Internal Revenue Service

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Person To Contact:
, ID No.
Telephone Number:

Refer Reply To:
CC:CORP:06
PLR-121269-05
Date:
August 08, 2005

Legend

OldCo1 =

OldCo2 =

NewCo =

State X =

aa =

bb =

ww =

yy =

Dear :

We respond to your representative's letter dated April 14, 2005, requesting rulings concerning the Federal tax consequences of a completed transaction, including whether the transaction qualified as a reorganization under § 368(a)(1)(F) of the Internal

Revenue Code. Additional information was submitted in letters dated July 19 and July 25, 2005. The material information submitted for consideration is summarized below.

Section 3.01(31) of Rev. Proc. 2005-3, 2005-1 I.R.B. 118, provides that the Service will not rule on the qualification of a transaction as a reorganization under § 368(a)(1)(F) unless the Service determines that there is a significant issue that is not clearly and adequately addressed by published authority. The taxpayer requested guidance addressing the significant issue of whether the issuance of a transitory and single share of stock by a newly-created corporation to a person other than a shareholder of the transferor corporation, prior to the transferor merging into the transferee corporation, will cause the merger to fail to qualify as a reorganization under § 368(a)(1)(F).

For business reasons, the taxpayer has completed a transaction composed of the following steps:

(i) OldCo1 and OldCo2 formed NewCo, a State X corporation, with each corporation receiving one share of NewCo stock for $ww in cash.

(ii) OldCo1 merged with and into NewCo, with NewCo as the surviving corporation (the “First Merger”). Pursuant to the First Merger, NewCo acquired all of OldCo1’s assets and liabilities. As part of the First Merger, the NewCo stock held by OldCo1 was cancelled, and each share of OldCo1 stock was converted into aa shares of NewCo stock. At the time of conversion each OldCo1 shareholder received an amount of NewCo stock equal to the number of shares due according to the conversion ratio plus an amount of cash in lieu of any fractional shares of NewCo. Immediately after the First Merger, OldCo1's shareholders owned over yy% of the stock of NewCo (greater than 99%).

(iii) Immediately after the First Merger, OldCo2 merged with and into NewCo, with NewCo as the surviving corporation (the “Second Merger”). Pursuant to the Second Merger, NewCo acquired all of OldCo2’s assets and liabilities. As part of the Second Merger, the NewCo stock held by OldCo2 was cancelled, and the OldCo2 shareholders received bb shares of NewCo stock in exchange for each share of their OldCo2 stock. The taxpayer has represented that the Second Merger qualified as a reorganization under § 368(a)(1)(A).

In addition to the information above, the following representations have been made:

(a) At the time of the First Merger, the fair market value of the NewCo stock and other consideration received by each OldCo1 shareholder was

approximately equal to the fair market value of the OldCo1 stock surrendered in the exchange.

(b) At the time of the First Merger, there was no plan or intention by the shareholders of OldCo1 who owned 5 percent of the OldCo1 stock, and to the best of the knowledge of management of OldCo1, there was no plan or intention on the part of the remaining shareholders of OldCo1 to sell, exchange or otherwise dispose of any of the shares of NewCo stock received in the transaction.

(c) With the exception of the NewCo stock received by OldCo2 in step 1 above, immediately following consummation of the First Merger, the OldCo1 shareholders owned all of the outstanding NewCo stock. The OldCo1 shareholders owned these shares of NewCo stock solely by reason of their ownership of OldCo1 stock immediately prior to the transaction.

(d) With the exception of the Second Merger, NewCo had no plan or intention to issue additional shares of its stock.

(e) Immediately following consummation of the First Merger, NewCo possessed the same assets and liabilities as those possessed by OldCo1 immediately prior to the First Merger, except for (i) assets distributed to OldCo1 shareholders who received cash or other property and (ii) assets used to pay expenses incurred in connection with the First Merger. Assets distributed to OldCo1 shareholders who received cash or other property, assets used to pay expenses, and all redemptions and distributions (except for regular, normal dividends) made by OldCo1 immediately preceding the First Merger, in the aggregate, constituted less than one percent (1%) of the net assets of OldCo1.

(f) At the time of the First Merger, OldCo1 did not have outstanding any warrants, options, convertible securities, or any other type of right pursuant to which any person could acquire stock in OldCo1, except for stock options issued under an OldCo1 compensatory stock option plan. Any stock option to acquire OldCo1 stock granted under an OldCo1 stock option plan that was unexercised and outstanding immediately prior to the First Merger was converted into an equivalent option to acquire NewCo stock.

(g) At the time of the First Merger, there was no plan or intention to have NewCo reacquire any of its NewCo stock issued in the transaction.

(h) At the time of the First Merger, there was no plan or intention to have NewCo sell or otherwise dispose of any of the assets of OldCo1 acquired

in the transaction, except for dispositions made in the ordinary course of business and transfers to corporations within NewCo's qualified group as the term is defined in § 1.368-1(d)(4)(ii) of the Income Tax Regulations.

