

Internal Revenue Service

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Washington, DC 20224

[Third Party Communication:
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Person To Contact:
, ID No.

Telephone Number:

Refer Reply To:
CC:ITA:B03
PLR-116201-08

Date:
September 11, 2008

EIN:

DO: TY:

Legend

Taxpayer =
Complex =

Sellers =

Property =
City =
State =
Date =
Buyer 1 =
Buyer 2 =
Amount 1 =
Amount 2 =

Dear

This letter responds to your request for a private letter ruling dated April 3, 2008. You have requested a ruling on the federal income tax consequences of the sale of certain improved real property owned by Taxpayer.

FACTS

Complex is improved real property consisting of residential apartments, commercial retail space, and parking facilities located in City. Sellers, which include

Taxpayer, are three State limited partnerships. Taxpayer owns Property, which is part of Complex, through a State land trust.

Taxpayer represents that Property consists of property used in a trade or business within the meaning of §1231(b)(1) of the Internal Revenue Code and that Taxpayer has held Property for more than one year. Taxpayer further represents that the State land trust has substantially the same terms as described in Rev. Rul. 92-105, 1992-2 C.B. 204 and it is therefore properly treated as the owner of Property for federal income tax purposes.

As part of the sale of Complex, on Date, Sellers entered into purchase and sale agreements for Property with Buyer 1 and Buyer 2. The agreement with Buyer 1 provides for the purchase of a 50-year estate for years in Property (the “Lead Interest”) for Amount 1. Taxpayer represents that Buyer 1’s purchase is neither directly nor indirectly funded by Sellers or Buyer 2. Buyer 1 plans to use Property in its business of renting commercial and residential real estate.

Taxpayer represents that all of the benefits and burdens of ownership during the Lead Interest will be transferred to Buyer 1. Buyer 1 will have the unrestricted right to sell, assign, encumber, or otherwise dispose of all its rights in Property. Further, Buyer 1 will pay all of the carrying costs associated with the Lead Interest.

The agreement with Buyer 2 provides for the purchase of a remainder interest in Property (the “Remainder Interest”) for Amount 2. Taxpayer represents that Buyer 2’s purchase will neither directly nor indirectly be funded by Sellers or Buyer 1. The agreement provides that Buyer 2 has the unrestricted right to sell, assign, encumber, or otherwise dispose of all its rights in the Remainder Interest. Buyer 2 plans to hold the Remainder Interest as a long-term investment.

Taxpayer represents that each direct and indirect owner of Sellers is unrelated within the meaning of § 267 to each direct and indirect owner of Buyer 1 and Buyer 2. Further, each direct and indirect owner of Buyer 1 is unrelated within the meaning of § 267 to each direct and indirect owner of Buyer 2.

The taxpayer will determine gain or loss by allocating the adjusted basis of Property between the Lead Interest and the Remainder Interest in the proportion that their respective fair market values bear to the fair market value of Property.

RULING REQUESTED

Assuming that Property constitutes “property used in the trade or business” within the meaning of § 1231(b) in the hands of Taxpayer, any gain or loss recognized

by Taxpayer on the sale of the Lead Interest and Remainder Interest will be § 1231 gain or § 1231 loss.

LAW AND ANALYSIS

Section 1001(c) provides in part that the entire amount of gain or loss on the sale or exchange of property shall be recognized.

Section 1221(a)(2) provides in part that the term capital asset means property held by the taxpayer, but does not include property, used in the taxpayer's trade or business, of a character which is subject to allowance for depreciation provided in section 167, or real property used in the taxpayer's trade or business.

Section 1231(a)(1) provides in part that if section 1231 gains exceed section 1231 losses, such gains and losses shall be treated as long-term capital gains or long-term capital losses, as the case may be. Section 1231(a)(2) provides in part that if section 1231 gains do not exceed section 1231 losses, such gains and losses shall not be treated as gains and losses from sales or exchanges of capital assets. Section 1231(a)(3)(A)(i) provides in part that a section 1231 gain includes any recognized gain on the sale or exchange of property used in the trade or business. Section 1231(b)(1) provides in part that, for purposes of section 1231, property used in the trade or business means property used in the trade or business of a character which is subject to the allowance for depreciation provided in section 167 that is held for more than one year, or real property used in the trade or business that is held for more than one year.

Section 1245(a)(1) provides in part that upon the sale of an item of section 1245 property, the amount by which the lower of the "recomputed basis" of the property, or the amount realized on the sale exceeds the adjusted basis of the property shall be treated as gain from a sale of property that is neither a capital asset nor property described in section 1231. Section 1245(a)(2) provides in part that the term "recomputed basis" means adjusted basis of the property plus all the adjustments for allowed or allowable depreciation reflected in the adjusted basis.

Section 1250 provides that a percentage of the gain from section 1250 property is treated as ordinary income.

Taxpayer has represented that Property constitutes property used in its trade or business within the meaning of § 1231(b)(1) and that Taxpayer has held Property for over one year. Accordingly, the only issue for our consideration is whether Taxpayer's combined sale of the Lead Interest and Remainder Interest constitutes a sale or exchange of property within the meaning of § 1231(a)(3)(A)(i).

The Lead Interest purchase agreements provide that all of the benefits and burdens of ownership in Property will transfer to Buyer 1 during the term of the Lead

Interest. Buyer 1 will have the unrestricted right to sell, assign, encumber, or otherwise dispose of, all of its rights in Property. Taxpayer represents that Buyer 1 intends to use Property in its active business. Buyer 1 will further pay all of the carrying costs associated with its interest in Property. The Remainder Interest purchase agreements provide that all of the benefits and burdens of ownership in Property will transfer to Buyer 2 upon the expiration of Buyer 1's Lead Interest. Buyer 2 will have the unrestricted right to sell, assign, encumber, or otherwise dispose of, all of its rights in the Remainder Interest. Taxpayer represents that Buyer 2 intends to hold Property as a long-term investment.

Based on our review of the documents provided by Taxpayer and Taxpayer's representations, we believe that Taxpayer is selling its entire interest in Property under the Lead Interest and Remainder Interest purchase agreements. The sale of Taxpayer's entire interest in Property constitutes a "sale or exchange" of property used in a trade or business within the meaning of § 1231(a)(3)(A)(i). See, e.g., *Jordan Marsh Co. v. Commissioner*, 269 F.2d 453 (2d Cir. 1959) (taxpayer's sale of real property consisting of a department store coupled with a 30-year leaseback of the same property to taxpayer constituted a sale instead of a like-kind exchange). See generally *Hunter v. Commissioner*, 44 T.C. 109 (1965) (accepting the uncontested proposition that the sale of a remainder interest in real property generated capital gain and allocating basis between the taxpayers' retained life estate and the value of the remainder interest sold to a third party). See also Rev. Rul. 72-85, 1972-1 C.B. 234, stating that a leasehold of real property used in a trade or business is § 1231 property, even if the lease is of indefinite duration.

CONCLUSION

Based on the analysis above, the gain or loss recognized by Taxpayer on the sale of the Lead Interest and Remainder Interest of Property will be treated as § 1231 gain or § 1231 loss. We express no opinion concerning whether Property constitutes "section 1245 property" or "section 1245 recovery property" such that the provisions of § 1245 apply to the characterization of Taxpayer's gain on the sale of Property, or whether Property constitutes "section 1250 property" such that the provisions of § 1250 apply to the characterization of Taxpayer's gain on the sale of Property.

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.

The rulings contained in this letter are based upon information and representations submitted by Taxpayer and accompanied by a penalty of perjury statement executed by an appropriate party. 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.

Sincerely,

Robert M. Casey
Senior Technical Reviewer, Branch 3
(Income Tax & Accounting)