Internal Revenue Service

Number: **202346008**
Release Date: 11/17/2023

Index Number: 856.01-00

Department of the Treasury
Washington, DC 20224

Third Party Communication: None
Date of Communication: Not Applicable

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Date:
May 30, 2023

Fax:

Legend

Taxpayer =

Subsidiary =

Company =

Agency =

State A =

State B =

State C =

Hurricane =

Date 1 =

Date 2 =

Date 3 =

Date 4 =

Year 1 =

Year 2 =

Year 3 =

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Dear :

This ruling responds to a letter dated November 8, 2022, and subsequent correspondence, requesting rulings on behalf of Taxpayer. Specifically, you have requested the following rulings:

1. The Floating Docks described below are real property for purposes of section 1.856-10(b) of the Income Tax Regulations and, therefore, are real estate assets for purposes of sections 856(c)(4) and (c)(5) of the Internal Revenue Code.

2. The Storage Fees, Pipeline Use Fees, and Docking Fees described below each qualify as rents from real property within the meaning of section 856(d) for purposes of sections 856(c)(2) and (c)(3).

3. The Section 481(a) Adjustment described below will not be treated as gross income for purposes of sections 856(c)(2) and (c)(3).

4. The Remediation Payment described below will not be treated as gross income for purposes of sections 856(c)(2) and (c)(3).

5. Taxpayer's income from the Insurance Payout described below will be treated as qualifying income for purposes of sections 856(c)(2) and (c)(3).

FACTS

Taxpayer was formed as a State A corporation on Date 2 and is currently taxed as a corporation for U.S. federal income tax purposes. Taxpayer intends to elect to be taxed as a real estate investment trust (“REIT”) beginning with its taxable year ending Date 4. An existing or newly formed subsidiary of Taxpayer will elect to be treated as a corporation for U.S. federal income tax purposes (if it is not formed as a corporation) and will make a joint election with Taxpayer to be treated as a taxable REIT subsidiary ("TRS") of Taxpayer.

Taxpayer owns bulk liquid storage terminal facilities (each, a "Storage Terminal Facility") with intermodal transportation access (i.e., access to multiple forms of transportation, such as ships, barges, rail, trucks, and pipelines). The Storage Terminal Facilities are constructed on land owned or leased by Taxpayer. Taxpayer represents that the Storage Terminal Facilities consist of assets that are either land, interests in land, improvements to land, inherently permanent structures, or structural components of an inherently permanent structure within the meaning of section 1.856-10 including roadways, buildings, stationary docks, storage tanks, and pipelines. The Storage Terminal Facilities also include personal property (e.g., pumps, compressors, and meters).

Floating Docks

Some of the Storage Terminal Facilities include floating docks (the "Floating Docks"). The Floating Docks provide a conduit or route for tenants to access the Storage Terminal Facilities and protect docked vessels from damage by the elements. Taxpayer represents that the Floating Docks serve no active function within the meaning of section 1.856-10(d)(2)(iii)(A). The Floating Docks are generally attached to poured concrete walkways on land, to concrete, timber, or steel bulkheads that retain contact with the land, and, as discussed below, to pilings. The configuration of each Floating Dock was determined during the original design of the applicable Storage Terminal Facility, and the Floating Docks are not interchangeable. Taxpayer represents that the Floating Docks are designed, constructed, and intended to remain permanently in place. Once attached, the Floating Docks are not portable or movable to another location and are not intended to be moved to a different location. The Floating Docks weigh hundreds of thousands to millions of pounds and are connected to land-based utilities, such as water and electricity. Moving the Floating Docks would be prohibitively costly, with the expense likely exceeding the cost of new construction. Taxpayer represents that the floating docks have a useful life expectancy of approximately d years.

The Floating Docks are permanently anchored to the seabed or riverbed by pilings. Taxpayer represents that the pilings are inherently permanent structures for purposes of section 1.856-10(d)(2)(i). The Floating Docks are permanently affixed to the pilings by steel pile guides or steel jackets that allow the Floating Docks to move up

or down on the pilings as necessary in response to water levels. Each Floating Dock remains permanently anchored to the seabed or riverbed by the pilings regardless of the elevation of the Floating Dock as water levels change. 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 Floating Docks with steel or aluminum bolts or brackets. Similarly, where steel jackets are used instead of pile guides, the jackets completely surround each piling and are welded to the Floating Dock. The Floating Docks are built around, surrounded by, or on top of the pilings and are not designed to be removed from the pilings. Because the Floating Docks are surrounded by, attached to, or on top of the pilings, it would be necessary to disassemble the Floating Docks to remove them from the pilings. Moreover, the removal of the Floating Docks would result in the pilings being cut flush with the seabed or riverbed effectively destroying the pilings.

