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Date:
January 10, 2024

Legend:

- Taxpayer =
- State =
- Country A =
- Country B =
- Communities =
- Property =
- a =
- b =
- c =
- d =
- e =
- f =
- g =
- Regulated Community =
- State Regulatory Body =
- Date =

Dear :

This ruling responds to a letter dated January 27, 2023, and subsequent correspondence, requesting rulings on behalf of Taxpayer. Taxpayer has requested the following rulings with respect to the independent retirement living facilities described below:

1.) The Managed Communities do not meet the definition of “health care facility” under section 856(e)(6)(D)(ii) of the Code.

2.) Property meets the definition of “health care facility” under section 856(e)(6)(D)(ii).

FACTS

Taxpayer is a publicly traded State corporation that has elected to be taxed as a real estate investment trust ("REIT") under sections 856 through 859 of the Internal Revenue Code. Taxpayer uses an overall accrual method of accounting and the calendar year as its taxable year. Taxpayer owns a diversified portfolio of properties, including senior living communities, hospitals, and other health care real estate. Taxpayer's senior housing portfolio includes independent retirement living communities.

Independent Living Communities

The independent retirement living communities that are the subject of this letter ruling consist of a facilities located in Country A and Country B (the “ILCs”). The ILCs include Communities and Property.

Several of the Communities are currently treated by Taxpayer as qualified health care properties (the “Leased Communities”). The Leased Communities are currently leased to a taxable REIT subsidiary (“TRS”) of Taxpayer and operated by eligible independent contractors, within the meaning of section 856(d)(9) (“EIK”), pursuant to management agreements. Other Communities are managed by a TRS and sub-managed by EIKs pursuant to sub-management agreements (the “Managed Communities”). Taxpayer intends to convert the Leased Communities into Managed Communities by the Effective Date.

Taxpayer represents that, with respect to periods on or after the Effective Date, health care or personal care services will no longer be provided at any Leased Community that Taxpayer intends to convert to a Managed Community. For purposes of this representation, the Effective Date as to any Leased Community, means the first date on which (1) Taxpayer's representations relating to the Resident Services and Commercial Tenants are true and (2) Taxpayer has determined that the third-party management agreement would not adversely impact the ability of Taxpayer to ensure that such representations will be true on a forward-looking basis, but no later than Date.

Each representation made by Taxpayer with respect to the services provided (or not provided, as applicable) at a Leased Community are made with respect to periods on or after the Effective Date.

The ILCs require a resident to be at least b years of age. The ILCs generally provide amenities such as common area dining, activity rooms, and community grounds. Additionally, the hallways and common bathroom areas of the ILCs are generally equipped with handrails. With the exception of Property, the ILCs are not licensed under state or local law as hospitals, nursing facilities, assisted living facilities, congregate care facilities, qualified continuing care facilities, or any other similar facility licensed to extend medical or nursing or ancillary services to patients.

Resident Agreements

A resident of an ILC (the “Resident”) enters into a lease agreement with a minimum term of at least c and typically a longer initial term of d (a “Resident Agreement”). The Resident Agreements entitle the Residents to individual living quarters within an ILC in exchange for fixed monthly payments (the “Rent”).

With the exception of Resident Agreements with respect to Property, the Resident Agreements do not require that Residents undergo an initial health assessment. The Resident Agreements at the Managed Communities do not include health care services provided by the Managed Communities. Furthermore, each Resident Agreement stipulates that the Resident is responsible for their own personal and health needs. The Residents’ health and medical needs are not monitored by (i) employees of the TRS or Taxpayer, (ii) employees of a third-party manager engaged by the TRS, or (iii) sub-contractors or sub-managers engaged by a third-party manager pursuant to a management contract with the TRS (“the Community Staff”). Thus, the Resident must be capable of providing for their own health care and personal care needs or otherwise be responsible for obtaining such care from sources other than the Community Staff.

Resident Services

The Managed Communities provide, as part of the Rent, a range of services to their Residents (“the Resident Services”). Some or all of the following Resident Services will be, or are, provided at each Managed Community:

- (1) a specified number of meals, generally three, with dietary accommodations, if necessary, in a common dining area;
- (2) scheduled transportation to and from local destinations and group activities;
- (3) social, cultural, fitness and on-site worship activities;
- (4) emergency call pendants (e.g., pull-cords or other stationary, hand-held, or wearable monitoring devices that connect to third-party care providers, family, or emergency services);

(5) utilities such as tap water, heat, electricity, sewer, basic cable television, and garbage collection;

(6) light housekeeping including linen service;

(7) hard plastic containers to safely dispose of hypodermic needles and other sharp medical instruments; and

(8) age-appropriate community activities such as exercise classes and presentations and programs about physical, mental, and social wellness (for example healthy eating, strength and mobility training, and meditation training).

Taxpayer represents that its intent is that the provision of the Resident Services described above is primarily for the Residents' living convenience and social purposes. Taxpayer further represents that the Resident Services are customarily furnished or rendered to tenants of age-restricted, non-healthcare independent living facilities in the geographic markets in which the Managed Communities are located.

Community Staff do not provide health care or personal care services such as diagnosing or treating illness or injury or providing assistance with daily living activities. On-site Community Staff may provide assistance in calling 911 and obtaining emergency medical services and contacting family in an emergency, and also may provide assistance to first responders as well as first aid. Community Staff do not provide 24-hour on-site assistance to Residents. Community Staff do not monitor Residents for their personal care or health care needs, nor do they determine whether independent living conditions are appropriate for each Resident. Nevertheless, general building services which are customary for residential buildings of a similar size in a comparable geographic area may be provided twenty-four hours per day.

Community Staff do not provide physical, occupational, or speech therapy, medication management, or skilled nursing services. Furthermore, Community Staff is not comprised of nurses, physical therapists, doctors, physicians' assistants, EMTs or other individuals who are employed at the Managed Communities as personal care providers. Community Staff neither provides periodic health screening, medical diagnoses or treatment for disease, illness, or injury nor assists with basic activities of daily living, such as dressing, toileting, and bathing. Other than providing information to Residents (e.g., pamphlets, brochures, websites), the Resident Services at the Managed Communities do not include Community Staff assisting Residents in obtaining medication and third-party health care services, except they may obtain emergency medical services as described above.

Property

Property is registered as a Regulated Community by the State Regulatory Body. Property provides many of the Resident Services described above to its Residents as

well as additional health care focused screening and related services. Pursuant to Property's state regulatory classification, Property is required to perform an initial health screening of each Resident prior to tenancy and an annual health screening once tenancy is established. Additionally, the State Regulatory Body requires Property to have a formal written agreement with at least one licensed home health care provider (a "Property Licensed Provider"). If Residents require health care services, such services must be accessible and available at Property through at least one Property Licensed Provider, but Residents are free to choose any provider. If Residents choose health care services from a Property Licensed Provider, such services are arranged by the management of Property.

Commercial Tenants

Some, but not all, of the Managed Communities lease space to commercial tenants that operate businesses open to the general public (the "Commercial Tenants") and whose services are not required to be made available to Residents by the Commercial Tenants' own leases with the Managed Communities (the "Commercial Leases") or the Resident Agreements. Commercial Tenants typically include providers of services such as personal care (e.g., beauty salons) and in-home health care. Taxpayer represents the following with respect to the Managed Communities that lease space to Commercial Tenants:

- (1) Nothing in the Commercial Leases requires Commercial Tenants that provide in-home health and personal care services to exclusively serve Residents, and no agreement (written or oral) between Taxpayer (or its subsidiaries or agents) and a Commercial Tenant requires any in-home health and personal care provider to exclusively serve the Residents of a Managed Community where that Commercial Tenant is leasing space.
- (2) Nothing in the Residents' Lease Agreements or any marketing materials provided to the Residents provides any assurances (or other statements intended to cause Residents to believe) that the Managed Communities will ensure that in-home health and personal care providers are among the businesses operated by the Commercial Tenants.
- (3) The Commercial Tenants enter into a standard lease agreement (a "Commercial Lease") that generally has an initial term of d and will automatically renew thereafter on a month-to-month basis. The Commercial Leases provide for an amount of monthly rent that the lease parties stipulate is reasonable, consistent with the fair market value of the premises, and not determined by reference to the volume or value of actual or anticipated referrals, which are prohibited under the Commercial Leases. Per Managed Community, the amount of rent received from Commercial Tenants will represent less than e% percent of total rent that will be received from Residents and Commercial Tenants combined. Taxpayer represents that the amounts paid by the Commercial

Tenants would not be excluded from “rents from real property” within the meaning of Section 856(d)(2).

- (4) Taxpayer neither tracks the percentage of Residents at a given Managed Community who use in-home and personal care services (including both non-medical home aide services and medical-related home health care services) nor receives such data from its Commercial Tenants; however, Taxpayer estimates that between f and g% of Residents will utilize in-home and personal care services, irrespective of whether those services are provided by a Commercial Tenant or another provider.
- (5) The Managed Communities do not track the extent to which Residents or non-Residents may call or visit the leased space of a Commercial Tenant.
- (6) The Commercial Leases do not require a Commercial Tenant to share any information with the Managed Communities as to the Commercial Tenant’s customer base.
- (7) The Managed Communities do not control, manage, or supervise the services provided or business conducted by the Commercial Tenants at a Managed Community.
- (8) Nothing in the Commercial Leases will be construed to require the Commercial Tenant, the Managed Community, or the landlord to make referrals of Residents or clients to one another, and the payment of any referral fees is prohibited.
- (9) Taxpayer does not actively seek out Commercial Tenants who provide in-home health and personal care services. Rather, in-home health or personal care service providers tend to seek out open commercial space in age-restricted, non-healthcare independent living facilities. Thus, it is common to find such tenants in the Managed Communities.
- (10) Taxpayer does not encourage Residents to obtain any in-home services or to choose any particular provider of such services.
- (11) Notwithstanding the presence of any Commercial Tenant, Residents remain free to choose any service provider they see fit to meet their needs.
- (12) The presence of the Commercial Tenants is not a result of the Managed Communities’ coordination of in-home health and personal care services in any way.
- (13) Commercial Tenants must be licensed as required by applicable law, maintain their own liability insurance, and adhere to each Managed Community’s code of conduct, which, for example, prohibits Commercial Tenants from soliciting Residents’ business door-to-door or in common areas.

(14) The Commercial Leases provide for no other payments between Taxpayer and the Commercial Tenants (i.e., profit shares, kickbacks, access fees).

(15) Taxpayer does not engage in marketing activities with respect to the business of the Commercial Tenants in any way. For purposes of this representation, customary signage and/or similar identification of the Commercial Tenant as a tenant at a Managed Community is not considered a marketing activity.

(16) Most Commercial Leases provide that neither the Commercial Tenant nor any of its employees are employees of a Managed Community. Furthermore, the Commercial Tenants are not employees of the Managed Communities, and, to Taxpayer's knowledge, the Commercial Tenants' employees are not employees of the Managed Communities.

(17) The physical space at Managed Communities that is leased to a Commercial Tenant is equally accessible to all customers of the Commercial Tenant, whether a Resident or non-Resident.

LAW & ANALYSIS

Section 856(c)(2) provides that at least 95 percent of a REIT's gross income must be derived from sources that include rents from real property.

Section 856(c)(3) provides that at least 75 percent of a REIT's gross income must be derived from sources, that likewise include, rents from real property.

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 such 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(d)(2)(B) provides that rents from real property do not include amounts received directly or indirectly from a corporation if the REIT owns 10 percent or more of the total combined voting power or 10 percent or more of the total value of the shares of the corporation.

Section 856(d)(8)(B) provides that amounts paid to a REIT by a TRS shall not be excluded from rents from real property by reason of section 856(d)(2)(B) when a REIT leases a qualified lodging facility or qualified health care property to a TRS, and

the facility or property is operated on behalf of the TRS by a person who is an eligible independent contractor.

Section 856(d)(9)(A) provides that the term “eligible independent contractor” with respect to any qualified lodging facility or qualified health care property (as defined in section 856(e)(6)(D)(i)) means any independent contractor if, at the time such contractor enters into a management agreement or other similar service contract with the TRS to operate such qualified lodging facility or qualified health care property, such contractor (or any related person) is actively engaged in the trade or business of operating qualified lodging facilities or qualified health care properties, respectively, for any person who is not a related person with respect to the REIT or the TRS.

Section 856(e)(6)(D)(i) defines qualified health care property as any real property, and any personal property incident to such real property, which is a health care facility or is necessary or incidental to the use of a health care facility.

Section 856(e)(6)(D)(ii) defines a health care facility as a hospital, nursing facility, assisted living facility, congregate care facility, qualified continuing care facility (as defined in section 7872(g)(4)), or other licensed facility which extends medical or nursing or ancillary services to patients and which, immediately before the termination, expiration, default, or breach of the lease of or mortgage secured by such facility, was operated by a provider of such services which was eligible for participation in the Medicare program under Title XVII of the Social Security Act (42 U.S.C.A. § 1395 et seq.) with respect to such facility.

Section 856(l)(1) defines TRS to mean, with respect to a REIT, a corporation (other than a REIT) if (A) such REIT directly or indirectly owns stock in such corporation, and (B) such REIT and such corporation jointly elect that such corporation shall be treated as a TRS of such REIT.

Section 856(l)(3)(A) provides that any corporation that directly or indirectly operates or manages a lodging facility or a health care facility is not a TRS. Section 856(l)(4)(B) provides that the term “health care facility” has the meaning given such term in section 856(e)(6)(D)(ii).

