

Internal Revenue Service

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Date:

August 25, 2004

In Re:

X =

Y =

LLC =

Firm =

3

Date =

1

p =

Date =

2

Date =

3

TRS =

1

Year =

1

Firm =

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Firm =

2

Dear _____ :

This is in reply to a letter dated March 3, 2004, requesting on behalf of X and Y an extension of time under section 301.9100-1 of the Procedure and Administration

Regulations to make an election under section 856(l) of the Internal Revenue Code to treat Y as a taxable REIT subsidiary ("TRS") of X.

FACTS

X was created as, and intended to be, a real estate investment trust ("REIT"). Its taxable year is the calendar year. X was formed on Date 1. It has not yet filed an income tax return for its initial year.

TRS 1 is a corporation that was formed on Date 2, and Y is a corporation that was formed on Date 3. On those dates both were wholly owned by LLC.

In mid-Year 1, when LLC owned all of the interests in Y and TRS 1, X acquired a *p* interest in LLC. Firm 2 advised X in the acquisition. At that time, Firm 1 was the adviser to another primary member of LLC.

Firm 2 advised X that a TRS election was needed for TRS 1. It was decided that Firm 1 would prepare a Form 8875 (i.e., a TRS election form), send it to Firm 2, and Firm 2 would send it to the client for execution. This Form 8875 for TRS 1 was timely filed.

In the case of Y, Firm 1 and Firm 2 realized that a Form 8875 electing TRS status was also needed. It was decided again that Firm 1 would prepare Form 8875 and forward it to Firm 2, as in the case of TRS 1. Firm 2, however, denies that it ever received a Form 8875 from Firm 1. Firm 1 and Firm 2 did not communicate with each other to determine whether one of them had filed the Form 8875 for Y. Rather, each assumed that the other firm had done so, when in fact neither had filed the Form 8875 to elect TRS status for Y.

At the end of Year 1, Firm 3 discovered the failure to file the Form 8875 for Y and immediately advised X to request relief under section 301.9100-1 of the regulations.

On X and Y's behalf, Firm discovered the failure to file the election before it was discovered by the Internal Revenue Service. After the discovery, Firm promptly requested an extension of time for X and Y to file a TRS election.

The following representations are made in connection with the request for an extension of time to file a Form 8875 on behalf of X and Y:

1. The request for relief was filed by the taxpayers before the failure to make the regulatory election was discovered by the Internal Revenue Service.
2. Granting the relief requested will not result in the taxpayers having a lower tax liability in the aggregate for all years to which the election applies than the

taxpayers would have had if the election had been timely made (taking into account the time value of money).

3. The taxpayers 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 the taxpayers 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, the taxpayers did not choose to not file the election.

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 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, 2001-1 C.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 elections, 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) of the regulations provides that the Commissioner has discretion to grant a reasonable extension of time to make a regulatory election (defined in section 301.9100-1(b) as an election whose deadline 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) of the regulations sets forth rules that the Internal Revenue Service generally will use to determine whether, under the 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(b) provides that subject to paragraphs (b)(3)(i) through (iii) of section 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 section 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 upon the facts and representations submitted, we conclude that X and Y have shown good cause for granting a reasonable extension of time to elect under 856(l) to treat Y as a taxable REIT subsidiary of X. Accordingly, X and Y 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 X otherwise qualifies as a REIT under subchapter M of the Code.

No opinion is expressed with regard to whether the tax liability of X and Y 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.

Except as specifically provided otherwise, no opinion is expressed on the federal income tax consequences of the transaction described above.

This ruling is directed only to the taxpayers that requested it. Section 6110(k)(3) of the Code provides that it may not be used or cited as precedent.

In accordance with the terms of a power of attorney on file in this office, a copy of this letter is being sent to your authorized representative.

Sincerely yours,

William E. Coppersmith
William E. Coppersmith
Chief, Branch 2
Office of Associate Chief Counsel
(Financial Institutions & Products)