Terminal Usage Agreements

Taxpayer enters into agreements with one or more unrelated third-party users of each Storage Terminal Facility (the "Terminal Users") permitting the Terminal Users to store their products at, and move their products through, the Storage Terminal Facility. The arrangement between Taxpayer and a Terminal User may be embodied in a single agreement or in multiple agreements that are related to one another (such agreements, collectively, "Terminal Usage Agreements"). Terminal Usage Agreements permit the Terminal Users to utilize the Storage Terminal Facility for the storage and movement of their products for a term of generally a or more years (and in no event less than c days).

A Terminal Usage Agreement specifies the storage tank capacity reserved for the particular Terminal User, but may or may not specify the tank in which the Terminal User's product will be stored: under some Terminal Usage Agreements, a specified tank or tanks is identified and dedicated to a Terminal User and, in other Terminal Usage Agreements, the Terminal User has a right to a fixed portion of the storage capacity at the Storage Terminal Facility but does not have a particular tank or tanks dedicated to it. Taxpayer represents that it does not oversell storage capacity and is obligated, at all times, to ensure that the capacity specified in a Terminal Usage Agreement is reserved for and available to the relevant Terminal User. A Terminal Usage Agreement may provide for the lease of a portion of the capacity of a storage tank (as opposed to a lease of the entire storage tank) where the stored content is fungible and may be stored on a comingled basis. Taxpayer represents that, at all times, the Terminal Users retain title to the product stored at the Storage Terminal Facilities.

Taxpayer represents that, with respect to each Terminal Usage Agreement, the fair market value rent for the pumps, compressors, meters, and other personal property which is leased under, or in connection with, the lease of the Storage Terminal Facility does not exceed 15 percent of the total rent for the taxable year paid by the Terminal User for both the real and personal property leased under, or in connection with, such Terminal Usage Agreement.

Taxpayer represents that it will only undertake activities with respect to the Storage Terminal Facilities that are consistent with its fiduciary duty to manage its assets or that would not result in unrelated business taxable income under section 512(b)(3) if received by an organization described in section 511(a)(2). Taxpayer will design, construct, inspect, maintain, and repair storage tanks and other real property assets located at each Storage Terminal Facility. Such activities will also include painting and repairing the storage tanks to prevent atmospheric corrosion or excessive wear and tear. On occasion, Taxpayer may test product in the storage tanks to verify it is the product specified in the Terminal Usage Agreement solely to ensure the safety and integrity of the storage tanks and the safety of the environment. Taxpayer will provide security at the Storage Terminal Facilities, including monitoring the area through security cameras and providing security guards.

Taxpayer will also provide Terminal Users with utility services, such as providing electricity to light the Storage Terminal Facilities. Such utility services may also include heating, cooling, or pressurizing the storage tanks located at a Storage Terminal Facility. Taxpayer may also circulate product stored in a storage tank. Such heating, cooling, pressurization, or circulation is only performed when it is necessary to avoid damage to the storage tanks, pipes, and stored product (e.g., so the stored product does not congeal in the storage tanks) and/or to make storing a product more efficient (e.g., to keep a product in a liquid state). Taxpayer represents that it is customary for storage tanks to be designed with the foregoing systems. Taxpayer further represents that the cooling, heating, pressurization, or circulation (i) will be applied, as necessary, at standard industry settings depending on the product stored therein, (ii) will not be customized for an individual Terminal User, and (iii) will not be provided primarily for the convenience of a particular Terminal User. In addition, none of the utilities provided by Taxpayer to the Terminal Users in connection with their use of the storage tanks separate, transform, modify, purify, or otherwise alter the nature or state of the product stored in the storage tank. Taxpayer represents that such services are necessary for the passive storage of the relevant products.

Taxpayer represents that all other activities and services will be undertaken by a TRS or an independent contractor from whom taxpayer derives no income (“IK”). In that regard, a TRS or IK will be responsible for the following services and activities: connecting and disconnecting loading arms or loading hoses and moving any product; capturing and/or burning off vapors that are displaced when product is moved; adding any agents or additives to any product in a storage tank for the benefit of a Terminal User; taking and testing samples of product in a storage tank for the benefit of a Terminal User; measuring or weighing product for the benefit of a Terminal User; and the drumming of products. The TRS or IK may also move different types of product owned by a Terminal User into a single tank to blend the Terminal User’s products. Additionally, a TRS or IK will monitor, operate, manage, and repair pumps, compressors, meters, and other personal property. Terminal Usage Agreements may or may not separately state fees for the foregoing services. Taxpayer represents the

TRS or IK will receive arm's length compensation from Taxpayer for the performance of these services.

Taxpayer represents that, consistent with section 1.856-4(b)(1), all services furnished to the Terminal Users are customarily provided to tenants of similar properties in the geographic market in which each Storage Terminal Facility is located.

Amounts paid by a Terminal User for a Terminal Usage Agreement (the "Storage Fee") are paid monthly and are based on the volume of storage capacity reserved by the Terminal User. The Storage Fee can be calculated as a fixed dollar amount multiplied by the total storage capacity of the storage tank(s) under contract in the Terminal Usage Agreement. Under such arrangements, the Terminal User pays for the full capacity reserved for it each month regardless of whether the Terminal User uses such full capacity. In other cases, the Storage Fee is calculated based on the volume of liquid product actually stored at and/or moved through the Storage Terminal Facility each month with a minimum volume commitment. In such cases, the Storage Fee is generally calculated as a fixed dollar amount multiplied by the amount of product stored and handled at the Storage Terminal Facility. Under these volume based agreements, the Terminal User pays the amount of its minimum volume commitment regardless of whether it uses the minimum capacity reserved for it plus the fixed dollar amount multiplied by the volume of any additional reserved capacity used that month. In all cases, each Terminal User may only use capacity reserved for its exclusive use pursuant to its Terminal Usage Agreement.

The fixed dollar amount used to calculate the Storage Fee generally increases periodically under the terms of the Terminal Usage Agreements based on an index tied to inflation. Taxpayer represents that the Storage Fee does not depend, in whole in or in part on the income or profits of any person.

Pipeline Use Agreements

Taxpayer also owns pipelines outside certain Storage Terminal Facilities (the “Pipelines”) that provide a conduit or route for product to flow to and from such Storage Terminal Facilities and connect to pipelines and/or facilities owned by third parties. Taxpayer represents that the Pipelines are inherently permanent structures under section 1.856-10. The Pipelines also include a de minimis amount of personal property (e.g., pumps, compressors, and meters).

Taxpayer enters into agreements with respect to the use of the Pipelines, including contractual arrangements that are subject to regulation by the U.S. Federal Energy Regulatory Commission, (each, a "Pipeline Use Agreement") with unrelated third-parties (each, a "Pipeline User") generally for a period of a or more years (and in no event less than c days). Taxpayer represents that it does not oversell capacity on a Pipeline and is obligated at all times to ensure that the capacity specified in a Pipeline Use Agreement will be available for use by the relevant Pipeline User.

Taxpayer represents that, with respect to each Pipeline Use Agreement, the fair market value rent for the pumps, compressors, meters, and other personal property which is leased under, or in connection with, the lease of the Pipeline does not exceed 15 percent of the total rent for the taxable year paid by the Pipeline User for both the real and personal property leased under, or in connection with, such Pipeline Use Agreement.

Taxpayer represents it will only undertake activities with respect to the Pipelines that are consistent with its fiduciary duty to manage its assets or that would not result in unrelated business taxable income under section 512(b)(3) if received by an organization described in section 511(a)(2). Taxpayer will design, construct, inspect, monitor, maintain, and repair the Pipelines (except as described below with respect to associated personal property). Taxpayer will mark the location of underground Pipelines to minimize the possibility of damage due to digging. Taxpayer may test product as it enters a Pipeline to verify that the product in that Pipeline is, in fact, the product specified in the Pipeline Use Agreement. Such testing is performed solely to ensure the safety and integrity of the Pipeline and the environment.

Similar to Taxpayer's activities with respect to the Storage Terminal Facilities, Taxpayer may heat or provide electricity to certain Pipelines. Taxpayer represents that it is customary for pipelines to be designed with the foregoing systems. Taxpayer represents that the purpose of heating the Pipelines is to avoid damage to the Pipelines and the product in the Pipelines (e.g., so the product does not congeal in the Pipelines and remains in a liquid state). Taxpayer further represents that heat (i) will be applied, as necessary, at standard industry settings depending on the product in the Pipeline, (ii) will not be customized for an individual Pipeline User, and (iii) will not be provided primarily for the convenience of a particular Pipeline User. Furthermore, Taxpayer represents that the heat does not help propel product along the Pipeline or act as a pumping mechanism to move product. In addition, none of the utilities provided by Taxpayer to the Pipeline Users in connection with their use of the Pipelines separate, transform, modify, purify, or otherwise alter the nature or state of the product in the Pipeline. Taxpayer represents that such services are necessary in order to provide a conduit or route for product to flow to and from Storage Terminal Facilities and connect to pipelines and/or facilities owned by third parties.

All other types of activities and services with respect to the Pipelines will be undertaken by a TRS or IK, including, scheduling use of the Pipeline by the Pipeline Users. Additionally, a TRS or IK will operate, monitor, maintain, and repair any pumps, compressors, meters, and other personal property and will receive arm's length compensation from Taxpayer for performing these activities.

Taxpayer represents that all services furnished to the Pipeline Users are customarily provided to tenants of similar properties in the geographic market in which the relevant Pipeline is located.

The amount received by Taxpayer from a Pipeline User with respect to a Pipeline is based on the volume of product placed on the Pipeline by the Pipeline User (the "Pipeline Use Fee"). The Pipeline Use Fee is generally calculated as a fixed dollar amount multiplied by the amount of product moved through the Pipeline. The Pipeline Use Agreement provides for an agreed-upon minimum volume commitment, and the Pipeline User is responsible for paying the minimum Pipeline Use Fee regardless of whether it uses the minimum capacity reserved for it. A Pipeline User that exceeds its minimum reserved capacity under its Pipeline Use Agreement is charged for such additional reserved capacity, but the fixed dollar amount per barrel may decrease if the product handled for a particular Pipeline User exceeds the minimum volume commitment for the month. The fixed dollar amount increases periodically under the terms of the Pipeline Use Agreement based on an index tied to inflation. Taxpayer represents that the Pipeline Use Fee does not depend, in whole in or in part on the income or profits of any person. In all cases, each Pipeline User may only use capacity reserved for its exclusive use pursuant to its Pipeline Use Agreement.

Dock Usage Agreement

Taxpayer enters into Dock Usage Agreements with one or more unrelated third-parties (each, a "Dock User") generally for a period of a or more years (and in no event less than c days). The Dock Users are not parties to Terminal Use Agreements. In exchange for a fee (the “Docking Fee”), a Dock Usage Agreement grants the Dock User the right to run pipeline across a Storage Terminal Facility that extends to the dock, use space on the dock to install equipment, dock a vessel at the dock and use the dock space to load/unload its product at any time during the term of the Dock Usage Agreement. Docking Fees are generally calculated in a manner similar to Storage Fees, i.e., as a fixed monthly charge or a fixed dollar amount multiplied by the amount of product moved over the dock with a minimum volume commitment. In all cases, each Dock User may only use space reserved for its exclusive use pursuant to its Dock Usage Agreement.

Taxpayer represents that it will only undertake activities with respect to Dock Usage Agreements that are consistent with its fiduciary duty to manage its assets or that would not result in unrelated business taxable income under section 512(b)(3) if received by an organization described in section 511(a)(2). Taxpayer will maintain and repair the dock and will provide electricity and security to the dock. A TRS or IK will undertake all other activities and services that benefit the Dock User and will be compensated at arm’s length by Taxpayer for those services. Specifically, a TRS or IK will perform all services provided in connection with the Dock User’s docking of vessels and loading or unloading product at the dock, including scheduling dock usage.

In addition, Taxpayer represents that, consistent with section 1.856-4(b)(1), all services furnished to the Dock User are customarily provided to tenants of similar properties in the geographic market in which the dock is located. In addition, Taxpayer represents that, with respect to each Dock Usage Agreement, the fair market value rent

for any personal property which is leased under, or in connection with, the lease of the dock space does not exceed 15 percent of the total rent for the taxable year paid by the Dock User for both the real and personal property leased under, or in connection with, such Dock Usage Agreement. Taxpayer further represents that a TRS or IK will monitor, operate, manage, and repair such personal property. Taxpayer also represents that the Docking Fees do not and will not depend, in whole or in part, on the income or profits of any person.

Taxpayer represents that it does not oversell dock space and is obligated at all times to ensure that the space specified in a Dock Usage Agreement is reserved for and available to the Dock User. While the Dock User does not have a specific area of the applicable dock reserved for its sole use, it is entitled to use the dock throughout the term of its Dock Usage Agreement.

Section 481(a) Adjustment

Taxpayer will file a Form 3115, *Application for Change in Accounting Method*, under the automatic change procedure described in Rev. Proc. 2015-13, 2015-5 I.R.B. 419, to change its method of depreciation for certain storage tanks and assets associated therewith. Specifically, Taxpayer will treat storage tanks and associated assets that it currently treats as personal property as real property for purposes of depreciation. This automatic change will result in a positive adjustment under section 481(a) that will be includible in Taxpayer's taxable income over a period of four years (the "Section 481(a) Adjustment").

Remediation Payment

Subsidiary is a State A limited liability company that is indirectly wholly-owned by Taxpayer and will be disregarded as an entity separate from Taxpayer as a result of Taxpayer's REIT election. In Year 1, Subsidiary acquired a parcel of property from Company, an unrelated third party ("the Parcel"). The Parcel is a portion of a larger site that is subject to a remediation order (the "Order"). The Order is an administrative consent order entered into between Company and Agency in which Company agreed to remediate certain polluted land in State B that was owned by Company.

The Parcel (and any other property subject to the Order) remains subject to the Order and any instrument of conveyance must contain a notice to that effect. Initially, Company agreed to remain responsible for all environmental liabilities, claims, and obligations associated with its ownership and operation of the Parcel prior to Date 1. Taxpayer represents that if Company had not agreed to remain responsible for the environmental liabilities at the time Subsidiary purchased the parcel, Subsidiary would not have been willing to pay as much to acquire the Parcel because it would have been required to assume a costly obligation with respect to the Parcel. Subsequently, on Date 3, Subsidiary agreed to assume certain pre-Date 1 environmental remediation liabilities with respect to Parcel in exchange for $g (the "Remediation Payment").

Subsidiary's remediation obligations include excavating portions of the Parcel, replacing contaminated soil with new soil, "capping" subsurface contamination to prevent its upward migration, constructing water treatment infrastructure to prevent future contamination of water and land in State B, and ongoing testing of soil samples to ensure the remediation efforts are and remain effective. Taxpayer represents that Subsidiary's obligations are with respect to its own real property, the Parcel, and that it is not responsible for the remediation of the rest of Company's land. Taxpayer represents that Subsidiary intends to engage independent contractors to perform most of the remediation work. Taxpayer also represents that it will capitalize the costs of the remediation for U.S. federal income tax purposes.

The amount of the Remediation Payment includes the following: the net present value of the estimated remediation costs, up to a b percent contingency fee in the event actual remediation costs are higher, and an amount intended to cover the risk of assuming the remediation liabilities. Taxpayer expects to include in its gross income all or a portion of the Remediation Payment in Year 4.

Taxpayer represents that the Parcel constitutes real property for purposes of section 856 and substantially all of the income generated from the Parcel will constitute qualifying income for purposes of section 856(c)(2) and (c)(3). Taxpayer further represents that it is responsible for the remediation and must incur the costs associated with remediating the Parcel and the Remediation Payment does not reflect compensation for services provided by Taxpayer to any third-party.

Insurance Payout

In Year 2, Hurricane caused extensive damage to three Storage Terminal Facilities located in State C. The hurricane-force winds caused most of the property damage, including damage to storage tank insulation, pipelines, and building roofs. Taxpayer estimates that the total cost to repair the damage from Hurricane will be between $f and $h (or more). Taxpayer carries property insurance to protect against damage to its storage terminal facilities and pipelines. After Taxpayer satisfies its property insurance deductible in the amount of approximately $e, the third-party insurance company that issued Taxpayer's policy will make an insurance payment to Taxpayer for the remainder of the damage (the "Insurance Payout"). Taxpayer expects to receive the Insurance Payout in multiple payments over more than one taxable year, beginning in Year 3 or Year 4.

