas in that state. Both events resulted in extensive damage to OP's marinas necessitating the closure of significant portions of the properties for varying periods of time. OP did not earn rental revenue that it typically would have earned during the period the marinas remained closed. OP's claims for BII proceeds resulted in the receipt of income in an amount equal to the amount of lost rental revenue from the closures less typical operating expenses that were not incurred due to the closures. Taxpayer represents that the BII proceeds are meant to make OP whole and not to provide a windfall to OP. Additionally, Taxpayer represents that but for these natural disasters, this lost revenue would have constituted qualifying income described in section 856(c)(2) and (3).

e. Amenities

Taxpayer represents that each of the Properties include some or all of the following amenities that are available to all tenants of that Property and their guests at no additional cost: a swimming pool; an exercise room with exercise equipment; tennis courts; locker rooms with showers and space for tenants to change clothing; a tenant lounge with seating that serves as a space for tenants to gather and socialize while their boats are docked in their leased wet slips, and walking trails (collectively, the "Amenities"). Taxpayer further represents that Property C, the property with cabins, does not have any of the Amenities.

Taxpayer represents that OP provides cleaning and maintenance services with respect to the Amenities. Additionally, OP engages either an independent contractor from whom it does not derive or receive any income or a TRS to provide lifeguards for swimming pools at the Properties. Taxpayer represents that these services are customarily furnished or rendered in connection with the provision of Amenities at marinas located in the geographic area in which the Properties are located.

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 Income Tax 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" 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 j and k 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 the right to use, real property of the REIT.

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 tax year attributable to both the real and personal property leased under, or in connection with, such lease.

Section 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 the tenants of a particular building will be considered as customary if, in the geographic market in which the building is located, tenants in buildings which are of a similar class are customarily provided with the service.

Section 856(d)(2)(C) excludes from the definition of rents from real property any impermissible tenant service income as defined in section 856(d)(7). Section 856(d)(7)(A) provides that impermissible tenant service income means, with respect to any real or personal property, any amount received or accrued directly or indirectly by a REIT for services furnished or rendered to the tenants of such property, or for managing or operating such property. Section 856(d)(7)(C)(i) provides that services furnished or rendered, or management or operation provided, through an independent contractor from whom the REIT itself does not derive or receive any income or through a TRS of such trust shall not be treated as furnished, rendered, or provided by the REIT for purposes of section 856(d)(7)(A).

The Properties contain both indoor and outdoor dry dock storage facilities. Taxpayer represents that its indoor dry dock storage facilities, indoor racking structures, and outdoor affixed racking structures are inherently permanent structures for purposes of section 1.856-10(d)(2). Taxpayer further represents that the blocks and movable racking structures at its outdoor dry dock storage facilities are personal property and that the rent attributable to personal property which is leased under, or in connection with, a lease of dry dock storage space, including blocks and movable racking structures, 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. Additionally, Taxpayer represents that its leases of space in both indoor and outdoor dry dock storage facilities are for terms of at least 90 days.

Furthermore, 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 the dry dock storage facility for the dry dock storage of the tenant's boat. Taxpayer 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 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 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 space in both the indoor and outdoor 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 operates or 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. OP 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 0 percent of OP'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 income from the cabins comprises less than 9 percent of OP'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 the cabin guests to be treated as lodging facilities for these purposes.

Ruling 4:

Section 856(c)(5)(J) provides that to the extent necessary to carry out the purposes of part II of subchapter M of chapter 1 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 section 856(c)(2) or (3) may be considered as not constituting gross income for purposes of section 856(c)(2) or (3), or (ii) otherwise constitutes gross income not qualifying under section 856(c)(2) or (3) may be considered as gross income which qualifies under section 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. 2020, 86th Cong., 2d Sess. 4 (1960) at 6, 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."

Section 1.856-4(b)(5)(ii) provides that the trustees or directors of the REIT are not required to delegate or contract out their fiduciary duty to manage the trust itself, as distinguished from rendering or furnishing services to the tenants of its property or managing or operating the property. The Trustees or directors may do all those things necessary, in their fiduciary capacities, to manage and conduct the affairs of the trust itself. For example, the trustees or directors may deal with insurance relating to the trust's property.

Taxpayer represents that it maintains BII to ensure against lost revenue in the event a natural disaster damages a marina to such a degree that the marina must shut down temporarily for repairs. Taxpayer has received BII proceeds in the aftermath of two separate natural disasters. Each respective disaster required Taxpayer to temporarily suspend ordinary operations while it made repairs. Taxpayer represents that the BII proceeds directly relate to lost revenue that would otherwise constitute qualifying income under section 856(c)(2) and (3) and that the proceeds are calculated to avoid a windfall (lost gross revenue less the operating expenses not incurred during that period). Additionally, Taxpayer represents that its TRSs separately claim BII proceeds related to lost revenue other than rental revenue.

The BII proceeds from lost revenue resulting from Event 1 and Event 2 constitute gross income to Taxpayer that is of a type not listed in section 856(c)(2) and (3). Based on all the facts and circumstances, however, treating the BII proceeds from Event 1 and

Event 2 as qualifying income for purposes of section 856(c)(2) and (3) does not interfere with Congressional policy objectives in enacting the income tests under those provisions.

Ruling 5:

Section 856(d)(7)(C)(ii) provides that for purposes of determining impermissible tenant service income, as defined in section 856(d)(7)(A), there shall not be taken into account 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).

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.

In determining whether a taxpayer has income that is impermissible tenant service income, only the income that is attributable to the provision of a service is analyzed. Although services may be provided in the Amenities, the Amenities themselves are not services. Income that is attributable to making available to all tenants at no additional cost a space such as one of the Amenities 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 Amenities are analyzed as any other service provided to tenants.

Taxpayer has represented that OP will provide cleaning and maintenance services with respect to the Amenities. Additionally, OP engages either an independent contractor from whom it does not derive or receive any income or a TRS to provide lifeguards for swimming pools at the Properties. Taxpayer further represents that these services are customarily furnished or rendered in connection with the provision of Amenities at marinas located in the geographic area in which the Properties are located.

The Amenities are common areas available for use by all marina tenants and their guests. Thus, the income from the cleaning and maintenance services provided with respect to the Amenities, for purposes of determining whether the income is qualifying income for REIT qualification purposes, is 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). The lifeguard services are provided by an independent contractor from whom Taxpayer does not derive any income or by a TRS of Taxpayer.

Accordingly, income from the cleaning and maintenance of the Amenities and lifeguarding the pools is not impermissible tenant service income and, therefore, will not cause any portion of the rents received by Taxpayer to fail to qualify as other than rents from real property under section 856(d).

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 the use of space in the indoor and outdoor dry dock storage facilities will not be treated 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).
- (4) The BII proceeds related to Taxpayer's lost revenue resulting from Event 1 and Event 2 will be treated as qualifying income for purposes of section 856(c)(2) and (3).
- (5) Neither income attributable to the Amenities themselves nor income attributable to the services discussed above in connection with the Amenities constitute impermissible tenant service income and, therefore, will not cause any portion of the rents received by Taxpayer to fail to qualify as rents from real property under section 856(d).

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 the purpose of any section of the Code other than section 856. No opinion is expressed concerning the valuation of personal property for the purpose of the section 856(d)(1)(C) 15 percent personal property limitation. Additionally, except as expressly provided herein, no opinion is expressed or implied concerning whether any income is qualifying income for purpose of section 856(c)(2) and (3). Furthermore, except as expressly provided herein, no opinion is expressed concerning any services performed by Taxpayer, OP, any TRS or any other party. Finally, no opinion is expressed whether Taxpayer otherwise qualifies as a REIT under subsection M, part II of Chapter 1 of the Code.

Furthermore, the ruling herein relates to whether income from certain services performed by Taxpayer is impermissible tenant service income and 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 cite 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
Branch Chief, Branch 2
Office of Associate Chief Counsel
(Financial Institutions & Products)

CC: