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Washington, DC 20224

Person to Contact:

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Refer Reply To:
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Date:
May 23,2002

Taxpayer =

Date 1 =

Date 2 =

Date 3 =

$A =

B% =

C% =

D% =

E =

X =

Y =

Z =

Dear

This letter is in response to your letter requesting rulings under section 280G of the Internal Revenue Code. Specifically, you requested a ruling that neither the approval, confirmation nor implementation of Taxpayer's Reorganization Plan (Plan) constitutes a change in the ownership or effective control of Taxpayer or in the ownership of a substantial portion of Taxpayer's assets within the meaning sections 280G and 4999 of the Code. This ruling affects the determination of whether any options, severance payments, and warrants are subject to sections 280G and 4999 of the Code. The facts, as represented by Taxpayer, are as follows:

On Date 1, Taxpayer filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code with the United States Bankruptcy Court. A creditor's committee was not appointed.

On Date 2, the Bankruptcy Court confirmed the Plan. The Plan resulted from negotiations between Taxpayer's largest creditors, comprised of institutions holding senior notes issued by Taxpayer with an aggregate face amount of $A (Former Senior Note Holders), and X. Pursuant to Plan, Taxpayer, as reorganized, issued a single class of common stock to Former Senior Note Holders and X. Plan also provided for the issuance of common stock to Y and Z (Executive Management). However, through negotiations with the Former Senior Note Holders and X, Executive Management received vested stock options in lieu of common stock.

Pursuant to Plan, the Former Senior Note Holders were issued shares representing B% of the total fair market value and total voting power of the common stock of Taxpayer. One Former Senior Note Holder received greater than 20% of the total fair market value and voting power of Taxpayer's common shares after the reorganization. X receive shares representing C% of the total fair market value and total voting power of the common stock of Taxpayer after the reorganization. The shares of common stock that each Senior Note Holder and X received under Plan were worth substantially less than the face amount of their respective claims against Taxpayer. Pre-reorganization common stock, preferred stock, and notes of Taxpayer were cancelled under Plan.

Plan, which was approved by a majority of Taxpayer's Board of Directors (the Old Board), provided for all existing directors of Taxpayer and each of Taxpayer's subsidiaries to resign as directors as of the effective date of Plan. Plan further provided that the Board of Directors of Taxpayer after the reorganization (the New Board) would consist of up to seven directors, six of whom were nominated by the Former Senior Note Holders and one who was nominated by X. Executive Management remain as Co-Chief Executive Officers of Taxpayer.

The Former Senior Note Holders, any transferee of a Former Senior Note Holder (together "stockholders"), Taxpayer, and X entered into a Stockholders Agreement as to the management of Taxpayer and stockholders' ownership of Taxpayer's common stock. The Stockholder's Agreement provides voting agreements with respect to the election and removal of New Board, the modification of charter agreements, and a corporate liquidation or a 50% change in voting power. The Taxpayer is aware of no other arrangements, formal or informal, under which the Former Senior Note Holders or X will act together as a group to control the management and policies of Taxpayer.

Pursuant to Plan, the Management and Retention Bonus Plan (in effect before the reorganization) was assumed by Taxpayer and amended to clarify that the reorganization did not constitute a change in control (as otherwise defined in the retention plan) that would trigger benefits under the retention plan. Plan also provides for a Warrant and an Option Plan. The Warrant Agreement as adopted to provide a distribution of warrants to holders of Taxpayer's preferred stock interests to induce such holders to vote in favor of Plan. Each warrant may be exercised for one share of common stock in Taxpayer at a stated price (subject to adjustments as provided in the Warrant Agreement). The warrants are exercisable beginning on the last day of the third month following the effective date of Plan and ending on the fifth anniversary of such date. Both the warrants and any shares issued on exercise of a warrant are subject to certain restrictions on transfer, but are otherwise nonforfeitable. The Option Plan provides for the granting of stock options to senior management only. Executive Management may not participate in the Option Plan.

Pursuant to Plan, existing severance agreements with senior management and existing employment agreements with Executive Management were assumed and amended to provide certain limitations on the receipt of severance benefits (Amended Employment Agreements). The Amended Employment Agreements generally provide for the forfeiture of severance benefits if a member of Executive Management is terminated for cause, or voluntarily terminates employment prior to Date 3 or prior to the earlier of the sale of all, or substantially all, of Taxpayer's assets or stock. However, severance benefits are payable to a member of Executive Management on any voluntary or involuntary termination of employment (except for cause, disability, or death) occurring on or after Date 3. The severance benefits payable to Executive Management are comprised of 18 months of salary continuation and 18 months of continuation of insurance. These provisions were intended to provide an incentive for Executive Management to remain with Taxpayer through the effective date of the reorganization and for at least four months thereafter. As the Date 3 date has passed, Executive Management is currently entitled to receive severance on any subsequent termination of employment (unless on account of death, disability, or for cause).

The Amended Employment Agreements also provide for a grant of immediately vested stock options (Options) to Executive Management. If exercised, these Options would represent approximately D% of the total shares of Taxpayer's common stock. These Options were granted in lieu of the issuance of shares of Taxpayer's common stock, as reflected in Plan.

Section 280G of the Code provides that no deduction will be allowed for any excess parachute payment. Section 280G(b)(1) defines "excess parachute payment" as an amount equal to the excess of any parachute payment over the portion of the base amount allocated to such payment.

Section 280G(b)(2)(A) of the Code defines "parachute payment" as any payment in the nature of compensation to (or for the benefit of) a disqualified individual if (i) such payment is contingent on a change in the ownership or effective control of the corporation or in the ownership of a substantial portion of the assets of the corporation and (ii) the aggregate present value of the payments in the nature of compensation to (or for the benefit of) such individual which are contingent on such change equals of exceeds an amount equal to three times the base amount.

Section 4999(a) of the Code imposes on any person who receives an excess parachute payment a tax equal to 20 percent of the amount of the payment.

Section 1.280G-1 of the Proposed Income Tax Regulations, published in the Federal Register on May 5, 1989 (54 Fed. Reg. 19,390) (the 1989 proposed regulations), provides guidance concerning parachute payments. The 1989 proposed regulations were amended and clarified on February 20, 2002, with the publication of section 1.280G-1 of the Proposed Income Tax Regulations (the 2002 proposed regulations), in the Federal Register (67 Fed. Reg. 7,630).

Q&A-27(a) of section 1.280G-1 of the proposed regulations provides that a change in the ownership or control of a corporation occurs on the date that any one person, or more than one person acting as a group, acquires ownership of stock of the corporation that, together with stock held by such person or group, possesses more than 50 percent of the total fair market value or total voting power of the stock of such corporation. Q&A-27(b) provides that persons will not be considered to be "acting as a group" merely because they happen to purchase or own stock of the same corporation at the same time, or as a result of the same public offering. However, persons will be considered to be "acting as a group" if they are owners of an entity that enters into a merger, consolidation, purchase or acquisition of stock , or similar business transaction with the corporation. If a person, including an entity shareholder, owns stock in both entities that enter into a merger, consolidation, purchase or acquisition of stock, or similar transaction, such shareholder is considered to be acting as a group with other shareholders in an entity only to the extent of his ownership in that entity prior to the transaction giving rise to the change and not with respect to his ownership interest in the other entity. Q&A-27(c) provides that section 318(a) applies to determine stock ownership.

Q&A-28(a) provides, in part, that a change of effective control of a corporation is presumed to occur on the date that either (1) any one person, or more than one person acting as a group, acquires (or has acquired during the 12-month period ending on the date of the most recent acquisition by such person or persons) ownership of stock of the corporation possessing 20 percent or more of the total voting power of the stock of such corporation; or (2) a majority of the members of the corporation's board of directors is replaced during any 12-month period by directors whose appointment or election is not endorsed by a majority of the members of the corporation's board of directors.

The presumption of Q&A-28(a)(1) and (2) may be rebutted by establishing that the acquisition or acquisitions of the corporation's stock, or the replacement of the majority of the members of the corporation's board of directors, does not transfer the power to control (directly or indirectly) the management and policies of the corporation from any one person (or more than one person acting as a group) to another person (or group). Q&A-28(d) contains the same language as Q&A-27(b) concerning when persons will be considered to be "acting as a group." Q&A-28(e) contains the same language as Q&A-27(c) concerning the application of section 318(a).

Q&A-29 provides that a change in the ownership of a substantial portion of a corporation's assets occurs on the date that any one person, or more than one person acting as a group, acquires (or has acquired during the 12-month period ending on the date of the most recent acquisition by such person or persons) assets from the corporation that have a total fair market value equal to or more than one third of the total fair market value of all of the assets of the corporation immediately prior to such acquisition or acquisitions. For this purpose, a transfer of assets by a corporation is not treated as a change in the ownership of the assets if the corporation transfers the assets to an entity in which, immediately after the transfer, the shareholders of the corporation own a greater than 50 percent interest (by value or voting power). See Q&A-29(b) and Example (3) of Q&A-29(d). Q&A-29 (d) contains that same language as Q&A-27(c) concerning when persons will be considered to be "acting as a group." Q&A-29(e) contains the same language as Q&A-27(c) concerning the application of section 318(a).

The passive receipt of stock by a creditor under a bankruptcy plan of reorganization is essentially involuntary in that the creditors of the bankruptcy estate typically would prefer that the debt be paid in cash rather than stock of the debtor. The fact that plan of reorganization provides for the creditors to receive stock instead of cash is a function of the financial resources of the estate and is not indicative of any intention on the part of the creditors, either singly or acting as a group, to acquire control of the debtor.

Pursuant to Plan, no person, or persons acting as a group, acquired ownership or more than 50 percent of the total fair market value or total voting power of Taxpayer.

Although E, one of the Former Senior Note Holders, acquired more than 20% of the total voting power of the stock of Taxpayer, the presumption of an effective change in control is rebutted by the facts of the reorganization. The facts, as submitted by Taxpayer, indicate that the reorganization will not transfer to E the power to control the management and policies of Taxpayer and that E will not act to control the management and policies of Taxpayer. The facts also indicate that the composition of the board of directors after the reorganization was agreed upon by Old Board pursuant to Plan.

No change in ownership of a substantial portion of the assets of Taxpayer occurred as a result of the reorganization of Taxpayer.

Based on the above described facts and representations, we rule as follows:

1. Neither the approval, confirmation, nor implementation of Plan constitutes a change in the ownership or effective control of Taxpayer or in the ownership of a substantial portion of Taxpayer's assets within the meaning of sections 280G and 4999 of the Code; and

2. The Options granted to Executive Management, the Severance payable to

Executive Management and the warrants are not subject to the provisions of sections 280G and 4999 of the Code.

Except as specifically ruled on above, on opinion is expressed or implied concerning the tax consequences of any aspect of the transaction or item discussed or referenced above.

This ruling is directed only to the taxpayer(s) requesting it. Section 6110(k)(3) of the Code provides that it may not be used or cited as precedent. The taxpayer should attach a copy of this ruling to any tax return to which it is relevant.

Sincerely,

Robert Misner
Senior Technical Reviewer
Office of Executive Compensation Branch
Office of the Division Counsel/Associate
Chief Counsel (Tax Exempt and
Government Entities)

Enclosure: Copy for 6110 purposes