

## Internal Revenue Service

Number: **201815014**

Release Date: 4/13/2018

Index Number: 856.07-00, 9100.00-00

Department of the Treasury

Washington, DC 20224

Third Party Communication: None

Date of Communication: Not Applicable

Person To Contact:

ID No.

Telephone Number:

Refer Reply To:

CC:FIP:B01

PLR-135042-17

Date:

January 08, 2018

## LEGEND

Trust =

Sub1 =

Sub2 =

Parent =

LP1 =

LP2 =

Law Firm =

Accounting Firm =

State A =

Date 1 =

Date 2 =

Date 3 =

Date 4 =

Date 5 =

Date 6 =

Date 7 =

Date 8 =

Date 9 =

Date 10 =

Date 11 =

Date 12 =

Year 1 =

Year 2 =

a =

b =

c =

Dear :

This responds to a letter dated November 10, 2017, submitted on behalf of Trust, Sub1, and Sub2 (collectively, "Taxpayers"). Taxpayers request an extension of time under sections 301.9100-1 and 301.9100-3 of the Procedure and Administration Regulations to make elections under section 856(l) of the Internal Revenue Code ("Code") to treat each of Sub1 and Sub2 (collectively, the "Subsidiaries") as a taxable REIT subsidiary ("TRS") of Trust effective as of Date 6.

#### FACTS

Trust is a State A corporation that was formed on Date 5 and has elected to be treated for U.S. federal income tax purposes as a real estate investment trust ("REIT"). Each of the Subsidiaries is a State A corporation that was formed on Date 6.

Parent originally was formed as a State A limited liability company, on Date 1, and subsequently was converted into a State A limited partnership on Date 3. LP1 and LP2 are State A limited partnerships formed on Date 4 and Date 2, respectively.

Trust and Parent are owned primarily by institutional investors. Trust owns approximately a percent of the limited partnership interests of each of LP1 and LP2. Parent owns the remaining percentage, approximately b percent, of the limited partnership interests of each of LP1 and LP2. LP1 owns c percent of all the issued and outstanding shares of Sub1. LP2 owns c percent of all the issued and outstanding shares of Sub2.

In Year 1, Taxpayers engaged Law Firm to provide legal and tax advice regarding the formation of each of Taxpayers and the qualifications of each of the Subsidiaries to be treated as a TRS of Trust. In the same year, Taxpayers engaged Accounting Firm to provide tax and accounting advice, including the preparation of all of the tax returns and related forms for each of Taxpayers. Around this time, Trust's in-house advisor ("Advisor") began to perform routine accounting functions for Taxpayers and began to coordinate accounting and tax advice with Law Firm and Accounting Firm.

Taxpayers represent that, since inception, they always have intended to make elections under section 856(l) to treat each of the Subsidiaries as a TRS of Trust, effective as of Date 6. For the intended elections to be effective as of Date 6, a Form 8875, *Taxable REIT Subsidiary Election*, should have been filed by or on behalf of each of Trust and Sub1 and Trust and Sub2 no later than Date 7 ("*Taxpayers' Forms 8875*"). *Taxpayers' Forms 8875*, however, were never filed due to confusion as to who among Law Firm, Accounting Firm, and Advisor would file *Taxpayers' Forms 8875*.

On Date 8, Law Firm, prepared and submitted to the Service a letter on behalf of Taxpayers, requesting extensions of time under sections 301.9100-1 and 301.9100-3 of the Procedure and Administration Regulations to make elections under section 856(l) to treat each of the Subsidiaries as a TRS of Trust effective as of Date 6. On Date 9, the Service issued a letter ruling ("Prior Ruling"), which concluded that Taxpayers had satisfied the requirements for granting a reasonable extension of time to elect under section 856(l) to treat each of Sub1 and Sub2 as a TRS of Trust effective as of Date 6, and which granted Taxpayers a reasonable extension of time until Date 10 to do so.

Law Firm, Accounting Firm, and Advisor each assumed that one of the others had timely filed *Taxpayers' Forms 8875* in accordance with Prior Ruling. Accounting Firm prepared Taxpayers' tax returns and audited financial statements consistent with this assumption. Law Firm attorney, who obtained Prior Ruling, left Law Firm in Year 2.

Trust recently began negotiations with potential buyers regarding the sale of Trust's shares. On Date 11, during the course of due diligence in connection with the proposed sale, the potential buyers requested copies of *Taxpayers' Forms 8875*.

On Date 12, having reviewed their files and consulted with Law Firm and Accounting Firm, Taxpayers realized that they had no evidence of the filing of *Taxpayers' Forms 8875*. Representatives for Taxpayers contacted the Service, and the Service advised Taxpayers' representatives that they found no evidence of such filings.

Law Firm, Accounting Firm and Advisor each represent that until Date 11, the date on which the potential buyers requested copies of *Taxpayers' Forms 8875*, no events had occurred which would have caused them to question whether *Taxpayers' Forms 8875* had been properly and timely filed in accordance with Prior Ruling.

Taxpayers represent that they believed that *Taxpayers' Forms 8875* had been properly and timely filed in accordance with Prior Ruling and that they have timely filed all of their respective U.S. tax and information returns consistent with and based on this belief. Taxpayers make the following additional representations:

- (1) The request for relief was filed before the failure to make the regulatory elections was discovered by the Service.
- (2) Granting the relief requested will not result in Trust, Sub1, or Sub2 having a lower tax liability, in the aggregate, for all taxable years to which the elections apply than they would have had if the elections had been timely made (taking into account the time value of money).
- (3) Taxpayers do not seek to alter return positions for which accuracy-related penalties have been or could have been imposed under section 6662 at the time they requested relief, and the new positions require or permit the regulatory elections for which relief is requested.
- (4) Being fully informed of the required elections and related tax consequences, Taxpayers did not choose to not file the elections.
- (5) Taxpayers are not using hindsight in making the decision to seek the relief requested. No specific facts have changed since Date 7, the due date of the elections, making the elections advantageous to Trust, Sub1, or Sub2.

In addition, as required by sections 301.9100-3(e)(2) and (3) of the Procedure and Administration Regulations, Taxpayers submitted with their request affidavits signed under penalties of perjury from appropriate individuals at Law Firm, Accounting Firm, and Advisor.

## 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) of the Procedure and Administration 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, revenue procedure, notice, or 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.

Under all the facts and circumstances of this case as represented by the Taxpayers, we have determined that the interests of the Government are not prejudiced under the standards set forth in section 301.9100-3(c)(1)(i).

## CONCLUSION

Based on the information submitted and representations made, we conclude that Taxpayers have satisfied the requirements for granting a reasonable extension of time to elect under section 856(l) to treat each of the Subsidiaries as a TRS of Trust effective as of Date 6. Accordingly, Taxpayers have 90 days from the date of this letter to make the intended elections.

This ruling is limited to the timeliness of *Taxpayers' Forms 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 or whether Sub1 or Sub2 otherwise qualifies as a TRS under subchapter M of the Code.

No opinion is expressed with regard to whether the tax liability of Taxpayers is not lower, in the aggregate, for all years to which the elections apply than such tax

liability would have been if the elections 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.

The ruling contained in this letter is based upon information and representations submitted by Taxpayers 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.

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.

This ruling is directed only to Taxpayers. 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,

---

Alexa T. Dubert  
Assistant to the Branch Chief, Branch 1  
Office of Associate Chief Counsel  
(Financial Institutions & Products)

Enclosure:

Copy of this letter for section 6110 purposes

cc: