

Internal Revenue Service

Department of the Treasury

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Person to Contact:

Telephone Number:

Refer Reply To:

CC:CORP:1 PLR-116279-00

Date:

December 21, 2000

LEGEND

Purchaser 1 =

Purchaser 2 =

Purchaser 3 =

Lossco =

Parent =

Subsidiary 1 =

Subsidiary 2 =

Newco =

Unrelated Purchaser
Group =

Date A =

Date B =

Date C =

Date D =

Date E =

Date F =

Date G =

Date H =

L =

M =

Company Official =

Outside Tax
Professional 1 =

Outside Tax
Professional 2 =

This responds to your authorized representative's letter dated August 17, 2000, requesting an extension of time under § 301.9100-1 through 301.9100-3 of the Procedure and Administration Regulations to file an election. Lossco is requesting an extension to file the election under § 1.382-6(b) of the Income Tax Regulations (the "Election") for Lossco, Subsidiary 1 and Subsidiary 2 with respect to an acquisition of Lossco stock on Date C (the "Change Date Transaction"). Additional information was received in letters dated November 14, November 28, December 13, December 19, and December 20, 2000. The material information is summarized below.

At the time of the Change Date Transaction, Lossco was common parent of a group of affiliated corporations filing a consolidated federal income tax return (the "Lossco Group"). On Date F, Lossco organized a new subsidiary ("Newco") and Lossco's two subsidiaries, Subsidiary 1 and Subsidiary 2, merged into Newco. On Date G, Newco merged into Lossco and Lossco changed its name (prior to Date G, Lossco was named Parent).

Lossco is currently a publicly held corporation. Lossco is a fiscal year taxpayer and uses the accrual method of accounting. Lossco's tax year that encompasses the Change Date Transaction (the "Change Date Transaction Tax Year") ended on Date D.

On Date A, Unrelated Purchaser Group acquired L percent (which is more than 5 percent) of the stock of Lossco in a private placement. On Date B, Purchaser 1, Purchaser 2 and Purchaser 3 (the "Acquirors") began a series of cash purchases of Lossco stock. By Date C, which is within 30 days of Date B and less than one year after Date A, the Acquirors had acquired M percent (which is more than 5 percent) of the stock of Lossco. These transactions increased the percentage ownership of Lossco stock held by the Acquirors and Unrelated Purchaser Group by more than 50 percent.

As a result of the Acquirors' and Unrelated Purchaser Group's acquisition of Lossco stock, a testing date, as defined in § 1.382-2, occurred on Date C. Because these transactions resulted in a greater than 50 percent shift in the ownership of Lossco during the testing period, an ownership change, as defined in § 382(g), occurred on Date C.

The Lossco Group intended to allocate its consolidated net operating loss between the pre-change period and post-change period as if the books were closed on

the change date. The Election was due on Date E, the extended due date for the Lossco Group's consolidated federal income tax return, but for various reasons it was not filed. Lossco relied on Outside Tax Professional 1 for federal income tax advice and tax reporting regarding the Change Date Transaction and the preparation and filing of Lossco's Change Date Transaction Tax Year federal income tax return. On Date H (which is after the due date for the Election), Outside Tax Professional 2 discovered the Election had not been filed. The statute of limitations under § 6501 has not expired for the Lossco Group's taxable year for which the Election is due or for any years affected by the Election.

The following representations have been made in connection with this request:

- (a) Lossco is the common parent of a "loss group" as defined in § 1.1502-91T(c)(1) (as in effect for the Change Date Transaction Tax Year) with respect to certain net operating loss carryovers.
- (b) As a result of the Change Date Transaction on Date C, Lossco underwent an ownership change as defined in § 382(g)(1).
- (c) The Lossco Group has not accelerated income into the pre-change period or deferred loss to the post-change period for the purpose of avoiding the application of § 382(b).
- (d) Lossco is not under the jurisdiction of a court in a Title 11 or similar case.
- (e) The Lossco Group will determine its alternative minimum taxable income and adjusted current earnings for the pre-change and post-change periods based on a closing of the books as of the change date, and will elect out of ratable allocation.
- (f) Since Date C, Lossco has continued the operation of its historic trade or business within the meaning of § 1.1502-93T(d)(1) (as in effect for the Change Date Transaction Tax Year).
- (g) The Lossco Group has not carried back and will not carry back, under § 172, or any applicable section of the consolidated return regulations, any portion of the consolidated net operating loss it incurred in the Change Date Transaction Tax Year to a prior tax year. The Lossco Group incurred consolidated net operating losses in the tax years that would otherwise have qualified under § 172 and any applicable section of the consolidated return regulations as carryback years for the consolidated net operating loss it incurred in the Change Date Transaction Tax Year.
- (h) An election under § 338 of the Internal Revenue Code was not made in connection with the Change Date Transaction.

Section 1.382-6(a) provides that except as provided in paragraphs (b) and (d) of that section, a loss corporation (defined in § 382(k)(1)) must allocate its net operating loss or taxable income and its net capital loss or modified capital gain net income for the change year between the pre-change period and the post-change period by ratably allocating an equal portion to each day in the year.

Section 1.382-6(b)(1) provides that a loss corporation may elect to allocate its net operating loss or taxable income and its net capital loss or modified capital gain net income for the change year between the pre-change period and the post-change period as if the loss corporation's books were closed on the change date.

Section 1.382-6(b)(2) provides that a loss corporation makes the closing-of-the-books election by including the following statement on the information statement required by § 1.382-2T(a)(2)(ii) for the change year: "THE CLOSING-OF-THE-BOOKS ELECTION UNDER § 1.382-6(b) IS HEREBY MADE WITH RESPECT TO THE OWNERSHIP CHANGE OCCURRING ON [INSERT DATE]." The election must be made on or before the due date (including extensions) of the loss corporation's income tax return for the change year.

Section 1.1502-77(a) provides that the common parent, for all purposes (other than for several purposes not relevant here), shall be the sole agent for each subsidiary in the group, duly authorized to act in its own name in all matters relating to the tax liability for the consolidated return year.

Under § 301.9100-1, the Commissioner has discretion to grant a reasonable extension of time to make a regulatory election or a statutory election (but no more than six months, except in the case of a taxpayer who is abroad), under all subtitles of the Code except subtitles E, G, H, and I.

Section 301.9100-1(b) defines the term "regulatory election" as including an election whose due date is prescribed by a regulation, revenue ruling, revenue procedure, notice, or announcement. Sections 301.9100-1 through 301.9100-3 provide standards the Commissioner uses to determine whether to grant an extension of time to make a regulatory election. Section 301.9100-1(a). Section 301.9100-2 provides automatic extensions of time for making certain elections. Section 301.9100-3 provides extensions of time for making regulatory elections that do not meet the requirements of § 301.9100-2. Requests for relief under § 301.9100-3 will be granted when the taxpayer provides evidence to establish that the taxpayer acted reasonably and in good faith, and that granting relief will not prejudice the interests of the government. Section 301.9100-3(a).

In this case, the time for filing the Election is fixed by the regulations (i.e., § 1.382-6(b)(2)(i)). Therefore, the Commissioner has discretionary authority under § 301.9100-1 to grant an extension of time for Lossco to file the Election, provided Lossco shows it acted reasonably and in good faith, the requirements of § 301.9100-1

and § 301.9100-3 are satisfied, and granting relief will not prejudice the interests of the government.

Information, affidavits, and representations submitted by Lossco, Company Official and Outside Tax Professional 1 explain the circumstances that resulted in the failure to timely file a valid Election. The information also establishes that tax professionals were responsible for the Election, that Lossco relied on them to timely make the Election, and that the government will not be prejudiced if relief is granted. See § 301.9100-3(b)(1)(v).

Based on the facts and information submitted, including the representations made, we conclude that Lossco has shown it acted reasonably and in good faith, the requirements of § 301.9100-1 and § 301.9100-3 are satisfied, and granting relief will not prejudice the interests of the government. Accordingly, an extension of time is granted under § 301.9100-1, until 30 days from the date of issuance of this letter, for Lossco to file the Election (by amending its information statement) with respect to the transaction described above. If a short taxable year under § 1.1502-76 is a change year for which the allocation under § 1.382-6 is made, such allocation will apply only to the items allocated to that short taxable year under § 1.1502-76. Section 1.382-6(d).

The above extension of time is conditioned on (1) the filing, within 120 days of the issuance of this letter ruling, of all returns and amended returns (if any) necessary to reflect the Election, and (2) the Lossco Group's tax liability (if any) being not lower, in the aggregate, for all years to which the Election applies, than it would have been if the Election had been timely made (taking into account the time value of money). No opinion is expressed as to the taxpayer's tax liability for the years involved. A determination thereof will be made by the District Director's office upon audit of the federal income tax returns involved. Further, no opinion is expressed as to the Federal income tax effect, if any, if it is determined that the taxpayer's liability is lower. Section 301.9100-3(c).

Lossco must file the Election in accordance with § 1.382-6(b)(2)(i), including filing any applicable amended returns. A copy of this letter should be attached to the information statement.

We express no opinion regarding: (1) whether Lossco is a "loss corporation" as defined in § 382(k)(1) or the common parent of a loss group as defined in § 1.1502-91T(c)(1); (2) whether a testing date, as defined in § 1.382-2, occurred on Date C; and, (3) whether an ownership change, as defined in § 382(g)(1) occurred on Date C.

In addition, we express no opinion as to the tax consequences of filing the Election late under the provisions of any other section of the Code and regulations, or as to the tax treatment of any conditions existing at the time of, or resulting from, filing the Election late that are not specifically set forth in the above ruling. For purposes of granting relief under § 301.9100-1, we relied on certain statements and representations made by the taxpayers. However, the District Director(s) should verify all essential

facts. In addition, notwithstanding that an extension is granted under § 301.9100-1 to file the Election, penalties and interest that would otherwise be applicable, if any, continue to apply.

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

Copies of this letter will be sent to your authorized representatives pursuant to the power of attorney on file in this office.

Sincerely yours,
Associate Chief Counsel (Corporate)

By: Mark S. Jennings
Chief, Branch 1