Internal Revenue Service

Department of the Treasury

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Date:
April 29, 1999

Legend

Trust =

Operating Partnership =

State X =

State Y =

Date 1 =

Date 2 =

Date 3 =

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Dear :

This responds to your September 29, 1998 letter and your subsequent correspondence submitted on behalf of Trust requesting a ruling that amounts derived from parking facilities operated by independent contractors will qualify as rents from real property within the meaning of section 856(d) of the Internal Revenue Code.

FACTS

Trust will file an election under section 856(c) of the Code to be treated as a real estate investment trust ("REIT") for federal income tax purposes with its tax return for the year ended Date 1. Trust was formed as a State Y corporation on Date 2, and recognized as a State X corporation on Date 3. Trust principally owns all of its assets and conducts all of its operations through Operating Partnership, a State X limited partnership. Trust is the sole general partner of Operating Partnership, and owns a general partnership interest of approximately b percent and a limited partnership interest of approximately c percent.

Through Operating Partnership, Trust owns a portfolio of commercial properties (the "Buildings"). Operating Partnership owns Buildings through sub-tier partnerships, limited partnerships, and limited liability companies (the "Sub-Tiers") formed to own and operate rental real estate. In most cases Operating Partnership owns, directly and indirectly, at least d percent of the economic interests in each Sub-Tier.

Certain of the Buildings have related parking facilities that are located in the Building itself. In other cases, the parking facility for the Building is situated adjacent to the Building. In still other cases, the parking facility is part of the same overall complex as the Building, but is neither in nor adjacent to the Building itself. The Operating Partnership is not involved in the management or operation of the parking facilities located in, adjacent to, or as part of the same complex as the Buildings (the "Parking Facilities") except as described below.

Operating Partnership has entered into leases ("Parking Leases") with one or more third parties, whereby lessee operates and manages the Parking Facilities, retains the net income therefrom and bears any loss. In some cases the Operating Partnership has entered into an operating agreement with an affiliate of the lessee and then assigned its rights and obligations under such agreement to the lessee.

In order to simplify business operations, the Operating Partnership intends to enter into exclusive license agreements (each a "Parking Management Contract") with third parties (each a "Service Company") to operate and manage one or more of the Parking Facilities. Trust has represented that each Service Company will be an independent contractor within the meaning of section 856(d) of the Code, and neither Trust nor Operating Partnership will derive any income from the Service Companies.

Each Parking Management Contract will grant to a Service Company the exclusive right to operate the Parking Facility that is the subject of the contract. The Parking Management Contract will require all personnel to be employees of the Service Company, and not the Trust or Operating Partnership. Each Service Company will provide and be directly responsible for all salary, benefits, labor, administration, and supervision of employees in the Parking Facilities that it operates. In addition, each Service Company will be responsible for establishing all major policies with respect to the Parking Facilities that it operates, subject to the approval of the Operating Partnership. However, in some cases the Service Company, together with the Operating Partnership, will establish parking rates and policies in order to maintain the reputation and quality of business relations of the related Building. Further, the Service Company may be required to consult with the Operating Partnership regarding staffing levels, and rules and regulations. Operating Partnership may also have the ability to request the removal of a specific employee of the Service Company from the Parking Facility if the employee's continued presence is not in the best interests of the operation of that Parking Facility or the related Building.

Trust has represented that the relationship with each Service Company will be at arm's length, the Service Companies will not be employees of the Trust or subject to the direct control of the Trust, and that the Service Companies will be adequately compensated. In some cases, the compensation may be a fixed dollar amount. In other cases, the Service Company's compensation may be a fixed dollar amount plus a percentage of the Parking Facility's net or gross revenues. In still other cases, the Service Company's compensation may be a percentage of net or gross revenues plus an additional fixed dollar amount paid only in certain circumstances. Finally, the compensation only may be a percentage of net or gross revenues.

The tenants of the Buildings, their employees, customers, and guests, as well as members of the general public generally will pay parking fees directly to the Service Companies. The Service Company will remit net revenues to the Operating Partnership. Net revenues will be based on revenues received, and amounts deemed to be received as a result of possible tenant discounts, less the Service Company's compensation and the operating expenses of the Parking Facilities. In some cases, however, Operating Partnership may directly collect parking revenues from tenants and remit them to the Service Company; these revenues will be treated in exactly the same manner as revenues collected directly by the Service Company.

Estimated operating expenses, staffing needs and proposed parking rates will be presented by the Service Company to the Operating Partnership in an annual budget that will be subject to the reasonable approval of Operating Partnership. However, the Service Company may be required to obtain prior consent from the Operating Partnership in advance of undertaking purchases exceeding certain thresholds.

Throughout the year, Operating Partnership will receive periodic accounting statements from the Service Company. In addition, there typically may be periodic meetings between the Service Company and representatives of Operating Partnership or Trust to review the results of operations from the Parking Facility. Either the Service Company, Operating Partnership or Trust can call a special meeting if it believes that the parking rates should be changed from the amount set forth in the approved budget.

In some Parking Facilities, parking spaces will be exclusively for the use of the tenants of the related building, either on a reserved or unreserved basis. In other Parking Facilities, parking spaces also may be available to the general public on an hourly, daily, weekly, or monthly unreserved basis, or on a weekly or monthly reserved basis. In some cases discounted parking is made available to the tenants.

Operating Partnership may provide basic customary maintenance, cleaning, lighting and repairs for some of the Parking Facilities, although those services generally will be provided through the Service Company. All other services will be performed by the Service Company. In some cases the Service Company may provide tire repair and towing. Some Parking Facilities may be operated on a "self-park" basis, in which patrons park their own vehicles. Other Parking Facilities will have attendant parking. Any and all services provided by the Operating Partnership or Service Company will be customary in parking facilities related to buildings of a similar class to the Buildings in the geographic markets in which the Buildings are located.

At certain Parking Facilities, an independent third party ("Car Service Provider") may offer routine car maintenance services, car washing services or car rental services, which are not customarily furnished in connection with the rental of real property. In such cases, the Parking Facility patrons will contract directly with the Car Service Provider. Trust has represented that the Car Service Provider will be an independent contractor within the meaning of section 856(d) of the Code and neither the Service Company nor Operating Partnership will receive any fees or income from the Car Service Provider.

Further, the cost of the services will be borne by the Car Service Provider, separate charges will be made for the services, the amount of the separate charges will be received and retained by the Car Service Provider, and the Car Service Provider will be adequately compensated for the providing the services.

LAW AND ANALYSIS

Section 856(c)(2) of the Code 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(d)(1) of the Code provides that "rents from real property" include (subject to the exclusions in section 856(d)(2)): (i) rents from interests in real property, (ii) charges for services customarily furnished or rendered in connection with the rental of real property (whether or not such charges are separately stated), and (iii) rent attributable to personal property which is 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 year attributable to both the real and personal property leased under, or in connection with the lease.

Section 856(d)(2)(C) of the Code 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) of the Code provides that "impermissible tenant service incomes" means, with respect to any real or personal property, any amount received or accrued directly or indirectly by a REIT for furnishing or rendering services to the tenants of such property or managing or operating such property. Section 856(d)(7)(B) of the Code provides that if the amount of impermissible tenant service income with respect to a property for any taxable year exceeds one percent of all amounts received or accrued directly or indirectly by the REIT with respect to such property, the impermissible tenant service income of the REIT with respect to the property shall include all such amounts.

Section 856(d)(7)(C)(i) of the Code 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 REIT itself does not derive or receive any income. Additionally, section 856(d)(7)(C)(ii) excludes from the definition of impermissible tenant service income any amount which would be excluded from unrelated business taxable income under section 512(b)(3) if received by an organization described

in section 511(a)(2).

Trust has represented that the Service Companies constitute independent contractors from whom the Trust does not receive any income. In the cases where the Service Company collects the parking revenues and remits them to the Operating Partnership net of its fees and operating expenses, the Service Company is functioning as a conduit for delivering the revenues to the Operating Partnership. Consequently under these circumstances, the Operating Partnership, and Trust, will not be treated as deriving or receiving income from the Service Companies.

The limited activities described above that are directly performed by Operating Partnership are not services for purposes of section 856(d)(2)(C) of the Code that are required to be performed by an independent contractor. The services furnished by the Service Companies with respect to the Parking Facilities will not generate impermissible tenant service income for purposes of section 856(d)(2)(C) of the Code because they are being performed by independent contractors.

Under section 1.856-3(g) of the Income Tax Regulations, a REIT that is a partner in a partnership is deemed to own its proportionate share of each of the assets of the partnership and to be entitled to the income of the partnership attributable to that share. For purposes of section 856 of the Code, the interest of a partner in the partnership's assets will be determined in accordance with the partner's capital interest in the partnership. The character of the various assets in the hands of the partnership and items of gross income of the partnership will retain the same character in the hands of the partners for all purposes of section 856 of the Code.

Accordingly, Trust's allocable share of amounts received by Operating Partnership from the Parking Facilities that are operated by the Service Companies pursuant to the arrangements described above will qualify as "rents from real property" within the meaning of section 856(d) of the Code.

CONCLUSIONS

Based on the facts submitted and representations made, we rule that Trust's allocable share of amounts received by Operating Partnership from the Parking Facilities that are operated by the Service Companies pursuant to the Parking Management Contracts qualify as "rents from real property" within the meaning of section 856(d) of the Code.

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. In particular, no opinion is expressed as to whether Trust qualifies as a real estate investment trust under section 856 of the Code.

This ruling is directed only to the taxpayer(s) requesting it. Section 6110(j)(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 the taxpayer.

Sincerely,

Assistant Chief Counsel (Financial Institutions and Products)

By: William Coppersmith
William Coppersmith
Chief, Branch 2