

Internal Revenue Service

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Department of the Treasury

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CC:CORP:BR2-PLR -127322-00

Date:

September 26, 2001

Legend

Distributing1 =

Distributing2 =

Controlled1 =

Controlled2 =

C2Sub =

A =

Business A =

Business B =

State X =

Country Y =

Continent Z =

Exchange =

Date A =

Date B =

Date C =

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This is in reply to a letter dated November 21, 2000 requesting rulings as to the federal income tax consequences of a proposed transaction. Additional information was provided in letters dated February 26, May 15, June 18, August 10, and August 31, 2001. The pertinent information is substantially as summarized below.

Distributing2, a State X corporation, is the parent of a controlled group that comprises both domestic and foreign corporations. Distributing2 joins with its includible affiliates in filing a consolidated federal income tax return. Distributing2 is directly and indirectly through members of its controlled group engaged in Business A and Business B.

Distributing2 has a single class of common stock outstanding, which is widely held and publicly traded on Exchange. A is the only five percent shareholder of Distributing2.

Distributing1, a Country Y corporation, was formed to effectuate the proposed transaction. Controlled1 has a single class of common stock outstanding, all of which is initially held by Distributing1.

Controlled2, a State X corporation, was formed to effectuate the proposed transaction. Controlled2 has a single class of common stock outstanding, all of which is initially held by Distributing2.

Financial information has been submitted indicating that Business A and Business B have had gross receipts and operating expenses representative of the active conduct of a trade or business for each of the past five years.

In order to resolve certain fit and focus problems that prevent the optimal development of both Business A and Business B; to allow Controlled2 to issue equity on materially enhanced terms to fund increased research and development, acquisitions, and an enlarged marketing and sales infrastructure and to permit key employees of Business B to receive a direct equity interest in its operations, management has determined that it is in the best interests of each of Business A and Business B that they be separate from each other. The taxpayers have provided documentation that management, systemic and other problems exist. Letters from an investment banker have advised Distributing2 that an offering of Controlled2 stock will raise substantially more funds per share than an offering of Distributing2 stock, and that an offering of Controlled2 stock will raise substantially more money if Distributing2 has announced that Controlled 2 will become a stand-alone company than if Controlled2 were to remain a subsidiary of Distributing2.

The taxpayers have also documented that Distributing2 had conducted unsuccessful negotiations for a business combination with another company via a merger or joint venture under terms whereby Distributing2 and its shareholders would

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retain more than fifty percent of the combined company. In addition, the taxpayers indicated their belief that a combination of Business B with another party would be more likely if it were separate from Business A.

To accomplish this separation, the following transaction is proposed (“the Proposed Transaction”):

Internal Distribution

- (I) Distributing1 formed Controlled1 on Date A by transferring a nominal amount of cash for minimum capitalization requirements. Distributing1 immediately prior to step (ii) below will transfer all but an immaterial portion of the assets associated with Business B conducted outside of Continent Z to Controlled1 in exchange for additional stock and the assumption by Controlled1 of certain liabilities associated with the business transferred, and a Country Y tax liability.
- (II) Immediately after the transfer of assets as described in step(I), Distributing1 will distribute all of the stock of Controlled1 to Distributing2.

IPO and Public Distribution

- (III) Distributing2 formed Controlled2 on Date B by transferring a nominal amount of cash for minimum capitalization requirements. Immediately after step (II), Distributing2 will transfer its Continent Z Business B assets and the Controlled1 stock to Controlled2 in exchange for stock and the assumption by Controlled2 of certain liabilities associated with the business transferred.
- (IV) For Country Y tax reasons, Controlled2 will then transfer the Continent Z Business B assets and the Controlled1 stock to its wholly owned subsidiary C2Sub in exchange for C2Sub stock and the assumption by C2Sub of certain liabilities associated with the business transferred.
- (V) Controlled2 will then recapitalize its stock and within 6 months of receiving a ruling from the IRS will sell less than 20 percent of its common stock in an initial public offering (“IPO”).
- (VI) Within 6 months after the IPO, Distributing2 will distribute all of its Controlled2 stock pro rata for each share of Distributing2 stock owned. No fractional shares of Controlled2 stock will be issued to the holders of Distributing2. In lieu thereof, each stockholder of Distributing2 who would otherwise be entitled to receive a fractional share of Controlled2 stock will receive cash. As soon as practical after the distribution, a dividend agent will aggregate and sell all fractional shares of Controlled2 stock in the

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open market at then prevailing market prices, and will distribute the aggregate proceeds (net of fees) pro rata to stockholders entitled thereto.

The following representations have been made concerning the Proposed Transaction:

Internal Distribution

- a) The indebtedness, if any, owed by Controlled1 to Distributing1 after the Internal Distribution will not constitute stock or securities.
- b) No part of the consideration to be distributed by Distributing1 will be received by a shareholder as a creditor, employee, or in any capacity other than that of a shareholder of Distributing1.
- c) The 5 years of financial information submitted on behalf of Distributing1 is representative of the corporation's present operation, and with regard to such corporation, there have been no substantial operational changes since the date of the last financial statements submitted.
- d) The 5 years of financial information submitted with respect to Business B conducted outside of Continent Z is representative of the present operation of such business, and with regard to such business, there have been no substantial operational changes since the date of the last financial statements submitted.
- e) Following the transaction, Distributing1 and Controlled1 will each continue the active conduct of its business, independently and with its separate employees.
- f) The distribution of the stock of Controlled1 is being carried out for the following corporate business purposes: (i) to alleviate certain fit and focus problems that currently obstruct the optimal development of both Business A and B; (ii) to allow Controlled2 to issue equity on materially enhanced terms, and (iii) to permit Business B to issue equity interests in its operations to its key employees. The distribution of the stock of Controlled1 is motivated, in whole or substantial part, by one or more of these corporate business purposes.
- g) Except for the transfer by Distributing2 of the Controlled1 Common stock to Controlled2, there is no plan or intention by Distributing2 to sell, exchange, transfer by gift, or otherwise dispose of its stock in either Distributing1 or Controlled1 after the transaction.

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- h) There is no plan or intention by either Distributing1 or Controlled1, directly or through any subsidiary corporation, to purchase any of its outstanding stock after the transaction, other than through stock purchases meeting the requirements of section 4.05(1)(b) of Revenue Procedure 96-30.
- i) There is no plan or intention to liquidate either Distributing1 or Controlled1, to merge either corporation with any other corporation, or to sell or otherwise dispose of the assets of either corporation after the transaction, except in the ordinary course of business.
- j) The distribution of Controlled1 Common Stock will not be a disqualified distribution within the meaning of Section 355(d)(2) because immediately after the Internal Distribution: (i) no person will hold disqualified stock in Distributing1 that will constitute a 50 percent or greater interest in Distributing1, and (ii) no person will hold disqualified stock in Controlled1 that will constitute a 50 percent or greater interest in Controlled1, within the meaning of Section 355 (d).
- k) The total adjusted bases and the fair market value of the assets transferred to Controlled1 by Distributing1 each equals or exceeds the sum of the liabilities assumed by Controlled1 plus any liabilities to which the transferred assets are subject plus the fair market value of any other property and the amount of any money distributed to its shareholders pursuant to the plan of reorganization or its creditors in connection with the plan of reorganization.
- l) The liabilities assumed in the transaction and the liabilities to which the transferred assets are subject were incurred in the ordinary course of business and are associated with the assets being transferred.
- m) No intercorporate debt will exist between Distributing1 and Controlled1 at the time of, or subsequent to, the Internal Distribution of the Controlled1 Common stock, except for (i) accounts payable incurred in the ordinary course of business and (ii) obligations resulting from agreements for shared services or facilities or pursuant to any indemnification payments.
- n) Payments made in connection with all continuing transactions, if any, between Distributing1 and Controlled1 will be for fair market value based on terms and conditions arrived at by the parties bargaining at arm's length except for certain transactions to be undertaken under (i) transitional services agreements for which the consideration paid either will be based on cost or other terms or (ii) leasing agreements for which the consideration paid will be based on cost or other terms.

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- o) No two parties to the transaction are investment companies as defined in Section 368(a)(2)(F)(iii) and (iv).
- p) The Internal Distribution is not part of a plan or a series of related transactions (within the meaning of Section 355(e)) pursuant to which one or more persons will acquire directly or indirectly stock possessing 50 percent or more of the total combined voting power of all classes of stock entitled to vote of either Distributing1 or Controlled1, or stock possessing 50 percent or more of the total value of all classes of stock of either Distributing1 or Controlled1.

Public Distribution

- q) The indebtedness, if any, owed by Controlled2 to Distributing2 after the Public Distribution will not constitute stock or securities.
- r) No part of the consideration to be distributed by Distributing2 will be received by a shareholder as a creditor, employee, or in any capacity other than that of a shareholder of Distributing2.
- s) The 5 years of financial information submitted on behalf of Distributing2 is representative of the corporation's present operation, and with regard to such corporation, there have been no substantial operational changes since the date of the last financial statements submitted.
- t) The 5 years of financial information submitted with respect to Business B conducted within Continent Z is representative of the present operation of such business, and with regard to such business, there have been no substantial operational changes since the date of the last financial statements submitted.
- u) Immediately after the Public Distribution, at least 90 percent of the fair market value of the gross assets of Controlled2 will consist of stock and securities of a controlled corporation (C2Sub) that is engaged in the active conduct of a trade or business as defined in Section 355(b)(2).
- v) Following the transaction, Distributing2 and C2Sub will each continue the active conduct of business, independently and with its separate employees.
- w) The distribution of the stock of Controlled2 is being carried out for the following corporate business purposes: (i) to alleviate certain fit and focus problems that currently obstruct the optimal development of both Business A and B; (ii) to allow Controlled2 to issue equity on materially enhanced

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terms, and (iii) to permit business B to issue equity interests in its operations to its key employees. The distribution of the stock of Controlled2 is motivated, in whole or substantial part, by one or more of these corporate business purposes.

- x) There is no plan or intention by any shareholder who owns 5 percent or more of the stock of Distributing2, and the management of Distributing2, to its best knowledge, is not aware of any plan or intention on the part of any particular remaining shareholder of Distributing2, to sell, exchange, transfer by gift or otherwise dispose of any stock in either Distributing2 or Controlled2 after the transaction.
- y) There is no plan or intention by either Distributing2 or Controlled2, directly or through any subsidiary corporation, to purchase any of its outstanding stock after the transaction, other than through stock purchases meeting the requirements of section 4.05(1)(b) of Revenue Procedure 96-30.
- z) There is no plan or intention to liquidate either Distributing2 or Controlled2, to merge either corporation with any other corporation, or to sell or otherwise dispose of the assets of either corporation after the transaction, except in the ordinary course of business.
- aa) The distribution of Controlled2 Common Stock will not be a disqualified distribution within the meaning of Section 355(d)(2) because immediately after the Public Distribution: (i) no person will hold disqualified stock in Distributing2 that will constitute a 50 percent or greater interest in Distributing2, and (ii) no person will hold disqualified stock in Controlled2 that will constitute a 50 percent or greater interest in Controlled2, within the meaning of Section 355(d).
- bb) The total adjusted bases and the fair market value of the assets transferred to Controlled2 by Distributing2 each equals or exceeds the sum of the liabilities assumed by Controlled2 plus any liabilities to which the transferred assets are subject plus the fair market value of any other property and the amount of any money distributed to its shareholders pursuant to the plan of reorganization or its creditors in connection with the plan of reorganization.
- cc) The liabilities assumed in the transaction and the liabilities to which the transferred assets are subject were incurred in the ordinary course of business and are associated with the assets being transferred.
- dd) No intercorporate debt will exist between Distributing2 and Controlled2 at

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the time of, or subsequent to, the Public Distribution of the Controlled 2 Common stock, except for (i) accounts payable incurred in the ordinary course of business or (ii) obligations resulting from agreements for shared services or facilities or pursuant to any indemnification payments.

- ee) Immediately before the Public distribution, items of income, gain, loss, deduction, and credit will be taken into account as required by the applicable Intercompany transaction regulations. (See § 1.1502-13 and § 1.1502-14 as in effect before the publication of T.D. 8597, 1995-32 I.R.B. 6, and as currently in effect; §1.1502-13 as published by T.D. 8597.) Further, Distributing2's excess loss account, if any, with respect to the Controlled2 Common Stock will be included in income immediately before the distribution (See § 1.1502-19).
- ff) Payments made in connection with all continuing transactions, if any, between Distributing2 and Controlled2, will be for fair market value based on terms and conditions arrived at by the parties bargaining at arm's length except for certain transactions to be undertaken under (i) transitional services agreements for which the consideration paid either will be based on cost or other terms or (ii) leasing agreements for which the consideration paid will be based on cost or other terms.
- gg) No two parties to the transaction are investment companies as defined in Section 368 (a)(2)(F)(iii)) and (iv).
- hh) The Public Distribution is not part of a plan or a series of related transactions (within the meaning of section 355(e)) pursuant to which one or more persons will acquire directly or indirectly stock possessing 50 percent or more of the total combined voting power of all classes of stock entitled to vote of either Distributing2 or Controlled2, or stock possessing 50 percent or more of the total value of all classes of stock of either Distributing2 or Controlling2.
- ii) The payment of cash in lieu of fractional shares of Controlled2 Common stock, if any, will be undertaken solely for the purposed of saving the expense and inconvenience of issuing and transferring fractional shares and does not represent separately bargained for consideration.

Other Representations

- jj) Neither Distributing1 nor Controlled2 is a foreign corporation.

