Internal Revenue Service

Department of the Treasury

Washington, DC 20224

Index Number: 856.00-00

Number: **200041024**
Release Date: 10/13/2000

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Telephone Number:

Refer Reply To:
CC:DOM:FIP:2-PLR-107645-00
Date:
July 18, 2000

LEGEND

Company =

State A =

Date X =

Date Y =

Date Z =

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Dear

This responds to your letter dated March 30, 2000, and subsequent correspondence, requesting rulings on behalf of Company. Company requests that its Rooftop Interests, described below, constitute "interests in real property" and "real estate assets" within the meaning of section 856(c)(5)(B) and (c)(5)(C) of the Internal Revenue Code. Company further requests that amounts received by Company from an Operator under an Operator's Lease for the use of a Rooftop Site, described below, will constitute "rents from real property" for purposes of section 856(c)(2) and (c)(3).

A. Background

Company is a State A corporation. For its taxable year ending Date X, Company intends to elect to be taxed as a real estate investment trust (REIT) within the meaning of section 856 of the Internal Revenue Code.

Company was organized to acquire fee, leasehold, license and other interests

(collectively, “Rooftop Interests”) in building rooftop sites (“Rooftop Sites”). Company then leases, subleases or licenses the Rooftop Sites to providers of wireless telecommunications services (“Operators”). Operators use the Rooftop Sites for the location and operation of their telecommunications receiving and transmission equipment (individually, a “Telecommunication Site”).

In Date Y, Company purchased a Rooftop Sites from a third party (“Seller”). In Date Z, Company also acquired from a different third party all of the stock of a corporation that owned certain additional fee sites. A very small portion of Company’s business operations includes management activities with respect to certain of the Rooftop Sites.

B. Ruling Request 1

1. FACTS

The Rooftop Interests fall into three descriptive classes based on the manner in which the interests are described in the governing agreements: (1) a fee interest in a Rooftop Site; (2) a leasehold interest in a Rooftop Site; or (3) a license interest in a Rooftop Site. However, Company is granted substantially identical interests to use, possess and control a Rooftop Site under the agreements conveying both the leasehold interests and license interests (collectively referred to as “Leasehold Agreements”). The Leasehold Agreements provide for Company to pay a monthly rent to the building owner for the Rooftop Site in one or a combination of the following manners: (i) a fixed monthly sum; (ii) a percentage of Company’s gross rent revenue or license fees attributable to use by Operators, or (iii) the greater or lesser of a fixed base rent and variable amounts dependent upon revenue or license fees derived from Operators.

Rooftop Sites are common in metropolitan areas where tall buildings are predominant and a large number of communications sites are required to accommodate the high volume of wireless communications signal traffic. In such areas, zoning restrictions and the value of land make it impractical or impossible to erect telecommunication towers on land. Telecommunication towers typically require significant tracts of land that are not generally available in a metropolitan area. In addition, such land would require appropriate zoning classification for use as a telecommunications tower site, which is often impractical or impossible to obtain even if adequate sized tracts of land were available.

In purchasing the Rooftop Sites, Company acquired interests, described above, in various types of real property and personal property related to the Sites. The premises described under a Leasehold Agreement consist of physical space on the building rooftop together with rights to the use of the air space above the surface of the roof and ancillary space within the building for storage. All of the Leasehold Agreements also afford Company the rights of ingress and egress over and through the land and building of the building owner as necessary to access and make use of the

Rooftop Site (a “Rooftop Easement”).

Additionally, Company in many instances is granted a leasehold interest or other right to exclusive and/or nonexclusive use of certain enclosed space (“Storage Space”). The Storage Space is generally within a maintenance or electrical room either on the building rooftop or within the building. The Storage Space may also include ducts or vents or other space for wiring and cabling. The Storage Space is used to house equipment owned by Company or an Operator, including radio transmitters, radio repeaters, radio antenna combiners, transmitting/receiving antennae and other equipment and personal property used in the operation of a Telecommunication Site (“Telecommunication Equipment”). Generally, all or substantially all of such Equipment is owned by the Operator. Company represents that the adjusted basis of any Telecommunication Equipment owned by it and leased to an Operator in connection with a Rooftop Site constitutes less than 15 percent of the adjusted basis of Company in all of the property leased by an Operator in connection with the Rooftop Site.

Although occasionally attached directly to a portion of the building structure, transmitting/receiving antennae of Operators are most often attached to a platform, which functions as a horizontal tower (a “Platform”). Platforms are heavy duty steel structures in the form of a grid that are specially constructed and permanently affixed into the infrastructure of the roof and building structure with bolts and welds. A Platform is primarily used to facilitate the installation and removal of the Telecommunication Equipment of multiple Operators without compromising the integrity of the building roof.

In certain instances, the building owner installed the Platform on the Rooftop Site. In other instances, the Seller installed the Platform coincident with its use of the Rooftop Site as a Telecommunication Site. The Rooftop Site in a Leasehold Agreement is sometimes described as all or a portion of an existing Platform situated on the building roof.

Platforms are constructed and installed to the rigorous standards and specifications of the American Society of Civil Engineers (wind loading capacity), the Electronics Industry Association (structural standards for steel antenna supporting structures) and the American Society of Mechanical Engineers (structural standards for steel antenna supporting structures). These standards apply to vertical transmitting and receiving towers as well as horizontal platforms and are incorporated into state and local building codes nationwide. The method of construction and incorporation of a Platform into a building structure is labor intensive and costly. Regardless of the agreement between the building owner and Company that may permit removal of a Platform upon expiration of the agreement, the construction method is designed so that a Platform will be a permanent part of the building and will come down only when the building itself comes down.

2. LAW AND ANALYSIS

Section 856(c)(4)(A) provides that at the close of each quarter of its tax year, at least 75 percent of the value of a REIT's total assets must be represented by real estate assets, cash and cash items (including receivables), and Government securities.

Section 856(c)(5)(B) defines the term "real estate assets", in part, to mean real property (including interests in real property and interests in mortgages on real property) and shares (or transferable certificates of beneficial interest) in other REITs. Section 856(c)(5)(C) provides that the terms "interests in real property" includes fee ownership and co-ownership of land or improvements thereon, leaseholds of land or improvements thereon, options to acquire land or improvements thereon, and options to acquire leaseholds of land or improvements thereon, but does not include mineral, oil or gas royalty interests.

Section 1.856-3(b) of the Income Tax Regulations provides, in part, that the term "real estate assets" means real property. Section 1.856-3(d) provides that "real property" includes land or improvements thereon, such as buildings or other inherently permanent structures thereon (including items which are structural components of such buildings or structures.) Local law definitions will not be controlling for purposes of determining the meaning of "real property" for purposes of section 856 and the regulations thereunder. Under this regulation, "real property" includes, for example, the wiring in a building, plumbing systems, central heating or central air-conditioning machinery, pipes or ducts, elevators or escalators installed in a building, or other items which are structural components of a building or other permanent structure. The term does not include assets accessory to the operation of a business, such as machinery, printing press, transportation equipment which is not a structural component of the building, office equipment, refrigerators, individual air-conditioning units, grocery counters, furnishings of a motel, hotel, or office building, etc. even though such items may be termed fixtures under local law.

Rev. Rul. 71-220, 1971-1 C.B. 210, considers whether mobile home units installed in a planned community are real property for purposes of section 856. The units were delivered to a site where they were set on foundations consisting of pre-engineered blocks. The wheels and axles were removed from the units, and the units were affixed to the ground by six or more steel straps. A carport or screened porch was attached to each unit and the unit was connected to utilities. The revenue ruling holds that the units are real property within the meaning of section 856.

Rev. Rul. 71-286, 1971-2 C.B. 263, considers whether air rights over real property are considered "interest in real property" and "real estate assets" within the meaning of section 856(c). The term air rights is defined as the long-term leasehold or fee simple ownership of the space above the ground that a landowner can occupy or use in connection with the land, plus necessary easements on the surface for support of structures erected in such air space. The revenue ruling holds that such air rights are considered "interests in real property" and "real estate assets" within the meaning of section 856(c).

Rev. Rul. 75-424, 1975-2 C.B. 270, concerns whether various components of a microwave transmission system are real estate assets for purposes of section 856. The system consists of transmitting and receiving towers built upon pilings or foundations, transmitting and receiving antennae affixed to the towers, a building, equipment within the building, and waveguides. The waveguides are transmission lines from the receivers or transmitters to the antennae, and are metal pipes permanently bolted or welded to the tower and never removed or replaced unless blown off by weather. The transmitting, multiplex, and receiving equipment is housed in the building. Prewired modular racks are installed in the building to support the equipment that is installed upon them. The racks are completely wired in the factory and then bolted to the floor and ceiling. They are self-supporting and do not depend upon the exterior walls for support. The equipment provides for transmission of audio or video signals through the waveguides to the antennae. Also installed in the building is a permanent heating and air conditioning system. The transmission site is surrounded by chain link fencing. The revenue ruling holds that the building, the heating and air conditioning system, the transmitting and receiving towers, and the fence are real estate assets. The ruling holds further that the antennae, waveguides, transmitting, receiving, and multiplex equipment, and the prewired modular racks are assets accessory to the operation of a business and therefore not real estate assets.

As noted above, Company acquired Rooftop Interests in Rooftop Sites, Platforms on certain Rooftop Sites, Storage Space and Rooftop Easements. Rooftop Sites, comprised of physical space on the building rooftop together with rights to the use of the air space above the surface of the roof, constitute “interests in real property” within the meaning of section 856(c)(5)(C) and “real estate assets” within the meaning of section 856(c)(5)(B). Rev. Rul. 71-286. Company’s Storage Space and Rooftop Easements are also considered “interests in real property” and “real estate assets.”

A Platform is a horizontal tower built into the foundation provided by the building roof structure. Company’s Platforms are constructed to remain permanently in place, cannot be readily moved, are unlikely to be moved, and are not intended to be moved. Further, Company represents that its Platforms are constructed and installed to the same rigorous standards and specifications that govern the construction of the towers that were the subject of Rev. Rul. 75-424. Because the method of construction of the Platforms and the permanency of such Platforms are substantially similar to the transmitting and receiving towers in Rev. Rul. 75-424, they are inherently permanent structures. Further, the Platforms are not assets accessory to the operation of a business. Therefore, the Platforms constitute “real estate assets” within the meaning of section 856(c)(5)(B).

3. CONCLUSION

Based on the facts as represented by Company, we conclude that Company’s fee, leasehold and license interests in Rooftop Sites (which may include a Platform),

Storage Space and Rooftop Easements constitute “interests in real property” and “real estate assets” within the meaning of section 856(c)(5)(B) and (c)(5)(C).

C. Ruling Request 2

1. FACTS

With respect to each Rooftop Site in which Company owns an interest, Company enters into agreements (“Operator’s Lease”) granting to Operators as lessees or licensees of Company the right to use the Rooftop Site for a Telecommunications Site. The Operator’s Lease grants the Operator some portion of the rights of use of the Rooftop Site as were conveyed to Company under its agreement with the building owner. The term of an Operator’s Lease is generally for a period of several years, and generally conforms to the term of the applicable Leasehold Agreement.

With respect to its obligations under an Operator’s Lease, Company has reserved the right to approve any installation or maintenance work performed by an Operator as well as contractors hired by an Operator, and is also obligated to maintain the Rooftop Site in good repair and provide utilities. Company employees will not install or maintain any property or equipment of an Operator, but may be present at the time of any installation or maintenance performed by an Operator in order to ensure compliance by the Operator with the covenants of Company under its agreement with the building owner and other Operators. Additionally, Company represents that any noncustomary services will be provided by independent contractors within the meaning of section 856(d)(3).

2. LAW AND ANALYSIS

Section 856(c)(2) provides that at least 95 percent of a REIT’s gross income must be derived from, among other sources, “rents from real property.” Section 856(c)(3) provides that at least 75 percent of a REIT’s gross income must be derived from, among other sources, “rents from real property.”

Section 856(d)(1) provides that rents from real property include (subject to exclusions provided in section 856(d)(2)): (A) rents from interests in real property, (B) charges for services customarily furnished or rendered in connection with the rental of real property, whether or not such charges are separately stated, and (C) rent attributable to personal property leased under, or in connection with, a lease of real property, but only if the rent attributable to such personal property for the taxable year does not exceed 15 percent of the total rent for the taxable year attributable to both the real and personal property leased under, or in connection with, such lease.

Section 856(d)(2)(C) excludes from the definition of "rents from real property"' any impermissible tenant service income as defined in section 856(d)(7). Section 856(d)(7)(A) provides, in relevant part, that the term impermissible tenant service

income means, with respect to any real or personal property, any amount received or accrued directly or indirectly by the real estate investment trust for managing or operating such property. Section 856(d)(7)(B) provides that de minimis amounts of impermissible tenant service income, i.e., amounts less than one percent of all amounts received or accrued by the REIT with respect to a particular property during the taxable year, will not cause otherwise qualifying amounts to not be treated as rents from real property.

Section 856(d)(7)(C) excludes from the definition of impermissible tenant service income amounts received for services furnished or rendered, or management or operation provided, through an independent contractor from whom the trust itself does not derive or receive any income. Similarly, subparagraph (C) excludes amounts that would be excluded from unrelated business taxable income under section 512(b)(3) if received by an organization described in section 511(a)(2).

Section 512(b)(3) provides, in part, that there shall be excluded from the computation of unrelated business taxable income all rents from real property and all rents from personal property leased with such real property, if the rents attributable to such personal property are an incidental amount of the total rents received or accrued under the lease, determined at the time the personal property is placed in service.

Section 1.512(b)-1(c)(5) provides that payments for the use or occupancy of rooms and other space where services are also rendered to the occupant, such as for the use or occupancy of rooms or other quarters in hotels, boarding houses or apartment houses furnishing hotel services, or in tourist camps or tourist homes, motor courts or motels, or for the use or occupancy of space in parking lots, warehouses or storage garages, do not constitute rent from real property. Generally, services are considered rendered to the occupant if they are primarily for the tenant's convenience and are other than those usually or customarily rendered in connection with the rental of rooms or other space for occupancy only. The supplying of maid service, for example, constitutes such service; whereas the furnishing of heat and light, the cleaning of public entrances, exits, stairways and lobbies, and the collection of trash are not considered as services rendered to the occupant. Payments for the use or occupancy of entire private residences or living quarters in duplex or multiple housing units or offices in an office building are generally treated as rent from real property.

Generally, Company will be responsible under an Operator's Lease only for furnishing utilities, and will not be required to furnish or render any services to the Operator. Company may perform certain activities, such as customary maintenance and repairs of the Rooftop Site pursuant to its lease with the building owner. Such activities will not be considered rendered primarily for the convenience of the tenants under section 1.512-1(c)(5). As a result, the services fall within the exception provided in section 856(d)(7)(C).

3. CONCLUSION

Based on the facts as represented by Company, we conclude that amounts received by Company from an Operator under an Operator's Lease for the use of a Rooftop Site constitute "rents from real property" for purposes of section 856(c)(2) and (c)(3).

Except as specifically set forth above, no opinion is expressed regarding the federal tax consequences of the transactions described above under any other provision of the Code. Specifically, no opinion is expressed concerning whether Company otherwise qualifies as a REIT under subchapter M, part II of Chapter 1 of the Code.

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 representatives.

Sincerely,
Acting Associate Chief Counsel
(Financial Institutions & Products)
By: William E. Coppersmith
Chief, Branch 2

Enclosures:
Copy of this letter
Copy for section 6110 purposes