While the Managed Communities may offer some of the services found in congregate care health care facilities, the emphasis of the amenities and services provided at the Managed Communities is not the health and wellbeing of the Residents. Instead, the emphasis of the Resident Services is for the Resident’s living convenience and to provide a social living environment. Although the Residents are provided with shared meals and transportation to local destinations and group activities, these

Resident Services are provided for convenience and to enhance the social lives of the Residents as opposed to providing a health benefit.

The Managed Communities do not provide physical, occupational, or speech therapy, medication management, or skilled nursing services. Furthermore, the Community Staff are not licensed nurses, certified physical therapists, doctors, physicians' assistants, EMTs, or individuals who are trained and employed to provide assistance with Residents' basic activities of daily living (such as dressing, toileting and bathing). As a result, neither the staff, nor any sub-contractor engaged at the Managed Communities, monitors, diagnoses, or treats disease, illness or injury, nor do they assist with basic activities of daily living. Furthermore, the Resident Agreements stipulate that Residents must be capable of providing for their own personal and health needs. The health of the Residents is not monitored after they move in, which indicates that the Managed Communities are not meant to be relied on to provide for health care needs. The Managed Communities provide personal emergency pendants to Residents, however the devices connect to a third-party emergency operator which is unrelated to Taxpayer. The absence of nurses, other medical personnel, health screenings, monitoring of medical needs, or transfer programs also suggests that the Managed Communities do not have a health care focus. Additionally, the terms of the Resident Agreements place responsibility for health care on the Residents themselves.

While some Commercial Tenants may offer home health and personal care services that do place an emphasis on health care, neither Taxpayer nor anyone else affiliated with the Managed Communities controls, manages, supervises, or otherwise actively supports or directs the services provided or business conducted by the Commercial Tenants in the provision of any home health or personal care services to the Residents. Further, the Commercial Tenants pay Taxpayer amounts that would not be excluded from "rents from real property" pursuant to section 856(d)(2), and which is insignificant in comparison to the aggregate rents that will be received from both the Residents and the Commercial Tenants at each Managed Community. Furthermore, no other payments are exchanged between Commercial Tenants and Taxpayer other than the rental payment. Taxpayer represents that it does not actively seek out (or seek to replace) Commercial Tenants that provide in-home health and personal care services, but rather that the demographic profile of the Residents attracts these types of businesses to rent commercial space in the Managed Communities. The physical space at the Managed Communities that is leased to Commercial Tenants is equally accessible to the general public as it is to Residents. However, given the demographic profile of the Residents and location of the businesses of the Commercial Tenants, the Residents are more likely than the general public to procure services from the Commercial Tenants. Taxpayer represents that the presence of home health and

personal care service providers as commercial tenants is common in the independent retirement living industry. Taxpayer further represents that it is not marketing health-related Commercial Tenants to its existing or prospective Residents, but the Managed Communities may use customary signage and/or similar identification of the Commercial Tenant as a tenant. Under these circumstances, the mere presence of the Commercial Tenants that provide home health and personal care services does not cause the Managed Communities to be treated as furnishing services and amenities with an emphasis on the health care of the Residents.

Considering all the facts and circumstances, the Managed Communities are neither “congregate care facilities” nor any other type of health care facility described in section 856(e)(6)(D)(ii).

On the other hand, although Property provides many of the same Resident Services as Communities, Property’s compliance with state health care regulations such as initial and periodic health screening, active management in procuring health care services when required by Residents and provision of such health care services through a licensed health care provider pursuant to a written agreement causes Property to have an emphasis on the health and wellbeing of its Residents.

CONCLUSION:

Accordingly, based on the facts provided and representations made, we rule that:

- 1.) The Managed Communities do not meet the definition of “health care facility” under section 856(e)(6)(D)(ii) of the Code. The Managed Communities include any Leased Community that has become a Managed Community by the Effective Date; and
- 2.) Property meets the definition of congregate care facility under section 856(e)(6)(D)(ii), and, therefore, constitutes a “qualified health care property” under section 856(e)(6)(D)(i) of the Code.

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. Specifically, no opinion is expressed or implied (1) whether Taxpayer otherwise qualifies as a REIT, (2) whether any services provided at the ILCs are customary services within the meaning of section 1.856-4(b)(1) of the Income Tax Regulations, or (3) whether the Rent otherwise qualifies as rents from real property within the meaning of section 856(d). In addition, no opinion is expressed or implied on the treatment of any amounts received or accrued by Taxpayer with respect to the Leased Communities for periods ending before the Effective Date.

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 cited as precedent.

In accordance with the Power of Attorney on file with this office, a copy of this letter is being sent to your authorized representatives.

Sincerely,

Matthew P. Howard
Senior Counsel
Office of Associate Counsel
(Financial Institutions & Products)

cc:

Appendix A

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