



Date 9 =

Date 10 =

Date 11 =

Date 12 =

Date 13 =

Date 14 =

Date 15 =

Date 16 =

Year 1 =

Year 2 =

Year 3 =

a =

b =

c =

d =

e =

f =

g =

h =

i =

i =

k =

Dear \_\_\_\_\_ :

This letter responds to your letter dated March 27, 2012, in which you requested rulings regarding certain federal income tax consequences resulting from what is represented as an ownership change as defined in § 382(g) of the Internal Revenue Code. The information submitted in that letter and later correspondence is summarized below.

The rulings contained in this letter are based upon facts and representations submitted by the taxpayer and accompanied by a penalty of perjury statement executed by an appropriate party. This office has not verified any of the materials submitted in support of the request for rulings. Verification of the facts, representations, and other data may be required as part of the audit process.

#### Summary of Facts

Parent is the common parent of an affiliated group of corporations that file a consolidated federal income tax return (the "Parent Group"). Parent has, since its incorporation, incurred a net operating loss ("NOL") every year. The Parent Group had a consolidated NOL carryover of approximately \$a as of Date 2, and has not used any of its NOL carryforward as of Date 16.

The Parent Group experienced an ownership change on Date 14 (the "Ownership Change") as a result of the issuance and subsequent conversion to common stock of the Parent Series B preferred stock. Capital contributions described below and certain transfers of shares from 5-percent shareholders to the Parent Group also contributed to the Ownership Change. (Date 14 was a date before the issuance of Notice 2008-78, 2008-41 I.R.B. 851.)

Between Date 4 and Date 14, the Parent group received approximately \$b in capital contributions (the "Pre-Change Contributions"). The Parent Group used all of the proceeds of the Pre-Change Contributions to fund operating expenses of the Parent Group. The Pre-Change Contributions were made in five categories:

- (i) Amounts taken into capital from the issuance of stock between Date 5 and Date 13 as a result of the exercise of compensatory options and vesting of restricted stock, such stock issued of \$c value.
- (ii) From Date 6 through Date 12, conversions to equity of debt originally issued from Date 1 to Date 7, totaling \$d (the "Debt Conversions").
- (iii) Equity Investment on Date 9, of \$e related to Joint Venture Agreement.
- (iv) Issuance of (a) common stock on Date 8 in exchange for \$f and (b) Series A preferred stock on Date 11 in exchange for \$g.

- (v) Funds received from issuances of stock valued at \$h on Date 10 to non-employees as a result of the exercise of warrants issued in connection with the issuance of common stock on Date 8, described above.

Information has been provided giving the details of when the Pre-Change Contributions occurred and the intended use of proceeds from prospectuses related to each issuance. The Parent Group has represented that all of the proceeds from the Pre-Change Contributions have been used for operating expenses. The Parent Group is engaged in Parent Group Business, the net proceeds of which had been insufficient to satisfy its existing debt obligations and operating expenses through Year 3. Parent Group between Date 3 and Date 15 spent more than \$i on research and development and operating expenses. During the same time period Parent Group spent approximately \$j on capital expenses. The operating income of Parent group during this period was \$k.

### Representations

Taxpayer has made the following representations:

- (a) Parent is the parent of a loss group as defined in Treas. Reg. § 1.1502-91(c).
- (b) The Parent Group experienced an ownership change as defined in section 382(g) on Date 14.
- (c) Neither Parent nor any member of the Parent Group is under the jurisdiction of a court in a Title 11 or similar case.
- (d) The Pre-Change Contributions were used solely to alleviate the financial distress of Parent and continue Parent's basic business operations.
- (e) Part or all of the proceeds of the Pre-Change Contributions were used to pay operational expenses such as insurance, utilities, supplies, travel, and employee wages. The expenses arose shortly before, during, or after, the Pre-Change Contributions and were reasonable in amount.
- (f) The financial information submitted is representative of Parent's business operations from Year 1 to Year 2, and there had been no substantial operational changes during that period.

### Rulings

- (1) Section 382(l)(1) does not apply to treat the Pre-Change Contributions as capital contributions received by Parent as part of a plan a principal purpose of which was to avoid or increase its section 382 limitation.

- (2) The Parent Group is not required to reduce its value by the value of the Pre-Change Contributions for purposes of determining its section 382 limitation for the 2007 ownership change

#### Caveats

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, or concerning any conditions existing at the time of, or effects resulting from, such transactions that are not specifically covered in the above rulings.

Amounts contributed to capital and amounts of expenditures made as specified in this ruling letter have not been examined by this office and are subject to verification on examination.

#### Procedural Statements

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. Alternatively, taxpayers filing their returns electronically may satisfy this requirement by attaching a statement to their return that provides the date and control number of the letter ruling.

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,

Isaac W. Zimbalist  
Isaac W. Zimbalist  
Senior Technician Reviewer, Branch 5  
Office of Associate Chief Counsel  
(Corporate)