Internal Revenue Service

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Person To Contact:
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PLR-139485-12
Date: February 4, 2013

In Re:

Legend:

Parent =

Company 1 =

Company 2 = .

State A =

b =

$a =

x =

Date 1 =

Date 2 =

Date 3 =

Date 4 =

Date 5 =

Sub 1 =

Sub 2 =

Dear :

This is in response to your representative's letter dated Date 1, submitted on behalf of Parent, requesting a ruling that the acquisition of Company 2 is a "covered transaction" within the meaning of § 1.263(a)-5(e)(3) of the Income Tax Regulations.

FACTS

Company 1 and Company 2 are both organized under the law of State A and operate as b companies. On Date 2, Parent, Company 1 and certain of its subsidiaries entered into a merger agreement with Company 2 (as amended on Date 3), providing for the combination of Company 1 and Company 2 under a new holding company, Parent. Parent is a State A corporation and was organized by Company 1 on Date 4 solely for the purpose of effecting the merger of Company 1 and Company 2. As a result of the merger, Parent became a publicly traded corporation. After the merger, the Company 1 consolidated group continued with Parent as the common parent.

Specifically, effective on Date 5, the following steps were undertaken to effectuate the merger transaction (the "Transaction"):

> Step 1: Company 1 formed Parent and Parent formed two wholly owned subsidiaries, Sub 1 and Sub 2.
>
> Step 2: Sub 1 merged with and into Company 1 with Company 1 surviving. Pursuant to the merger, each share of common stock of Company 1 was converted into the right to receive a share of Parent stock. The Company 1 stockholders received Parent shares in a one-for-one exchange for their former shares of common stock of Company 1 (the "Company 1 Acquisition").
>
> Step 3: Sub 2 merged with and into Company 2 with Company 2 surviving. Pursuant to the merger, each share of common stock of Company 2 (other than shares held by Company 2 as treasury stock or that were owned by Company 2, Sub 2 or any wholly owned subsidiary of Company 2, and shares with respect to which appraisal rights under State A law were properly exercised and not withdrawn) was converted into (i) the right to receive $a in cash, without interest, and (ii) x shares of validly issued, fully paid and non-assessable common stock of Parent (the "Company 2 Acquisition").

The Company 1 Acquisition qualified for tax-free treatment as an exchange under § 351 of the Internal Revenue Code, a § 368(a)(1)(B) reorganization or a § 368(a)(2)(E) reorganization. The shareholders of Company 1 recognized no gain or loss on the exchange of their shares for Parent shares, Parent recognized no gain or loss on the receipt of the Company 1 shares in exchange for its stock, and there was carryover basis and holding periods with respect both to Parent's Company 1 stock, and the Company 1 shareholders' Parent stock.

The Company 2 Acquisition was both a taxable acquisition and qualified as an exchange to which § 351 applies. The Company 2 shareholders recognized gain but not loss on cash received in exchange for their Company 2 stock pursuant to § 351(b). Parent recognized no gain or loss on the acquisition of the Company 2 stock, and will generally take carryover basis and holding period. However, Company 2 shareholders basis in their new Parent stock is reduced by the amount of cash received, and increased by the amount of gain recognized.

REPRESENTATIONS

Parent makes the following representations:

1. Prior to the Transaction, Company 1 and Company 2 were not related within the meaning of § 267(b).

2. Immediately after the Transaction was consummated, Parent, Company 1 and Company 2 were related within the meaning of § 267(b).

3. The Company 2 Acquisition was a taxable acquisition, which qualified as an exchange to which § 351 applies. Pursuant to § 351(b), the Company 2 shareholders recognized gain (if any) but not loss to the extent cash was received in exchange for their Company 2 stock.

4. The Transaction was undertaken to facilitate the combination of the businesses of Company 1 and Company 2.

RULING REQUESTED

The Company 2 Acquisition is a "covered transaction" within the meaning of § 1.263(a)-5(e)(3) of the regulations.

LAW AND ANALYSIS

Section 162(a) of the Code provides that there shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business.

Section 263(a)(1) of the Code provides that no deduction shall be allowed for any amount paid out for new buildings or for permanent improvements or betterments made to increase the value of any property or estate.

Section 1.263(a)-5(a) of the regulations provides, in part, that a taxpayer must capitalize an amount paid to facilitate the following transactions:

1. An acquisition of assets that constitute a trade or business (whether the taxpayer is the acquirer or the target in the acquisition);

2. An acquisition by the taxpayer of an ownership interest in a business entity if, immediately after the acquisition, the taxpayer and the business entity are related within the meaning of § 267(b) or § 707(b);

3. An acquisition of an ownership interest in the taxpayer (other than an acquisition by the taxpayer of an ownership interest in the taxpayer, whether by redemption or otherwise);

4. A restructuring, recapitalization, or reorganization of the capital structure of a business entity (including reorganizations described in § 368 and the distribution of stock by the taxpayer as described in § 355);

5. A transfer described in § 351 or § 721 (whether the taxpayer is the transferor or transferee);

6. A formation or organization of a disregarded entity;

7. An acquisition of capital;

8. A stock issuance;

9. A borrowing; and

10. Writing an option.

Section 1.263(a)-5(b) of the regulations provides, in part, that an amount is paid to facilitate a transaction if the amount is paid in the process of investigating or otherwise pursuing the transaction. Section 1.263(a)-5(e) provides a bright-line rule to determine whether amounts paid in certain covered transactions are facilitative. Section 1.263(a)-5(e)(1) provides that an amount, which is not inherently facilitative (as defined in

§ 1.263(a)-5(e)(2)), facilitates a transaction only if the amount relates to activities performed on or after the earlier of (i) the date on which a letter of intent, exclusivity agreement, or similar written communication (other than a confidentiality agreement) is executed by representatives of the acquirer and the target; or (ii) the date on which the material terms of the transaction (as tentatively agreed to by the representatives of the acquirer and the target) are authorized or approved by the taxpayer's board of directors (or committee of the board of directors). In the case of a transaction that does not require authorization or approval by the taxpayer's board of directors, the date determined under this paragraph is the date on which the acquirer and the target execute a binding written contract reflecting the terms of the transaction.

The bright line rule applies only with respect to "covered transactions," which is defined in § 1.263(a)-5(e)(3) of the regulations as:

> (i) a taxable acquisition by the taxpayer of assets that constitute a trade or business,
>
> (ii) a taxable acquisition of an ownership interest in a business entity (whether the taxpayer is the acquirer in the acquisition or the target of the acquisition) if, immediately after the acquisition, the acquirer and the target are related within the meaning of § 267(b) or § 707(b), and
>
> (iii) a reorganization described in § 368(a)(1)(A), (B), or (C) or a reorganization described in § 368(a)(1)(D) in which stock or securities of the corporation to which the assets are transferred are distributed in a transaction which qualifies under § 354 or § 356.

Parent argues that the Company 2 Acquisition satisfies the requirements for the second category of covered transactions under § 1.263(a)-5(e)(3)(ii) because it is a taxable acquisition that results in Company 2 being a wholly owned subsidiary of Parent. Company 2 and Parent are thus related under § 267(b).

Section 3.01 of Rev. Proc. 2013-3, 2013-1 I.R.B. 113 (Jan. 2, 2013), provides that the Service will not issue a ruling concerning most corporate reorganizations.

RULING

Based solely on the information submitted and the representations set forth above, we rule that the Company 2 Acquisition is a "covered transaction" within the meaning of § 1.263(a)-5(e)(3) of the regulations.

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 rulings contained in this letter are based upon information 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 information, representations, and other data may be required as part of the audit or examination process.

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,

Robert M. Casey
Senior Technician Reviewer, Branch 3
Income Tax & Accounting