REIT Taxation Developments

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Requirements & Developments

- To maintain REIT status, various requirements must be met:
  - Organization & Capital Structure
  - Rent
  - Income
  - Assets
  - Distributions*
- Today's Discussion
  - New Regulations define "real property"
  - Thinking about services related to real property rental
  - Global REITs
  - PATH Act, regulatory developments and pending guidance projects
  - REITs under tax reform
  - * For a summary, see A. Ponda, "How Much Gain Would a REIT Defer if a REIT Could Defer Gain?", 135 Tax Notes 1249 (June 4, 2012)

Basic Framework of Finalized REIT Real Property Regulations

- Property must be broken down into "distinct assets"
- Distinct assets must be evaluated individually
- Assets that fall into one of three categories are considered real property for REIT purposes:
  - Land
  - Improvements to Land
    - Inherently Permanent Structures
    - Structural Components
  - Certain Intangible Assets
- Examples
- Effective Date and Transition Issues
- These new rules are for REIT purposes only, not depreciation, FIRPTA, etc.
- *See* public comments of Ameek Ashok Ponda to Propsed Treasury Regulations § 1.856-10, available at 2014 TNT 177-22 (Aug. 11, 2014)

Distinct Assets - § 1.856-10(e)

- Each “distinct asset” is evaluated separately from any other asset to which the distinct asset might relate, in order to determine if it is real property
- Whether or not a separately identifiable item is distinct is based on all facts and circumstances
- In particular, four factors must be taken into account:
  - Whether the item is customarily sold or acquired as a single unit rather than as a component part of a larger asset;
  - Whether the item can be separated from a larger asset, and if so, the cost of separating the item from the larger asset;
  - Whether the item is commonly viewed as serving a useful function independent of a larger asset of which it is a part; and
  - Whether separating the item from a larger asset of which it is a part impairs the functionality of the larger asset

Land - § 1.856-10(c)

- Includes water and air space superjacent to land
- Natural products and deposits that are unsevered from the land (such as timber, crops, ores and minerals) are real property
  - Once natural products are severed, extracted, or removed from the land, they no longer constitute real property
  - Natural products severed, extracted, or removed from the land do not become real property by the fact that they are stored in or upon real property

Improvements to Land - § 1.856-10(d)

- Inherently Permanent Structures
  - Includes buildings and other structures that are permanently affixed to either land or other inherently permanent structures
  - Affixation is considered permanent if it is reasonably expected to last indefinitely based on all of the facts and circumstances
  - Any distinct asset that serves an active function is not an inherently permanent structure
- Structural Components of Inherently Permanent Structures

Inherintly Permanent Structures - § 1.856-10(d)(2)

- A building is defined as a structure that encloses a space within its walls and is covered by a roof
  - Safe harbor - If permanently affixed, the following constitute buildings: houses, apartments, hotels, motels, enclosed stadiums and arenas, enclosed shopping malls, factory and office buildings, warehouses, barns, enclosed garages, enclosed transportation stations and terminals, and stores
- Other inherently permanent structures are structures that serve passive functions, such as to contain, support, shelter, cover, protect, or provide a conduit or a route – they do not serve any active function such as to manufacture, create, produce, convert, or transport
  - Safe harbor - If permanently affixed, the following constitute other inherently permanent structures: microwave transmission, cell broadcast and electrical transmission towers; telephone poles; parking facilities; bridges; tunnels; roadbeds; railroad tracks; transmission lines; pipelines; fences; in-ground swimming pools; offshore drilling platforms; storage structures; and stationary wharves and docks

Inherently Permanent Structures

- For distinct assets that fall outside the safe harbors, a facts and circumstances approach is used to determine if they are inherently permanent structures. In particular, five factors must be taken into account:
  - The manner in which the distinct asset is affixed to real property;
  - Whether the distinct asset is designed to be removed or to remain in place indefinitely;
  - The damage that would be caused to the item or to the real property to which it is affixed if the item were to be removed;
  - Circumstances that that might suggest that the affixation is not indefinite (such as lease terms); and
  - The time and expense required to move the distinct asset

Structural Components - § 1.856-10(d)(3)

- A structural component is any distinct asset that:
  - is a constituent part of and integrated into an inherently permanent structure,
  - serves the inherently permanent structure in its passive function, and
  - does not produce or contribute to the production of income other than consideration for the use or occupancy of space (even if it is capable of producing such income)
- Interconnected assets that work together to serve an inherently permanent structure with a utility-like function (such as electric, water, or heat systems) are analyzed as a single distinct asset

Structural Components

- A structural component may only qualify as real property if the REIT holds an interest in the structural component together with a real property interest in the space in the inherently permanent structure served by the structural component
  - The REIT need not hold equivalent interests in both the structural component and the inherently permanent structure that it serves
  - An affirmation and update of Rev. Rul. 73-425, 1973-2 C.B. 222, and a rejection of Samis v. Comm'r, 76 T.C. 609 (1981), in the REIT arena
  - For example, a REIT may lease a building shell or floor from a superior landlord, do a tenant-owned build-out of the interior, and the build-out can constitute the REIT's real property structural components within its leased (but not owned) space

Structural Components

- Safe harbor – The following distinct assets and systems are structural components if integrated into the inherently permanent structure and held together with a real property interest in the space in the inherently permanent structure served by the distinct asset or system:
  - Wiring; plumbing systems; central heating and air-conditioning systems; elevators or escalators; walls; floors; ceilings; permanent coverings of walls, floors and ceilings; windows; doors; insulation; chimneys; fire suppression systems, such as sprinkler systems and fire alarms; fire escapes; central refrigeration systems; security systems; and humidity control systems

Structural Components

- For distinct assets that fall outside the safe harbor, a facts and circumstances approach is used to determine if they are structural components. In particular, eight factors must be taken into account:
  - The manner, time, and expense of installing and removing the distinct asset;
  - Whether the distinct asset is designed to be moved;
  - The damage that removal of the distinct asset would cause to the item itself or to the inherently permanent structure to which it is affixed;
  - Whether the distinct asset serves a utility-like function with respect to the inherently permanent structure;
  - Whether the distinct asset serves the inherently permanent structure in its passive function;
  - Whether the distinct asset produces income from consideration for the use or occupancy of space in or upon the inherently permanent structure

Structural Components

- Whether the distinct asset is installed during construction of the inherently permanent structure; and
- Whether the distinct asset will remain if the tenant vacates the premises
  - Customized structural components are acceptable, and thus Hospital Corp. of Am. v. Comm'r, 109 T.C. 21 (1997), nonacq., is rejected in the REIT arena

Intangible Assets - § 1.856-10(f)

- An intangible asset may be real property to the extent it meets three conditions:
  - It derives its value from real property or an interest in real property;
  - It is inseparable from that real property or interest in real property; and
  - It does not produce or contribute to the production of income other than consideration for the use or occupancy of space
- Licenses and Permits
  - A license, permit, or other similar right that is solely for the use, enjoyment, or occupation of land or an inherently permanent structure and that is in the nature of a leasehold or easement generally is an interest in real property
  - A license or permit to engage in or operate a business is not real property or an interest in real property if it produces or contributes to the production of income other than consideration for the use or occupancy of space

Examples - § 1.856-10(g)

- Thirteen examples
- An exposition of new real estate verticals – towers, pipelines, solar energy sites, data centers, cold storage warehouses
  - Outdoor real estate
  - Specialty buildings
- An applied demonstration of the various, multi-pronged facts-and-circumstances analyses
- A unified framework for real property intangibles, particularly the concept of capitalized value of Section 856(d)(1) "rents from real property" in § 1.856-10(g)(*Example 11, Above-market lease*)

Effective Date and Transition Issues - § 1.856-10(h)

- Taxable years beginning after August 31, 2016 – i.e., calendar 2017 is the start date in most cases
- Special transition for asset test grandfathering in Section 856(c)(4) flush language
- Taxpayers may choose to apply the new rules to earlier periods
- The new rules clearly impact REIT quarterly asset testing, but can also be impactful to REIT annual gross income testing, i.e., "real property" underlies "rents from real property"
- The new rules are meant as a "restatement" of prior law that is built upon a coherent foundational framework
- Special rules for "green" infrastructure in the Treasury Decision preamble

What Impact on Prior Private Letter Rulings?

- New Regulations' impact on prior private letter rulings
  - Rev. Proc. 2017-1, 2017-1 I.R.B. 1, § 11.04(4)
  - "Nobody has a private letter ruling anymore"?
  - Prior rulings still valid to the extent "consistent" with new Regulations?
  - Prior rulings still valid to the extent "not inconsistent" with new Regulations?
  - Impact on public REIT markets
- Might older private letter rulings survive as "gloss" on the new Regulations? Yes, but caution is warranted in any such reliance:
  - New Regulations use a detailed framework for making "real property" determinations, whereas prior private rulings are not as clear on the applied criteria
  - PLR 200725015 (Mar. 13, 2007) (transmission and distribution system analyzed as an "integrated system" rather than new Regulations' framework of an inherently permanent structure and its constituent components)
- Caution is especially warranted when analyzing and concluding on intangible assets such as goodwill – new Regulations have a tighter definitional framework

Case Study – Chain-Link Fencing in a Data Center

- PLR 201314002 (Oct. 9, 2012) says that chain-link fencing within a data center is real property, presumably in partial reliance on the conclusion in Rev. Rul. 75-424 that outdoor fencing is real property
- But § 1.856-10(d)(3)(iii) and § 1.856-10(g)(Example 7, Partitions) now compel a much more nuanced and multi-factor analysis
- Today, internal chain-link fencing (aka cage mesh paneling) may or may not come out as real property, depending on the facts and circumstances

Case Study – Carbon Credits

- Outside of REIT arena, a carbon credit could arguably be any one of the following, depending on the design of the carbon credit program and on the interpretation and application of Rev. Rul. 92-16, 1992-1 C.B. 15:
  - A legal interest unsevered from the land (no realization event)
  - A legal interest severed from the land (realization event, but zero gross income inclusion)
  - An item of property received by the landowner gratis (realization event, but arguably zero gross income inclusion)
  - An item of property received by the landowner as payment for use of the land for a term of years, i.e., a temporary easement (realized rental income, with gross income inclusion equal to fair market value of received property)
  - See, e.g., Feld, "Federal Taxation of State Tax Credits", 151 Tax Notes 1243 (May 30, 2016)

Case Study – Carbon Credits

- Or is the starting point here whether carbon credits are a separate GAAP asset, per § 1.856-2(d)(3) (total assets are determined in accordance with GAAP), even though doing that might create a disconnect with Section 61 gross income measurement (and thus REIT gross income testing under § 1.856-2(c)(1))?
- PLR 201123003 (Mar. 4, 2011) concludes that carbon credits are real estate assets
- In contrast, § 1.856-10(f) now suggests that, because they are separately tradable, carbon credits cannot be real property for REIT purposes
- Stay tuned for more developments in this area

What Impact on Prior Published Rulings?

- New Regulations "restate/codify" and solidify prior published rulings
- Except as specifically described in Treasury Decision 9784 and the prior Notice of Proposed Rule Making, the new Regulations were not intended to override or change prior published rulings
  - See public comments of Ameek Ashok Ponda to Proposed Treasury Regulations § 1.856-10, available at 2014 TNT 177-22 (Aug. 11, 2014)
  - See Ponda, "How Much Gain Would a REIT Defer if a REIT Could Defer Gain?", 135 Tax Notes 1249 (June 4, 2012)
- Do prior published rulings thus survive as a favorable "gloss" on the new Regulations – i.e., different analysis but same bottom line conclusion? Yes, and Rev. Rul. 69-94, 1969-1 C.B. 189 (certain railroad assets are REIT real property) presumably fits this mold
- Might the new Regulations override or chip away at some conclusions from prior published rulings?

Case Study – Waveguides and Cabling at a Tower Site

- Rev. Rul. 75-424, 1975-2 C.B. 269, says that, although permanently encased and bolted to the steel tower, transmission lines and waveguides are not real property
- §§ 1.856-10(d)(2)(iii)(B) and 1.856-10(d)(3)(ii) now hold that such permanently installed wiring/transmission lines and conduits are per se real property, returning to the conclusion of GCM 36052 (Oct. 9, 1974)
- This has not been a material issue for tower REITs in that cabling is typically tenant-owned property
- But, the rule in § 1.856-10(d)(2)(iii)(B) (outdoor) and § 1.856-10(d)(3)(ii) (indoor) underlies and reinforces the distributed antenna system (DAS, aka "small cell networks") conclusion in PLR 201450017 (Aug. 29, 2014)

75% Gross Income Test

- At least 75% of the REIT's gross income for each taxable year must consist of:
- *Rents from Real Property*;*
- Interest on obligations secured by *Real Property* (such as Mortgage Loans);
- Dividends received on shares of other REITs;
- Gain from the sale of shares of other REITs;
- Dividends and interest from the certain investments of new capital raised by the REIT;
- Gain from the sale of *Real Property* that is not *Dealer Property* (gains on *Dealer Property* are subject to a 100% tax);
- Abatements and refunds of real estate taxes; and
- Income and gain from *Foreclosure Property*

*Terms in italics are defined in the Code or Regulations

95% Gross Income Test

- At least 95% of the REIT's gross income for each tax year must consist of:
- Income that qualifies for the 75% Gross Income Test;
- Dividends (other than from other REITs);
- Interest income from obligations not secured by real property; and
- Gain from the sale or disposition of stock or securities (other than stock of other REITs or interests in partnerships)

Rents from Real Property

- *Rents from Real Property* **include**:
  - Payments for use or occupancy of real property or interests in real property (§ 1.856-4(a))
  - Income received or accrued for certain services furnished to tenants, including:
    - Charges for services customarily furnished or rendered in connection with the rental of real property, whether or not separately stated
      - Services that are (a) furnished or rendered to the tenants of the REIT or, primarily for the convenience or benefit of the tenant, to the guests, customers, or subtenants of the tenant, and (b) are customarily provided to tenants in buildings which are of a similar class and in the same geographic market in which the building is located (§ 1.856-4(b)(1))
      - Services that either are not provided primarily for the tenant's convenience or are usually or customarily rendered in connection with the rental of rooms or other space for occupancy only (§ 1.512(b)-1(c)(5))

Rents from Real Property

- Amounts received for services performed by TRSs
  - For a discussion on the treatment of bundled versus separately stated charges for services performed by TRSs, see Decker, Kaplan, and Ponda, "Non-Customary Services Furnished By Taxable REIT Subsidiaries", 148 Tax Notes 413 (July 27, 2015)

- Rent attributable to personal property leased under or in connection with a lease of real property (only if such rent does not exceed 15% of the total rent for the lease of both real and personal property) (§ 1.856-4(b)(2))

Rents from Real Property

- *Rents from Real Property* **exclude**:
  - Rents determined in whole or in part on the income or profit of any person (though rent based on a fixed percentage or percentages of receipts or gross sales is acceptable) (§ 1.856-4(b)(3))
  - Any amount received from:
    - a corporation, of which the REIT owns 10% or more of the stock by vote or value, and
    - any other entity, of which the REIT owns an interest of 10% or more of the assets or profits (§ 1.856-4(b)(4))
  - Impermissible tenant service income
    - Exception for service that either satisfies the standard of § 1.512(b)-1(c)(5) or is provided through a TRS

REIT Services Timeline

- 1909: First corporate income tax
- 1911: Eliot v. Freeman, 220 U.S. 178 (real estate trusts exempt from corporate tax)
- 1935: Morrissey v. Comm'r, 296 U.S. 344 (real estate trusts subject to corporate tax)
- 1956-58: Early REIT legislation is vetoed and struggles
- 1960: Section 856 (REITs are born)
- 1962: § 1.856-4(b)(3)
- 1976: Section 856(d)(1)(B) and §§ 1.856-4(b)(1) and 1.856-4(b)(5)
- 1986: Section 512(b)(3) – UBTI Exception

  See also Rev. Rul. 2004-24, 2004-1 C.B. 550 (parking revenue)
- 2001: Section 856(l) – Taxable REIT Subsidiary
- 2002: Rev. Rul. 2002-38, 2002-2 C.B. 4*

  - For a detailed exposition, see Decker, Kaplan, and Ponda, "Non-Customary Services Furnished By Taxable REIT Subsidiaries", 148 Tax Notes 413 (July 27, 2015)

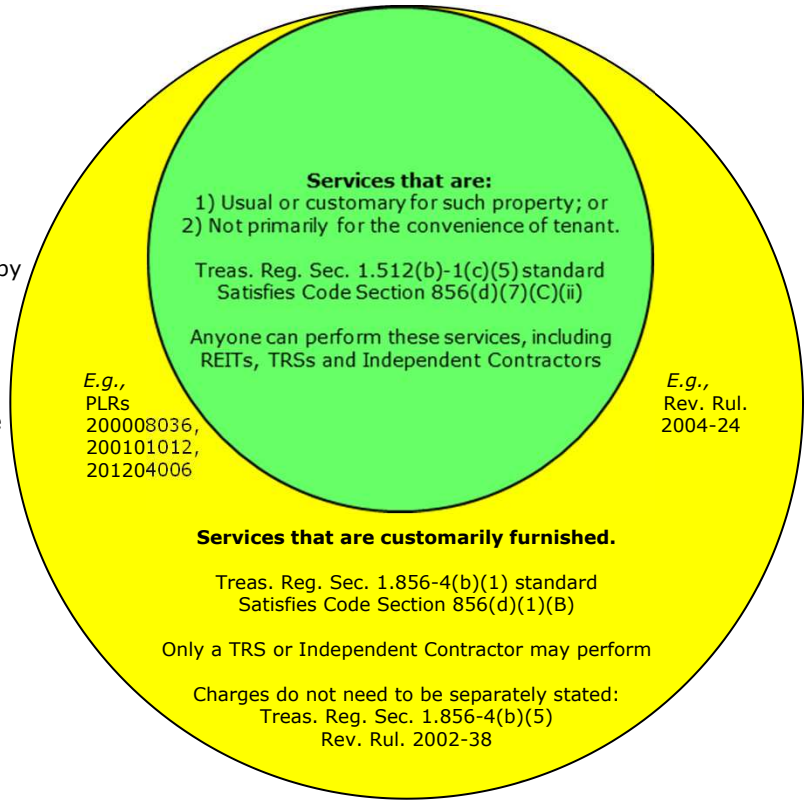
Services at REIT-Owned Properties

Independent Contractors

Treas. Reg. Sec. 1.856-4(b)(5)

Independent Contractor may perform only if:

- The cost of the services are borne by the independent contractor;
- A separate charge is made for the services;
- The amount of the separate charge received and retained by the independent contractor; and
- The independent contractor is adequately compensated for the services.



Taxable REIT Subsidiaries

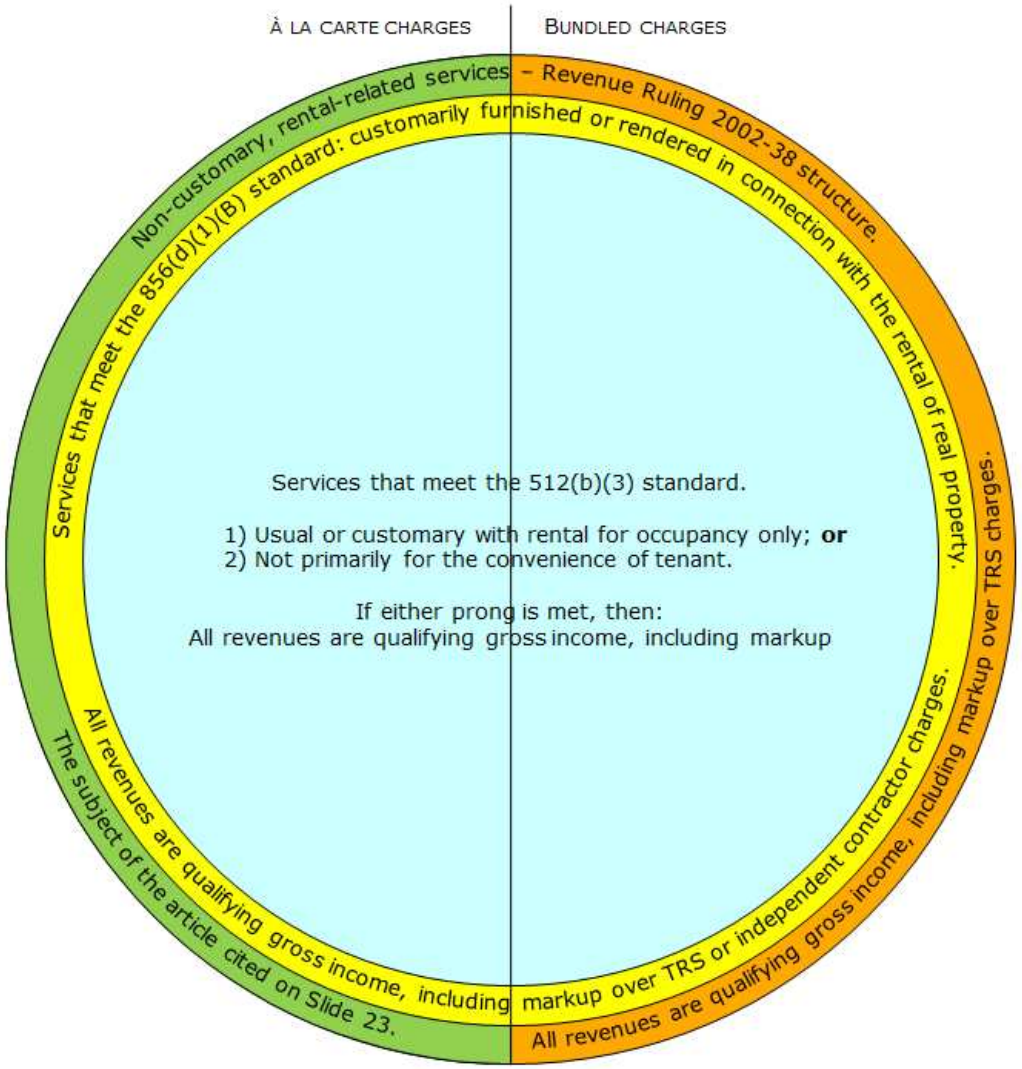
Code Section 857(b)(7)

Rev. Rul. 2002-38

Not a REIT qualification issue, but 100% tax unless:

- The REIT pays the TRS an arm's-length charge for the services or pays a 50% markup on the TRS's costs;
- The TRS provides a significant amount of similar services to unrelated parties for substantially comparable fees within the meaning of Code Section 857(b)(7)(B)(iii); or
- The charges are separately stated and rent paid by the tenant is comparable to rent paid by tenants not receiving the service, all within the meaning of Code Section 857(b)(7)(B)(iv).

Services at REIT-Owned Properties



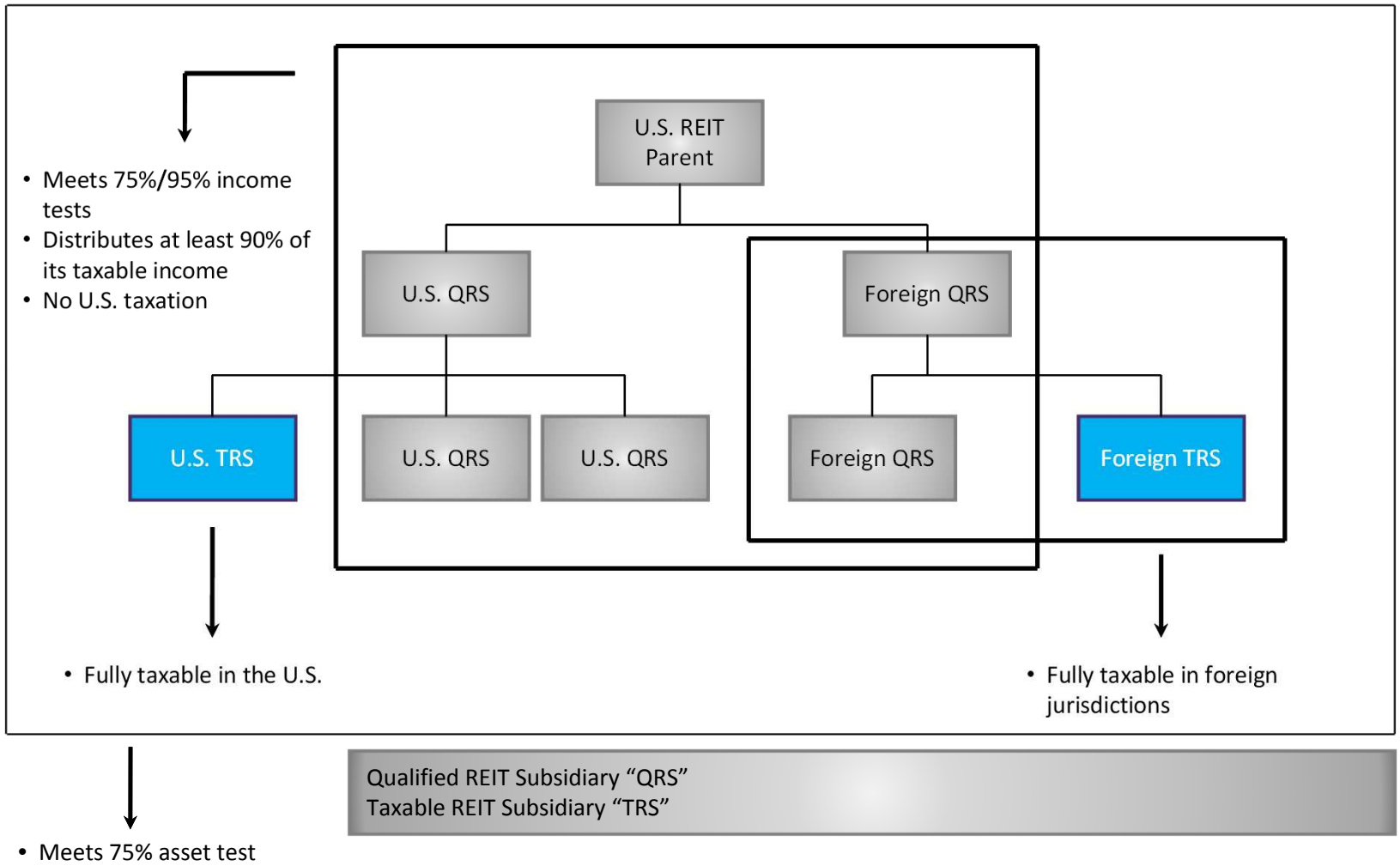
Global REITs – REIT Subsidiaries

- Qualified REIT Subsidiary (QRS)
  - QRSs are corporations that are wholly-owned by the REIT and for which a TRS election is not made
  - QRSs are transparent for income and asset testing purposes and thus are consolidated with the REIT for income and asset testing, activity restrictions and distribution requirements and mechanics
  - Among REIT practitioners, QRSs colloquially include disregarded entities under the Section 7701 regulations
  - QRSs may be domestic or foreign
- Taxable REIT Subsidiary (TRS)
  - TRSs are subject to federal corporate income tax on their taxable income
  - TRSs are treated as separate corporations and are not consolidated with the REIT for income and asset testing, and are generally outside the activity restrictions and distribution requirements and considerations
  - "Bad" assets and businesses should be assigned to TRSs
  - TRSs may be domestic or foreign
- Special Considerations for Foreign Subsidiaries (CFC, PFIC)

Global REITs – REIT Subsidiaries

- A TRS must be compensated at arm's-length pricing for services performed by it to the REIT's tenants/customers
  - The REIT must pay a 100% tax to the extent of any discount from arm's-length pricing provided by the TRS, or
  - If arm's-length pricing is not available, the 100% tax will not apply if the TRS is compensated at 150% of its costs for providing the service
- As a TRS accumulates income, it may distribute excess cash as a dividend
  - TRS dividends to the REIT are good income for the 95% gross income test, but not for the 75% gross income test
- A TRS may borrow from the REIT
  - Loans to a TRS count against the 25% asset test unless secured by real estate (e.g., foreign real estate in a foreign TRS)
  - Normal intercompany transfer pricing metrics are applicable; however,
    - a 100% excise tax applies to interest that is excessive
    - a statutory thin capitalization provision defers deductions for interest paid to the REIT to the extent certain income and asset thresholds are exceeded

Global REITs – REIT Subsidiaries*



* For a summary, *see* A. Ponda, "REITs Abroad," *Tax Strategies for Corporate Acquisitions, Dispositions, Spin-Offs, Joint Ventures, Financings, Reorganizations & Restructurings 2006*, Practising Law Institute (Sept. 2006-2008)

Challenges with a Foreign QRS

- Foreign cash favorably addressed by Section 856(c)(5)(K) and Rev. Rul. 2012-17
- Section 987 and Section 988 gains
  - REIT income testing favorably covered by Section 856(n); however, such gains can involve phantom income that impact REIT distribution requirements/planning
- Hedging gains under Sections 856(c)(5)(G) and 856(n)
  - Debt and currency hedges are covered; some asset hedging is achievable
  - With proper elections, qualified hedges are no longer a REIT income testing issue
- Foreign operations must be REIT-compliant in terms of asset and income testing
  - Commercial and language barriers
  - Issues with hiving off service employees in a separate TRS (e.g., payroll company)
  - Local group relief and local tax sharing agreements
- REIT distribution requirement imposed on QRS earnings
  - Repatriation of profits to the U.S. may encounter headwinds – capital controls, foreign withholding taxes, distributable reserves
  - Perhaps instead fund these distributions from depreciation-sheltered U.S. earnings, or from new capital raises

Opportunities with a Foreign QRS

- Easier to satisfy 75%/25% REIT asset testing, which is the principal driver to the QRS answer, particularly if foreign assets are growing faster than U.S. assets
- Cross-border capital flows, guarantees, internal/external borrowings – all more transparent for REIT income and asset testing
- U.S. REIT parent is functionally tax-exempt, and planning possibilities often exist to limit foreign tax expense of non-U.S. subsidiaries

Challenges with a Foreign TRS

- Qualification issues
  - Satisfying 75%/25% REIT asset testing, which is the principal challenge
    - Note that beginning with tax year 2018, a REIT's TRS assets are limited to 20% of its total assets
  - Intercompany loans adequately secured by real estate can help on 75%/25% REIT asset testing
  - Subpart F income can qualify for the 95% income test – if based on TRS/CFC's FPHC income or in the case of certain Section 956 inclusions
  - PFIC income (including QEF inclusions) can qualify for the 95% test – if majority of TRS's income is FPHC-style passive income
  - Section 986(c) exchange gains can be excluded from REIT income testing
  - Commodities/foreign base company services income/insurance income
  - Guarantee fees for REIT parent guarantee of TRS's debt – Bank of America vs. Container Corp. (passive financial transaction vs. service)
  - Hedging gains
- Achieving conventional deferral
  - Subpart F's active rental exception
  - Single vs. multi-tenanted properties

Opportunities with a Foreign TRS

- Deferral REIT-style is not about postponing U.S. taxes, but about postponing the distribution to REIT shareholders
- Non-U.S. activities do not need to be operated in REIT-compliant fashion
- Non-REIT activities may be hived off in a foreign (or domestic) TRS
- Foreign taxes of non-U.S. subsidiaries are managed with conventional structures

Opportunities with a Foreign TRS

- Conversion from TRS to QRS can be achieved with check-the-box election and/or revocation of TRS election
  - Sections 481(a) and 964(a) depreciation recapture inside the TRS
  - Section 367(b) dividend income and impact on the 95% income test
  - Built-in gains tax on property disposed of during the five-year period following QRS conversion
- Conversion from QRS to TRS is much harder
  - Sections 351, 362(e)(2), 367(a)(3)(B)(v), 367(a)(3)(C), 367(d), 904(f), and 987; Treasury Regulation §§ 1.367(a)-2 and 1.367(a)-4(b), (c)
  - Bottom line: some or all gain triggered on outbound transfer

Foreign Tax Credit Planning

- As a practical matter, a REIT cannot use foreign tax credits – Rev. Ruls. 72-383 and 87-65; GCM 34871
  - No need for Sections 78 and 902
  - Section 338(g) elections are desirable, and Section 901(m) without practical impact
- Nor can the REIT pass through foreign tax credits to shareholders – no Section 853 analog for REITs
- Foreign taxes are deductible expenses – Sections 164(a)(3), 275(a)(4), and 901(a)
- Thus, foreign tax credit planning is about minimizing source country taxation
  - See OECD, "Tax Treaty Issues Related to REITs", ¶¶ 16 and 43 (Oct. 30, 2007)

PATH Act (P.L. 114-113) - Highlights

- Repeal of preferential dividend rule for 34 Act reporting REITs**
- Improved rules for REIT hedging
- Improved rules for de minimis personal property
- FIRPTA relaxation thresholds increased from 5% to 10%
- Qualified foreign pension fund exemption is most powerful when coupled with a REIT structure
- TRS securities cap reduced from 25% to 20%
- New statutory proscriptions on spin-and-go-REIT transactions and REIT-to-C spin offs

* For a discussion of these changes, see "Real Estate Investment Trusts (REITs) and the Foreign Investment in Real Property Tax Act (FIRPTA): Overview and Recent Tax Revisions," Congressional Research Service (July 14, 2016)

**With regard to relaxing the preferential dividend rule for private REITs, see Letter from NAREIT to the Internal Revenue Service regarding Notice 2016-26: Request for Comments Regarding Recommendations for Items that Should be Included on the 2016-2017 Priority Guidance Plan, available at 2016 TNT 98-14 (May 16, 2016)

Regulatory Developments and Pending Guidance Projects

- Under its 2016-2017 Priority Guidance Plan, the IRS is prioritizing the following:
  - Guidance clarifying the definition of income in Section 856(c)(3) for purposes of the REIT qualification tests, i.e., the 75% gross income test
  - Guidance defining congregate care for purposes of the definition of a REIT health care facility under Sections 856(e)(6)(D)(ii) and (l)(4)(B)
    - See A. Ponda, "Toward a Workable Definition of REIT Healthcare Facility", 133 Tax Notes 1231 (Dec. 5, 2011)
    - See Letter from NAREIT to the Secretary of the Treasury regarding Definition of "Congregate Care" for Purposes of Definition of "REIT Health Care Facility", available at 2016 TNT 62-33 (Mar. 23, 2016)
  - New regulations are subject to Exec. Order No. 13771 (Jan. 30, 2017) mandating the elimination of two existing regulations for each new regulation issued

Regulatory Developments and Pending Guidance Projects

- Temporary Regulation § 1.337(d)-7T
  - Covers the intersection of REIT M&A with Section 355 spin-offs
  - See Letter from NAREIT to the IRS regarding Certain Transfers of Property to RICs and REITs, available at 2014 TNT 177-22 (July 19, 2016)
  - All "significant" tax regulations issued after January 1, 2016 are subject to review under Exec. Order No. 13789 (Apr. 21, 2017), including potentially Treasury Regulation § 1.856-10 defining real property for REIT purposes

Taxation of REITS Under a DBCFT*

- In moving from an income tax to a DBCFT, no changes should be made to the various organizational, asset composition, and revenue composition tests for qualification for taxation as a REIT
- The immediate expensing of land should be allowed under a DBCFT for all taxpayers generally, and for REITs in particular
- It is crucial to maintain a single level of taxation for REITs under a DBCFT in order for REITs to fulfills their dual purpose of enabling small investors access to real estate markets and stabilizing the U.S. real estate markets
- In order for a single-level tax regime for REITs to function effectively, a REIT must be able to use its NOLs and distributions to offset up to 100% of its DBCFT base

Taxation of REITS Under a DBCFT*

- In order to fully and properly integrate a REIT's tax base with its shareholders' income tax base, Section 172(d)(6)(A) must be amended to include the dividends paid deduction in the NOL carryover computation to future REIT tax years
- Special issues exist for global REITs regarding territoriality, qualification and distribution requirements, active rental exception, and deferred foreign earnings on transition date**

* For a discussion of this topic by the author, see "Fundamental Thesis of REITs Should Continue Under Tax Reform, Sullivan & Worcester Partner Says," NAREIT (April 19, 2017)

** A detailed memorandum describing the issues and recommendations for Global REITs is available from A. Ponda upon request