As of February 6, 2024 ***VIA EMAIL ONLY***

SRRT Shakopee DST
c/o SRRT Properties, LP
900 North Third Street
Minneapolis, Minnesota 55401
Attn: Evan R. Richardson

Re: Tax Opinion of Special Tax Counsel

Ladies and Gentlemen:

You have requested our opinion (this "Opinion") as to whether, for federal income tax purposes, an investor's acquisition of a beneficial interest in SRRT Shakopee DST, a Delaware statutory trust (the "Trust") described in Chapter 38 of Title 12 of the Delaware Code (the "Act"), will be treated as an acquisition of a direct interest in the Property (as defined herein) for purposes of Section 1031 of the Internal Revenue Code of 1986, as amended (the "Code").

Based on the relevant facts and applicable law and subject to the qualifications discussed below, we conclude that, for federal income tax purposes, the acquisition by an investor (a "Beneficiary") of a beneficial interest (an "Interest") in the Trust should be treated as a direct acquisition of an ownership interest in the Property by the Beneficiary for purposes of Code Section 1031.

A tax opinion rendered at a "should" level of confidence such as this Opinion involves a greater degree of certainty than a "more likely than not" opinion, but it is not a "will" opinion nor any guarantee of tax consequences. There can be no assurance that the Internal Revenue Service (the "IRS") would agree with our conclusions, would not successfully challenge our conclusions upon audit, or would not prevail in their challenge if litigated.

In addition, qualification of a transaction pursuant to Code Section 1031 for a Beneficiary involves issues based on numerous specific facts which are not and cannot be known to us; therefore, we give no opinion as to the ability of any Beneficiary to effectuate an acquisition of replacement property under Code Section 1031. This Opinion addresses only one aspect of qualifying under Code Section 1031, *i.e.*, whether the acquisition of an Interest should be treated as a direct acquisition of the Property for purposes of Code Section 1031. We are not opining as to whether some portion of the Property may be "personal property" as opposed to "real property," or as to whether any amounts paid by, or deemed paid by, the Beneficiary with respect to certain costs or expenses of the offering, financing costs, and amounts paid to fund any reserves for capital expenses (as defined in the Master Lease) will be deemed to constitute other consideration received in the exchange or the acquisition of real estate. Finally, this Opinion does not address any state or local tax consequences of the transactions described herein.

In giving this Opinion, we have reviewed the following:

(i) The Trust Agreement of the Trust, entered into by and among The Corporation Trust Company, a Delaware corporation, as co-trustee of the Trust (the "Delaware Trustee"), SR DST Trustee, LLC, a Minnesota limited liability company, as co-trustee of the Trust (the "Signatory Trustee," and together with the Delaware Trustee, the "Trustees") and SRRT Properties, LP, a Delaware limited partnership, as the Initial Beneficiary of the Trust (the "Initial Beneficiary") on February 6, 2024 (the "Trust Agreement");

(ii) The Contribution Agreement, dated as of February 6, 2024, by and between the Initial Beneficiary and the Trust, pursuant to which the Initial Beneficiary contributed one hundred percent (100%) of all of the limited liability company interests in SRRT Shakopee, LLC, a Minnesota limited liability company ("Owner"), to the Trust;

(iii) A deed showing the transfer of that certain parcel of real property known as Goodwill Shakopee located at 4450 12th Avenue East, Shakopee, Minnesota, 55379 (the "Property") to Owner and the title policy with Chicago Title Insurance Company, showing that Owner owns the Property;

(iv) The Master Lease, dated as of February 6, 2024, by and between Owner and Shakopee MT, LLC, a Minnesota limited liability company (the "Master Tenant"), which is an affiliate of the Initial Beneficiary (the "Master Lease");

(v) The Asset Management & Services Agreement, dated as of February 6, 2024, by and between the Trust and the Signatory Trustee, which is an affiliate of the Initial Beneficiary (the "Asset Management Agreement");

(vi) The Confidential Property Management and Leasing Agreement, dated as of February 6, 2024, by and between the Master Tenant and SR Management Services, LLC, a Minnesota limited liability company (the "Property Manager" and, together with the Signatory Trustee, the "Managers"), which is an affiliate of the Initial Beneficiary (the "Property Management Agreement");

(vii) The Private Placement Memorandum with respect to the Interests dated February 6, 2024 (the "Private Placement Memorandum") (items (i) through (vi) are collectively referred to as the "Transaction Documents");

(viii) Applicable provisions of the Code, final, temporary and proposed Treasury Regulations promulgated thereunder, judicial decisions, Revenue Rulings and other interpretative releases of the Internal Revenue Service (the "IRS"); and

(ix) Such other materials and documents as we considered relevant.

This Opinion is expressly based upon the following representations from the Initial Beneficiary: (i) there are no written or oral agreements, other than the Transaction Documents, or understandings inconsistent with or significant to the transactions contemplated herein, and any

final Transaction Documents that were not final as of the date of our review will conform with the Transaction Document drafts we have reviewed in all material respects; (ii) all payments made to the Trust, the Trustees, the Managers, and their affiliates will be at fair market value; (iii) the Master Lease is a commercially reasonable net lease; (iv) the Annual Rent (as defined in the Master Lease) payable under the Master Lease constitutes fair market value rent for the Property over the term of the Master Lease; (v) Owner has made a substantial equity investment in the Property, reasonably expects the Property to have a substantial remaining economic useful life and residual value at the end of the Master Lease's term, and reasonably expects to realize a substantial economic profit from the Master Lease and subsequent further leasing and/or disposition of the Property apart from the value of tax benefits and net of the Disposition Fee (as defined below); (vi) the Master Tenant is reasonably capitalized, is acting as a principal for its own account and may reasonably be expected to realize a commercially reasonable profit from its lease and sublease of the Property; (vii) the Landlord and the Master Tenant intend that the Master Lease constitutes a true lease and not a partnership, a joint venture, or a management, agency or nominee agreement; (viii) neither the Trust nor any Trustee, employee, agent or independent contractor of the Trust, including the Initial Beneficiary, will provide any services to the Master Tenant or any subtenants; (ix) none of the Initial Beneficiary, the Trust, the Managers or any affiliate of any thereof has loaned or will loan to any Beneficiary any of the funds necessary to acquire his, her or its Interest in the Trust or has guaranteed or will guarantee any indebtedness incurred by any Beneficiary to acquire his, her or its Interest in the Trust; (x) the Property is not encumbered by any mortgage or other indebtedness; (xi) none of the Trust, the Trustees or the Initial Beneficiary has entered into or will enter into any agreement or understanding with any beneficiary of the Trust creating an agency or nominee relationship and none of the Trust, the Trustees or the Initial Beneficiary has been or will be represented as an agent or nominee of any beneficiary of the Trust in dealings with third parties; (xii) the Trust has not opted-out and will not opt-out of its status as a separate legal entity pursuant to Section 3810(a)(2) of the Delaware Statutory Trust Act; (xiii) for federal income tax purposes, Owner is disregarded as an entity separate from the Initial Beneficiary and none of the Initial Beneficiary, Owner, the Trust, or the Trustees has made or will make an election, or has taken or will take any other action, that would cause Owner to be classified as an association taxable as a corporation for federal income tax purposes; (xiv) the Initial Beneficiary may retain an Interest (the "IBI"); and (xv) the Trust will not make or fund capital expenditures on the Property unless such expenditures are for modifications to the Property that are required by law or the Trustees reasonably believe that such modifications protect and conserve the Property, that any increase in the value of the Property resulting from such modifications would be incidental to the foregoing, and that such modifications will not change the nature of the Property as a commercial property.

In addition, in rendering this Opinion, we have, with your permission, assumed that: (i) the Interests will be acquired by the Beneficiaries directly from the Trust and the Initial Beneficiary's interest in the Trust will be reduced in proportion to the amount of such acquisitions; (ii) none of the Initial Beneficiary, the Trust, the Trustees, or any Beneficiary has made or will make an election, or has taken or will take any other action, that would cause the Trust to be classified as an association taxable as a corporation or a partnership for federal income tax purposes; (iii) the Transaction Documents (without modification) are properly executed and

delivered, and are enforceable in accordance with their terms; (iv) all parties to the Transaction Documents will comply with all provisions of the Transaction Documents, and will take no action inconsistent with the Transaction Documents or any terms of this Opinion; (v) all transactions described in the Private Placement Memorandum have occurred or will occur as described in the Private Placement Memorandum; and (vi) neither the exchanged property nor the replacement property in any Code Section 1031 exchange involving the Trust is, or at any relevant time has been or will be, tax-exempt use property within the meaning of Code Section 470(e)(4)(A). We have further assumed the accuracy and completeness of all documents and records that we have reviewed, the genuineness of all signatures, the authenticity of the documents submitted to us as originals, and the conformity to authentic original documents of all documents submitted to us as pro forma or reproduced copies.

Capitalized terms which are not herein defined have the meanings ascribed to them in the Transaction Documents.

RELEVANT PROVISIONS IN THE TRANSACTION DOCUMENTS

The following provisions in the Transaction Documents are of particular relevance to this Opinion:

A. *Trust Agreement*.

Article I of the Trust Agreement states that the Interests shall be of a single class.

Section 2.03 of the Trust Agreement provides that the purposes of the Trust are: (i) to hold 100% of the membership interests in Owner; (ii) to lease and operate the Property and any related personal property through its ownership of Owner; (iii) to enter into or assume and comply with, as necessary and appropriate, the terms of the Transaction Documents; (iv) to conserve, protect, manage and dispose of the Property through its ownership of Owner; and (v) to take such other actions as the Trustees deem necessary or advisable to carry out the foregoing. Section 2.03 of the Trust Agreement also provides that the Trust shall hold the Trust Property solely for investment purposes, that none of the Trustees, nor their agents, shall provide non-customary services with respect to the Property, and that the Trust shall conduct no business other than as specifically provided in Section 2.03 of the Trust Agreement.

Section 2.04 of the Trust Agreement states that the Trustees will hold the Trust Property for the benefit of the Beneficiaries, subject to the obligations of the Trust under the Transaction Documents. Section 2.04 of the Trust Agreement further states that it is the intention of the parties to the Trust Agreement that the Trust constitute a "statutory trust" within the meaning of the Act, and that Trust not constitute an agency, partnership, association or trust for federal income tax purposes. Instead, each Beneficiary shall be treated for federal income tax purposes as if it owns a direct interest in the Property and other Trust Property and shall be obligated to report its interest in the Trust consistently with such characterization.

Section 2.09 of the Trust Agreement provides that, under certain circumstances, the Initial Beneficiary may require that the Beneficiaries exchange their Interests for cash (the "FMV Option"). If the FMV Option is exercised, a Beneficiary will receive cash in an amount

equal to the fair market value of the Beneficiary's Interest, which will be based on the fair market value of the Property at or around the time of exercise of the FMV Option, as determined by the Initial Beneficiary and which fair market value may not be less than the value of the Property as determined by an independent appraisal firm.

Section 3.01 of the Trust Agreement permits any Beneficiary to transfer and assign all or a portion of its Interest without the prior consent of the Trustees or the other Beneficiaries, subject to the terms of the Trust Agreement.

Section 4.02 of the Trust Agreement directs the Signatory Trustee to distribute all available cash to the Beneficiaries on a quarterly basis in accordance with their respective Percentage Interests, only retaining funds as required for a reasonable reserve as necessary to pay anticipated ordinary current and future Trust expenses. Undistributed cash may be invested only in short-term government obligations and in certificates of deposit or interest bearing bank accounts of any bank or trust company having a minimum stated capital and surplus of $50,000,000. All such obligations must be held until maturity and must mature prior to the next distribution to Beneficiaries.

Section 5.01(a) of the Trust Agreement states that the Trust Agreement shall not impose a partnership, joint venture or other similar relationship on or between the Beneficiaries, and that no Beneficiary shall have any liability for the debts or obligations of any other Beneficiary, nor have any authority to act on behalf of any other Beneficiary or to impose any obligation with respect to the Trust Property. Section 5.01(c) of the Trust Agreement further provides that from and after such time as there is more than one Beneficiary that is an owner of the Trust, the Trust shall not constitute a business entity for federal income tax purposes, but shall instead constitute an investment trust pursuant to Treasury Regulations Section 301.7701-4(c); and a grantor trust under Subpart E of part 1 of Subchapter J of the Code (Code Section 671 and following).

Section 5.01(d) of the Trust Agreement provides that the Trust, and not the Beneficiaries, shall have legal title to the Trust Property, and the Trust Agreement shall not be terminated by reason of the bankruptcy, death or other incapacity of any Beneficiary, nor the transfer by any Beneficiary of any interest in the Trust Property.

Section 5.01(d) of the Trust Agreement further provides that, except as otherwise provided in the Trust Agreement, the Beneficiaries shall not be liable for any liabilities or obligations of the Trust or the Trustees or for the performance of the Trust Agreement.

Section 5.02 of the Trust Agreement provides that, prior to entering into a binding contract to sell the Property, the Signatory Trustee will solicit the views of the Beneficiaries regarding the potential sale. Although the Signatory Trustee will consider such views in good faith, it will not be bound by them, and any sale of the Property by the Signatory Trustee will be binding on the Beneficiaries.

Section 5.04 of the Trust Agreement provides that no Beneficiary has any right to demand and receive from the Trust an in-kind distribution of the Trust Property.

Section 6.04 of the Trust Agreement provides that the Signatory Trustee shall manage, control, dispose of or otherwise deal with the Trust Property, subject to any restrictions provided in the Trust Agreement.

Section 7.02 of the Trust Agreement authorizes the Signatory Trustee to take all actions necessary to conserve and protect the Trust Property, including: (a) acquiring, owning, conserving, protecting and selling the Trust Property; (b) causing Owner to acquire, own, conserve, protect, operate and sell the Property; (c) entering into and/or assuming and complying, or causing Owner to enter into and/or assume and comply, with the terms of the Master Lease and any other Transaction Documents; (d) collecting rents (or cause Owner to collect rents) and making distributions in accordance with Article IV of the Trust Agreement; (e) entering into, or cause Owner to enter into, any agreement for purposes of completing tax free exchanges of real property for Beneficiaries with each such Beneficiary's "qualified intermediary" as defined in Section 1031 of the Code and the Regulations thereunder; (f) notifying the relevant parties of any default by them under the Transaction Documents; (g) solely to the extent necessitated by the bankruptcy or insolvency of a tenant of an underlying parcel of the Property, renegotiating existing lease(s) and entering into new lease(s) with respect to the Property; and (h) consenting to the exercise of any right held by the Master Tenant with respect to the Property; provided, however, that any such right to the extent it exists may only be exercised to maintain the value of the Trust Property.

Section 7.03 of the Trust Agreement prohibits the Trustees from taking the following actions, if the effect of such actions would constitute the exercise of a power under the Trust Agreement to "vary the investment of the certificate holders" under Treas. Reg.§ 301.7701-4(c)(1): (a) reinvest any monies of the Trust, except as provided in Section 4.02 of the Trust Agreement; (b) enter into new financing, renegotiate the Master Lease or enter into new leases, except in the case of a tenant's bankruptcy or insolvency; (c) make other than minor, non-structural modifications to the Property, other than as required by law; (d) accept any capital from the Beneficiaries or new investors except as provided for in the Private Placement Memorandum; or (e) take any other action that, in the reasoned opinion of tax counsel to the Trust, should be expected to cause the Trust to be treated as a "business entity" for federal income tax purposes.

Section 9.01 of the Trust Agreement provides that the Trust will dissolve and wind up in accordance with Section 3808 of the Act, and that each Beneficiary's share of the Trust Property shall be distributed to the Beneficiaries *pro rata* in proportion to each Beneficiary's Percentage Interest in the Trust, at the earlier of: (a) February 6, 2074 or (b) the sale or other disposition of (x) the Trust's ownership interest in Owner or (y) the Property by Owner.

Section 9.02 of the Trust Agreement provides that, notwithstanding Section 9.01, if the Signatory Trustee determines that the Beneficiaries are at risk of losing all or a substantial portion of their investment in the Interests, and the Signatory Trustee is prohibited from taking actions to cure or mitigate the events causing such risk by reason of the restrictions set forth in Section 7.03 of the Trust Agreement, the Signatory Trustee shall terminate the Trust and distribute the Trust Property to the Beneficiaries in the manner provided in Section 9.03 of the Trust Agreement.

Section 9.03(b) of the Trust Agreement provides that the Signatory Trustee shall convert the Trust into a newly formed Delaware limited liability company (the "LLC") and by effectively converting or exchanging the Interests of the Beneficiaries for equivalent membership interests in the LLC.

B. ***Master Lease*.**

Section 2.01 of the Master Lease provides that the Master Lease term shall expire, unless terminated earlier in accordance with the terms of the Master Lease, on the earlier to occur of (i) the sale of the Property or (ii) ten (10) years from the Commencement Date (as defined in the Master Lease).

Section 3.01(a) of the Master Lease provides that the Tenant shall pay to Landlord annual rent in an amount equal to $295,000, plus Operating Costs (as defined in the Master Lease), Impositions (as defined in the Master Lease), and any other maintenance, repair and replacements related expenses.

Section 3.01(b)(i) of the Master Lease requires the Master Tenant to pay (i) all costs and expenses paid or incurred in respect of the operation, maintenance, management and security of the Property, including the cost of utilities such as electricity, gas, oil, steam, water, air conditioning and other fuel and utilities used or consumed in connection with the Property, and (ii) all taxes, assessments, water and sewer rents, rates and charges, charges for public utilities, exceeds, levies, license and permit fees, and other similar charges associated with the Property.

Section 3.07 of the Master Lease provides that the Landlord and the Master Tenant agree that the Master Lease is a "true lease" and not a financing arrangement, partnership, joint venture, management or other arrangement, and that the parties will reflect the transactions represented by the Master Lease consistent with its treatment as a "true lease."

Section 4.02 of the Master Lease provides that the Master Tenant is required to maintain insurance with respect to the Property, including but not limited casualty insurance in respect of the Property.

Section 7.01 of the Master Lease provides that the Master Tenant is responsible for all expense incurred in the maintenance, repair, and replacements in connection with the Property except for "Capital Expenses" (as defined below), and is also responsible for taking good care of the Property, parking lots, alleyways and passageways and the sidewalks, and the curbs adjoining the Property, and keeping the same in good order and condition, ordinary wear and tear and obsolescence excepted, and making necessary nonstructural repairs thereto, interior and exterior.

Section 7.02 of the Master Lease provides that the Landlord is responsible for "Capital Expenses," which means any and all costs and expenses incurred in connect with (i) major repairs and replacements in connection with the structural elements of the Property, including exterior walls, but excluding ongoing or routine tuckpointing; and (ii) roof replacements. Section 7.02 of the Master Lease further provides that the Landlord will not otherwise be required to furnish any services or facilities or make any repairs, replacements or alterations in or to the Property.

Section 7.03 of the Master Lease provides that the Master Tenant will deposit into a special account reserves in an amount equal to $5,000 per year, which will be available to the Master Tenant to pay for the above-mentioned repairs , among other items.

Section 8.01 of the Master Lease provides that the Master Tenant may make alterations to (but not additions to, removals of or substitutions for) the Property with the Landlord's prior written consent, provided that certain conditions are met.

Section 8.02 of the Master Lease provides that at the any time Landlord is wholly-owned by a Delaware statutory trust, Landlord shall not have the right power or ability to make more than minor non-structural modifications to the Property (in accordance with Revenue Ruling 2004-86).

Section 13.01 of the Master Lease provides that the Master Tenant may enter into subleases of the Property with subtenants.

Section 13.02 of the Master Lease provides that the Master Tenant may not assign its interest in the Master Lease without the prior written consent of the Landlord.

Section 16.01 of the Master Lease provides that if any "Event of Default" occurs, the Landlord can give notice of such default and terminate the Master Lease and repossess the Property after giving notice. Section 16.01 of the Master Lease generally defines "Event of Default" to include, among other things: (a) the failure by the Master Tenant to pay Monthly Rent, Operating Costs, or Impositions which failure is not cured within fifteen (15) days after notice; (b) the failure to comply with the other terms of the Master Lease which failure is not cured within thirty (30) days after notice (or longer if the Master Tenant diligently undertakes efforts to cure such Event of Default); (c) the occurrence of certain bankruptcy-related events with respect to the Master Tenant, including but not limited to the filing by the Master Tenant of a voluntary bankruptcy petition (including any petition for reorganization, composition, readjustment or similar relief) or the adjudication of the Master Tenant as a bankrupt or insolvent; and (d) if any representation, warranty or statement of the Master Tenant in the Master Lease is incorrect or misleading in any material respect.

C. ***Asset Management Agreement.***

The Trust has entered into the Asset Management Agreement with the Signatory Trustee, an affiliate of the Initial Beneficiary. Pursuant to Section 1 and Section 6.1 of the Asset Management Agreement, the Trust engaged the Signatory Trustee as an independent contractor to perform the services described below. Section 1 further provides that Trust, through Owner, will retain title, ownership and exclusive control of the Property and that the Signatory Trustee will not acquire title to, any security interest in, or any rights of any kind in or to the Property except as explicitly set forth therein.

Section 2 of the Asset Management Agreement provides that the duties and responsibilities of the Signatory Trustee shall include, but not be limited to, the following: (i) maintaining books of account reflecting the operation of the Property; (ii) reviewing all performance and financial information related to the Property; (iii) if the Property is to be sold, assist the Trust in negotiating a

sale satisfactory to the Trust, and assisting the Trust in effecting a closing of the transaction between the Trust and the purchaser, including without limitation, engaging real estate brokers; (iv) administering monthly cash distributions; and (v) communicating with Beneficiaries. Section 2 of the Asset Management Agreement further provides that notwithstanding any other provision of the Asset Management Agreement, the Signatory Trustee shall not perform any services with respect to the Property in violation of the provisions set forth in Revenue Ruling 2004-86.

Section 4 of the Asset Management Agreement provides that, unless the Signatory Trustee waives its right thereto, the Signatory Trustee is entitled to (i) one-half percent (0.5%) of $5,200,000, paid in one-twelfth increments monthly (the "Asset Management Fee") and (ii) and fee equal to three percent (3%) of the purchase price received by Trust from the sale of the Property, payable from the proceeds of such sale of the Property (excluding any sale or exchange to or with an affiliate of the Signatory Trustee) (the "Disposition Fee"). Section 4.4 of the Asset Management Agreement states that the Trust and the Signatory Trustee intend that the Disposition Fee, if any, will constitute compensation for the agreement of the Signatory Trustee to assist the Trust in disposing of the Property as the Trust may reasonably request.

Section 3.1 of the Asset Management Agreement provides for an initial one-year term with automatic renewals for successive one-year terms unless the Trust gives written notice its election not to renew the Asset Management Agreement; provided, that the Asset Management Agreement terminates upon a sale or disposition of the Property. Section 3.2 the Asset Management Agreement also provides that if any party is in default in the performance of its material obligations under the Asset Management Agreement, the other parties shall have the right to terminate the Asset Management Agreement by giving ten (10) days prior written notice to the defaulting party and if the defaulting party fails to cure such defaults specified in the notice within five (5) days of its receipt of the notice.

D. ***Property Management Agreement.***

The Master Tenant has entered into the Property Management Agreement with the Property Manager, an affiliate of the Initial Beneficiary. Section 2 of the Property Management Agreement provides that the Property Manager shall, among other things, use commercially reasonable efforts to lease the Property, collect rents, security deposits and other charges from tenants, make arrangements for the operation and maintenance of the Property and perform such other duties as are customarily performed by managers of similar properties in the area surrounding the location of the Property.

Section 6.1 of the Property Management Agreement provides that the rights and duties granted to and assumed by the Property Manager are those of an independent contractor only.

Section 4.1 of the Property Management Agreement provides that the Property Manager is entitled to a management fee of $2,000 per month, with a three percent (3%) annual increase each year (the "General Management Fee"). Section 4.2 the Property Management Agreement provides that the Property Manager is entitled to a fee for supervising construction of tenant improvements, such as the installation of new carpeting or wallpaper, which fee is equal to a fixed percentage of the cost of

such tenant improvements (the "Supervision Fee"). Section 4.3 of the Property Management Agreement provides that any leasing commissions must be agreed upon in advance by the Master Tenant and the Property Manager and must be consistent with and not exceed rates generally established in the market pursuant to local industry standards for property of the same type and class (such fee, together with General Management Fee and the Supervision Fee, the "Property Management Fee"). Section 4.4 of the Property Management Agreement provides that the Property Manager is also entitled to reimbursement of certain expenses.

Section 3.1 of the Property Management Agreement provides for an initial one-year term with automatic renewals for successive one-year terms unless the Trust gives written notice its election not to renew the Property Management Agreement; provided, that the Property Management Agreement terminates upon termination of the Master Lease. Section 3.2 also provides that if any party is in default in the performance of its material obligations under the Asset Management Agreement, the other parties shall have the right to terminate the Property Management Agreement by giving ten (10) days prior written notice to the defaulting party and if the defaulting party fails to cure such defaults specified in the notice within five (5) days of its receipt of the notice.

Section 6.13 of the Property Management Agreement provides that the Property Manager acknowledges and agrees that nothing stated in the Property Management Agreement shall vest the Property Manager with an interest in the Property, including a leasehold estate therein, and all rights to the use or possession of the Property shall automatically terminate upon the termination of the Property Management Agreement.

TAX ANALYSIS

It is our opinion that, for federal income tax purposes, the acquisition by a Beneficiary of an Interest "should" be treated as the direct acquisition by such Beneficiary of the Property for purposes of Code Section 1031 and the Master Lease should be treated as a true lease and not a financing for federal income tax purposes.

The principal authority governing the treatment of interests in Delaware statutory trusts for purposes of Code Section 1031 is Revenue Ruling 2004-86, 2004-2 C.B. 191. As more fully described below, our conclusion as to the treatment of the Interests under Code Section 1031 is based largely on the similarity between the facts described in Revenue Ruling 2004-86 and the facts surrounding the Trust, and the Treasury Regulations and case law that form the basis for the revenue ruling.

Treatment of the Interests as Qualified Property for Purposes of Code Section 1031.

Code Section 1031(a)(1) provides that "[n]o gain or loss [is] recognized on the exchange of real property held for productive use in a trade or business or for investment if such real property is exchanged solely for real property of like kind which is to be held either for the productive use in a trade or business or for investment" ("Qualified Property").

Code Section 1031 does not apply to personal property and certain types of other property, including stock in trade or other property held primarily for sale, stocks, bonds, notes, other securities or evidences of indebtedness or interest, partnership interests, certain trust interests, and choses in action. However, even though these types of interests do not generally qualify for like-kind exchange treatment, an exchange of such interests may still qualify under Code Section 1031, if the tax law disregards or looks through the legal form of ownership and treats the owner of the interests as directly owning the Qualified Property underlying such interests.

On July 20, 2004, the IRS issued Revenue Ruling 2004-86, which held that, assuming other requirements of Code Section 1031 are satisfied, a taxpayer may exchange real property for a beneficial interest in a Delaware statutory trust such as the trust described in the ruling (the "DST") in a tax-free exchange under Code Section 1031. The holding of Revenue Ruling 2004-86 is based on certain factual assumptions regarding the provisions of the trust agreement of the DST, although not all the facts described in the ruling are crucial to its holding. The facts in Revenue Ruling 2004-86 are as follows:

> On January 1, 2005, A, an individual, borrows money from BK, a bank, and signs a 10-year note bearing adequate stated interest, within the meaning of § 483. On January 1, 2005, A uses the proceeds of the loan to purchase Blackacre, rental real property. The note is secured by Blackacre and is nonrecourse to A.
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> Immediately following A's purchase of Blackacre, A enters into a net lease with Z for a term of 10 years. Under the terms of the lease, Z is to pay all taxes, assessments, fees, or other charges imposed on Blackacre by federal, state, or local authorities. In addition, Z is to pay all insurance, maintenance, ordinary repairs, and utilities relating to Blackacre. Z may sublease Blackacre. Z's rent is a fixed amount that may be adjusted by a formula described in the lease agreement that is based upon a fixed rate or an objective index, such as an escalator clause based upon the Consumer Price Index, but adjustments to the rate or index are not within the control of any of the parties to the lease. Z's rent is not contingent on Z's ability to lease the property or on Z's gross sales or net profits derived from the property.
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> Also on January 1, 2005, A forms DST, a Delaware statutory trust described in the Delaware Statutory Trust Act, Del. Code Ann. title 12, §§ 3801 – 3824, to hold property for investment. A contributes Blackacre to DST. Upon contribution, DST assumes A's rights and obligations under the note with BK and the lease with Z. In accordance with the terms of the note, neither DST nor any of its beneficial owners are personally liable to BK on the note, which continues to be secured by Blackacre.
>
> The trust agreement provides that interests in the DST are freely transferable. However, DST interests are not publicly traded on an established securities market. The DST will terminate on the earlier of 10 years from the date of its creation or the disposition of Blackacre, but will not terminate on the bankruptcy, death, or incapacity of any owner or on the transfer of any right, title, or interest of

the owners. The trust agreement further provides that interests in DST will be of a single class, representing undivided beneficial Interests in the assets of DST.

Under the trust agreement, the trustee is authorized to establish a reasonable reserve for expenses associated with holding Blackacre that may be payable out of trust funds. The trustee is required to distribute all available cash less reserves quarterly to each beneficial owner in proportion to their respective interests in DST. The trustee is required to invest cash received from Blackacre between each quarterly distributions and all cash held in reserve in short-term obligations of (or guaranteed by) the United States, or any agency or instrumentality thereof, and in certificates of deposit of any bank or trust company having a minimum stated surplus and capital. The trustee is permitted to invest only in obligations maturing prior to the next distribution date and is required to hold such obligations until maturity. In addition to the right to a quarterly distribution of cash, each beneficial owner has the right to an in-kind distribution of its proportionate share of trust property.

The trust agreement provides that the trustee's activities are limited to the collection and distribution of income. The trustee may not exchange Blackacre for other property, purchase assets other than the short-term investments described above, or accept additional contributions of assets (including money) to DST. The trustee may not renegotiate the terms of the debt used to acquire Blackacre and may not renegotiate the lease with Z or enter into leases with tenants other than Z, except in the case of Z's bankruptcy or insolvency. In addition, the trustee may make only minor non-structural modifications to Blackacre, unless otherwise required by law. The trust agreement further provides that the trustee may engage in ministerial activities to the extent required to maintain and operate DST under local law.

On January 3, 2005, B and C exchange Whiteacre and Greenacre, respectively, for all of A's interests in DST through a qualified intermediary, within the meaning of § 1.1031(k)-1(g). A does not engage in a § 1031 exchange. Whiteacre and Greenacre were held for investment and are of like kind to Blackacre, within the meaning of 1031.

Neither DST nor its trustee enters into a written agreement with A, B, or C, creating an agency relationship. In dealings with third parties, neither DST nor its trustee is represented as an agent of A, B, or C.

BK is not related to A, B, C, DST's trustee or Z within the meaning of § 267(b) or § 707(b). Z is not related to B, C, or DST's trustee within the meaning of § 267(b) or § 707(b).

The IRS's conclusions in Revenue Ruling 2004-86 were as follows:

(1) The Delaware statutory trust described above is an investment trust, under § 301.7701-4(c), that will be classified as a trust for federal tax purposes.

(2) A taxpayer may exchange real property for an interest in the Delaware statutory trust described above without recognition of gain or loss under § 1031, if the other requirements of § 1031 are satisfied.

The IRS noted that, under the facts of the ruling, if the DST' s trustee had the power to do one or more of the following acts, it would be classified as a partnership or other business entity: "(i) dispose of Blackacre and acquire new property; (ii) renegotiate the lease with Z or enter into leases with tenants other than Z; (iii) renegotiate or refinance the obligation used to purchase Blackacre; (iv) invest cash received to profit from market fluctuations; or (v) make more than minor non-structural modifications to Blackacre not required by law."

In addition, the DST would not have qualified as an "investment" trust had the DST's trustee been able to (a) accept additional contributions of new cash or assets from existing or new owners, or (b) invest reserves and cash in investments other than short term government obligations, certificates of deposit or interest bearing accounts that are held to maturity and that mature prior to the distribution of cash to the DST's owners.

Other facts in Revenue Ruling 2004-86 are not determinative of the outcome, including that (a) Blackacre was subject to the note and lease prior to being contributed to the DST, (b) each owner had a right to an in-kind distribution of DST's property, and (c) the persons who acquired interests in the DST pursuant to exchanges under Code Section 1031 acquired their interests indirectly from the original owner of the DST, rather than the DST itself.

In determining whether a Beneficiary's acquisition of an Interest "should" be treated as the direct acquisition of the Property, we analyze below in light of all relevant authorities: (i) the Trust's classification as an entity (and not as an agency or other co-ownership arrangement) for federal income tax purposes; (ii) the Trust's classification as an "investment" trust (and not as a business entity) for federal income tax purposes; (iii) the Trust's classification as a "grantor trust" for federal income tax purposes; (iv) the treatment of a Beneficiary as holding a direct interest in Trust Property for federal income tax purposes; (v) the Disposition Fee and the Asset Management Fee; (vi) whether the Trust should be characterized as having a single class of Interests; and (vii) whether the Master Lease constitutes a true lease for federal income tax purposes.

1. Classification of the Trust as an Entity Separate from the Beneficiary for Federal Income Tax Purposes.

Under Treasury Regulations Section 301.7701-1(a)(1), whether an organization is an entity separate from its owners for federal tax purposes is a matter of federal tax law and does not depend on whether the organization is recognized as an entity under local law. Revenue Ruling 2004-86 states that, generally, when participants in a venture form a state law entity and avail themselves of the benefits of that entity for a valid business purpose, such as investment or profit, and not for tax avoidance, the entity will be recognized for federal income tax purposes.

Whether the Trust is treated as an entity separate from the Beneficiary for federal income tax purposes depends upon its treatment under local law and the nature of the relationships created among the parties to the Trust pursuant to the Trust Agreement.

Section 3801(a) of the Act provides that a Delaware statutory trust is an unincorporated association that is created by a governing instrument for the purpose of holding property for business or investment. This section further provides that "any such association ... shall be a statutory trust and a separate legal entity." Section 3803 of the Act provides that owners of a trust are "entitled to the same limitation of personal liability extended to stockholders of private corporations for profit organized under the general corporation law by the State." Section 3804 of the Act provides that a trust may sue or be sued, and that its property is subject to attachment and execution as if it were a corporation. Section 3805 of the Act provides that, except as otherwise provided in the trust agreement, a beneficial owner of an interest in a trust shall have an undivided beneficial interest in the property of the trust and shall share in the profits and losses of the trust in pro rata in proportion to the owner's percentage interest in the trust. Section 3805 further provides that no creditor of a beneficial owner has any right to obtain possession of trust property, and that, except to the extent otherwise provided in the trust agreement, interests in a trust are freely transferable. Section 3815 of the Act provides that a trust may merge into or consolidate with other trusts or other business entities.

In Revenue Ruling 2004-86, after describing certain relevant provisions of the Act (including those described above), and after observing that the DST was "formed for investment purposes," the IRS concluded that the DST was an entity for federal income tax purposes. We believe that the Trust is substantially similar to the DST described in Revenue Ruling 2004-86. First, and most importantly, both the DST and the Trust are Delaware statutory trusts, subject to the provisions of the Act set forth above. The Initial Beneficiary has represented that the Trust has not opted out and will not opt out of its status as a separate legal entity under the Act. Second, Section 2.03 of the Trust Agreement provides that one of the purposes of the Trust is to hold the Trust Property for investment purposes. That provision of the Trust Agreement is consistent with the purpose of the DST in Revenue Ruling 2004-86 (*i.e.*, "to hold property for investment"). Third, Section 5.01(d) of the Trust Agreement provides that the Beneficiaries shall not be not liable for any liabilities or obligations of the Trust or the Trustees or for the performance of the Trust Agreement. This provision is similar to provisions in the DST's trust agreement. Fourth, consistent with the DST's trust agreement, the Trust Agreement does not purport to create an agency relationship. In addition, the Initial Beneficiary has represented that none of the Trust, the Trustees or the Initial Beneficiary has entered into or will enter into any agreement or understanding with any beneficiary of the Trust creating an agency or nominee relationship and none of the Trust, the Trustees or the Initial Beneficiary has been or will be represented as an agent or nominee of any beneficiary of the Trust in dealings with third parties. Accordingly, the Trust should be respected as an entity separate from the Beneficiaries for federal income tax purposes.

2. Classification of the Trust as an "Investment" Trust Rather than as a Business Entity for Federal Income Tax Purposes.

In general, an organization constitutes a trust for tax purposes if it is an arrangement whereby trustees take title to property for the purpose of protecting or conserving it for the beneficiaries. Generally speaking, an arrangement will be treated as a trust for tax purposes if the purpose of the arrangement is to vest in trustees responsibility for the protection and conservation of property for

beneficiaries who cannot share in the discharge of that responsibility and, therefore, are not associates in a joint enterprise for the conduct of business for profit. Treas. Reg. §§ 301.7701-1(a)(1), (b), 4(a).

There are other arrangements which are known as trusts because the legal title to property is conveyed to trustees for the benefit of beneficiaries, but which are not classified as trusts for tax purposes because they are not simply arrangements to protect or conserve the property for the beneficiaries. These trusts, which are often known as business or commercial trusts, generally are created by the beneficiaries simply as a device to carry on a profit-making business which normally would have been carried on through business organizations that are classified as corporations or partnerships for tax purposes. The fact that the corpus of such a trust is not supplied by the beneficiaries is not sufficient reason in itself for classifying the arrangement as an ordinary trust rather than as a corporation or a partnership for tax purposes. The technical casting of an organization in trust form, by conveying title to property to trustees for the benefit of persons designated as beneficiaries, will not change the real character of the organization if the organization is more properly classified as a corporation or a partnership for tax purposes. Treas. Reg. § 301.7701-4(b).

An investment trust will not be classified as a trust if there is a power under the trust agreement to vary the investment of the certificate holders. An investment trust with a single class of ownership interests, representing undivided beneficial interests in the assets of the trust, will be classified as a trust for tax purposes if there is no power under the trust agreement to vary the investment of the certificate holders. An investment trust with multiple classes of ownership interests ordinarily will be classified as a corporation or a partnership for tax purposes. An investment trust with multiple classes of ownership interests will be classified as a trust for tax purposes, however, if the trust is formed to facilitate direct investment in the assets of the trust and the existence of multiple classes of ownership interests is incidental to that purpose and if there is no power under the trust agreement to vary the investment of the certificate holders. Treas. Reg. § 301.7701-4(c).

A. Investment Trusts in General.

The DST in Revenue Ruling 2004-86 was held to be an "investment" trust and not a business entity. The courts and the IRS have considered the distinctions between an "investment" trust and a business entity on several other occasions.

In *Commissioner v. Chase National Bank*, 122 F.2d 540 (2d Cir. 1941), a depositor transferred "units" consisting of shares of the common stock of a number of corporations to a trust in exchange for certificates in the trust, and then sold those trust certificates to investors. The trustee was vested with all of the rights of ownership of the shares except that the depositor controlled the voting rights of the shares and the trust instrument governed and restricted the disposal of the shares. Under the terms of the trust instrument, property deposited into the trust was held until some disposition of it was made consistent with the terms of the trust instrument. Further, distributions of currently available funds were required. No purchases were to be made by the trustee by way of reinvestment of funds or otherwise. The IRS argued that the trust was taxable as a corporation for federal income tax purposes. The court rejected the IRS's argument, holding that because the trust agreement required the trust property "to be held for investment and not to be used as capital in the transaction of business for profit like a corporation organized for such a purpose," the trust was prevented from being or becoming more than a "strict investment" trust. *Id*. at 543.

In *Commissioner v. North American Bond Trust*, 122 F.2d 545 (2d Cir. 1941), *cert. denied*, 314 U.S. 701 (1942), an opinion issued by the U.S. Court of Appeals for the Second Circuit on the same day that it issued the *Chase National Bank* opinion, the court reached a different conclusion regarding the treatment of a trust for federal income tax purposes. In contrast to the terms of the trust instruments in the *Chase National Bank* case, the terms of the trust instrument in *North American Bond Trust* accorded the depositor with the power "to take advantage of market variations to improve the investments even of the first investors." *Id.* at 546. This power arose in two ways. First, in making up new units, the depositor "was not confined to the same bonds he had selected for" the previous units. Second, "the bonds of all units constituted a single pool in which each certificate holder shared according to his proportion of all the certificates issued." As a result, the money from new investors could be used to purchase new bond issues which would in turn reduce the existing certificate holders' interests in the old bond issues. Based on these facts, the court held that the depositor "had power, though a limited power, to vary the existing investments of all certificate holders at will..." (*Id.*), and accordingly that the trust was an association taxable as corporation.

Revenue Ruling 75-192, 1975-1 C.B. 384, concerned a trust agreement that required the trustee to invest cash on hand between quarterly distribution dates in short-term government obligations or in certificates of deposit issued by banks with minimum stated surplus and capital that mature prior to the following distribution date. The IRS concluded that, because the trust agreement limited "the trustee to a fixed return similar to that earned on a bank account," there was "no opportunity to profit from market fluctuations." Accordingly, the power to invest in short-term instruments described in Revenue Ruling 75-192 is not a power to vary a trust's investment.

In Revenue Ruling 79-77, 1979-1 C.B. 448, the IRS ruled that a trust formed to hold real property was an ordinary trust under Treasury Regulations Section 301.7701-4(a) and a "grantor trust" within the meaning of Subpart E of Subchapter J of Chapter 1 of the Code (*i.e.*, Code Section 671 *et seq.*), and not a "business entity" within the meaning of Treasury Regulations Section 301.7701-2 (*e.g.*, a partnership or an association taxable as a corporation), where the trustee's duties were limited to the following: (i) holding title to real estate; (ii) at the direction of the beneficiaries, signing a 20-year "triple net" lease (with renewal options) for the real estate; (iii) enforcing the lease; (iv) signing such other agreements as are approved by the beneficiaries; (v) approving minor nonstructural alterations to the real estate; and (vi) distributing net income of the trust to the beneficiaries on a quarterly basis.[1]

In other situations, however, the IRS has determined that an arrangement formed to hold real estate was properly classified as a business entity. For example, in Revenue Ruling 78-371, 1978-2 C.B. 344, the heirs to certain real estate established a trust and transferred to the trust real estate subject to a net lease. The trust agreement expressly authorized the trustees to acquire additional real

[1] *See also* PLR 9352008 (September 29, 1993), in which the IRS ruled that an ownership interest in real estate was merely an ownership interest in the real estate and not a partnership interest where the real estate was subject to a triple net lease. It noted that the "mere co-ownership of an interest in real property without providing more than the customary services of maintenance and repair and collecting of rents will not render a co-ownership a partnership." In its ruling, the IRS noted that the real estate was "already subject to a net lease under which the lessee was responsible to pay all insurance premiums, general real estate taxes and special assessments, most of the utility expenses and a significant portion of the repair costs."

estate, to sell assets of the trust, to invest such sales proceeds in certain types of financial products, to borrow money, to mortgage and lease the trust property, and to build or remove improvements from the trust property without the knowledge or consent of the owners of the trust. The IRS concluded that the trustee's power to engage in extensive real estate operations and to invest the sales proceeds in financial products indicated that that the trust was not formed to merely protect and conserve the trust's property and ruled that the trust was taxable as a corporation.

Revenue Ruling 78-371 should be contrasted, however, with Revenue Ruling 75-374, 1975-2 C.B. 261. In that ruling, the IRS addressed the level of joint business activity that would cause co-owners of real estate to be viewed as partners for tax purposes. The co-owners of an apartment project hired an unrelated management company to manage the apartment project; the management company negotiated and executed the leases for the apartment units, collected rents and other payments from tenants, and paid taxes, assessments and insurance premiums relating to the project. The management company performed (i) "all services customarily performed in connection with the maintenance and repair of an apartment project" (such as furnishing "heat, air conditioning, hot and cold water, unattended parking, normal repairs, trash removal, and cleaning of public areas"), and (ii) certain "[a]dditional services such as attendant parking, cabanas, gas, electricity and other utilities." Customary tenant services were furnished by the management company to the tenants "at no additional charge above the basic rental payments." The management company paid the costs incurred in providing the additional services and retained the charges paid by the tenants. The ruling concluded that the co-owners were not partners for tax purposes because (i) the furnishing of customary services in connection with the maintenance and repair did not render the co-ownership a partnership and (ii) the co-owners did not furnish either directly or through an agent any additional services. The IRS also found that the management company was not an agent of the co-owners because the co-owners did not share any of the profits realized from the rendition of the non-customary additional services by the management company. Based on IRS's conclusions in Revenue Ruling 75-374, Revenue Ruling 78-371 should not be applicable to situations in which owners of real estate (whether direct or indirect) share only in the proceeds from customary services provided to tenants.

Subject to the discussion below of certain differences between the facts in respect of the Trust and the facts of revenue Ruling 2004-86, we believe that the arrangements provided for under the Trust Agreement and the Master Lease are similar to the arrangements described in *Chase National Bank* and Revenue Rulings 2004-86, 79-77 and 75-192, and are distinguishable from the arrangements discussed in *North American Bond Trust* and Revenue Ruling 78-371. The Trust satisfies the "one class of interests" requirement because Article I of the Trust Agreement expressly states that the Interests shall be of a single class. Section 2.03 of the Trust Agreement provides that one of the purposes of the Trust is to hold the Trust Property for investment purposes and that neither the Trustees, the Beneficiaries, nor their agents shall provide non-customary services with respect to the Property. The Initial Beneficiary has represented that neither the Trust nor any Trustee, employee, agent or independent contractor of the Trust, including the Initial Beneficiary, will provide any services to the Master Tenant or any subtenants. Section 2.04 of the Trust Agreement states that (i) the Trustees are holding the Trust Property for the benefit of the Beneficiaries, subject to the obligations of the Trust; (ii) it is the intention of the parties to the Trust Agreement that the Trust constitute a "statutory

trust" within the meaning of the Act, and that the Trust not constitute an agency, partnership, corporation, association or business trust for federal income tax purposes; and (iii) the Beneficiaries shall be treated for federal income tax purposes as owning a direct interest in the Property and other Trust Property and shall be obligated to report their Interests consistently with such characterization. Section 4.02 of the Trust Agreement (1) directs the Signatory Trustee to distribute all available cash to the Beneficiaries in accordance with their respective Percentage Interests after paying or reimbursing the Trustees for any fees or expenses paid or incurred by the Trustees on behalf of the Trust and retaining funds as required for a reasonable reserve as necessary to pay anticipated ordinary current and future Trust expenses, and (2) requires undistributed cash to be invested only in short-term government obligations and in certificates of deposit or interest-bearing bank accounts with a bank or trust company having a minimum stated capital. Section 5.01(c) of the Trust Agreement provides that from and after such time as there is more than one Beneficiary that is an owner of the Trust, the Trust shall not constitute a business entity for federal income tax purposes, but shall instead constitute an investment trust within the meaning of Treasury Regulations Section 301.7701-4(c). Section 7.03 of the Trust Agreement provides that, notwithstanding any other provision of the Trust Agreement, the Trustees shall not take certain specified actions, if the effect of any such action would be to "vary the investment" of the Beneficiaries under Treasury Regulations Section 301.7701-4(c)(1). The Master Lease provides that the Master Tenant is responsible for all insurance, maintenance, ordinary repairs and utilities, and the Master Lease may not be renegotiated unless the Master Tenant becomes bankrupt or insolvent.

B. Certain Differences between the Facts in Respect of the Trust and the Facts of Revenue Ruling 2004-86.

We have considered differences between the facts in respect of the Trust and the facts of Revenue Ruling 2004-86, including the differences noted below.

1. ***Conversion of Trust to LLC.***

The ability of the Signatory Trustee to convert the Trust to an LLC in specified circumstances should not constitute a power to vary the investment of the Beneficiaries. In such event, of course, the Beneficiaries will no longer be investors in a trust but instead will be investors in a newly formed limited liability company. Be that as it may, the corpus of the Trust would not have changed during the continuance of the Trust as a trust for state law purposes. Thus, the IRS ruled in Revenue Ruling 81-238, 1981-2 C. B. 248, that a trust retains its tax status as such notwithstanding arrangements whereby the beneficiaries may reinvest distributions in a newly formed trust, noting that "[t]he plan does not involve reinvestment in the original trust." Private letter rulings (which under Code Section 6110(k)(3) may not be used or cited as precedent) have made it clear that such arrangements amount to a reinvestment of trust distributions into the original trust only if the subsequent trust in substance is simply a continuation of, and therefore the same trust as, the original trust. As a limited liability company and not a trust, any LLC into which the Trust is converted cannot he the same entity as the original Trust. Private Letter Ruling 199943042 (July 23, 1999); Private Letter Ruling 200007006 (Nov. 15, 1999).

II. Capital Expenditures.

The Trust is responsible for certain capital expenditures on the Property, including structure, roof and exterior walls, whereas the DST was authorized to make only minor non-structural modifications to the property. Revenue Ruling 2004-86, provides that a trust will be classified as a business entity for tax purposes if its trustees have the power under its trust agreement to make more than minor non-structural modifications to the trust property not required by law. Section 7.03 of the Trust Agreement forbids the Trustees from making other than minor non-structural modifications to the Property (unless required by law) if doing so would constitute a power under the Trust Agreement to "vary the investment of the certificate holders" under Treasury Regulations Section 301.7701-4(c)(1). Therefore, the Trustees do not have the power under the Trust Agreement to make the above-described capital expenditures if doing so would vary the investment of the Beneficiaries under Treasury Regulations Section 301.7701-4(c)(1) and Revenue Ruling 2004-86. Moreover, the IRS has ruled that a trustee that leases property may consent to alterations to the leased property if the trustee reasonably believes that the alterations protect and conserve the trust estate or are required by law, and that a trustee may consent to changes to the credit support for financial instruments that constitute a trust estate if the trustee reasonably believes that the change is advisable to maintain the trust estate and that any resulting increase in the value of the trust estate would be incidental to maintaining the value thereof Rev. Rul. 79-77, 1979-1 C.B. 448; Rev. Rul. 90-63, 1990-2 C.B. 270. Presumably, if a trustee can consent to alterations to leased property if the trustee reasonably believes that the alterations protect and conserve the trust estate, then a trustee can also make capital expenditures on alterations to leased property if the trustee reasonably believes that the alterations protect and conserve the trust estate. The Initial Beneficiary has represented that the Trust will not make or fund capital expenditures on the Property unless such expenditures are for modifications to the Property that are required by law or the Trustees reasonably believe that such modifications protect and conserve the Property, that any increase in the value of the Property resulting from such modifications would be incidental to the foregoing, and that such modifications will not change the nature of the Property as commercial real estate. Accordingly, in our judgment the obligation of the Trust to make the above-described capital expenditures should not result in a conclusion that the Trust is carrying on a business and dividing the gains therefrom rather than performing the functions of a trust by protecting and conserving property for the Beneficiaries.

III. FMV Option.

The FMV Option provided in the Trust Agreement also should not be viewed as a power to vary the Trust's investments. If the FMV Option is exercised, a transfer of Interests is made for a cash purchase price equal to the fair market value of a Beneficiary's Interest, which will be based on the fair market value of the Property at or around the time of exercise of the FMV Option, as determined by the Initial Beneficiary and which fair market value may not be less than the value of the Property as determined by an independent appraisal firm. The option price is tied directly to the fair market value at or around the time of exercise of the FMV Option and is not nominal in relation to such value or discounted in any way.

IV. ***Conclusion.***

The differences described in the preceding paragraphs, and any other differences between the Trust and the DST, should not in our view defeat the classification of the Trust as an investment trust under Treasury Regulations Section 301.7701-4(c)(1) because they do not cause the Trust to have more than a single class of ownership interests and do not create a power to vary the investment of the Beneficiaries during the term of the Trust.

3. Classification of the Trust as a "Grantor Trust" for Federal Income Tax Purposes.

Code Sections 671 through 678 describe certain circumstances in which the grantor of a trust or another person will be considered to be the owner of all or a portion of the trust's assets and income for federal income tax purposes. Code Section 677(a) provides that a grantor is treated as the owner of any portion of a trust whose income without the approval or consent of any adverse party or, in the discretion of the grantor or a nonadverse party (or both) may be distributed, held, or accumulated for future distribution to the grantor or its spouse. In Revenue Ruling 2004-86, the IRS held that the DST was a grantor trust.

Like the DST in Revenue Ruling 2004-86, the Trust satisfies the Code requirements for qualification as a grantor trust. Section 2.04 provides that each Beneficiary is to be treated for federal income tax purposes as owning a direct interest in the Trust Property. Section 4.02 of the Trust Agreement provides that all available cash of the Trust is required to be distributed to the Beneficiary's pro rata in proportion to their Percentage Interests in the Trust. The Trust shall constitute a grantor trust under Code Sections 671 through 678.

4. Treatment of the Beneficiaries as Directly Holding the Property for Federal Income Tax Purposes.

Section 671 of the Code provides that where a grantor is treated as the owner of any portion of a trust, there shall then be included in computing the taxable income of the grantor those items of income and deductions of the trust which are attributable to that portion of the trust to the extent that such items would be taken into account in computing taxable income of an individual. Under Code Section 671, a grantor includes in computing such grantor's taxable income those items of income and deductions which are attributable to or included in any portion of a trust of which such grantor is treated as the owner. An item of income or deduction included in computing the taxable income of a grantor under Code Section 671 is treated for federal income tax purposes as if it had been received or paid directly by the grantor. Treasury Regulations Section 1.671-2(a), (c).

For federal income tax purposes, in general, if an entity is disregarded as separate from its owner, its activities are treated in the same matter as a sole proprietorship, branch, or division of the owner. Treasury Regulations Section 301.7701-2(a).

In Revenue Ruling 2004-86, the IRS held that a person who is treated as the grantor of a grantor trust is considered to own its proportionate share of the assets of the trust for federal income tax purposes. Revenue Ruling 2004-86 went on to hold that an owner of a grantor trust that holds real property is

considered to be the owner of an undivided interest in the real property and that, accordingly, real property can be exchanged for an interest in such a grantor trust without the recognition of gain or loss so long as the other requirements of Code Section 1031 are satisfied.

As indicated above, upon the issuance of the Interests to the Beneficiaries, the Trust will satisfy the tax law requirements for qualification as an investment trust and a grantor trust. In addition, the Initial Beneficiary has represented that Owner is disregarded as an entity separate from the Initial Beneficiary for federal income tax purposes.

Thus the Beneficiaries should be treated for federal income tax purposes as owning direct interests in the property held by the Trust. Accordingly, the Beneficiaries should be treated as owning direct interests in the Property for purposes of Code Section 1031.

5. The Asset Management Fee, the Disposition Fee and the Property Management Fee.

If the Asset Management Fee and the Disposition Fee, alone or together with the Property Management Fee, were to be recharacterized for federal income tax purposes as creating a partnership between the Trust on the one hand and the Signatory Trustee and/or the Property Manager (and/or their affiliate the Master Tenant, which necessarily has many of the benefits and burdens of ownership of the Property as the lessee under the Master Lease, including the right to exploit the Property and the obligation to maintain the Property) on the other hand in respect of the ownership of the Property from the outset, then an acquisition of the Interests in the Trust would not qualify as replacement property for purposes of the like-kind exchange provisions of Code Section 1031. If the Asset Management Fee and the Disposition Fee and/or the Property Management Fee were recharacterized for federal income tax purposes as conveying to the Signatory Trustee, the Property Manager, and/or the Master Tenant an ownership interest in the Property as a tenant-in-common with the Trust, then the real property deemed owned by the Beneficiaries as grantors of the Trust for purposes of Code Section 1031 would be proportionately reduced.

The Asset Management Fee could be viewed as a share in the current income of the Property. The Asset Management Fee is equal to one-half percent (0.5%) of $5,200,000, paid in one-twelfth increments monthly. In addition, the Disposition Fee could be viewed as a share in the residual value of the Property. The Disposition Fee is equal to three percent (3%) of the purchase price received by the Trust from the sale of the Property (excluding any sale or exchange to or with an affiliate of the Signatory Trustee). The Signatory Trustee is also entitled to reimbursement of certain expenses.

In our view the Signatory Trustee is not engaged in carrying on a trade or business in partnership with the Trust with a view to dividing the profits therefrom within the meaning of the check-the-box Treasury Regulations discussed above. Rather, the Signatory Trustee has a separate interest rather than a joint interest in profiting from the Property. The Asset Management Agreement is styled as a management agreement. The Trust hired the Signatory Trustee to manage the day-to-day operations of the Trust. The Asset Management Agreement provides that the Trust has hired the Signatory Trustee as an independent contractor. The Asset Management Agreement has an initial term of one (1) year and is terminable upon various events. The Signatory Trustee has a separate rather than

a joint interest in profiting from the operation of the Property. Moreover, the Asset Management Fee is fixed in amount (and not measured by revenue from operation of the Property), and the Initial Beneficiary has represented that the Asset Management Fee is at fair market value. The Asset Management Agreement states that the Trust and the Signatory Trustee intend that the Disposition Fee, if any, will constitute compensation for the agreement of the Signatory Trustee to assist the Trust in disposing of the Property as the Trust may reasonably request. Therefore, the Disposition Fee is a fee for services to be rendered, or for the Signatory Trustee's agreement to stand ready to provide disposition services if reasonably requested to do so by the Trust, rather than simply a share of the residual value of the Property. Moreover, the Disposition Fee is measured by the sales price with respect to the Property, the Signatory Trustee has not contributed capital to a joint venture with the Trust, does not share in any losses of the Trust, and is not held out to taxing authorities or third parties as a partner of the Trust. Accordingly, in our judgment the Signatory Trustee is not properly characterized for federal income tax purposes as standing in a partner-to-partner relationship with the Trust.

Nor in our view should the Disposition Fee be characterized as granting to the Signatory Trustee an undivided interest in the Property as a tenant-in-common with the Trust. Owner alone holds title to the Property. No document denominated as a tenancy-in-common or similar agreement exists between the Trust (or any Trustee) and the Signatory Trustee. The Asset Management Agreement provides that the Signatory Trustee will not acquire title to or any rights of any kind in or to the Property except as explicitly set forth therein. The Disposition Fee does not include any participation in current income from the Property and is not measured by net profits on the disposition of the Property.

The Property Management Fee could be viewed as a share in the current income of the Property. The Property Management Fee consists of a fee equal to $2,000 per month, with a three percent (3%) annual increase each year, a fee for supervising construction of tenant improvements equal to a fixed percentage of the cost of such tenant improvements and potential leasing commissions. The Property Manager is also entitled to reimbursement of certain expenses.

In our view the Property Manager should not be viewed as engaged in carrying on a trade or business in partnership with the Master Tenant with a view to dividing the profits therefrom within the meaning of the check-the-box Treasury Regulations discussed above. The Property Management Agreement is styled as a management agreement. The Master Tenant hired the Property Manager to manage and operate the Property. The Property Management Agreement provides that the Master Tenant has hired the Property Manager as an independent contractor. The Property Management Agreement has an initial term of one (1) year and is terminable upon various events. The Property Manager has a separate rather than a joint interest in profiting from the operation of the Property. Moreover, the Property Management Fee is fixed in amount (and not measured by revenue from operation of the Property), the Initial Beneficiary has represented that the Property Management Fee is at fair market value, the Property Manager has not contributed capital to a joint venture with the Master Tenant, does not share in any losses of the Master Tenant, and is not held out to taxing authorities or third parties as a partner of the Master Tenant. Nor does the Property Manager share in the proceeds of a sale of the Property. Accordingly, in our judgment the Property Manager is not properly characterized for federal income tax purposes as standing in a

partner-to-partner relationship with the Master Tenant. Moreover, even if the Property Manager were properly characterized for federal income tax purposes as standing in a partner-to-partner relationship with the Master Tenant, such a partnership relationship would not transmute the Trust into a partnership and cause an acquisition of the Interests in the Trust to fail to qualify as replacement property for purposes of the like-kind exchange provisions of Code Section 1031.

6. The Trust should be characterized as having a single class of Interests.

An investment trust with a single class of ownership interests, representing undivided beneficial interests in the assets of the trust, will be classified as a trust if there is no power under the trust agreement to vary the investment of the certificate holders.[2] Whether or not an investment trust has a single class of ownership interests is an important determination because, in general, an investment trust with multiple classes of ownership interests ordinarily will be classified as a business entity.[3] The use of multiple classes of interests in an investment trust would generally introduce the potential for complex allocations of trust income among investors not appropriate in the fixed investment trust context.[4] The Initial Beneficiary has represented that is may retain an Interest. It is possible that the IRS may assert that, if the Initial Beneficiary owns the IBI and receive distributions in connection therewith, while at the same time (i) the Signatory Trustee, an affiliate of the Initial Beneficiary, receives compensation in its role as asset manager under the Asset Management Agreement, (ii) the Master Tenant, an affiliate of the Initial Beneficiary, receives income from the Property through leasing the Property under the Master Lease, and (iii) the Property Manager, an affiliate of the Initial Beneficiary, receives compensation in its role as property manager under the Property Management Agreement, the IBI amounts to a second class of beneficial interests separate and distinct from those of the other Beneficiaries. However, we believe that the facts and circumstances sufficiently support the position that the Trust should be characterized as having only one single class of beneficial interests.

As an initial matter, while we do not believe there is specific precedent or authority directly on point to the facts and circumstances of the IBI and the Trust, there are other areas of tax jurisprudence and statutory and regulatory guidance which we believe are instructive by analogy and which provide a relevant framework through which the Trust should be analyzed. For example, S corporations are another entity type requiring only one single class of equity interests.[5]

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[2] Treas. Reg. § 301.7701-4(c)(1); Rev. Rul. 61-175, 1961-2 C.B. 128.

[3] Treas. Reg. § 301.7701-4(c)(1). The Treasury Regulation describing an investment trust applies the principles of the economic substance doctrine by providing that a trust arrangement that otherwise would be treated as an investment trust absent multiple classes of ownership interests nonetheless will be so treated if the trust's multiple classes of ownership interests are incidental to the investment purpose of the trust. We believe that this important exception does not warrant separate analysis herein because the Trust should be characterized as having a single class in both substance and form, as its structure does not utilize a feature commonly utilized by other similar syndicated Delaware statutory trusts whereby the trust uses two classes of beneficial interests that differ in name only, and otherwise have identical rights and obligations, and which are utilized solely in connection with tracking and segregating for accounting purposes the initial investment by the sponsor prior to its eventual pro rata redemption as the trusts are syndicated to investors. Because the Trust only utilizes a single class of beneficial interests, the analysis herein is limited to the substance of such single class of beneficial interests.

[4] *See, Principal Life Ins. Co. & Subs., et al. v. U.S.,* 751 F.3d 867 (Ct. Fed. Cl. 2014) (citing the "Sears Regulations", 51 Fed. Reg. 9950, 9951 (March 24, 1986)).

[5] *See* Code § 1361(b)(1)(D); Treas. Reg. § 1.1361-1(1).

An S corporation is treated as having only one class of stock if all outstanding shares of the corporation confer identical rights to distribution and liquidation proceeds."[6] The determination of whether all outstanding shares of stock confer such identical rights is made based on the corporate charter, articles of incorporation, bylaws, applicable state law and binding agreements relating to distribution and liquidation proceeds.[7] For these purposes, a commercial contractual agreement, such as a lease, employment agreement or loan agreement, is not a binding agreement relating to distribution and liquidation proceeds (unless the principal purpose is to circumvent the one class of stock requirement).[8] The S corporation regulations even provide that excessive compensation to one of two otherwise equal shareholders under such an agreement does not in and of itself create a second class of stock where the facts and circumstances do not reflect that a principal purpose of the applicable agreement is to circumvent the one class rule.[9] In addition, such other instruments, obligations or arrangements are not treated as a separate class of stock unless such separate instruments, obligations or arrangements (i) would be treated as equity under general principles of tax law or (ii) represent certain limited types of call options, warrants or similar instruments.[10]

Various fixed investment trust, real estate mortgage investment conduit ("REMIC") and regulated investment company ("RIC") rulings also provide analogous guidance. For example, the IRS has ruled that a trust (holding all or a portion of a single class of pass-through certificates issued by an investment trust or a single class of REMIC regular interests) may issue multiple classes of certificates qualifying as "stripped coupons" or "stripped bonds" and nevertheless qualify as a fixed investment trust.[11] In another example, a trust operating as a RIC was ruled to have not violated the preferential dividend rules by virtue of its holding four separate funds which each intended to offer three classes of shares with identical economic distributions.[12] Further, as discussed above, a trust with multiple classes of ownership interests that otherwise meets the description of an investment trust also will be classified as a "trust" for federal income tax purposes if the existence of multiple classes of ownership interests is incidental to the purpose of facilitating the direct

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[6] Treas. Reg. § 1.1361-1(l)(1). Differences in voting rights among shares of stock are disregarded in determining whether there is more than one class.
[7] Treas. Reg. § 1.1361-1(l)(2)(i).
[8] *Id. See, also,* Priv. Ltr. Rul. 9519036 (disproportionate distributions relating to tax liquidity ruled not to reflect any binding agreement with respect to corporate distributions). We believe this is supportive of the proposition that, based on other similar principles of tax law, the Asset Management Agreement, the Master Lease and the Property Management Agreement need not be treated as part of or otherwise altering the Trust Agreement and its provisions relating to the Beneficiaries' distribution and liquidation rights thereunder. *See* Trust Agreement at §§ 4.02 and 9.03.
[9] Treas. Reg. § 1.1361-1(1)(2)(vi), Example (3). We believe this is supportive of the proposition that, based on other similar principles of tax law, any economics inuring to (i) the Signatory Trustee alone as a result of its role pursuant to the Asset Management Agreement, (ii) the Master Tenant alone as a result of its role pursuant to the Master Lease, and (iii) the Property Manager alone as a result of its role pursuant to the Property Management Agreement, should each be similarly treated as separate and distinct from, and not otherwise altering, any economics inuring to the Signatory Trustee, the Master Tenant and the Property Manager, respectively, as a result of their affiliate's ownership of the IBI.
[10] Treas. Reg. § 1.1361-1(1)(4)(i)-(iii). Assuming one is applying the S corporation principles by analogy, we believe neither such exception should be extrapolated to the Asset Management Agreement, the Master Lease or the Property Management Agreement.
[11] Priv. Ltr. Rul. 200624005; *see, also,* Rev. Rul. 92-32, 1992-1 C.B. 434.
[12] Priv. Ltr. Rul. 9412037.

investment in the trust's assets.[13] The fixed investment trust Treasury Regulations provide illustrative examples of the application of such principle — the first example illustrating a circumstance whereby the existence of two classes of ownership interests in a trust is incidental to the trust's purpose of facilitating direct investment in a portfolio of residential mortgages and the second example illustrating a circumstance where multiple classes of ownership interests in a trust merely facilitate direct investment in the assets held by the trust.[14] We believe such rulings are indicative of the general principle that, despite a taxpayer in form having multiple nominal classes, the IRS will often look to the economics, rights and obligations underlying such classes when determining if, in substance, such classes should be characterized as one single class. Reaching a different result, the IRS has ruled that a purported investment trust with three classes having equivalent economic interests should in fact be treated as a partnership for federal income tax purposes because such classes had differing management and transfer rights under the trust's operative document.[15]

Applying these principles to the Trust, in form the Trust utilizes only a single class of beneficial interests in its structure as, on its face, the Trust Agreement only provides for a single class of beneficial interests.[16] In this regard, the Trust's structure presents even more favorable facts than a structure utilizing multiple, albeit nominally different, classes that must otherwise rely on principles of law to be characterized as one single class. In this case, the Trust does in fact only have one single class of beneficial interests in name and form. However, because the form of a transaction is not necessarily dispositive with respect to its treatment for federal income tax purposes, one must also analyze the substance of a transaction. The often-cited principle that the economic substance of a transaction, and not its mere form, governs the tax treatment of a given transaction

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[13] *See* footnote 3.

[14] *See* Treas. Reg. § 301.7701-4(c)(2), Example 2 (Originator of a mortgage portfolio transferred mortgages to a bank under a trust agreement, retained the class D beneficial ownership interest in the trust and sold to investors the class C beneficial ownership interests in the trust; the two classes are identical except that, in the event of a default on the underlying mortgages, the payment rights of the class D interests are subordinate to the rights of the class C certificate holders. The example observes that the interests of the beneficial holders in the aggregate, however, is substantially equivalent to an undivided ownership interest in the mortgage pool, coupled with a limited recourse guarantee running from the originator to the class C beneficial holders. Thus, the difference in rights between the class D and class C beneficial ownership interests is present simply to facilitate the investment by the class C beneficial owners in the trust's assets.) and Example 4 (Purchasers purchased trust certificates evidencing the right to receive a particular payment with respect to a specific bond that is included in a bond portfolio held by the trust. Because the purchase of stripped interests in bonds and coupons are treated as separate bonds for federal income tax purposes, the example states that the multiple classes simply provide each certificate holder with a direct interest in what would be treated as a separate bond. Because the certificate holders acquired an interest in the trust's assets that was similar to what the certificate holder could acquire by direct investment, the multiple classes of ownership interest will not prevent the trust arrangement from being treated as a trust rather than a business entity for federal income tax purposes.).

