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Department of the Treasury
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PLR-148104-09

Date:
March 29, 2010

LEGEND:

Date 1	=
Date 1.1	=
Date 1.5	=
Date 2	=
Date 3	=
Date 4	=
Date 4.5	=
Date 5	=
Date 5.5	=
Date 5.6	=
Date 6	=
Date 7	=
Date 8	=
Date 9	=

Date A	=
Date B	=
Date C	=
Date D	=
Parent	=
Former Owner	=
LLC	=
Former Parent	=
S1	=
Merger LLC	=
Document A	=
Company 1	=
Company 2	=
Accounting Firm	=
Identified Interests	=

Nominee	=	
Joint Filers	=	
the Funds	=	
the Managing Entities	=	
the Principals	=	

AA =

Stock Exchange =

Convertible Exchange Notes =

Taxpayer Notes =

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A =

B =

C =

D =

E =

F =

G =

H =

J =

K =

Dear :

We respond to your letter dated October 27, 2009, and subsequent correspondence on February 23, 2010, and March 23, 2010 (collectively, “Taxpayer Submissions”) in which you requested rulings as to certain federal income tax consequences of the transactions discussed below.

The rulings contained in this letter are based on 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 information and other data may be required as part of the audit process.

FACTS

In General

Parent is the common parent of a consolidated group (the “Parent Group”) within the meaning of §1.1502-1(h) of the Income Tax Regulations. The Parent Group is an accrual method taxpayer with a 52/53 week tax year that ends always on the Saturday that is nearest to the end of December, as provided in §1.441-2(a)(1). In addition, the Parent Group is a loss group within the meaning of §1.1502-91(c)(1). Parent’s predecessor corporation, as described further below, was Former Parent.

On Date 1, Former Owner distributed the following assets pro-rata to its shareholders in a bankruptcy reorganization—(i) all of its interest in LLC (a limited liability company), (ii) all of the stock of Former Parent and S1, and (iii) some cash. After the distribution, LLC was taxed as a partnership for Federal income tax purposes and owned all the stock of Former Parent. Former Parent, in turn, owned all the stock of S1, with which Former Parent joined in filing consolidated returns (the “Former Parent Group”) beginning on Date 1.1 (i.e., the day after Date 1). Former Parent and S1 were not attributed any pre-change loss from the Former Owner Group, and neither Former Parent nor S1 had a net unrealized built-in loss on Date 1. During the entirety of its existence, LLC had only a single class of membership interest outstanding.

On Date 2, LLC changed its business form from that of a limited liability company to that of a corporation, accomplished as follows (the “Conversion Transaction”): (1) LLC formed wholly-owned Parent, which, in turn, formed wholly-owned Merger LLC, and (2) Merger LLC merged into LLC with LLC surviving as an entity wholly-owned by Parent and thereafter disregarded for Federal income tax purposes. All holders of membership units in LLC became shareholders of Parent as a result of the Conversion Transaction, with one share of Parent exchanged for every A membership units of LLC. The Conversion Transaction qualified as a reverse acquisition under §1.1502-75(d)(3) with Parent becoming the common parent of the continuing Former Parent Group. For purposes of this letter, a reference to “Taxpayer” is a reference to the continuing Parent Group (including its predecessor, the Former Parent Group).

Shortly after Date 2, on Date 3, Parent’s stock was registered and began trading on the Stock Exchange. Parent has had a single class of common stock outstanding (“Common”) since Date 3 through March 23, 2010 (the date of Taxpayer’s final submission letter). For this purpose, certain penny warrants with an exercise price of $0.01 (collectively, the “Penny Warrants”), which were issued in connection with various financings on Dates Date 1.5, Date 5, Date 5.5 and Date 5.6 and were immediately exercisable at the option of the holder, have been treated as Common Stock on the date of grant and thereafter.

On Date 4, Parent issued a class of voting convertible preferred stock (the “Preferred) for $B. The Preferred was convertible into Common at $C per share. On Date 4, Common was trading for $D per share. On Date 5, all of the Preferred was redeemed for Convertible Exchange Notes in an aggregate principal amount of $E, representing the amount due to holders of the Preferred on Date 5, which included the original issuance price, plus $F accrued but unpaid dividends, and a G percent liquidation preference to which the holders of the Preferred would have been entitled upon a deemed liquidating event. The Convertible Exchange Notes were convertible into Common at $C per share. At the time the Preferred was exchanged, the Common was trading at only $H per share, with J shares outstanding.

Taxpayer has issued other series of debt in the form of notes on various dates, including Date 5 (collectively, along with the Convertible Exchange Notes, the “Taxpayer Notes”). The Convertible Exchange Notes were and are the most junior of the Taxpayer Notes and are not publicly traded. Taxpayer states that it is not aware of—(i) any trading in the Convertible Exchange Notes or (ii) any person who holds as much as K% of the Convertible Exchange Notes. Effective as of Date 9, Parent entered into an amendment and limited waiver to the note agreements that govern the terms of various of the previously issued series of debt, generally extending maturities, increasing interest rates payable, eliminating redemption premiums, and authorizing the issuance of a limited amount of additional debt (all as set forth in Document A).

Parent has issued its Common in connection with acquisitions (such as in connection with the acquisition of Company 1 and Company 2). The Taxpayer has had and continues to have various option plans in place under which it has issued options to acquire Parent’s Common (or membership units in Former Parent) to compensate employees and other service providers. In some cases, Taxpayer has substituted its options for those previously issued by acquired subsidiaries.

Tracking Stock Ownership

Since after Date 3, Parent has had a dedicated investor relations employee (the "Stock Tracking Employee") who has monitored ownership of its Common (including Penny Warrants) and Preferred Stock. The Stock Tracking Employee coordinates the monitoring of the ownership of the Common and Preferred, including monitoring Schedule 13D, 13G, and other SEC (i.e., the U.S. Securities and Exchange Commission) filings with respect to Parent stock, corresponding with significant shareholders for purposes of reporting stock ownership in Parent's SEC filings and tracking the Penny Warrants. In addition, Parent employed a stock surveillance company through Date 4.5 to assist in these efforts.

Parent has retained Accounting Firm to analyze the application of the section 382 of the Code, and the regulations thereunder, during testing periods and to develop and maintain an analysis of whether Parent had an ownership change (the "Section 382 Analysis"). The Section 382 Analysis covers the period beginning on Date 1.1 through Date 8 and identifies fifteen dates as "testing dates" on which an owner shift occurred. For purposes of the issues raised by this letter, the most significant of the testing dates were said to be: (i) Date 4 (issuance of the Preferred), (ii) Date 5 (redemption of the Preferred in exchange for the Convertible Exchange Notes), and (iii) the dates on which Penny Warrants were issued in connection with various financings.

In connection with its Section 382 Analysis, Taxpayer has identified five individuals or entities which it has treated as 5-percent shareholders or first tier entities for purposes of measuring shifts in ownership under section 382 (the "Identified Interests"). In addition, there was another group of entities and individuals (the "Joint Filers") of which the Taxpayer was aware as the result of certain SEC filings. This group generally was identified in SEC filings as having a more than 5-percent beneficial interest in the stock of Parent.

When LLC emerged from bankruptcy on Date 1, Nominee held membership units in LLC. Accordingly, LLC issued a Schedule K-1 statement to Nominee. In documentation filed by Parent with the SEC in connection with the Conversion Transaction, the Nominee was listed as beneficially owning more than five percent of Parent. The documentation filed did not provide information as to the owners of the Nominee.

Subsequent to the Conversion Transaction, the Joint Filers, rather than the Nominee, filed a Schedule 13G on Date A, reporting the acquisition by the Joint Filers of almost the exact same number of shares of Common as reportedly held by Nominee. The Joint Filers filed three subsequent Schedule 13Gs (or Schedule 13G/As) on Dates Date

B, Date C, and Date D, reporting ownership with respect to Common. None of these filings ever indicated that the Joint Filers owned any Preferred or any right to acquire Common. The Date D filing reported a disposition of all stock previously held.

Each of the first three filings indicated that some of the Joint Filers had beneficial ownership of all or a portion of the Common beneficially owned by other Joint Filers. For this purpose, the filings may be regarded as placing each Joint Filer into one of three generally non-overlapping categories—(i) entities that were said to beneficially own Common (the "Funds"), (ii) entities (the "Managing Entities") that were said to beneficially own Common "as a result of [their] voting and dispositive power over [shares beneficially owned by one or more of the Funds]", and (iii) individuals (the "Principals"), each of whom, "may be deemed to beneficially own [all of the Common that the Funds beneficially own] as a result of their voting and dispositive power over [those shares]." None of the filings indicated that any of the Funds, viewed individually, beneficially owned as much as 5 percent of the outstanding Common.

Although information was filed with the SEC reporting ownership on behalf of the Joint Filers of shares representing in the aggregate more than five percent of Parent's stock, these filings did not affirm the existence of a "group" within the meaning of section 13(d)(3) of the Securities Exchange Act of 1934 (the "Exchange Act"). Each of the Joint Filers signed a filing with the SEC that certified the shares of Parent stock described in the filing "were not acquired and not held for the purpose of or with the effect of changing or influencing control of" Parent. In addition, none of the Joint Filers has individually filed a Schedule 13D or Schedule 13G that affirms the existence of a "group."

Based on the Schedules 13G that had been filed by the Joint Filers (and the lack of any filing by the Nominee), Parent was uncertain as to whether the Nominee owned the Parent stock for tax purposes and whether the Joint Filers were acting in concert in owning Common. To clarify its understanding of the ownership of its stock by Nominee and the Joint Filers, the Stock Tracking Employee reached out to its point of contact at the Joint Filers to answer these questions. This contact at the Joint Filers directed the Stock Tracking Employee to one of the Filer's internal accountants, AA, as the person at the Filer with the necessary knowledge of the structure of the Filer, including the arrangement between Nominee and the Joint Filers and the relationship among the Joint Filers, to respond to the Stock Tracking Employee's questions.

On Date 6, the Stock Tracking Employee along with the Vice President of Finance and Taxation of Parent had a telephone conversation with AA during which they discussed the ownership of Parent stock by Nominee and how the investment decisions of the Joint Filers were made. AA addressed the questions and indicated that he would further confirm his responses with other employees of the Joint Filers. Parent received an email correspondence, dated Date 7, from AA that confirmed—(1) Nominee was never the economic owner (*i.e.*, did not have the right to dividends and/or proceeds from the sale) of Parent stock, but rather held such stock as a nominee for the entities listed in the Schedules 13G, and (2) the decision of each entity (listed in the Schedules 13G) to invest in Parent stock was made independently of the other entities and was not based upon the investment decisions of one or more of the other entities.

REPRESENTATIONS

Taxpayer makes the following representations:

1. Taxpayer has been a loss group within the meaning of §1.1502-91(c) of the Income Tax Regulations since its inception on Date 1.1.

2a. There were no classes Parent stock outstanding that constituted "stock" within the meaning of section 382(k)(6) and §1.382-2(a)(3) at any time during the period beginning Date 2 and ending March 23, 2010, other than the following: the Common (including the Penny Warrants) and the Preferred.

2b. The Preferred does not satisfy the requirements of section 1504(a)(4). Accordingly, the Preferred constitutes stock for purposes of section 382.

2c. During the entirety of its existence, LLC only had a single class of membership interest outstanding.

3. Other than the Preferred issued on Date 4, Parent did not issue any shares of Preferred or any rights to acquire Preferred. Parent has not made any distributions to the holders of Common (including the Penny Warrants) or Preferred. Parent has not redeemed any Common or Penny Warrants.

4. Parent has not issued, nor has any Parent Group member issued, any contingent purchase, warrant, convertible debt, put, stock subject to a risk of forfeiture, contract to acquire stock, or option with a principal purpose of avoiding or ameliorating the impact of an ownership change.

5. Taxpayer has treated, and will continue to treat, the Taxpayer Notes as debt for U.S. Federal income tax purposes.

6. To the best of the Taxpayer's knowledge, the amount of tax liability on any of Taxpayer's federal income tax returns filed to date would not be affected by whether or not Taxpayer takes into account the effect of fluctuations in the relative values of different classes of stock for purposes of determining owner shifts and ownership changes under section 382.

7. Except as otherwise noted in Taxpayer Submissions, Parent has no knowledge of— (i) any SEC filings affirming that any persons filing Schedules 13D or 13G with respect

to Parent stock should be treated as a group; (ii) the existence of any group of persons who have or had a formal or informal understanding amongst themselves to make a coordinated acquisition of Parent stock; or (iii) any entity or individual (through application of the attribution rules of section 318 as modified by section 382(l)) that economically owns (i.e. has the right to dividends and/or proceeds with respect to) five percent or more of Parent stock.

8. For purposes of identifying its direct shareholders or indirect owners who are 5-percent shareholders through reliance on the existence or absence of SEC filings under §1.382-2T(k)(1)(i), the Taxpayer, to the best of its knowledge, has located every relevant SEC filing and has discussed same in its Taxpayer Submissions.

RULINGS

For purposes of ruling 1 below, the Hold Constant Principle is defined as follows:

> On any testing date, in determining the ownership percentage of any 5-percent shareholder, the value of each share of such shareholder's stock, relative to the value of all other shares of the Taxpayer's stock, shall be considered to remain constant since the Acquisition Date of that share, except as properly adjusted to account for the dilutive effect of subsequent issuances or the accretive effect of subsequent redemptions of other shares of the Taxpayer's stock. The issuance of a second class of stock generally establishes the Acquisition Date for the preexisting class as well as the second class. For stock acquired before the beginning of any given testing period, the Taxpayer may use as its Acquisition Date the date that begins the testing period in lieu of its actual acquisition date(s), provided it does so with respect to every testing period and with respect to each and every share of stock so acquired.

Based solely on the information submitted, we rule as follows:

1. Taxpayer may apply a method employing the Hold Constant Principle (the "Method") to determine the increase in percentage ownership of each of its 5-percent shareholders on each of its testing dates on or after Date 4 (and to identify which such testing dates are change dates) for purposes of section 382, provided that—(i) Taxpayer takes a return position consistent therewith on its tax return for its first taxable year in which the application of the Method would affect the amount of its tax liability, and (ii) if employment of the Method does not result in an ownership change during said first taxable year, Taxpayer continues to apply the Method thereafter through the testing date on which the Method first results in an ownership change. See section 382(l)(3)(C).

2. A person who has the right to dividends and proceeds from the sale of stock ("Economic Ownership") is the owner of stock for section 382 purposes ("the Economic

Owner”). The Nominee was not an Economic Owner of Parent stock for purposes of section 382(k)(7) because Nominee did not have the right to receive, or the power to direct the receipt of, the distributions on and proceeds from the sale of the membership interests in LLC.

3. Unless Parent has actual knowledge to the contrary, from Date 3 forward, Parent may rely on the existence or absence of Schedules 13D and 13G to identify all persons who own five percent or more of the Parent stock. Section 1.382-2T(k)(1).

4. Each of the Joint Filers is not a “5-percent shareholder” or “first tier entity” for purposes of section 382(k)(7) and the regulations under section 382.

5. As regard each of the filings of SEC Schedules 13G on Dates Date A, Date B, and Date C by Joint Filers, the Joint Filers (or any subset thereof) do not constitute an entity within the meaning of §1.382-3(a)(1)(i).

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. In particular, no opinion is expressed as to whether or not—(i) any Parent debt should have been treated as Parent equity under debt/equity principles or as stock under §1.382-2T(f)(18)(iii) as of any date, or (ii) any warrants or options should have been treated as exercised under §1.382-4(d). One or more rulings given in this letter deal with issues that may be addressed in subsequent published guidance. See section 11 of Rev. Proc. 2009-1, 2009-1 I.R.B. 1, 47-51, regarding the circumstances, including published guidance, which may result in the revocation or modification of a ruling letter.

PROCEDURAL STATEMENTS

This ruling letter is directed only to the taxpayers who requested it. Section 6110(k)(3) 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, any taxpayer filing its return electronically may satisfy this requirement by attaching a statement to the return that provides the date and control number of this ruling letter.

In accordance with the power of attorney on file in this office, a copy of this ruling letter will be sent to your authorized representative.

Sincerely,

Mark S. Jennings
Branch Chief, Branch 1
Office of Associate Chief Counsel (Corporate)