Notice of Proposed Rulemaking and Notice of Public Hearing

Modification of Check the Box

REG–106681–02

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking and notice of public hearing.

SUMMARY: This document contains proposed regulations that clarify that qualified REIT subsidiaries, qualified subchapter S subsidiaries, and single owner eligible entities that are disregarded as entities separate from their owners are treated as separate entities for purposes of any Federal tax liability for which the entity is liable. This document also provides notice of a public hearing.

DATES: Written or electronic comments must be received by June 30, 2004. Outlines of topics to be discussed at the public hearing scheduled for July 22, 2004, at 10:00 a.m., must be received by July 1, 2004.

ADDRESSES: Send submissions to: CC:PA:LPD:PR (REG–106681–02), room 5203, Internal Revenue Service, POB 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to: CC:PA:LPD:PR (REG–106681–02), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW, Washington, DC. Alternatively, taxpayers may submit electronic comments directly to the IRS internet site at *http://www.irs.gov/regs*. The public hearing will be held in the Auditorium, Internal Revenue Building, 1111 Constitution Avenue, NW, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations, James M. Gergurich, (202) 622–3070; concerning submissions and the hearing, Treena Garrett, (202) 622–7180 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background

Under the Internal Revenue Code and its regulations, three types of entities may be disregarded as entities separate from their owners: qualified REIT subsidiaries (within the meaning of section 856(i)(2)), qualified subchapter S subsidiaries (within the meaning of section 1361(b)(3)(B)), and single owner eligible entities (within the meaning of §301.7701–3(a)) (each, a disregarded entity).

Section 856(i)(1) provides that a qualified REIT subsidiary (QRS) shall not be treated as a separate corporation. Under section 856(i)(2), a QRS is defined as any corporation 100 percent of the stock of which is held by a real estate investment trust (REIT), unless the REIT and the corporation jointly elect under section 856(l) that the corporation shall be treated as a taxable REIT subsidiary. Such election may be revoked at any time with the consent of both the corporation and the REIT.

Section 1361(b)(3)(A) similarly provides that a qualified subchapter S corporation (QSub) shall not be treated as a separate corporation. Under section 1361(b)(3)(B), a QSub is defined as any eligible domestic corporation that is wholly owned by an S corporation and that the S corporation elects to treat as a QSub.

In addition, under §301.7701–3(b)(1) and (2), an eligible entity with a single owner may be disregarded as an entity separate from its owner. Section 301.7701–3(b)(1)(ii) provides that a domestic eligible entity with a single owner is disregarded unless the entity makes an election to be classified as an association (and thus a corporation under §301.7701–2(b)(2)). Section 301.7701–3(b)(2)(C) provides that a foreign eligible entity with a single owner that does not have limited liability is disregarded unless the entity elects to be classified as a corporation. Under §301.7701–3(c), a single owner eligible entity that has elected to be treated as a corporation and a foreign eligible entity with a single owner that has limited liability (that would otherwise be treated as a corporation under §301.7701–3(b)(2)(i)(B)) may elect, subject to certain limitations, to be disregarded.

Explanation of Provisions

As described above, a taxable entity may become disregarded in a variety of circumstances. For example, if a REIT acquires all of the stock of a corporation, the corporation will become a QRS that is not treated as a separate corporation. Likewise, an S corporation may elect to treat a wholly owned eligible domestic corporation as a QSub that is not treated as a separate corporation. It is also possible for a disregarded entity to be the survivor of a merger of a taxable entity (for example, a corporation) and the disregarded entity. Although a disregarded entity generally is not liable for Federal tax liabilities of its owner with respect to taxable periods during which it is disregarded, the disregarded entity may be liable for Federal taxes with respect to taxable periods during which it was not disregarded or because it is the successor or transferee of a taxable entity.

The proposed regulations do not address the question of whether the disregarded entity is, in fact, either liable for Federal taxes or entitled to a refund or credit of Federal tax. Rather, the regulations clarify that if a disregarded entity is liable for Federal taxes, the disregarded entity will be treated as an entity separate from its owner for purposes of those liabilities, such that assessment may be made against the disregarded entity, the assets of the disregarded entity may be subject to lien and levy, and the disregarded entity may consent to extend the period of limitations on assessment. In addition, the regulations clarify that if a disregarded entity is entitled to a refund or credit of Federal tax, the disregarded entity will be treated as an entity separate from its owner for purposes of that refund or credit.

Proposed Effective Date

These regulations are proposed to apply on or after April 1, 2004.

Special Analyses

It has been determined that this notice of proposed rulemaking is not a significant regulatory action as defined in Executive

Order 12866. Therefore, a regulatory assessment is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations and, because the regulations do not impose a collection of information on small entities, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Therefore, a Regulatory Flexibility Analysis is not required. Pursuant to section 7805(f) of the Code, these regulations will be submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Comments and Public Hearing

Before this proposed regulation is adopted as a final regulation, consideration will be given to any written (a signed original and (8) copies) or electronic comments that are submitted timely to the IRS. The IRS and Treasury Department request comments on the clarity of the proposed rules and how they can be made easier to understand. All comments will be available for public inspection and copying.

A public hearing has been scheduled for July 22, 2004, at 10:00 a.m., in the Auditorium, Internal Revenue Building, 1111 Constitution Avenue, NW, Washington, DC. Due to building security procedures, visitors must enter at the Constitution Avenue entrance. In addition, all visitors must present photo identification to enter the building. Because of access restrictions, visitors will not be admitted beyond the immediate entrance area more than 30 minutes before the hearing starts. For information about having your name on the building access list to attend the hearing, see the FOR FURTHER INFORMATION CONTACT portion of this preamble. The rules of 26 CFR 601.601(a)(3) apply to the hearing. Persons who wish to present oral comments must submit written or electronic comments by June 30, 2004, and an outline of the topics to be discussed and the time to be devoted to each topic (a signed original and eight (8) copies) by July 1, 2004. A period of 10 minutes will be allotted to each person for making comments. An agenda showing the scheduling of the speakers will be prepared after the deadline for receiving outlines has passed. Copies of the agenda will be available free of charge at the hearing.

Drafting Information

The principal author of these regulations is James M. Gergurich of the Office of the Associate Chief Counsel (Passthroughs & Special Industries), IRS. However, other personnel from the IRS and Treasury participated in their development.

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Proposed Amendments to the Regulations

Accordingly, 26 CFR parts 1 and 301 are proposed to be amended as follows:

PART 1—INCOME TAX

Paragraph 1. The authority citation for part 1 continues to read in part as follows:

Authority: 26 U.S.C. 7805 * * *

Par. 2. Section 1.856–9 is added to read as follows:

§1.856–9 Treatment of certain qualified REIT subsidiaries.

(a) *In general*. A qualified REIT subsidiary, even though it is otherwise not treated as a corporation separate from the REIT, is treated as a separate corporation for purposes of:

(1) Federal tax liabilities of the qualified REIT subsidiary with respect to any taxable period for which the qualified REIT subsidiary was treated as a separate corporation.

(2) Federal tax liabilities of any other entity for which the qualified REIT subsidiary is liable.

(3) Refunds or credits of Federal tax.

(b) *Examples*. The following examples illustrate the application of paragraph (a) of this section:

Example 1. X, a calendar year taxpayer, is a domestic corporation 100 percent of the stock of which is acquired by Y, a real estate investment trust, in 2002. X was not a member of a consolidated group at any time during its taxable year ending in December 2001. Consequently, X is treated as a qualified REIT subsidiary under the provisions of section 856(i). In 2004, the Internal Revenue Service ("IRS") seeks to extend the period of limitations on assessment for X's 2001 taxable year. Because X was treated as a separate corporation for its 2001 taxable year, X is the proper party to sign the consent to extend the period of limitations.

Example 2. The facts are the same as in *Example 1*, except that upon Y's acquisition of X, Y and X jointly elect under section 856(l) to treat X as a taxable REIT subsidiary of Y. In 2003, Y and X jointly revoke that election. Consequently, X is treated as a qualified REIT subsidiary under the provisions of section 856(i). In 2004, the IRS determines that X miscalculated and underreported its income tax liability for 2001. Because X was treated as a separate corporation for its 2001 taxable year, the deficiency may be assessed against X and, in the event that X fails to pay the liability after notice and demand, a general tax lien will arise against all of X's property and rights to property.

Example 3. X is a qualified REIT subsidiary of Y under the provisions of section 856(i). In 2001, Z, a domestic corporation that reports its taxes on a calendar year basis, merges into X in a state law merger. Z was not a member of a consolidated group at any time during its taxable year ending in December 2000. Under the applicable state law, X is the successor to Z and is liable for all of Z's debts. In 2004, the IRS seeks to extend the period of limitations on assessment for Z's 2000 taxable year. Because X is the successor to Z and is liable for Z's 2000 taxes that remain unpaid, X is the proper party to sign the consent to extend the period of limitations.

(c) *Effective date*. This section applies on or after April 1, 2004.

Par. 3. Section 1.1361–4 is amended as follows:

1. In paragraph (a)(1), the first sentence is amended by adding the language "and (a)(6)" immediately following the language "Except as otherwise provided in paragraph (a)(3)".

2. Paragraph (a)(6) is added.

The addition reads as follows:

§1.1361–4 Effect of Qsub election.

(a) * * * (1) * * *

(6) *Treatment of certain QSubs*—(i) *In general*. A QSub, even though it is generally not treated as a corporation separate from the S corporation, is treated as a separate corporation for purposes of:

(A) Federal tax liabilities of the QSub with respect to any taxable period for which the QSub was treated as a separate corporation.

(B) Federal tax liabilities of any other entity for which the QSub is liable.

(C) Refunds or credits of Federal tax.

(ii) *Examples*. The following examples illustrate the application of paragraph (a)(6)(i) of this section:

Example 1. X has owned all of the outstanding stock of Y, a domestic corporation that reports its taxes on a calendar year basis, since 2001. X and Y do not report their taxes on a consolidated basis. For 2003, X makes a timely S election and simultaneously makes a QSub election for Y. In 2004, the Internal Revenue Service ("IRS") seeks to extend the period of limitations on assessment for Y's 2001 taxable year. Because Y was treated as a separate corporation for its 2001 taxable year, Y is the proper party to sign the consent to extend the period of limitations.

Example 2. The facts are the same as in *Example 1*, except that in 2004, the IRS determines that Y miscalculated and underreported its income tax liability for 2001. Because Y was treated as a separate corporation for its 2001 taxable year, the deficiency for Y's 2001 taxable year may be assessed against Y and, in the event that Y fails to pay the liability after notice and demand, a general tax lien will arise against all of Y's property and rights to property.

Example 3. X is a QSub of Y. In 2001, Z, a domestic corporation that reports its taxes on a calendar year basis, merges into X in a state law merger. Z was not a member of a consolidated group at any time during its taxable year ending in December 2000. Under the applicable state law, X is the successor to Z and is liable for all of Z's debts. In 2003, the IRS seeks to extend the period of limitations on assessment for Z's 2000 taxable year. Because X is the successor to Z and is liable for Z's 2000 taxes that remain unpaid, X is the proper party to execute the consent to extend the period of limitations on assessment.

(iii) *Effective date.* This paragraph (a)(6) applies on or after April 1, 2004.

PART 301—PROCEDURE AND ADMINISTRATION

Par. 4. The authority citation for part 301 continues to read in part as follows:

Authority: 26 U.S.C. 7805 * * *

Par. 5. Section 301.7701–2 is amended as follows:

1. Paragraph (c)(2)(iii) is added.

2. Paragraph (e) is revised.

The addition and revision read as follows:

§301.7701–2 Business entities; definitions.

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(c) * * *

(2) * * * (i) * * *

(iii) *Tax liabilities of certain disregarded entities*—(A) *In general.* An entity that is otherwise disregarded as separate from its owner is treated as an entity separate from its owner for purposes of:

(*1*) Federal tax liabilities of the entity with respect to any taxable period for which the entity was not disregarded.

(*2*) Federal tax liabilities of any other entity for which the entity is liable.

(*3*) Refunds or credits of Federal tax.

(B) *Examples.* The following examples illustrate the application of paragraph (c)(2)(iii)(A) of this section:

Example 1. In 2001, X, a domestic corporation that reports its taxes on a calendar year basis, merges into Z, a domestic LLC wholly owned by Y that is disregarded as an entity separate from Y, in a state law merger. X was not a member of a consolidated group at any time during its taxable year ending in December 2000. Under the applicable state law, Z is the successor to X and is liable for all of X's debts. In 2004, the Internal Revenue Service ("IRS") seeks to extend the period of limitations on assessment for X's 2000 taxable year. Because Z is the successor to X and is liable for X's 2000 taxes that remain unpaid, Z is the proper party to sign the consent to extend the period of limitations.

Example 2. The facts are the same as in *Example 1*, except that in 2002, the IRS determines that X miscalculated and underreported its income tax liability for 2000. Because Z is the successor to X and is liable for X's 2000 taxes that remain unpaid, the deficiency may be assessed against Z and, in the event that Z fails to pay the liability after notice and demand, a general tax lien will arise against all of Z's property and rights to property.

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(e) *Effective date.* (1) Except as otherwise provided in this paragraph (e), the rules of this section apply as of January 1, 1997, except that paragraph (b)(6) of this section applies on or after January 14, 2002, to a business entity wholly owned by a foreign government regardless of any prior entity classification, and paragraph (c)(2)(ii) of this section applies to taxable years beginning after January 12, 2001. The reference to the Finnish, Maltese, and Norwegian entities in paragraph (b)(8)(i) of this section is applicable on November 29, 1999. The reference to the Trinidadian entity in paragraph (b)(8)(i) of this section applies to entities formed on or after November 29, 1999. Any Maltese or Norwegian entity that becomes an eligible entity as a result of paragraph (b)(8)(i) of this section in effect on November 29, 1999, may elect by February 14, 2000, to be classified for Federal tax purposes as an entity other than a corporation retroactive to any period from and including January 1, 1997. Any Finnish entity that becomes an eligible entity as a result of paragraph (b)(8)(i) of this section in effect on November 29, 1999, may elect by February 14, 2000, to be classified for Federal tax purposes as an entity other than a corporation retroactive to any period from and including September 1, 1997.

(2) Paragraph (c)(2)(iii) of this section applies on or after April 1, 2004.

Mark E. Matthews,
Deputy Commissioner for Services and Enforcement.

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