[15] Priv. Ltr. Rul. 9627005. This ruling calls to mind the S corporation rules discussed above in which the determination of whether all outstanding shares of stock confer such identical rights is made based on the corporate charter, articles of incorporation, bylaws, applicable state law and binding agreements relating to distribution and liquidation proceeds.

[16] *See* Trust Agreement at Article I. Unlike the alternative approach discussed in footnote 2 above, here the Trust does not even nominally have beneficial interests referred to using different nomenclature.

is a well-established doctrine of federal tax law.[17] In this case, we believe that the substance of the Trust's beneficial interests should be characterized as consistent with its form of one single class of beneficial interests.

Substantively, there is no distinction between any one Beneficiary's Interests from those of any other, whether by name, rights, economics or otherwise, under the Trust Agreement.[18] Regarding the IBI specifically, the Interest owned by the Initial Beneficiary, if any, is not linked to any of the Signatory Trustee's, the Master Tenant's or the Property Manager's role as the asset manager, Landlord or the property manager, respectively, under the Trust Agreement, the Asset Management Agreement, the Master Lease, the Property Management Agreement or otherwise. For example, the Trust Agreement does not require that the Initial Beneficiary alienate the IBI if the Property Manager ceases to serve as the property manager under the Property Management Agreement, and it does not require that the entity serving as manager (or an affiliate) under the Property Management Agreement, whether the Property Manager or otherwise, own an interest in the Trust. Similarly, the Property Management Agreement neither requires nor prevents the Initial Beneficiary's ownership of an interest in the Trust. In other words, the Initial Beneficiary could dispose of the IBI while the Property Manager continues its role under the Property Management Agreement, or the Property Manager's role under the Property Management Agreement could be terminated yet the Initial Beneficiary could continue to hold the IBI. The same applies equally to the Asset Management Agreement and the Master Lease. Further, from a contractual perspective the economics arising in connection with the Interests under the Trust Agreement (*i.e.*, distributions to Beneficiaries) and arising in connection with (i) the Asset Management Agreement (*i.e.*, the Signatory Trustee's fees and reimbursement), (ii) the Master Lease (*i.e.*, the Annual Rent received by the Master Tenant), and (iii) the Property Management Agreement (*i.e.*, the Property Manager's fees and reimbursement), bear no contractual or mechanical correlation. For the reasons noted herein, we believe that the reasoned analysis set forth above establishes that that the IBI should be characterized as being in substance unrelated to, and disconnected from, (i) the Signatory Trustee's rights and obligations inuring to its roles under the Asset Management Agreement, (ii) the Master Tenant's rights and obligations inuring to its roles under the Master Lease, and (iii) the Property Manager's rights and obligations inuring to its roles under the Property Management Agreement. As such, we believe that such degree of separation of each of the Signatory Trustee's, the Master Tenant's and the Property Manager's (and each of their affiliate's) various interests warrant a similar analysis to the principles applied to S corporations, whereby separate arrangements involving an equity owner and the entity should not necessarily be characterized as impacting the rights and obligations of the Beneficiaries under the Trust's actual governing instrument (*i.e.*, the Trust Agreement).

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[17] *See, e.g., Gregory v. Helvering,* 293 U.S. 465, 467, 470 (1935) (holding that "the reorganization attempted was without substance and must be disregarded"); *Commissioner v. Court Holding Co.,* 324 U.S. 331, 334 (1945) (stating that "the incidence of taxation depends on the substance of a transaction. The tax consequences which arise from gains from a sale of property are not finally to be determined solely by the means employed to transfer legal title."); *Weiss v. Stearn,* 265 U.S. 242, 254 (1924) (stating that the court "must regard matters of substance and not mere form"); *Higgins v. Smith,* 308 U.S. 473, 477 (1940) (holding that the Government may look at "actualities" and disregard the form of a transaction if it is "unreal" or a "sham").
[18] *See, e.g.,* Trust Agreement at §4.02.

Because the Trust's structure in form utilizes one single class of beneficial interests and because in substance such interests should not be characterized as multiple classes, we believe the Trust should be characterized as having a single class of beneficial interests and is, therefore, consistent with treating the Trust as a fixed investment trust.

7. *Treatment of the Master Lease as a True Lease and Not a Financing for Federal Income Tax Purposes.*

In 1939, the Supreme Court in *Helvering v. F&R Lazarus & Co.* established that tax ownership in a lease transaction is not determined by the location of title or by the nomenclature adopted by the parties to the transaction: "In the field of taxation, administrators of the laws and the courts are concerned with substance and realities, and formal written documents are not rigidly binding." Thus, as in other areas of the tax law, substance takes priority over form. In the context of a lease, the fundamental issue is whether, taking into account all the facts and circumstances, the lessor has sufficient benefits and burdens of ownership to be respected as the owner of the leased property for tax purposes, or whether the lessor is in substance a conditional seller, a lender, a holder of an option, some other type of participant in the transaction, or perhaps an accommodation party rather than a real participant in the transaction. *Helvering v. F&R Lazarus & Co.,* 308 U.S. 252, 255 (1939) (lessee is tax owner).

In 1978, the Supreme Court revisited the true lease issue *in Frank Lyon Company v. Commissioner*, and ruled as follows:

> we hold that where, as here, there is a genuine multiple-party transaction with economic substance which is compelled or encouraged by business or regulatory realities, is imbued with tax-independent considerations, and is not shaped solely by tax-avoidance features that have meaningless labels attached, the Government should honor the allocation of rights and duties effectuated by the parties. Expressed another way, so long as the lessor retains significant and genuine attributes of the traditional lessor status, the form of the transaction adopted by the parties governs for tax purposes. *Frank Lyon Company v. Comm'r,* 435 U.S. 561, 583-84 (1978) (lessor is tax owner).

Both before and after the Supreme Court decisions, the IRS and the courts have considered the true lease issue. It is fair to conclude from the various cases and rulings that the principal aspect of a true lease for tax purposes is the availability to the lessor of a substantial anticipated residual value at the end of the lease term in underlying property in which the lessor has made a substantial equity investment, the enjoyment of which is subject to market forces and conditions, and the opportunity of the lessor, by realizing such residual value, to achieve a substantial economic profit from the lease transaction apart from the value of tax benefits. *See generally*, Michael G. Robinson and William A. Macan IV, "Tax Considerations", Chapter 3 of Ian Shrank and Arnold G. Gough, Jr. (eds), Equipment Leasing - Leveraged Leasing (5th ed 2014); *see also,* Rev. Proc. 2001-28, 2001-1 C.B. 1156 (IRS advance ruling guidelines for leveraged lease transactions).

The Master Lease is styled as a lease. The Master Lease grants the right to possession and use of the Property to the Master Tenant for a term of years. The Landlord has lessor remedies such as termination of the Master Lease and repossession of the Property in the case of an uncured event of default. The Initial Beneficiary has represented that the Landlord has made a substantial equity investment in the Property, reasonably expects the Property to have a substantial remaining economic useful life and residual value at the end of the Master Lease's term, and reasonably expects to realize a substantial economic profit from the Master Lease and subsequent further leasing and/or disposition of the Property apart from the value of tax benefits and net of the Disposition Fee. In addition, there is no mortgage or other indebtedness encumbering the Property, so there is no issue of so-called lessee debt, and the Property is not so-called limited use property that would be useful only to or useable only by the Master Tenant or an affiliate at the end of the term of the Master Lease.

Accordingly, in our view the Master Lease should be respected as a true lease for federal income tax purposes, with the result that the Master Tenant should not be treated as the owner of the Property for tax purposes.

CONCLUSION

Based on the facts and the authorities discussed above, we conclude for federal income tax purposes that the acquisition of an Interest by a Beneficiaries should be treated as a direct acquisition of an ownership interest in the Property for purposes of Code Section 1031.

This Opinion is given in reliance upon the accuracy and completeness of the documents, facts, assumptions and representations described herein. Any misstatement or change of a material fact referred to or omission of any material fact may require an adverse modification of all or a part of this Opinion.

However, qualification of a transaction pursuant to Code Section 1031 for any Beneficiary involves issues based on numerous specific facts which are not and cannot be known to us; therefore, we give no opinion as to the ability of any Beneficiary to effectuate an acquisition of replacement property under Code Section 1031. This Opinion addresses only one aspect of qualifying under Code Section 1031, *i.e.*, whether acquisition of an Interest can be treated as a direct acquisition of the Property for purposes of Code Section 1031. We are not opining as to whether some portion of the Property is not "real property" as opposed to other "personal property" or as to whether any amounts paid by, or deemed paid by, any Beneficiary with respect to certain costs or expenses of the offering, financing costs, and amounts paid to fund any reserve for capital expenses will be deemed to constitute other consideration received in the exchange or the acquisition of real estate. Finally, this Opinion does not address any state or local tax consequences of the transactions described herein.

This Opinion is based on existing federal law, including judicial decisions, applicable current and proposed Treasury Regulations, and current published administrative positions of the IRS, all of which are subject to change either prospectively or retroactively. We assume no responsibility to inform the addressee or any Beneficiary of any future change in the law.

Although this Opinion represents our best legal judgment, it has no binding effect and, therefore, there can be no assurance that the IRS will not be able to successfully challenge the conclusions reached herein. This Opinion is delivered subject to that understanding and agreement. Finally, this Opinion is intended solely for the use of any Beneficiary in accordance with the terms of this letter and may not be shown to or relied upon by any other party without our express written approval.

IRS REQUIRED DISCLOSURE. The advice contained within this Opinion is not intended or written by us to be used, and cannot be used, by any taxpayer for the purpose of avoiding penalties that may be imposed on the taxpayer. The advice is not written to support the promotion or marketing of the transactions or matters addressed by the written advice. The taxpayer should seek advice based on the taxpayer's particular circumstances from an independent tax advisor.

Very truly yours,

Winthrop & Weinstine, P.A.
4/12/2024

WINTHROP & WEINSTINE, P.A.