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Department of the Treasury

Washington, DC 20224

Person to Contact:

Telephone Number:

Refer Reply To:
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Date:
September 17, 2001

LEGEND:

A =
B =
C =
D =
E =
W =
X =
Y1 =
Y2 =
Y3 =
Date 1 =
Date 2 =
Date 3 =
Date 4 =
Date 5 =
Date 6 =
Date 7 =
Date 8 =
Date 9 =
Date 10 =

Dear :

This is in response to your letter, dated March 8, 2001, submitted on behalf of A.

FACTS

A is the common parent of an affiliated group of corporations (the "A Group"). Prior to the reorganization described below, A directly owned 100% of the stock of B, C, and D (collectively the "First Tier Subs"). A indirectly owned, through the First Tier Subs and other direct subsidiaries, 100% of the stock of E. E owns certain intellectual property and licenses such property to other members of the A Group.

Effective on Date 2, B, C, D, and E agreed to sell certain assets to W, an unrelated corporation. The assets subject to the agreement were all of the operating assets used in their respective trades or businesses by B, C, and D, and certain of the assets used in E's business. The sales agreement allowed B, C, D, and E to assign their rights in the agreement to a qualified intermediary, such that the transaction could qualify as a like-kind exchange under § 1031.

On Date 1, B, C, D, and E each entered into an agreement with X. Pursuant to these agreements, B, C, D, and E agreed to transfer to X, and X agreed to accept, all rights in the property they were selling to W, subject to W's right to purchase such property. A represents that X is a qualified intermediary within the meaning of § 1.1031(k)-1(g)(4). On Date 3, the sale of assets to W closed. On that date, the relinquished property was transferred to W and X received the sale proceeds from W.

As of Date 4, A agreed to acquire replacement property from Y1, Y2, and Y3, all entities unrelated to the A Group. The purchase agreement allowed A to assign its rights under the agreement to any of its affiliates or to a qualified intermediary, for the purpose of qualifying the transaction as a like-kind exchange under § 1031. On Date 5, in anticipation of the merger and assignment described below, B, C, D, and E each identified as replacement property an interest in the property that A had agreed to purchase from Y1, Y2, and Y3. On Date 6, A assigned all of its rights under the purchase agreement with Y1, Y2, and Y3 to B, C, D, and E.

On Date 7, C merged with and into B, with B as the surviving corporation. A represents that this merger qualified as a statutory merger under § 368(a)(1)(A). On Date 8, D assigned its rights in the purchase agreement with Y1, Y2, and Y3 to B. As a result of the merger and assignment, B and E possessed the right to receive all of the assets covered by the purchase agreement with Y1, Y2, and Y3.

On Date 9, B and E assigned their rights in the purchase agreement with Y1, Y2, and Y3 to X. On Date 10, the purchase of the assets from Y1, Y2, and Y3 closed. Y1, Y2, and Y3 received the purchase price from X, which then directed Y1, Y2, and Y3 to transfer the assets to B and E.

RULING REQUESTED

A requests a ruling that the merger of C into B does not disqualify the exchange by those corporations of their assets for the assets of Y1, Y2, and Y3 from nonrecognition treatment under § 1031, to the extent that § 1031 otherwise applies to such exchange.

LAW AND ANALYSIS

Section 1031(a)(1) provides that no gain or loss will be recognized on the exchange of property held for productive use in a trade or business or for investment if the property is exchanged solely for property of like kind which is to be held either for productive use in a trade or business or for investment. Under § 1031(a)(3), any property received by the taxpayer (the "replacement property") will be treated as property that is not of a like kind to the property transferred (the "relinquished property") if the replacement property (a) is not identified within 45 days of the taxpayer's transfer of the relinquished property, or (b) is received after the earlier of (i) 180 days after the taxpayer's transfer of the relinquished property, or (ii) the due date (determined with regard to extensions) for the taxpayer's return for the year in which the transfer of the relinquished property occurred. Section 1.1031(k)-1(g)(4) provides a safe harbor by which a taxpayer can effect a like-kind exchange through a qualified intermediary without being considered to be in actual or constructive receipt of money or other property for purposes of § 1031.

Section 381(a) provides that, in the case of the acquisition of assets of a corporation by another corporation - (1) in a distribution to such other corporation to which § 332 applies; or (2) in a transfer to which § 361 applies, but only if the transfer is in connection with a reorganization described in § 368(a)(1)(A), (C), (D), (F), or (G), the acquiring corporation shall succeed to and take into account, as of the close of the day of distribution or transfer, the items described in § 381(c) of the distributor or transferor corporation, subject to certain conditions and limitations.

Section 361(a) provides that no gain or loss shall be recognized to a corporation if such corporation is a party to a reorganization and exchanges property, in pursuance of the plan of reorganization, solely for stock or securities in another corporation a party to the reorganization. Section 368(a)(1)(A) provides that the term "reorganization" includes a statutory merger or consolidation.

Section 1.381(a)-1(b)(3)(i) provides, in part, that § 381 does not apply to the carryover of an item or tax attribute not specified in § 381(c), and that no inference is to be drawn from § 381 as to whether any such item or tax attribute should be taken into account by the successor corporation. Section 381(c) does not refer to like kind exchanges under § 1031. However, the legislative history of § 381 explains that "[§ 381] is not intended to affect the carryover treatment of an item or tax attribute not specified in the section or the carryover treatment of items or tax attributes in corporate transactions not described in subsection (a). No inference is to be drawn from the enactment of this section whether any item or tax attribute may be utilized by a successor or predecessor corporation under existing law." H.R. Rep. No. 1337, 83rd Cong., 2d Sess. A135 (1954). Thus, Congress did not intend § 381(c) to be the exclusive list of attributes that should be carried over after a reorganization. The legislative history further reveals that the purpose of § 381 was to put into practice the policy that "economic realities rather than . . . such artificialities as the legal form of the reorganization" ought to control in the question of whether a tax attribute from an acquired corporation is to be carried over to the acquiring corporation. Section 381 was enacted "to enable the successor corporation to step into the 'tax shoes' of its predecessor corporation without necessarily conforming to artificial legal requirements which then existed at the time of its enactment under court-made law." S. Rep. No. 1622, 83rd Cong., 2d Sess. 52 (1954).

The special treatment of like kind exchanges under § 1031 has been explained primarily on two grounds. First, a taxpayer making a like kind exchange has received property similar to the property relinquished and therefore has not "cashed out" of the investment in the relinquished property. Second, administrative problems may arise with respect to valuing property that is exchanged solely or primarily for similar property. See, e.g., Staff of the Joint Committee on Taxation, General Explanation of the Revenue Provisions of the Deficit Reduction Act of 1984, 98th Cong., 2d Sess. 244-45 (1984); Starker v. United States, 602 F.2d 1341, 1352 (9th Cir. 1979). These concerns are equally applicable when, following a reorganization under § 368(a)(1)(A), the surviving corporation receives like-kind property in exchange for property transferred by a predecessor corporation prior to the merger. Accordingly, in this case we conclude that B steps into the shoes of C for purposes of receiving the replacement property C identified before the merger.

CONCLUSION

Based on the facts presented above, we rule that the merger of C into B does not disqualify the exchange by those corporations of their assets for the assets of Y1, Y2, and Y3 from nonrecognition treatment under § 1031, to the extent that § 1031 otherwise applies to such exchange.

CAVEATS:

Except as expressly provided herein, no opinion is expressed or implied concerning the tax consequences of any aspect of any item discussed or referenced in this ruling. In particular, we express no opinion on whether the transaction meets the other requirements of § 1031 as to B or C, or whether § 1031 has any application to A, D, or E. A copy of this ruling must be attached to any income tax return to which it is relevant.

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

Sincerely,
Douglas A. Fahey
Assistant to Branch Chief, Branch 3
Office of Associate Chief Counsel
(Income Tax & Accounting)