(i) At the time of the First Merger, the liabilities of OldCo1 assumed by NewCo, and the liabilities to which the transferred assets of OldCo1 were subject, were incurred by OldCo1 in the ordinary course of OldCo1's business and were associated with the assets transferred.

(j) NewCo or a member of its qualified group (within the meaning of § 1.368-1(d)(4)(ii)) has continued the historic business of OldCo1 or has used a significant portion of OldCo1's historic business assets in a business.

(k) OldCo1 paid all of its own expenses incurred in connection with the negotiation and consummation of the transaction. OldCo1 paid one-half of the costs incurred for the preparation, including printing, of the registration statement filed with the Securities and Exchange Commission with respect to the issuance of the NewCo stock in the First Merger.

(l) At the time of the First Merger, OldCo1 was not under the jurisdiction of a court in a case under Title 11 of the United States Code or a receivership, foreclosure or similar proceeding in a federal or state court.

(m) The payment of cash to OldCo1 shareholders in lieu of fractional shares of NewCo stock in the transaction did not represent separately bargained for consideration. The total cash consideration paid to the OldCo1 shareholders in the transaction did not exceed one percent (1%) of the total consideration issued to the OldCo1 shareholders in exchange for their shares of OldCo1 stock. The fractional share interests of each OldCo1 shareholder were aggregated, and no OldCo1 shareholder received cash in an amount equal to or greater than the market value of one full share of NewCo stock.

(n) None of the compensation received by any shareholder-employees of OldCo1 was separate consideration for, or allocable to, any of their shares of OldCo1 stock. None of the NewCo stock received in the transaction by any shareholder-employees was separate consideration for, or allocable to, any employment agreement. The compensation paid to any shareholder-employees of OldCo1 was for services actually rendered and was commensurate with amounts paid to third parties bargaining at arm's length for similar services.

Based solely on the information and representations set forth herein, we rule as follows:

(1) The First Merger qualifies as a reorganization within the meaning of § 368(a)(1)(F) of the Code. OldCo1 and NewCo will each be "a party to the reorganization" under § 368(b).

(2) The shareholders of OldCo1 will not recognize any gain or loss upon their exchange of OldCo1 shares for Newco shares in the First Merger (§ 354(a)).

(3) OldCo1 will not recognize any gain or loss on the First Merger (§§ 361(a) and 357(a)).

(4) NewCo will not recognize any gain or loss on the receipt of the OldCo1's assets in First Merger (§ 1032(a)).

(5) The basis of the assets of OldCo1 in the hands of NewCo will be the same as the basis of such assets in the hands of OldCo1 immediately prior to the First Merger (§ 362(b)).

(6) The holding period of the OldCo1 assets held by NewCo will include the period during which such assets were held by OldCo1 (§ 1223(2)).

(7) The basis of the NewCo shares received by the OldCo1 shareholders in the First Merger will be the same as the basis of the OldCo1 shares surrendered in the exchange (§ 358(a)(1)).

(8) The holding period of the NewCo shares received by the OldCo1 shareholders will include the period during which the OldCo1 shares were held, provided that the shares were held as capital assets on the date of the exchange (§ 1223(1)).

(9) The taxable year of OldCo1 does not close of the date of the First Merger and such tax year continues in the name of NewCo (§ 1.381(b)-1 and Rev. Rul. 57-276, 1957-1 C.B. 126).

(10) OldCo1 shareholders who received cash in lieu of fractional share interests in OldCo1 stock in the First Merger will be treated as though such fractional share interests were distributed as part of the First Merger and then were redeemed. The treatment of cash received by such shareholders will be determined under § 302 (§ 1.305-3; Rev. Proc. 77-41, 1977-2 C.B. 574).

(11) The Second Merger will not adversely affect rulings issued regarding the First Merger (rulings (1) through (10)), even though the First Merger is a

step in a larger transaction that includes a series of steps. See Rev. Rul. 96-29, 1996-1 C.B. 50.

Except as expressly provided herein, no opinion is expressed or implied concerning the tax consequences of any aspect of any transaction or item discussed or referenced in this letter.

The ruling contained in this letter is based upon information and representations submitted by the taxpayer and accompanied by a penalty of perjury statement executed by an appropriate party. While this office has not verified any of the material submitted in support of the request for rulings, it is subject to verification on examination.

This ruling is directed only to the taxpayer requesting it. Section 6110(k)(3) of the Code provides that it may not be used or cited as precedent.

A copy of this letter must be attached to any income tax return to which it is relevant.

In accordance with the Power of Attorney on file with this office, a copy of this letter is being sent to your authorized representative.

Sincerely,

Mark J. Weiss
Acting Assistant to the Chief, Branch 6
Office of Associate Chief Counsel
(Corporate)