TAX EXEMPT AND
GOVERNMENT ENTITIES
DIVISION

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

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Release Date: 8/29/2014
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512.10-00
4941.00-00
4943.04-03

Contact Person:

Identification Number:

Contact Number:

FAX Number:

LEGEND:

Decedent	=
Husband	=
Date	=
LLC	=
Road	=
Trust	=

Dear :

This is in response to your ruling request, dated April 5, 2012, as modified, requesting rulings under I.R.C. §§ 512, 4941, and 4943 regarding the proposed donation of limited liability company membership interests from Decedent's estate to you.

FACTS

You are an irrevocable charitable trust recognized as an organization exempt from federal income tax under § 501(c)(3) and are classified as a private, non-operating foundation within the meaning of § 509(a). You were formed by Decedent and her late husband, Husband, who predeceased her.

In Date, Decedent and Husband formed a limited liability company, LLC. LLC owns office buildings on land in an office park. More than 45 years ago, prior to the development of the office park, 36 years prior to the creation of LLC, and 28 years prior to your founding, Husband recorded an easement that allows all tenants of the office park access rights to Road, as well parking rights on the office park property.

LLC leases office space in the buildings it owns to various tenants. You represent that there are no mortgages or other debt-financing on the property owned by LLC. The office park has other office buildings and land, which are owned by disqualified persons, within the meaning of § 4946, through various limited liability companies and trusts. Like LLC, the disqualified persons lease office space in their buildings to various tenants.

Decedent and Husband owned each owned fifty percent of LLC's membership interests. When Husband predeceased Decedent, his membership interests passed to Decedent pursuant to his will. After Decedent's death, all of the LLC membership interests passed to Decedent's estate. Decedent's will provided that the residuary estate (which includes all LLC interests), shall be given to Trust, a non-exempt trust. You state that Trust is a disqualified person under § 4946. Trust's trust agreement provides that, after several specific devises and state estate taxes, the remainder of the Trust's assets, upon Decedent's death and if Husband did not survive her, will be devised to you. As noted above, Husband predeceased Decedent.

The property owned by LLC contains a private road, Road, which provides access from a state road to the office park and property owned by LLC as well as the disqualified persons. Road is a u-shaped, two-lane wide paved access road that contains storm sewers, sidewalks, and outdoor pole lighting. Road, which is not gated and is open to the public, provides access to some buildings owned by disqualified persons. The buildings owned by the disqualified persons are situated close to the state road so that only a small portion of Road is used by persons accessing those buildings. Most of Road is used by persons accessing buildings owned by LLC, which includes patients, clients, customers, employees, and invitees of building tenants.

The property owned by LLC also contains parking areas, which, like Road, are not gated and are open to the public. You state that buildings in the office park owned by the disqualified persons have adjacent parking that, generally speaking, should be sufficient for tenants and visitors to those buildings. You also state that although there is no requirement that tenants and visitors to the office park only in spaces adjacent to the building they will be visiting, the configuration of the parking areas makes it unlikely that these individuals will park in spaces other than those adjacent to their buildings.

You state that, once you receive the donation of LLC property from Trust, you and the disqualified persons propose to enter into separate agreements with independent third parties for maintenance and capital repairs on items such as storm sewers, sidewalks, and outdoor pole lighting on Road. Allocations under these agreements will be based on rentable square footage in the buildings owned by each party in the office park. There will be no exchange of funds between you and the disqualified persons.

You represent that once you receive the donation of the LLC property (the office buildings and surrounding real property in the office park) from Trust, you will hold it for passive investment only. You also state that, because of the high vacancy rate as well as the type of office space, you anticipate you will either sell the property or enter into a § 1031 like-kind exchange transaction.

RULINGS REQUESTED

1. The continued ownership of all of the membership interests of LLC, a limited liability company, by you after you accept the donation from the Trust, will not result in "excess business holdings" under § 4943 as the membership interests in LLC do not constitute, under § 4943(d)(3)(B), a "business enterprise" because at least 95 percent of the gross income from LLC is derived from passive sources, i.e., rental income from the office park property which real property you are not actively managing.

2. The receipt by LLC as a disregarded entity (and by you as its sole member) of rental

income from the office park property will not create unrelated business taxable income for you under § 512(b)(3) as such rental income will be received from the leasing of real property only and the property is not debt-financed property under § 514(b)(1) as it has no acquisition indebtedness as defined under § 514(c).

3. The real property held by you through your wholly-owned limited liability company, LLC, is not "property of a kind which would properly be includible in inventory" as described in § 512(b)(5)(A) or "property held primarily for sale to customers in the ordinary course of trade or business" under § 512(b)(5)(B), and therefore income from the sale of the property is excluded from unrelated business income tax.

4. The acceptance of the donation of the membership interests in LLC by you will not constitute self-dealing under § 4941, even if Trust is a disqualified person under § 4946(a)(1)(G).

5. The co-location of the property owned by LLC in an office park where other office buildings and real property are owned by other entities, in which heirs of the Decedent, through intermediary limited liability companies and/or family trusts, have an ownership interest, and may also be disqualified persons under § 4946, does not constitute self-dealing under § 4941.

6. The access over Road and use of certain parking spaces on the office park property by disqualified persons and their invitees under the terms of the existing easements recorded over 45 years ago against the office park property, and the entering into of separate agreements by you and the disqualified persons with third parties to perform maintenance and capital repairs on Road allocated on the basis of the percentage of rentable square feet in the buildings owned by each party in the office park, do not constitute self-dealing under § 4941.

LAW

I.R.C. § 511(a) imposes a tax on the unrelated business taxable income or organizations described in § 501(c). Section 511(b) imposes this unrelated business income tax on charitable trusts that are exempt from taxation under § 501(a).

I.R.C. § 512(a)(1) provides, that except as otherwise provided in this subsection, the term "unrelated business taxable income" means the gross income derived by any organization from any unrelated trade or business (as defined in § 513) regularly carried on by it, less the deductions allowed by this chapter which are directly connected with the carrying on of such trade or business, both computed with the modifications provided in subsection (b).

I.R.C. § 512(b)(3)(A)(i) excludes from unrelated business taxable income all rents from real property. Section 512(b)(3)(B) provides that § 512(b)(3)(A) shall not apply if (i) more than 50 percent of the total rent received or accrued under the lease is attributable to personal property described in § 512(b)(3)(A)(ii) or (ii) if the determination of the amount of such rent depends in whole or in part on the income or profits derived by any person from the property leased (other than an amount based on a fixed percentage or percentages of receipts or sales).

I.R.C. § 512(b)(4) provides that, notwithstanding paragraph (1), (2), (3), or (5), in the case of debt-financed property (as defined in § 514) there should be included, as an item of gross income derived from an unrelated trade or business, the amount ascertained under § 514(a)(1), and there should be allowed as a deduction, the amount ascertained under § 514(a)(2).

I.R.C. § 512(b)(5) excludes from unrelated business taxable income all gains or losses from the sale, exchange, or other disposition of property other than –

(A) stock in trade or other property of a kind which would properly be includible in inventory if on hand at the close of the taxable year, or

(B) property held primarily for sale to customers in the ordinary course of the trade or business.

I.R.C. § 513(a) provides that the term "unrelated trade or business" means, in the case of any organization subject to the tax imposed by § 511, any trade or business the conduct of which is not substantially related (aside from the need of such organization for income or funds or the use it makes of the profits derived) to the exercise or performance by such organization of its charitable, educational or other purpose or function constituting the basis for its exemption under § 501.

I.R.C. § 514(b)(1) provides, that for purposes of this section, the term "debt-financed property" means any property which is held to produce income and with respect to which there is an acquisition indebtedness (as defined in subsection (c)) at any time during the taxable year.

I.R.C. § 514(c)(1) provides, that for purposes of this section, the term "acquisition indebtedness" means, with respect to any debt-financed property, the unpaid amount of –

(A) the indebtedness incurred by the organization in acquiring or improving such property;

(B) the indebtedness incurred before the acquisition or improvement of such property if such indebtedness would not have been incurred but for such acquisition or improvement; and

(C) the indebtedness incurred after the acquisition or improvement of such property if such indebtedness would not have been incurred but for such acquisition or improvement and the incurrence of such indebtedness was reasonably foreseeable at the time of such acquisition or improvement.

I.R.C. § 4941(a) provides for the imposition of a tax on each act of self-dealing between a disqualified person and a private foundation.

I.R.C. § 4941(d)(1) provides, in part, that the term "self-dealing" means any direct or indirect–

(A) sale or exchange, or leasing, of property between a private foundation and a disqualified person;

(B) lending of money or other extension of credit between a private foundation and a

disqualified person;

(C) furnishing of goods, services, or facilities between a private foundation and a disqualified person;

(D) payment of compensation (or payment or reimbursement of expenses) by a private foundation to a disqualified person;

(E) transfer to, or use by or for the benefit of, a disqualified person of the income or assets of a private foundation.

I.R.C. § 4943 imposes excise taxes on the excess business holdings of any private foundation in a business enterprise.

I.R.C. § 4943(c)(1) provides that the term "excess business holdings" means, with respect to the holdings of any private foundation in any business enterprise, the amount of stock or other interest in the enterprise which the foundation would have to dispose of to a person other than a disqualified person in order for the remaining holdings of the foundation in such enterprise to be permitted holdings.

I.R.C. § 4943(d)(3)(B) provides that the term "business enterprise" does not include a trade or business at least 95 percent of the gross income of which is derived from passive sources. Gross income from passive sources includes the items excluded by § 512(b)(1), (2), (3), and (5).

I.R.C. § 4946(a)(1) provides that the term "disqualified person" means, with respect to a private foundation, a person who is:

(A) a substantial contributor to the foundation,

(B) a foundation manager (within the meaning of subsection (b)(1)),

(C) an owner of more than 20 percent of—

(i) the total combined voting power of a corporation,

(ii) the profits interest of a partnership, or

(iii) the beneficial interest of a trust or unincorporated enterprise, which is a substantial contributor to the foundation,

(D) a member of the family (as defined in subsection (d)) of any individual described in subparagraph (A), (B), or (C),

(E) a corporation of which persons described in subparagraph (A), (B), (C), or (D) own more than 35 percent of the total combined voting power,

(F) a partnership in which persons described in subparagraph (A), (B), (C), or (D) own more than 35 percent of the profits interest,

(G) a trust or estate in which persons described in subparagraph (A), (B), (C), or (D) hold more than 35 percent of the beneficial interest.

Treas. Reg. § 53.4941(d)-2(f)(2) provides that the fact that a disqualified person receives an incidental or tenuous benefit from the use by a foundation of its income or assets will not, by itself, make such use an act of self-dealing.

ANALYSIS

Excess Business Holdings

Section 4943 imposes excise taxes on the excess business holdings of any private foundation in a business enterprise. Section 4943(c)(1) provides that the term "excess business holdings" means, with respect to the holdings of any private foundation in any business enterprise, the amount of stock or other interest in the enterprise which the foundation would have to dispose of to a person other than a disqualified person in order for the remaining holdings of the foundation in such enterprise to be permitted holdings.

Section 4943(d)(3)(B) contains an exception to the excess business holdings rules and provides that the term "business enterprise" does not include a trade or business at least 95 percent of the gross income of which is derived from passive sources. Gross income from passive sources includes the items excluded by § 512(b)(1), (2), (3), and (5). You represent that you will hold the LLC property for passive investment only and that at least 95 percent of the gross income from LLC is derived from passive sources, as described in §§ 512(b)(3) and 512(b)(5). Therefore, LLC is not a business enterprise within the meaning of § 4943(d)(3)(B) and your continued ownership of these interests will not result in excess business holdings.

Unrelated Business Income Tax

Section 511(a) imposes a tax on the unrelated business taxable income or organizations described in § 501(c). Section 511(b) imposes this unrelated business income tax on charitable trusts that are exempt from taxation under § 501(a). Section 512(a)(1) provides, that except as otherwise provided in this subsection, the term "unrelated business taxable income" means the gross income derived by any organization from any unrelated trade or business (as defined in § 513) regularly carried on by it, less the deductions allowed by this chapter which are directly connected with the carrying on of such trade or business, both computed with the modifications provided in subsection (b).

Section 513(a) provides that the term "unrelated trade or business" means, in the case of any organization subject to the tax imposed by § 511, any trade or business the conduct of which is not substantially related (aside from the need of such organization for income or funds or the use it makes of the profits derived) to the exercise or performance by such organization of its charitable, educational or other purpose or function constituting the basis for its exemption under § 501.

Under § 513(a), your ownership and operation of LLC would constitute an "unrelated trade or business" as such activity is a trade or business not substantially related to your charitable purposes of distributing funds to appropriate organizations. However, with respect to the rents

you receive from the rental of LLC office space, you meet an exclusion to the unrelated business taxable income provisions.

Section 512(b)(3)

Section 512(b)(3)(A)(i) excludes from unrelated business taxable income all rents from real property. Section 512(b)(3)(B) provides that § 512(b)(3)(A) shall not apply if (i) more than 50 percent of the total rent received or accrued under the lease is attributable to personal property described in § 512(b)(3)(A)(ii) or (ii) if the determination of the amount of such rent depends in whole or in part on the income or profits derived by any person from the property leased (other than an amount based on a fixed percentage or percentages of receipts or sales). You represent that the rental income you will receive is not attributable to personal property and is not determined based on the income or profits derived by any person from the property leased. Therefore, neither of the § 512(b)(3)(B) exceptions to the § 512(b)(3)(A) exclusion apply here.

There is also another exception to the exclusion for rents from real property under § 512(b)(3). Section 512(b)(4) provides that, notwithstanding paragraph (1), (2), (3), or (5), in the case of debt-financed property (as defined in § 514) there should be included, as an item of gross income derived from an unrelated trade or business, the amount ascertained under § 514(a)(1), and there should be allowed as a deduction, the amount ascertained under § 514(a)(2).

Section 514(b)(1) provides, that for purposes of this section, the term "debt-financed property" means any property which is held to produce income and with respect to which there is an acquisition indebtedness (as defined in subsection (c)) at any time during the taxable year. Section 514(c)(1) provides, that for purposes of this section, the term "acquisition indebtedness" means, with respect to any debt-financed property, the unpaid amount of – (A) the indebtedness incurred by the organization in acquiring or improving such property; (B) the indebtedness incurred before the acquisition or improvement of such property if such indebtedness would not have been incurred but for such acquisition or improvement; and (C) the indebtedness incurred after the acquisition or improvement of such property if such indebtedness would not have been incurred but for such acquisition or improvement and the incurrence of such indebtedness was reasonably foreseeable at the time of such acquisition or improvement.

You represent that rental income received by LLC is not from any debt-financed property under § 512(b)(4) as there is no acquisition indebtedness relating to LLC property nor do you ever contemplate incurring acquisition indebtedness for acquisition or improvement of LLC property. Therefore, because you meet the requirements of § 512(b)(3)(A) and no exceptions to this exclusion are applicable, the receipt by LLC as a disregarded entity (and by you as its sole member) of rental income from LLC property will not create unrelated business taxable income for you under § 512(b)(3).

Section 512(b)(5)

Section 512(b)(5) excludes from unrelated business taxable income all gains or losses from the sale, exchange, or other disposition of property other than – (A) stock in trade or other property of a kind which would properly be includible in inventory if on hand at the close of the taxable year, or (B) property held primarily for sale to customers in the ordinary course of the trade or business.

You state that you anticipate selling or exchanging the LLC property to a third party. You represent that you does not currently have an inventory of real property you own and that you do not intend to acquire real properties and hold them for sale or lease to others. You also represent that the LLC property, once it is transferred from the Trust to you, will be the only real property that you directly own. Based on these representations, you meet the requirements of § 512(b)(5) and the real property held by you through LLC will be excluded from unrelated business taxable income as is not "property of a kind which would properly be includible in inventory" as described in § 512(b)(5)(A) or "property held primarily for sale to customers in the ordinary course of trade or business" under § 512(b)(5)(B).

Self-Dealing

Donation of LLC Interests to You

Section 4941(a) provides for the imposition of a tax on each act of self-dealing between a disqualified person and a private foundation. Section 4941(d)(1)(A) provides that the term "self-dealing" means any direct or indirect sale or exchange, or leasing, of property between a private foundation and a disqualified person. You state that the LLC interests will be donated from Decedent's estate to you through Trust and that Trust is a disqualified person as described in § 4946(a)(1)(G). You represent that the donation of the LLC membership interests from Trust to you is without consideration paid or liability assumed. There is no prohibition against a disqualified person making a donation or contribution to a private foundation if there is no obligation, lien, debt or any restriction and it is an outright gift. Therefore, because there is no sale, exchange, or leasing of property between you and Trust, the acceptance of the donation of the LLC membership interests without restrictions or any obligations on your part will not constitute self-dealing under § 4941.

Co-location of Property

Section 4941(d)(1)(E) provides that the term "self-dealing" means any direct or indirect transfer to, or use by or for the benefit of, a disqualified person of the income or assets of a private foundation. Section 53.4941(d)-2(f)(2) provides that the fact that a disqualified person receives an incidental or tenuous benefit from the use by a foundation of its income or assets will not, by itself, make such use an act of self-dealing. You state that once you receive the LLC membership interests, you will own property that is located in the same office park as property owned by disqualified persons, within the meaning of § 4946, through various limited liability companies and trusts.

You state that you will be receiving the LLC interests pursuant to a bequest from Decedent. Therefore, the location of the LLC property you will receive next to that of the disqualified persons is not of your choosing. In addition, as noted above, you anticipate selling or exchanging the property and, consequently, you will not be holding it long term. Based on these facts and circumstances, any benefit the disqualified persons may receive from the co-location of property next to yours is incidental or tenuous within the meaning of § 53.4941(d)-2(f)(2). Therefore, the co-location of LLC property next to property owned by disqualified persons will not constitute self-dealing under § 4941.

Use of Road and Parking and Road Maintenance

Absent an exception, § 4941(d)(1)(E) would apply to the use of LLC's Road and parking for the benefit of visitors to the property of the disqualified persons. This use of Road and parking is pursuant to a pre-existing, more than 45 year old easement that was recorded prior to the development of the office park and before your formation and the existence of any disqualified persons. You represent that, based on the configuration of the office park, visitors use Road to access only some of the buildings owned by the disqualified persons and only use a very small portion of Road. You state that these visitors are predominately comprised of members of the general public, including patients, clients, customers, employees, and invitees of building tenants. You represent that most of Road is used by those accessing LLC's property.

Buildings owned by disqualified persons also have an easement for the use of parking areas surrounding LLC buildings to be received by you. This is part of the same easement discussed above granted over 45 years prior to the transaction proposed in this ruling request. Further, each building owned by a disqualified person is immediately surrounded by its own land improved by parking areas or parking lots. Generally speaking, the disqualified person-owned parking areas adjacent to disqualified person owned buildings should be sufficient for the needs of customers and tenants making use of the disqualified person owned buildings. You also state that although there is no requirement that tenants and visitors to the office park only in spaces adjacent to the building they will be visiting, the configuration of the parking areas makes it unlikely that these individuals will park in spaces other than those adjacent to their buildings. Therefore, based on your representations, it is rare that visitors to buildings owned by disqualified persons will park in areas owned by LLC.

In addition, as noted earlier, the location of the LLC property you will receive next to that of the disqualified persons is not of your choosing and you anticipate selling or exchanging the property. Therefore, the use of Road and parking will not be long-term. Based on these facts and circumstances, any benefit the disqualified persons may receive from Road access or the use of certain parking spaces is incidental or tenuous within the meaning of § 53.4941(d)-2(f)(2) and will therefore not constitute self-dealing under § 4941.

Further, the right of customers of the disqualified person-owned buildings to use Road and the parking areas is of such a long-standing nature, that the disqualified person use does not constitute use of private foundation property or assets in that the easement sanctions the use by customers of the disqualified persons. You have submitted documentation with your ruling request that supports the long-standing nature of this arrangement and that it was arranged prior to the involved parties being defined as disqualified persons and there was obviously no intent to avoid the rules of Chapter 42. Thus, the disqualified person use does not come within the parameters of § 4941(d)(1)(E) under the facts of this particular case.

Finally, you represent that you and the disqualified persons propose to enter into separate agreements, based on rentable square footage owned in the office park, with third parties to perform maintenance and capital repairs of Road. Because these agreements are with independent third parties, and do not involve a transaction between you and disqualified persons, they do not constitute self-dealing under § 4941.

RULINGS

Based on the information and representations submitted, we rule as follows:

1. The continued ownership of all of the membership interests of LLC, by you after you accept the donation from Trust, will not result in excess business holdings under § 4943 as the membership interests in LLC do not constitute, under § 4943(d)(3)(B), a business enterprise because at least 95 percent of the gross income from is derived from passive sources, i.e. rental income from the office park property which real property you are not actively managing.

2. The receipt by LLC as a disregarded entity (and by you as its sole member) of rental income from the office park property will not create unrelated business taxable income for you under § 512(b)(3) as such rental income will be received from the leasing of real property only and the property is not debt-financed property under § 514(b)(1) as it has no acquisition indebtedness as defined under § 514(c).

3. The real property held by you through your wholly-owned limited liability company, LLC, is not "property of a kind which would properly be includible in inventory" as described in § 512(b)(5)(A) or "property held primarily for sale to customers in the ordinary course of trade or business" under § 512(b)(5)(B), and therefore income from the sale of the property is excluded from unrelated business income tax.

4. The acceptance of the donation of the membership interests in LLC by you will not constitute self-dealing under § 4941, even if Trust is a disqualified person under § 4946(a)(1)(G).

5. The co-location of the property owned by LLC in an office park where other office buildings and real property are owned by other entities, in which heirs of the Decedent, through intermediary limited liability companies and/or family trusts, have an ownership interest, and may also be disqualified persons under § 4946, does not constitute self-dealing under § 4941.

6. The access over Road and use of certain parking spaces on the office park property by disqualified persons and their invitees under the terms of existing easements recorded over 45 years ago against the office park property, and the entering into of separate agreements by you and the disqualified persons with third parties to perform maintenance and capital repairs on Road allocated on the basis of the percentage of rentable square feet in the buildings owned by each party in the office park, do not constitute self-dealing under § 4941.

This ruling will be made available for public inspection under § 6110 of the Code after certain deletions of identifying information are made. For details, see enclosed Notice 437, *Notice of Intention to Disclose.* A copy of this ruling with deletions that we intend to make available for public inspection is attached to Notice 437. If you disagree with our proposed deletions, you should follow the instructions in Notice 437.

This ruling is directed only to the organization that requested it. § 6110(k)(3) provides that it may not be used or cited by others as precedent.

This ruling is based on the facts as they were presented and on the understanding that there will be no material changes in these facts. This ruling does not address the applicability of any section of the Code or regulations to the facts submitted other than with respect to the sections described. Because it could help resolve questions concerning your federal income tax status, this ruling should be kept in your permanent records.

If you have any questions about this ruling, please contact the person whose name and telephone number are shown in the heading of this letter.

In accordance with the Power of Attorney currently on file with the Internal Revenue Service, we are sending a copy of this letter to your authorized representative.

Sincerely,

Michael Seto
Manager, EO Technical

Enclosure
Notice 437