Taxpayer represents that it will recognize income due to the receipt of the Insurance Payout to the extent it exceeds Taxpayer's actual expenditures to repair and replace damaged real property. Any such income compensates Taxpayer for the damaged real property that Taxpayer does not repair or replace. Taxpayer represents that any income from the Insurance Payout relates solely to Taxpayer's real property damaged by Hurricane.

LAW AND ANALYSIS

Ruling 1: Floating Docks

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" 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.

Taxpayer represents that the pilings are inherently permanent structures for purposes of section 1.856-10(d)(2)(i). Taxpayer further represents that: (A) the Floating Docks are affixed to the pilings by steel pile guides containing rollers that always touch the pilings and are permanently connected to the Floating Docks with steel or aluminum bolts or brackets or are affixed to the pilings by steel jackets that completely surround the pilings and are welded to the Floating Docks; (B) the Floating Docks are designed, constructed, and intended to remain permanently in place; (C) removal of the Floating Docks from the pilings would require total deconstruction of the Floating Docks and would also result in destruction of the pilings; (D) no circumstances suggest that the expected period of affixation is not indefinite; and (E) moving the Floating Docks would be prohibitively costly, with the expense likely exceeding the cost of new construction. Taxpayer represents that the Floating Docks provide a conduit or route for tenants to access the Storage Terminal Facilities and protect docked vessels from damage by 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 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 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: Storage Fees, Pipeline Use Fees, and Docking Fees

Section 856(c)(2) provides that in order for a corporation to qualify as a REIT, at least 95 percent of the corporation's gross income (excluding gross income from prohibited transactions) must be derived from dividends; interest; rents from real property; gain from the sale or other disposition of stock, securities, and real property

(other than property described in section 1221(a)); abatements and refunds of taxes on real property; income and gain derived from foreclosure property; commitment fees to make loans secured by mortgages on real property or on interests in real property or to purchase or lease real property; gain from certain sales or other dispositions of real estate assets; and certain mineral royalty income.

Section 856(c)(3) provides that in order for a corporation to qualify as a REIT, at least 75 percent of the corporation's gross income (excluding gross income from prohibited transactions) must be derived from rents from real property; interest on obligations secured by mortgages on real property or on interests in real property; gain from the sale or other disposition of real property (other than property described in section 1221(a)); dividends or other distributions on, and gain from the sale or disposition of, transferable shares in other REITs; abatements and refunds of taxes on real property; income and gain derived from foreclosure property; commitment fees to make loans secured by mortgages on real property or on interests in real property or to purchase or lease real property; gain from certain sales or other dispositions of real estate assets; and qualified temporary investment income.

Section 856(d)(1) provides that “rents from real property” includes (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 which is leased under, or in connection with, a lease of real property, but only if the rent attributable to such 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 856(d)(2)(A) provides that, subject to certain exceptions, rents from real property does not include any amount received or accrued, directly or indirectly, with respect to any real or personal property, if the determination of such amount depends in whole or in part on the income or profits derived by any person from such property (except that any amount so received or accrued shall not be excluded from rents from real property solely by reason of being based on a fixed percentage or percentages of receipts or sales).

Section 856(d)(2)(C) provides that any impermissible tenant service income is excluded from 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 the property, or for managing or operating such property.

Section 856(d)(7)(C) provides certain exceptions 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 impermissible tenant service income does not include 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 1.856-4(a) defines "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 1.856-4(b)(1) provides that, for purposes of sections 856(c)(2) and (3), 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 of a similar class (such as luxury apartment buildings) are customarily provided with the service. To qualify as a service customarily furnished, the service must be furnished or rendered to the tenants of the REIT or, primarily for the convenience or benefit of the tenants, to the guests, customers, or subtenants of the tenants.

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 REIT itself, as distinguished from rendering or furnishing services to the tenants of its property or managing or operating the property. Thus, the trustees or directors may do all those things necessary, in their fiduciary capacities, to manage and conduct the affairs of the REIT itself, including establishing rental terms, choosing tenants, entering into renewal of leases, and dealing with taxes, interest, and insurance relating to the REIT's property. The trustees may also make capital expenditures with respect to the REIT's property (as defined in section 263) and may make decisions as to repairs of the REIT's property (of the type that would be deductible under section 162), the cost of which may be borne by the REIT. See also Rev. Rul. 67-353, 1967-2 C.B. 252.

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 rents 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.

Taxpayer represents that the Storage Terminal Facilities and the Pipelines are real property for purposes of section 856. Furthermore, this letter ruling concludes that the Floating Docks are real property for purposes of section 856. The Terminal Usage Agreements, Pipeline Use Agreements, and Dock Usage Agreements will generally have a term of a or more years, and in no event less than c days. Each of the Terminal Usage Agreements, Pipeline Use Agreements, and Dock Usage Agreements will provide the user with the exclusive right to use a fixed portion of the capacity of the Storage Terminal Facilities, the Pipelines, or docks and land at the Storage Terminal Facilities throughout the term of the agreement. Taxpayer represents that the Storage Fee, Pipeline Use Fee, and Docking Fee do not depend, in whole or in part, on the income or profits of any person. Accordingly, each of the Storage Fee, Docking Fee, and Pipeline Use Fee is an amount received for the use of, or the right to use, real property of Taxpayer and qualifies as rents from interests in real property under section 856(d)(1)(A).

With respect to the Storage Terminal Facilities, Pipelines, and docks, Taxpayer represents that it will only undertake activities that are consistent with its fiduciary duty to manage itself or that would produce amounts 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). Taxpayer represents that a TRS or an IK will perform all other activities and services. In connection with the Storage Terminal Facilities, Taxpayer represents that the heating, cooling, or pressurization of the storage tanks and the circulation of product stored in a storage tank is performed only when it is necessary to avoid damage to the storage tanks and pipes, to make storing a product more efficient; and is necessary for the passive storage of the relevant products. Such heating, cooling, pressurization, or circulation is applied at standard industry settings depending on the product stored and is not tailored to the needs of individual Storage Terminal Users. Such heating, cooling, pressurization, or circulation is not provided primarily for the convenience of a particular Storage Terminal User. Additionally, such heating, cooling, pressurization, or circulation does not separate, transform, modify, purify, or otherwise alter the nature or state of the product stored in the storage tank. Similarly, in connection with the Pipelines, Taxpayer represents that the heat is applied as necessary to avoid damage to the Pipelines and is applied at standard industry settings depending on the product in the Pipeline and is not customized for any individual Pipeline User. Neither the heat nor the electricity provided by Taxpayer separate, transform, modify, purify or otherwise alter the nature or state of the product in the Pipeline. Furthermore, the heat does not help propel product along the Pipeline or act as a pumping mechanism to move product. Therefore, the activities and services

performed by Taxpayer and by a TRS or IK detailed in the Facts section of this letter do not give rise to impermissible tenant service income. Taxpayer represents that all services furnished to the Storage Terminal Users are customarily provided to tenants of similar properties in the geographic market in which the Storage Terminal Facility is located, and that all services furnished to the Pipeline Users are customarily provided to tenants of similar properties in the geographic market in which the Pipeline is located. Likewise, Taxpayer represents that the services furnished to a Dock User are customarily provided to tenants of similar properties in the geographic market in which the dock is located.

Taxpayer represents that, with respect to each Terminal Usage Agreement, each Pipeline Use Agreement, and each Dock Usage Agreement, rent attributable to personal property that is leased under, or in connection with, the lease of the Storage Terminal Facility, Pipeline, or dock 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 agreement. Accordingly, the Storage Fees, Pipeline Use Fees, and Docking Fees received by Taxpayer qualify as rents from real property within the meaning of section 856(d) for purposes of sections 856(c)(2) and (c)(3).

Ruling 3: Section 481(a) Adjustment

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 the 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 822-823 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 481(a) provides that a taxpayer that changes its method of accounting takes into account necessary adjustments in computing its taxable income.

Section 1.481-1(d) provides that a section 481(a) adjustment must be properly taken into account for purposes of computing gross income, adjusted gross income, or taxable income in determining the amount of any item of gain, loss, deduction, or credit that depends on gross income, adjusted gross income, or taxable income.

As noted above, Taxpayer will file a Form 3115 to change its method of accounting for depreciating certain storage tanks. The method change will result in a positive Section 481(a) Adjustment that will be includible in taxable income. Sections 856(c)(2) and (3) list the sources of permissible income for a REIT. Income from a section 481(a) adjustment is not specifically enumerated in section 856(c)(2) or (3). Based on all the facts and circumstances, however, excluding the Section 481(a) Adjustment from Taxpayer's gross income for purposes of section 856(c)(2) and (c)(3) does not interfere with Congressional policy objectives in enacting the income tests under those provisions. Accordingly, pursuant to section 856(c)(5)(J)(i), the Section 481(a) Adjustment will not constitute gross income for purposes of section 856(c)(2) and (c)(3).

Ruling 4: Remediation Payment

The Remediation Payment constitutes gross income that does not qualify under sections 856(c)(2) or (c)(3). The Remediation Payment is essentially an amount intended to compensate Taxpayer for the cost of remediating its own property. Taxpayer represents that had it been obligated to perform the remediation when it purchased the Parcel, the purchase price of the Parcel would have been lower to reflect the cost of remediation. In addition, Taxpayer represents that the Remediation Payment is not compensation for any services provided to a third party or for remediating property that is not owned by Taxpayer. As such, excluding the Remediation Payment from gross income for purposes of sections 856(c)(2) and (c)(3) does not impede or interfere with Congress' policy objective in enacting the income tests under those provisions. Accordingly, pursuant to section 856(c)(5)(J)(i), the Remediation Payment will not constitute gross income for purposes of sections 856(c)(2) and (c)(3).

Ruling 5: Insurance Payout

Any gross income attributable to the Insurance Payout is not gross income that qualifies under sections 856(c)(2) or (c)(3). Taxpayer represents that receipt of the Insurance Payout merely restores Taxpayer to the position in which it would have been absent the hurricane damage to its property and the income attributable to the Insurance Payout is a payment for the damaged real property that Taxpayer does not repair or replace, which is akin to the disposition of lost real property as a result of Hurricane. Taxpayer represents that the property damaged is real property for purposes of section 856. Based on the facts and circumstances of the instant case, treating the income attributable to the Insurance Payout as qualifying income for purposes of sections 856(c)(2) and (c)(3) does not interfere with Congressional policy objectives in enacting the income tests under those provisions. Accordingly, pursuant to section 856(c)(5)(J)(ii), income attributable to the Insurance Payout will be treated as qualifying income for purposes of sections 856(c)(2) and (c)(3).

CONCLUSIONS

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

1. The Floating Docks are real property for purposes of section 1.856-10(b) and, therefore, are real estate assets for purposes of sections 856(c)(4) and (c)(5).

2. The Storage Fees, Pipeline Use Fees, and Docking Fees received by Taxpayer qualify as rents from real property within the meaning of section 856(d) for purposes of sections 856(c)(2) and (c)(3).

3. Pursuant to section 856(c)(5)(J)(i), the Section 481(a) Adjustment will not be treated as gross income for purposes of sections 856(c)(2) and (c)(3).

4. Pursuant to section 856(c)(5)(J)(i), the Remediation Payment will not be treated as gross income for purposes of sections 856(c)(2) and (c)(3).

5. Pursuant to section 856(c)(5)(J)(ii), Taxpayer's income from the Insurance Payout will be treated as qualifying income for purposes of sections 856(c)(2) and (c)(3).

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, other than the floating docks, constitutes real property for purposes of section 856. Additionally, no opinion is expressed regarding whether any amount received by Taxpayer depends on the income or profits of any person, any activities are fiduciary duties to manage the REIT itself, any activities would not result in unrelated business taxable income under section 512(b)(3) if received by an organization described in section 511(a)(2), any services are customarily provided to tenants of similar properties in the same geographic market, or any income attributable to personal property leased in connection with real and personal property does not exceed 15 percent of the total rent under section 856(d)(1)(C). Furthermore, no opinion is expressed regarding the propriety of Taxpayer's method change or the amount of the Section 481(a) Adjustment. Additionally, no opinion is expressed or implied as to whether any portion of the Insurance Payout constitutes gross income for federal income tax purposes. Finally, no opinion is expressed regarding 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
Senior Technical Reviewer, Branch 3
Office of Associate Chief Counsel
(Financial Institutions & Products)

cc: