

## Internal Revenue Service

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Department of the Treasury

Washington, DC 20224

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CC:FIP:B03

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Date:

July 26, 2018

## LEGEND

Taxpayer =

Subsidiary =

Company =

Firm =

State =

Date 1 =

Date 2 =

Date 3 =

Date 4 =

Dear \_\_\_\_\_ :

This ruling responds to a letter dated March 20, 2018, and subsequent 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 1.

### FACTS

Taxpayer is a State limited liability company formed on Date 1. Taxpayer represents that it qualifies as a real estate investment trust (“REIT”) under sections 856 through 859 of the Code and that it will timely file an election to be treated as a REIT commencing with its taxable year that ended on Date 2.

Company invests in specialized real estate, which it owns through various REITs. One of Company’s REITs is Taxpayer, which was formed to hold real estate used for medical offices, senior housing, student housing, and self-storage. Taxpayer represents that the senior housing properties are health care facilities, as defined in section 856(e)(6)(D)(ii).

Subsidiary is a State limited liability company that was formed on Date 3 and is wholly owned by Taxpayer. Pursuant to Rev. Proc. 2009-41, 2009-2 C.B. 439, Subsidiary filed a Form 8832, *Entity Classification Election*, to elect to be treated as a corporation for federal income tax purposes effective as of Date 1. Pursuant to section 856(d)(8)(B), Subsidiary leases the senior housing owned by Taxpayer and contracts with an eligible independent contractor, as defined in section 856(d)(9)(A), to operate and manage the senior housing.

Company has an internal tax department (the “Tax Department”), which is responsible for ensuring that all elections are made for the entities in which Company is a primary investor, including Taxpayer and Subsidiary. At times, the Tax Department prepares and files elections, and at other times, the Tax Department requests that an election be prepared by an outside tax advisor.

When Company formed Subsidiary, it intended to cause Taxpayer and Subsidiary to jointly file a Form 8875, *Taxable REIT Subsidiary*, to treat Subsidiary as a TRS of Taxpayer effective as of Date 1. The deadline to file the Form 8875 with an effective date of Date 1 was Date 4. However, during the period between Date 1 and Date 4, Company transferred most of its outside tax work, including that for Taxpayer and Subsidiary, from one accounting firm to Firm. The Tax Department was heavily

involved in the transition and inadvertently failed to cause Taxpayer and Subsidiary to timely file the Form 8887.

After Date 4, Firm requested a copy of the Form 8875 for Taxpayer and Subsidiary. It was at this time that the Tax Department realized it had inadvertently failed the election. Firm then prepared and submitted a request for an extension under sections 301.9100-1 and 301.9100-3 to elect under section 856(l) to treat Subsidiary as a TRS of Taxpayer with an effective date of Date 1.

Taxpayer and Subsidiary make the following additional representations in connection with their request for an extension of time:

1. The request for relief was filed before the failure to make the regulatory election was discovered by the Service.
2. Granting the relief requested will not result in Taxpayer or Subsidiary having a lower U.S. federal tax liability in the aggregate for all years to which the 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 do 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 making the decision to seek the relief requested. No specific facts have changed since the due date for making the election that make the election advantageous to Taxpayer or Subsidiary.
6. The period of limitations on assessment under section 6501(a) has not expired for Taxpayer or Subsidiary for the taxable year in which the election should have been filed, nor for any taxable year(s) 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).

## **LAW AND ANALYSIS**

Section 856(l) of the Code 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) of the Regulations 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 the 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 as of Date 1. 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 as of Date 1.

This ruling is limited to the timeliness of the filing of 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 as to whether Taxpayer qualifies as a REIT, or whether Subsidiary otherwise qualifies as a TRS of Taxpayer under part II of subchapter M of the Code. Further, no opinion is expressed as to whether the senior housing is a health care facility under section 856(e)(6)(D)(ii) or whether it is operated by an eligible independent contractor pursuant to a structure permitted by section 856(d)(8)(B).

No opinion is expressed with regard to whether the tax liability of Taxpayer or 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 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 U.S. federal income tax effect.

The ruling contained in this letter is based upon information and representations submitted by Taxpayer and Subsidiary and accompanied by penalty 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 rulings, it is subject to verification on examination.

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 representative.

Sincerely,

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Julanne Allen  
Assistant Branch Chief, Branch 3  
Office of the Associate Chief Counsel  
(Financial Institutions & Products)

Enclosure (1)

cc: