Internal Revenue Service

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Department of the Treasury
Washington, DC 20224

Person To Contact:
, ID No.
Telephone Number:

Refer Reply To:
CC:FIP:2 – PLR-110871-04
Date:
March 31, 2004

Legend:

Trust =

State A =

Subsidiary =

LLC =

LP =

Lender =

Office Building =

State B =

Date 1 =

Law Firm =

Date 2 =

Dear :

This is in reply to a letter dated February 2, 2004, requesting a ruling on behalf of Trust and Subsidiary. You have requested a ruling granting Trust and Subsidiary an extension of time under sections 301.9100-1 and 301.9100-3 of the Procedure and

Administration regulations to file an election for Subsidiary to be treated as a taxable REIT subsidiary (TRS) of Trust under section 856(l) of the Internal Revenue Code.

Facts:

Trust is a State A real estate investment trust (REIT) that has elected to be treated as a real estate investment trust for federal income tax purposes. Trust's primary business is the acquisition, ownership, and operation of medical office properties. The sole business of Subsidiary is to serve as the manager of LLC, an entity that is indirectly wholly-owned by Trust.

Trust conducts substantially all of its operations through a limited partnership, LP, of which Trust is the sole general partner. In early 2001, LP began the process of obtaining a loan from Lender to be secured by Office Building. As a condition of the loan, Lender required that the borrower be a bankruptcy-remote entity that also holds the property. Lender also required that if the borrower were a limited liability company, the borrower must be managed by a special purpose entity whose purpose was limited to serving as the manager of the limited liability company. To satisfy Lenders requirement, LP formed LLC, a limited liability company having LP as its only member, to serve as borrower. On Date 1, LP organized Subsidiary, a State B corporation, to serve as manager of LLC. LP then transferred Office Building to LLC, and LLC obtained the loan from Lender.

LP has owned all of the stock of Subsidiary since Subsidiary's formation. LLC's limited liability company agreement provides that the business and affairs of LLC shall be conducted exclusively by Subsidiary. Neither LLC nor LP may initiate bankruptcy proceedings related to LLC without the unanimous written consent of Subsidiary's entire board of directors. Throughout its existence, Subsidiary has had no revenues or expenses, and its only asset has been a non-interest bearing note from its shareholder.

Law Firm represented trust in connection with the loan transaction. Trust did not expect Law Firm to provide tax advice. Late in the loan process, Law Firm informed Trust of Lender's requirement that a special purpose entity be created to function as manager of the borrower. Law Firm prepared all of the documents to organize Subsidiary and the documents were reviewed and approved by both the Co-General Counsel and Secretary of Trust. Neither of these Trust officials has a background in tax. Consequently, the formation of Subsidiary was not brought to the attention of Trust's tax professionals.

Trust has recently signed a merger agreement. The buyer, in conducting an investigation of Trust's business, discovered the existence of Subsidiary and asked Trust whether an election was made to treat Subsidiary as a TRS of Trust. After conducting its own investigation, Trust determined on Date 2 that an election had not

been made. Prior to the inquiry from the potential buyer, none of Trust's tax advisors was aware of Subsidiary's existence.

Management of Trust has at all times intended to maintain Trust's status as a REIT. Trust and Subsidiary represent that they are not aware of any specific facts that would indicate that their failure to make the TRS election had been discovered by the Service prior to this request for relief. Additionally, Trust and Subsidiary represent that they are not seeking to alter a return position for which an accuracy-related penalty has been or could be imposed under section 6662. Finally, Trust and Subsidiary state that by granting this request, neither Trust nor Subsidiary will be in a better position than if the election had been made in a timely manner (taking onto account the time value of money).

Trust and Subsidiary have submitted an affidavit of A, the Executive Vice-President, Secretary and Co-General Counsel of Trust and Secretary of Subsidiary, in support of the requested ruling.

Law and Analysis:

Section 856(c)(4)(B)(iii) provides that an entity shall not be considered a REIT for any taxable year unless, at the close of each calendar quarter, the trust does not hold securities possessing more than 10 percent of the voting power or more than 10 percent of the value of the outstanding securities of any one issuer. The foregoing requirement does not apply to the securities of a TRS held by a REIT.

Section 856(l) provides that a REIT and a corporation (other than a REIT) may jointly elect to treat such corporation as a taxable REIT subsidiary. To be eligible for treatment as a taxable REIT subsidiary, 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, the election and the revocation may be made without the consent of the Secretary.

In Announcement 2001-17, 8 I.R.B. 716, the Internal Revenue Service (Service) announced the availability of Form 8875, Taxable REIT Subsidiary Election. According to the Announcement, this form is to be used for tax years beginning after 2000 for eligible entities to elect treatment as a taxable REIT subsidiary. The instructions to Form 8875 provide that the subsidiary and the REIT can make the election at any time during the tax year. The instructions further provide that the effective date of the election 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. Officers of both the REIT and the taxable REIT subsidiary must jointly sign the form, which is filed with the IRS Service Center in Ogden, Utah.

Section 301.9100-1(c) provides that the Commissioner has discretion to grant a reasonable extension of time to make a regulatory election (defined in § 301.9100-1(b) 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), 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 Internal Revenue Code except subtitles E, G, H, and I.

Section 301.9100-3(a) through (c)(1)(i) sets forth rules that the Internal Revenue 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 § 301.9100-2. Section 301.9100-3(b) provides that subject to paragraphs (b)(3)(i) through (iii) of § 301.9100-3, when a taxpayer applies for relief under this section before the failure to make the regulatory election is discovered by the Service, the taxpayer will be deemed to have acted reasonably and in good faith; and § 301.9100-3(c) 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 years to which the regulatory election applies than the taxpayer would have had if the election had been timely made (taking into account the time value of money).

Conclusion

Based on the information submitted and representations made, we conclude that Trust and Subsidiary have satisfied the requirements for granting a reasonable extension of time to elect under section 856(l) to treat Subsidiary as a taxable REIT subsidiary of Trust as of Date 1. Therefore, Trust and Subsidiary are granted a period of time not to exceed 30 days from the date of this letter to submit the Form 8875.

This ruling is limited to the timeliness of the filing of the Form 8875. This ruling's application is limited to the facts, representations, Code sections, and regulations cited herein. No opinion is expressed with regard to whether Trust qualifies as a REIT under subchapter M of the Code.

No opinion is expressed with regard to whether the tax liability of Trust and Subsidiary 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 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.

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 representative.

Sincerely yours,

William Coppersmith
William Coppersmith
Chief, Branch 2
Office of Associate
Chief Counsel
(Financial