

taxable REIT subsidiary (TRS) of Taxpayer under section 856(l) of the Internal Revenue Code (the Code) effective Date 5.

FACTS

Fund is a State limited partnership formed on Date 1. Fund's purpose is to make, improve, operate, hold, sell, and exchange investments in commercial real estate as well as to engage in any other necessary or related activities.

Taxpayer is a State limited liability company formed on Date 2 as a wholly-owned disregarded entity of Fund. In Date 4, Taxpayer filed Form 8832, *Entity Classification Election*, to elect to be classified as an association taxable as a corporation, effective Date 3. Taxpayer intends to elect to be a real estate investment trust ("REIT") beginning with its first taxable year ended Date 7.

Subsidiary is a State limited liability company formed on Date 5 and is wholly owned by Taxpayer. On Date 9, Subsidiary filed Form 8832 pursuant to the late classification relief in Revenue Procedure 2009-41, 2009-39 I.R.B. 439, to elect to be classified as an association taxable as a corporation, effective Date 5.

Taxpayer and Subsidiary are entities that were formed to, among other things, provide for the operation of Hotel, a qualified lodging facility as defined in section 856(d)(9)(D), through an arrangement described in section 856(d)(8)(B), wherein Subsidiary would qualify as a TRS, lease Hotel from Taxpayer, and engage an eligible independent contractor or contractors, as defined in section 856(d)(9), to operate Hotel on its behalf.

Taxpayer intended that it qualify as a REIT and that Subsidiary qualify as a TRS under section 856 during the Year 1 taxable year and for each taxable year thereafter. In order to make a timely TRS election effective on Date 5, Taxpayer and Subsidiary would have had to file Form 8875, *Taxable REIT Subsidiary Election*, no later than Date 6.

Taxpayer's internal tax department prepared and filed forms related to the formation of Taxpayer. However, outside advisors and Taxpayer's former outside counsel did not advise Taxpayer of the need to file the appropriate tax forms with respect to Subsidiary. In Date 8, during discussions regarding audit reporting for Fund, Taxpayer discovered that neither the Form 8832 for Subsidiary nor the Form 8875 to jointly elect to treat Subsidiary as a TRS of Taxpayer had been filed. Firm subsequently prepared Form 8832, filed by Subsidiary on Date 9, and this request for a private letter ruling under sections 301.9100-1 and 301.9100-3 to seek an extension of time to allow Taxpayer and Subsidiary to make an election pursuant to 856(l) for Subsidiary to be treated as a TRS of Taxpayer effective Date 5.

REPRESENTATIONS

Taxpayer and Subsidiary make 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 or 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 or Subsidiary.
6. The period of limitations on assessment under section 6501(a) has not expired for Taxpayer or Subsidiary for the taxable year for which the election should have been filed, nor for any taxable year(s) 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 section 301.9100-3 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 generally is deemed to have acted reasonably and in good faith if the taxpayer (i) requests relief under section 301.9100-3 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, however, 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 section 301.9100-3.

Under all the facts and circumstances of this case as presented by Taxpayer and Subsidiary, we have determined that the interests of the Government are not prejudiced under the standards set forth in section 301.9100-3(c)(1)(i).

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 5. Accordingly, Taxpayer and Subsidiary have 90 calendar days from the date of this letter to make the intended joint election.

CAVEATS

This ruling is limited to the timeliness of the filing of 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.

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 rulings, 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,

Grace Cho
Assistant to the Branch Chief, Branch 3
Office of the Associate Chief Counsel
(Financial Institutions & Products)

cc: