Internal Revenue Service

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Department of the Treasury
Washington, DC 20224

Third Party Communication: None
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Date:
November 15, 2004

LEGEND

Taxpayer =

Corp 1 =

Corp 2 =

Corp 3 =

Corp 4 =

Corp 5 =

Corp 6 =

Foreign Entity A =

Foreign =

Entity B

Country A =

State A =

State B =

State C =

State D =

X =

Y =

Date A =

Year X =

Year Z =

Month Y =

Dear :

This replies to a letter dated July 9, 2004, in which Taxpayer requests a ruling that the deferred gain that is the subject of a gain recognition agreement filed pursuant to Treas. Reg. § 1.367(a)-8 is not recognized when Taxpayer, the U.S. transferor under the agreement, participates in a reorganization qualifying for nonrecognition treatment under section 368(a)(1)(F). The information submitted for consideration is substantially as set forth below.

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

Taxpayer is a private limited liability company organized under the laws of Country A. For U.S. federal income tax purposes, it is represented that Taxpayer is treated as a U.S. corporation pursuant to section 269B because the shares of Taxpayer may not be transferred to any person unless corresponding shares of another U.S. corporation, Corp 1, are simultaneously transferred to the same person (stapled corporations).

Taxpayer is indirectly owned by Corp 2, a publicly-traded U.S. corporation organized under the laws of State A. Corp 2's indirect interest in Taxpayer is described as follows: Corp 2 directly owns all the stock of Corp 3, a U.S. corporation organized under the laws of State B. Corp 3 directly owns all the stock of Corp 4, a U.S. corporation organized under the laws of State B, and all the stock of Corp 1, a U.S. corporation organized under the laws of State C. Corp 3 and Corp 4 directly own X and Y percent, respectively, of the stock of Corp 5, a U.S. corporation organized under the laws of State B. Corp 5 directly owns the stock of Taxpayer and Corp 6, a U.S. corporation organized under the laws of State D, necessary to satisfy the ownership requirements of section 1504(a)(2).

Corp 1, Corp 2, Corp 3, Corp 4, Corp 5, and Corp 6 are each members of the same affiliated group of corporations that files a consolidated federal income tax return under section 1502 and the regulations thereunder, with Corp 2 as the common parent corporation (the "Corp 2 consolidated group"). Taxpayer has taken the position that because it is a U.S. corporation under section 269B, it is not included as a member of the Corp 2 consolidated group, but files a separate U.S. corporation income tax return (Notice 89-94, 1989-2 C.B. 416).

Taxpayer directly owns all the stock of Foreign Entity A, a private limited liability company organized under the laws of Country A. Prior to Date A, Taxpayer also directly owned all the stock of Foreign Entity B, a private limited liability company organized under the laws of Country A. Both Foreign Entity A and Foreign Entity B are treated as controlled foreign corporations, as defined in section 957, for U.S. federal income tax purposes.

On Date A, Taxpayer transferred 100 percent of the outstanding shares of Foreign Entity B to Foreign Entity A as a contribution to Foreign Entity A's capital in a transaction that Taxpayer represents qualified for nonrecognition under section 351. In order to preserve nonrecognition treatment under section 351, Taxpayer represents that it will file a gain recognition agreement pursuant to Treas. Reg. § 1.367(a)-8 with its Year Z U.S. corporate federal income tax return (hereinafter referred to as the "Foreign Entity B GRA").

Taxpayer proposes to transfer its statutory seat to State C and terminate its corporate charter in Country A. Taxpayer represents that this transaction will constitute a reorganization described in section 368(a)(1)(F). Subsequent to this transaction, the restrictions on the ability to transfer or otherwise dispose of the shares of Taxpayer without a simultaneous transfer of corresponding shares of Corp 1 will be removed (the corporations will no longer be stapled). After the transaction, Taxpayer will be a member of the Corp 2 consolidated group. Taxpayer requests a ruling that the section

368(a)(1)(F) reorganization will not trigger the Foreign Entity B GRA, which would require the recognition of gain under section 367(a).

LAW AND ANALYSIS

Under Treas. Reg. § 1.367(a)-8(b)(3), a U.S. transferor, by filing a gain recognition agreement, agrees that if the transferee foreign corporation disposes of the stock of the transferred corporation prior to the close of the fifth taxable year following the close of the taxable year of the initial stock transfer, the U.S. transferor will recognize gain realized but not recognized upon the initial transfer of the stock of the transferred corporation, with interest. The general rule is that the U.S. transferor must recognize this gain on an amended return filed for the year of the transfer. However, an election may be made to recognize this gain and interest for the year the gain recognition agreement is triggered.

Under Treas. Reg. § 1.367(a)-8(e)(1)(i), a disposition of stock of the transferred corporation that triggers gain under the gain recognition agreement includes any sale or any disposition treated as an exchange under subtitle A (Income Taxes) of the Internal Revenue Code. A disposition of stock of the transferred corporation does not include certain nonrecognition exchanges described in Treas. Reg. § 1.367(a)-8(g) in which the gain recognition agreement is retained but modified, or certain transfers described in Treas. Reg. § 1.367(a)-8(h) in which the gain recognition agreement is terminated and has no further effect.

Under Treas. Reg. § 1.367(a)-8(g)(1), if a U.S. transferor disposes of its stock of the transferee foreign corporation in a nonrecognition transaction and the U.S. transferor complies with certain reporting requirements similar to those contained in Treas. Reg. § 1.367(a)-8(g)(2), then the U.S. transferor shall continue to be subject to the terms of the gain recognition agreement in its entirety. As part of the reporting requirements under Treas. Reg. § 1.367(a)-8(g)(2), the U.S. transferor is required to provide a notice of the transfer with its next annual certification setting forth the description of the transfer, the applicable nonrecognition provision, and the name, address, and taxpayer identification number of the transferee corporation. In addition, the U.S. transferor is required to file a new gain recognition agreement taking into account the new ownership structure after the transaction.

The issue is whether Taxpayer, as a U.S. transferor participating in a section 368(a)(1)(F) reorganization, remains in existence to continue to be subject to the terms of a gain recognition agreement for purposes of Treas. Reg. § 1.367(a)-8(g)(1). A U.S. transferor that participates in a section 368(a)(1)(F) reorganization and merely reincorporates in another domestic jurisdiction should be treated as the same corporation for purposes of Treas. Reg. § 1.367(a)-8(g). Section 368(a)(1)(F) reorganizations involve only one operating company (H.R. Rep. No. 97-760, 97th Cong., 2d Sess. 541(1982)), and typically involve an insignificant modification such as the reincorporation of the same corporate business with the same assets and the same shareholders surviving under a new charter (Berghash v. Comm., 43 T.C. 743, 752 (1965); aff'd 361 F. 2d 257 (2nd Cir. 1966)). *See also* section 381(b) and Treas. Reg. § 1.381(b)-1(a)(2).

In complying with reporting requirements similar to those contained in Treas. Reg. § 1.367(a)-8(g)(2), Taxpayer should provide notice of the section 368(a)(1)(F) reorganization and the reincorporation of Taxpayer from Country A to State C. Identifying information of the new transferee of the transferred property should be that of the Taxpayer. Because Taxpayer is treated as the same corporation immediately after the reincorporation for this purpose, Taxpayer should not be required to enter into a new gain recognition agreement. Instead, Taxpayer should provide a statement certifying that it continues to be the same taxpayer after the transaction for purposes of Treas. Reg. § 1.367(a)-8(g)(1), and remains subject to the terms of the Foreign Entity B GRA in its entirety for the remaining term of the agreement. The statement must be signed under penalties of perjury by a responsible officer pursuant to Treas. Reg. § 1.367(a)-8(a)(3).

Thus, based solely on the information submitted and the representations set forth above, it is held as follows:

> Under Treas. Reg. § 1.367(a)-8(g)(1), Taxpayer's participation in a domestic to domestic section 368(a)(1)(F) reorganization does not result in recognition of gain under the Foreign Entity B GRA, provided Taxpayer satisfies reporting requirements similar to those contained in Treas. Reg. § 1.367(a)-8(g)(2) as provided in this letter.

No opinion is expressed or implied concerning the tax consequences of any aspect of any transaction or item discussed or referenced in this letter under any other provisions of the Code or regulations or the tax treatment of any conditions existing at the time of, or effects resulting from any transactions (including any other domestic to domestic section 368(a)(1) asset reorganization) that are not specifically covered by the above ruling. Specifically, no opinion is expressed as to whether the transactions described in this ruling constitute a valid section 351 exchange or a section 368(a)(1)(F) reorganization, and no opinion is expressed about the application of section 269B to Taxpayer (see Notice 2003-50, 2003-32 I.R.B. 295).

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.

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

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

Sincerely,

/s/ Robert W. Lorence, Jr.

Robert W. Lorence, Jr.
Senior Counsel, CC:INTL:B04
Office of Associate Chief Counsel
(International)