

## Internal Revenue Service

Department of the Treasury

Number: **200121069**

Washington, DC 20224

Release Date: 5/25/2001

Index Number: 355.00-00, 368.04-00

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Refer Reply To:

CC:CORP:B05 -PLR-104660-01

Date: February 28, 2001

In re:

Sub 17 =

c =

Date A =

This letter responds to your January 19, 2001, request for a letter ruling supplementing our letter ruling dated August 1, 2000 (the "Prior Letter Ruling"). In the Prior Letter Ruling, we ruled that Distributing may separate Business B from Business A under § 355 of the Internal Revenue Code. The legend abbreviations (except as noted above), the defined terms, the summary of the facts, the description of the proposed transactions, the representations, and the caveats appearing in the Prior Letter Ruling are incorporated herein by reference.

### FACTUAL ISSUES

#### Controlled's Active Trade or Business

In the Prior Letter Ruling, Distributing represented that 5 percent of the gross value of Controlled's assets would be active trade or business assets. However, after the Prior Letter Ruling was issued, Controlled completed the Offering at a price substantially in excess of the Financial Advisors' projected price. In addition, since that time, the fair market value of Controlled's assets has fluctuated significantly. The volatility of the value of Controlled's assets makes it impossible to be certain that the gross value of Controlled's active business assets at the time of the Controlled and Newco Distributions (the "Distributions") will be at least 5 percent of the gross value of all of its assets. In particular, an increase in the value of Controlled's assets may cause the relative value of Controlled's active business assets to fall below 5 percent. Nevertheless, Controlled has provided sufficient information which proves that even if the relative value of Controlled's active business assets falls below 5 percent, these assets are not de minimis compared with the other assets and activities of Controlled.

#### Distributing's Issuance of Additional Common Stock

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Favorable market conditions made it possible for Distributing to raise additional capital through a public offering of its stock. On Date A, Distributing issued c shares to the public (the “Distributing Offering”). The proceeds from the Distributing Offering will be used by Distributing to fund operations of Business A and to repay existing indebtedness. None of the proceeds from the Distributing Offering will be used to fund Business B.

### **Distributing’s Capital Contribution to Controlled to Pay Certain Expenses**

Pursuant to arms-length agreements between Distributing and Controlled, Distributing directly and indirectly contributed cash to Controlled to defray certain Controlled expenses incurred in connection with the Offering and the Distributions (the “Capital Contribution”).

### **Distributing/Controlled Stock Held in Employee Benefit Plans**

Distributing has established two employee benefit plans, the Distributing Employee Savings Plan (the “ESP”) and the Distributing Employee Stock Ownership Plan (the “ESOP”) (collectively referred to as the “Distributing Plans”). The Distributing Plans are both qualified plans under § 401, and they provide restrictions on the specific types of investments that may be held in a participant’s account. Under the provisions of the Distributing Plans, the participants may invest in Distributing stock, and they have voting rights over any Distributing stock held in their account.

At the time of the Controlled Distribution, it is anticipated that the ESP will hold 5 percent or more of the stock of Distributing on behalf of its participants, while the ESOP will hold less than 5 percent. No individual participant in the ESP holds 5 percent or more of Distributing’s stock, including stock held directly and stock held indirectly by such individual (including stock held through the ESP and ESOP).

Controlled will form plans substantially similar to the Distributing Plans (the “Controlled Plans”) for the benefit of Controlled employees. These plans will hold, among other investments, Distributing stock. In connection with the Controlled Distribution, participants in the Distributing Plans and the Controlled Plans will receive Controlled stock in the same manner as other shareholders of Distributing. Accordingly, after the Controlled Distribution, Distributing employees who participate in the Distributing Plans will have investments in Controlled stock, and Controlled employees who participate in the Controlled Plans will have investments in Distributing stock, to the extent such employees have Distributing stock in their individual accounts.

Neither the Distributing Plans nor the Controlled Plans will require the immediate disposition of the Controlled shares or the Distributing shares, respectively. Plan participants may direct their respective trustees to sell these shares at the participants’ discretion, but may not acquire any additional shares of the other company’s stock. At the end of 5 years from the Controlled Distribution, it is anticipated that any Controlled

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shares in the Distributing Plans and any Distributing shares in the Controlled Plans will be sold, and the proceeds reinvested in permitted investments under the terms of the respective plans.

### **New Operating Company**

Distributing has formed a new corporation, Sub 17. At the time of the Controlled Distribution, Sub 17 will not have material assets. It is anticipated that Distributing Sub will acquire the Facility from Sub 7 after the Controlled Distribution.

### **Continuing Relationships**

In order to minimize any potential tort or contract liability, Controlled will continue to manage and operate certain facilities, nominally owned by Distributing, that are currently in bankruptcy proceedings. Controlled and Distributing anticipate that both of their involvement in these facilities will end upon the conclusion of the bankruptcy proceedings.

Because of these changes to the proposed transaction subsequent to the issuance of the Prior Letter Ruling, the following are modifications to the Prior Letter Ruling:

#### **REPRESENTATIONS**

In connection with the Controlled Distribution and the Capital Contribution, Distributing makes the following representation:

- (q) Except as described above, Distributing, Controlled, and their respective shareholders will each pay their own expenses, if any, incurred in connection with the Controlled Distribution.

#### **RULINGS**

In connection with the Capital Contribution, we rule as follows:

- (1) The Capital Contribution transferred by Distributing to Controlled in constructive exchange for additional shares of Controlled common stock, followed by Distributing's distribution of all of its Controlled common stock will constitute a reorganization within the meaning of § 368(a)(1)(D). Distributing and Controlled will each be a "party to a reorganization" within the meaning of § 368(c).
- (2) No gain or loss will be recognized by Distributing on its transfer of the Capital Contribution to Controlled in constructive exchange for Controlled stock (§ 361(a)).

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(3) No gain or loss will be recognized by Controlled on its receipt of the Capital Contribution in constructive exchange for Controlled stock (§ 1032).

(4) Ruling 13 of the Prior Letter Ruling is changed to read as follows:

No gain or loss will be recognized by Distributing upon the distribution of the Controlled stock to Distributing's shareholders (§ 361(c)(1)).

(5) Ruling 17 of the Prior Letter Ruling is changed to read as follows:

As provided in § 312(h), proper allocation of earnings and profits between Distributing and Controlled will be made in accordance with § 1.312-10.

Based solely on the information and representations submitted in the original and supplemental requests, we rule that the additional information and representation will have no adverse effect on the Prior Letter Ruling and, except as provided above, the Prior Letter Ruling remains in full force and effect.

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.

Each taxpayer affected by the Prior Letter Ruling should attach a copy of the letter and of this supplemental letter to its federal income tax return for the taxable year in which the transactions covered by these letters are completed.

Under a power of attorney on file in this office, copies of this supplemental letter are being sent to the taxpayer and its authorized representative.

Sincerely yours,

Associate Chief Counsel (Corporate)

By: Debra Carlisle

Chief, Branch 5