Internal Revenue Service

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Department of the Treasury
Washington, DC 20224

Third Party Communication: None
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Person To Contact:
, ID No.

Telephone Number:

Refer Reply To:
CC:FIP:B02
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Date:
February 22, 2024

Legend:

Taxpayer =

Subsidiary =

Entity A =

Entity B =

Entity C =

Accounting Firm =

State =

Property =

Date 1 =

Date 2 =

Date 3 =

Date 4 =

Date 5 =

Date 6 =

Date 7 =

Date 8 =

Date 9 =

Date 10 =

Date 11 =

Date 12 =

Date 13 =

Year 1 =

Year 2 =

x =

Dear :

This ruling responds to a letter dated August 1, 2023, and supplemental correspondence, submitted on behalf of Taxpayer and Subsidiary. Taxpayer and Subsidiary request an extension of time under sections 301.9100-1 and 301.9100-3 of the Procedure and Administration Regulations (the "Regulations") to make an election under section 856(l) of the Internal Revenue Code (the "Code") to treat Subsidiary as a taxable REIT subsidiary ("TRS") of Taxpayer effective as of Date 10.

FACTS

Taxpayer is a State limited liability company that has elected to be taxed as a real estate investment trust (REIT) under sections 856 through 859 of the Code commencing with its taxable year that began on Date 10. Entity A holds an indirect interest in Taxpayer through an x percent interest in Entity C. Taxpayer, through Entity B (an entity disregarded from Taxpayer for federal income tax purposes), owns and operates Property. Subsidiary provides services to tenants of Property under a tenant services agreement (the "Agreement") with Entity B. Taxpayer uses an accrual method as its overall method of accounting, and Taxpayer's taxable year is the calendar year.

Entity A was initially formed on Date 1. Entity A elected on Date 3 to be treated as a corporation for U.S. federal income tax purposes by timely filing Form 8832, Entity Classification Election, and elected to be treated as a REIT by timely filing Form 1120-REIT for its taxable year ended Date 4.

Taxpayer was originally formed as a State limited partnership on Date 2. Taxpayer converted to a limited liability company on Date 6. As of Date 7, Taxpayer was a disregarded entity for federal income tax purposes wholly owned by Entity C.

Subsidiary was formed on Date 5 as a State entity disregarded from Taxpayer for federal income tax purposes. On Date 9, Subsidiary filed Form 8832, *Entity Classification Election*, electing to be treated as a corporation effective Date 8. Also on Date 9, a Form 8875, *Taxable REIT Subsidiary Election*, was filed electing to treat Subsidiary as a TRS of Entity A. Subsidiary uses an accrual method as its overall method of accounting, and its taxable year is the calendar year.

On Date 12, effective Date 10, Taxpayer filed, with the intent to make a REIT election effective Date 10, Form 8832, electing to be treated as a corporation for U.S. federal income tax purposes. Taxpayer made the REIT election by timely filing, including extensions, its Year 2 (a year which includes Date 10) Form 1120-REIT tax return. Taxpayer represents that, as a result of Taxpayer's election to be treated as a corporation, Entity C was treated as having contributed both Property and the stock of Subsidiary to Taxpayer in exchange for stock of Taxpayer.

The Agreement was executed on Date 7 and requires Subsidiary to provide certain services (which may have resulted in impermissible tenant service[1] income to Entity A if not provided through a TRS) to the tenants of Property. Taxpayer represents that the Agreement has remained in effect through Taxpayer's election to be treated as a corporation and is now treated for federal income tax purposes as an agreement between Taxpayer and Subsidiary. As part of the plan for Taxpayer to become a REIT, Taxpayer represents that it was intended that Subsidiary would become a TRS of Taxpayer. Thus, Taxpayer and Subsidiary intended to timely file Form 8875 with an effective date of Date 10.

[1] See generally section 856(d)(7).

Accounting Firm prepares all relevant tax filings for Entity A, Entity C, and Taxpayer based on information provided by Taxpayer. Accounting Firm's responsibilities also include ascertaining Taxpayer's compliance with the quarterly and annual REIT qualification requirements. Accounting Firm had prepared the initial elections in Year 1 for Subsidiary to be treated as a corporation and as a TRS of Entity A. Accounting Firm prepared the election for Taxpayer to be treated as a corporation and was aware of its intent to be treated as a REIT. Taxpayer and Accounting Firm discussed the need for Taxpayer and Subsidiary to file a TRS election effective as of Date 10 and determined that Accounting Firm would prepare and file the TRS election. Notwithstanding these considerations, Accounting Firm inadvertently failed to timely prepare the Form 8832 and Form 8875 and, as a result, Taxpayer failed to timely file Form 8832 to elect to be treated as a corporation and Taxpayer and Subsidiary also failed to timely file Form 8875 to elect to treat Subsidiary as Taxpayer's TRS. On Date 12, while Accounting Firm was carrying out an unrelated REIT qualification and maintenance process, it was discovered that Taxpayer had not yet filed Form 8832 to make a corporate election effective Date 10, as it intended.

Accounting Firm immediately brought the missed entity classification election filing to Taxpayer's attention and the election was filed with the Service the same day. Such corporate election requested an effective date of Date 10 and included a request for late election relief under Section 4.01 of Revenue Procedure 2009-41, 2009-39 I.R.B. 439. Whereas the review of the tax election tracking schedule showed that the Taxpayer had not filed the Form 8832 timely, at that time Accounting Firm did not identify that the TRS election for Subsidiary had not been made. However, approximately one month later, Accounting Firm identified the missed TRS election while reviewing and updating the tax election tracking schedule. A TRS election was promptly prepared for Subsidiary, and it was filed with the Service on Date 13, with an effective date of Date 11, which represented a date within the period of two months and 15 days prior to the filing date. Notwithstanding having filed the TRS election effective as of Date 11, Taxpayer and Subsidiary are seeking relief to have the TRS election effective as of Date 10 as originally intended in order to ensure that any tenant services provided pursuant to the Agreement are provided by a TRS.

Taxpayer relied on Accounting Firm and its experienced tax professionals who advised Taxpayer regarding (i) Taxpayer's election to be treated as a corporation and its intent to elect to be treated as a REIT and (ii) Taxpayer's intention for Subsidiary to elect to be treated as a TRS of Taxpayer. Taxpayer also hired Accounting Firm to handle any compliance obligations, including the preparation and filing of the TRS election. Taxpayer did not have any reason to believe that the TRS election would not be filed.

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 and 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 and Subsidiary.

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

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 10. Accordingly, Taxpayer and Subsidiary have 90 calendar days from the date of this letter to make the intended election to treat Subsidiary as a TRS of Taxpayer effective Date 10.

CAVEATS

This ruling is limited to the timeliness of the filing 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. Further, no opinion is expressed or implied regarding the classification of any entity under section 301.7701-3 or the consequences of any entity's election to be treated as a corporation for federal income tax purposes.

No opinion is expressed with regard to whether the tax liability of Taxpayer is not lower in the aggregate for all years to which the election applies than such tax liability would have been if the election had been timely made (taking into account the time value of money). Upon audit of the U.S. federal income tax returns involved, the director's office will determine such tax liability for the years involved. If the director's office determines that such tax liability is lower, that office will determine the federal income tax effect.

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 ruling, 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,

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

cc: