

Internal Revenue Service

Number: **202409002**
Release Date: 3/1/2024
Index Number: 856.01-00

Department of the Treasury
Washington, DC 20224

Third Party Communication: None
Date of Communication: Not Applicable

Person To Contact:
, ID No.

Telephone Number:

Refer Reply To:
CC:FIP:B02
PLR-111473-23

Date:
December 01, 2023

Legend:

Taxpayer =

Operating Partnership =

Subsidiary =

JV =

Fee Owner =

Address =

Tax =

State A =

State B =

Date =

Year 1 =

Year 2 =

Year 3 =

Year 4 =

Law 1 =

Law 2 =

a =

b =

c =

Dear :

This is in reply to a letter dated May 23, 2023. Taxpayer has requested the following rulings:

- (1) Taxpayer's right to receive the Brownfield Credits (defined below), to the extent that right is an asset under generally accepted accounting principles ("GAAP"), is a receivable for purposes of section 856(c)(4) of the Internal Revenue Code (the "Code"); and
- (2) Pursuant to section 856(c)(5)(J)(ii), the gross income of Taxpayer arising from the receipt or accrual of the Brownfield Credits is considered qualifying income for purposes of section 856(c)(2) and (c)(3).

Facts

Taxpayer is the sole general partner of Operating Partnership, which is treated as a partnership for Federal income tax purposes. Taxpayer elected to be treated as a Real Estate Investment Trust ("REIT") beginning with the tax year ended Date.

Taxpayer owns approximately a% of Operating Partnership. Through Operating Partnership and its subsidiaries, Taxpayer owns interests in real property throughout the United States. Operating Partnership is the sole member of Subsidiary. Subsidiary is a State A limited liability company disregarded for Federal income tax purposes.¹

¹ Taxpayer represents that because Subsidiary is a disregarded entity, the income, assets, and activities of Subsidiary are treated as those of Operating Partnership for all relevant purposes of this letter. See section 301.7701-3(b)(1)(ii) of the procedure and administration regulations.

Subsidiary owns b% of the interests in JV, a State A limited liability company that is treated as a partnership for Federal income tax purposes. The remaining c% of the interests in JV is owned by a person unrelated to Taxpayer, Operating Partnership, or Subsidiary.

JV is the sole member of Fee Owner, a State A limited liability company that is treated as a disregarded entity for Federal income tax purposes.² Fee Owner is the owner of real property located at Address (the "Site").

JV incurred significant expenditures in connection with the remediation of adverse environmental conditions at the Site and with the rehabilitation and development of the Site. Taxpayer represents that these expenditures were for the remediation, rehabilitation, or development of real property within the meaning of section 1.856-10 of the income tax regulations. In connection with JV's remediation, rehabilitation, and development of the Site, Taxpayer has claimed on its Year 1, Year 2, and Year 3 State B income tax returns brownfield redevelopment tax credits under Law 1³ (the "Brownfield Credits"). The amount of the Brownfield Credits is a percentage of the costs of (1) site preparation, (2) certain tangible property (including buildings and structural components placed in service at the Site), and (3) on-site groundwater remediation. For each of Year 1, Year 2, and Year 3, the amount of the Brownfield Credits claimed exceeds Taxpayer's liability for Tax, i.e., Taxpayer's State B income tax liability. Taxpayer represents that, under State B law, the excess is treated under Law 2 as an overpayment of Tax and that Taxpayer has elected to receive a refund of the overpayment.

The allowable amount of Brownfield Credits has been under audit by State B. In Year 4, Taxpayer consented to State B's proposed allowable amount of Brownfield Credits for Taxpayer's Year 1 State B income tax return. Taxpayer's Year 2 and Year 3 State B returns are still under audit, but for such years, Taxpayer anticipates receiving notice that the refund claims or portions thereof have been approved.

JV constructed an office building on the Site and leased the building or portions thereof on terms that cause the income from any such lease to be qualifying rents from real property for purposes of section 856(c)(2) and (3). Taxpayer represents that substantially all of the income derived from the Site (other than income arising from the receipt or accrual of the Brownfield Credits) is qualifying income for purposes of section 856(c)(2) and (3).

² Taxpayer represents that because Fee Owner is a disregarded entity, the income, assets, and activities of Fee Owner are treated as those of JV for all relevant purposes of this letter. See section 301.7701-3(b)(1)(ii).

³ Taxpayer represents that if a partnership completes the requirements for such credit, the credit is claimed, and any refund is collected, by the partners.

Taxpayer represents that the right to receive the Brownfield Credits is properly treated as a receivable under GAAP. The Brownfield Credits are allowable and refundable only with respect to Taxpayer's State B income tax liability and are not abatements or refunds of taxes on real property under State B law. Taxpayer also represents that neither it nor any other person purchased the Brownfield Credits from another person. Rather, the right to receive the Brownfield Credits arose from the development of real property on land in connection with the leasing business of JV.

Law and Analysis

Asset Test

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

Section 1.856-2(d)(1) defines the term "receivables" for purposes of section 856(c)(4)(A) to mean only those receivables that arise in the ordinary course of a REIT's operation, excluding receivables purchased from another person.

Section 1.856-2(d)(3) provides that in determining the investment status of a REIT, the term "total assets" means the gross assets of the REIT determined in accordance with GAAP.

Neither Taxpayer nor any other person purchased the Brownfield Credits from another person. The right of Taxpayer to receive the Brownfield Credits arose from the development of real property on land in connection with the leasing business of JV. Taxpayer also represents that the right to receive the Brownfield Credits is properly treated as a receivable under GAAP. Therefore, Taxpayer's right to receive the Brownfield Credits is a receivable that arose in the ordinary course of Taxpayer's operations within the meaning of section 1.856-2(d)(1).

Income Tests

Section 856(c)(2) provides that at least 95% of a REIT's gross income must be derived from certain enumerated sources, which include dividends, interest, rents from real property, gain from the sale or other disposition of stock, securities, and real property (other than property in which the corporation is a dealer), abatements and refunds of taxes on real property, income and gain derived from foreclosure property, and certain commitment fees.

Section 856(c)(3) provides that in order for a corporation to qualify as a REIT for a taxable year, at least 75 percent of the corporation's gross income (excluding gross income from prohibited transactions) must be derived from certain enumerated sources,

which include rents from real property, interest on obligations secured by real property, gain from the sale or other disposition of real property (other than property in which the corporation is a dealer), distributions on and gain from the sale of REIT stock, abatements and refunds of taxes on real property, income and gain derived from foreclosure property, certain commitment fees, and qualified temporary investment income.

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, (i) whether any item of income or gain that 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) whether any item of income or gain that otherwise constitutes gross income not qualifying under section 856(c)(2) or (3) may be considered as gross income that qualifies under section 856(c)(2) or (3).

Legislative history indicates that Congress intended part II of subchapter M to apply to certain “organizations specializing in investments in real estate and real estate mortgages.” H.R. Rep. No. 2020, 86th Cong., 2d Sess. 4 (1960), 1960-2 C.B. 819, 820. Congress intended to restrict the beneficial tax treatment of part II of subchapter M to “what is clearly passive income from real estate investments, as contrasted to income from the active operation of businesses involving real estate.” *Id.*

Income attributable to the receipt or accrual of the Brownfield Credits is not derived from any source listed in section 856(c)(2) or (3). Pursuant to section 856(c)(5)(J), the Secretary has the authority to determine that the income attributable to the receipt or accrual of the Brownfield Credits be considered as qualifying gross income under those provisions. On the basis of all of the facts and circumstances, including Taxpayer’s representations that JV leases the office building constructed on the Site to generate rents from real property and that substantially all of the income generated by the Site (exclusive of income arising from the receipt or accrual of the Brownfield Credits) is qualifying income for purposes of section 856(c)(2) and (3), treating Taxpayer’s income attributable to the receipt or accrual of the Brownfield Credits as qualifying income is consistent with the purposes of part II of subchapter M of the Code.

Conclusions

We hereby rule as follows:

- (1) Taxpayer’s right to receive the Brownfield Credits, to the extent the right is an asset under GAAP, is a receivable for purposes of section 856(c)(4); and

(2) Pursuant to section 856(c)(5)(J)(ii), the gross income of Taxpayer attributable to the receipt or accrual of the Brownfield Credits is considered qualifying income for purposes of section 856(c)(2) and (3).

This ruling's application is limited to the facts, representations, Code sections, and regulations cited herein. Except as specifically ruled upon above, no opinion is expressed concerning any Federal income tax consequences related to the facts herein under any other provisions of the Code. Specifically, we express no opinion as to the proper amount of Taxpayer's gross income from the Brownfield Credits, whether the right to receive the Brownfield Credits is an asset under GAAP, or whether Taxpayer qualifies as a REIT under part II of subchapter M of chapter 1 of the Code.

This ruling is directed only to the taxpayer that requested it. Section 6110(k)(3) provides that it may not be used or cited as precedent. In accordance with the provisions of a Power of Attorney on file, we are sending a copy of this letter ruling to your authorized representatives.

Sincerely,

Bernard Audet
Chief, Branch 2
Office of Associate Chief Counsel
(Financial Institutions & Products)