

Sent: Wednesday, October 04, 2006 2:05 PM
To: Verne, B. Michael
Subject: Realty Exemptions

802.2
802.5

Hi Mike.

I hope all is well.

I am analyzing whether X's acquisition of interests in a REIT would be exempt under 802.4 and the realty exemptions. In doing so, I need some guidance on whether the assets described below would be considered exempt or not.

(1) The REIT leases (under triple net or double net leases) restaurants and retail space to third parties. In some cases, the REIT holds only the underlying land and leases such land under triple net leases to tenants who own the improvements thereon. Would all realty (whether land and improvements or just land) leased by the REIT under triple or double net leases to third parties be exempt?

(2) The REIT also holds "dark stores" -- land and vacant buildings. Would "dark stores" be exempt under unproductive real property so long as the abandoned buildings weren't in operation in the last 12 months and did not generate revenues of \$5 million in the last 36 months preceding X's acquisition of interests in the REIT? What if the REIT intends to demolish the buildings and build new realty projects on the land? Would the property be exempt as unproductive real property regardless of whether the buildings were in operation in the last 12 months, regardless of the level of revenues attributable to the property in the last 36 months, and regardless of whether the REIT has actually demolished the building or taken steps to demolish the building when X acquires interests in the REIT?

(3) The REIT owns a title company that underwrites title policies for realty sold by the REIT to third parties. Would this company be exempt?

(4) The REIT is a non-possessor jobber for some of its tenants and buys on paper supplies (inventory) needed by such third-party tenants and re-sells those supplies to the third-party tenants under contracts. Would these contracts be considered exempt?

(5) I assume that all office space leased by the REIT from a third party for its own offices (and the related personal property used therein) would be exempt.

(6) To the extent that the REIT develops realty for its own ownership or with the intent to sell to a third party, I assume all such development projects would be exempt regardless of whether the projects involve restaurants, retail, gas stations, office buildings, hotels, etc...

(7) The REIT derives income from "third party net lease servicing" -- or providing services to third party lessors to help them find lessees. Would this be exempt activity?

(8) The REIT owns malls and controls (under the HSR Act) entities (hereafter the "Tenants") that lease space in the REIT-controlled malls and in malls not controlled by the REIT. Some of the Tenants contract with a third party (under a management agreement) for the third party to manage and operate the rented space as either a restaurant, retail establishment, or entertainment venue. I understand that when such Tenants sublease the space to third parties to operate the space, the activities of such Tenants would be exempt. Is this also the case if the Tenants contract with a third party to manage the space?

(9) The REIT owns an entity that rents kiosks and portable retail carts in REIT-controlled malls and other malls. Would this entity be engaged in exempt activity?

(10) The REIT owns an entity that rents shopping carts to customers in REIT-controlled malls and other malls and operates a wishing well (in which people contribute coins) in REIT controlled malls and other malls. Would these activities be exempt?

(11) The REIT has advertising income for ads and other promotional materials placed by third parties in malls that the REIT controls under the HSR Act. Would such income be considered exempt? Would it be exempt if it were derived from ad placement in malls not controlled by the REIT?

(12) The REIT buys electricity at wholesale and sells it at retail to its tenants in malls. It also derives revenues from trash removal at malls, vending machines at malls, gift card activities at malls, and telephone services provided at malls. I understand that such revenue sources would be incidental to the ownership and leasing of the malls and would therefore be considered exempt. Is that correct? What if the REIT earns such revenues at malls it does not control under the HSR Act (such as third party malls it operates)? If such revenues would not be exempt, and the REIT owns 40% of the entity that owns the third party mall, would we be able to consider only 60% of such revenues non-exempt?

SEE BELOW
B. M. ...

- (1) Yes
- (2) Yes to both
- (3) Yes - if it only underwrites title policies for the REIT
- (4) Yes
- (5) Don't understand. If the REIT is leasing the property from someone else, it doesn't hold the property.
- (6) Yes
- (7) No
- (8) Yes
- (9) Yes
- (10) Only in the REIT controlled malls
- (11) Only in the REIT controlled malls
- (12) Only in the REIT controlled malls - You can do an allocation of the percentage that is not REIT controlled to determine how much is non-exempt