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- kk) Each of Distributing₁ and Controlled₁ will be a corporation, within the meaning of Section 7701(a)(3), at all times before and immediately after the Internal Distribution.
- ll) Before and after the Internal Distribution, Distributing₁ and Controlled₁ will be controlled foreign corporations ("CFCs") (within the meaning of Section 957(a)), but neither corporation is or will be a passive foreign investment corporation (as defined by Section 1297(a)).
- mm) Neither Distributing₂ nor Controlled₂ has been or will be a US real property holding corporation ("USRPHC") (within the meaning of Section 897(c)(2)) at any time during the five-year period ending on the date of the Public Distribution, and none of Distributing₂, Controlled₂, or C2Sub will be a USRPHC immediately after the Public Distribution.
- nn) Distributing₁ will not transfer any CFCs or any US branch operations of foreign corporations to Controlled₁ as part of its transfer of the assets of Business B held outside of Continent Z to Controlled₁.
- oo) Distributing₂ will not transfer any CFCs other than Controlled₁ or any US branch operations of foreign corporations to Controlled₂ as part of its transfer of the Continent Z Business B to Controlled₂.
- pp) Controlled₂ will transfer no CFCs other than Controlled₁ to C2Sub in its transfer of the Continent Z Business B to C2Sub.
- qq) With respect to each of Distributing₁ and Controlled₁, Distributing₂ will be a Section 1248 shareholder, within the meaning of § 1.367(b)-2(b), immediately before and after the Internal Distribution.
- rr) The notice requirements of § 1.367(b)-1(c)(1) will be met for Distributing₁'s transfer of the assets of Business B held outside of Continent Z to Controlled₁, and for Distributing₁'s distribution of Controlled₁'s Common Stock to Distributing₂.
- ss) Distributing₁'s transfer of the assets of Business B held outside of Continent Z to Controlled₁ in exchange for all of the outstanding stock of Controlled₁ is not an exchange described in § 1.367(b)-4(b)(1)(i), § 1.367(b)-4(b)(2)(i) or § 1.367(b)-4(b)(3).
- tt) None of Distributing₂, Controlled₂, nor C2Sub will transfer property, directly or indirectly, to a foreign corporation in an exchange described in Section 367(a) in the Proposed Transaction.

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Based on the information submitted and representations set forth above, and provided that: (1) Controlled1 and Distributing1 are each a corporation within the meaning of Section 7701 (a)(3), and (2) the requirements of § 1.367(b)-1(c) are met for the Proposed Transaction, we rule as follows on the Proposed Transaction:

Internal Distribution

- 1) The transfer by Distributing1 to Controlled1 of its assets relating to Business B conducted outside of Continent Z in exchange for stock of Controlled1 and Controlled1's assumption of liabilities, followed by the distribution by Distributing1 of all of the stock of Controlled1 to Distributing2, will qualify as a reorganization within the meaning of Section 368(a)(1)(D). Distributing1 and Controlled1 will each be "a party to the reorganization" within the meaning of Section 368(b).
- 2) No gain or loss will be recognized by Distributing1 on the transfer of Business B conducted outside of Continent Z in exchange for Controlled1 Common Stock and Controlled1's assumption of certain liabilities. (Sections 361(a) and 357(a)).
- 3) No gain or loss will be recognized by Controlled1 on the receipt of Business B conducted outside of Continent Z in exchange for Controlled1 Common Stock. (Section 1032(a)).
- 4) The basis of property received by Controlled1 will be the same as the basis of such property in the hands of Distributing1 immediately prior to the transfer of Business B conducted outside of Continent Z to Controlled1. (Section 362(b)).
- 5) The holding period of the property received by Controlled1 will include the period during which Distributing1 held such property. (Section 1223(2)).
- 6) No gain or loss will be recognized by Distributing1 upon the Internal Distribution of all of the stock of Controlled1 to Distributing1's sole shareholder (Distributing2). (Section 361(c)).
- 7) No gain or loss will be recognized by (and no amount shall be includible in the income of) Distributing1's sole shareholder (Distributing2) upon its receipt of the Controlled1 Common Stock in the Internal Distribution. (Section 355(a)).
- 8) The holding period of the Controlled1 Common Stock received by Distributing1's sole shareholder (Distributing2) in the Internal Distribution will include the holding period of its Distributing1 Common Stock with respect to which the Internal Distribution will be made, provided that such shares of Distributing1 Common Stock are held as a capital asset on the date of the Internal Distribution. (Section 1223(1)).

Public Distribution

9) The transfer by Distributing2 to Controlled2 of its assets relating to Business B conducted within Continent Z and the Controlled1 Common Stock in exchange for stock of Controlled2 and Controlled2's assumption of liabilities, followed by the distribution by Distributing2 of all the stock of Controlled2 to Distributing2's shareholders, will qualify as a reorganization within the meaning of Section 368(a)(1)(D). Distributing2 and Controlled2 will each be "a party to the reorganization" within the meaning of Section 368(b).

10) No gain or loss will be recognized by Distributing2 on the transfer of Business B conducted within Continent Z and the Controlled1 Common Stock in exchange for Controlled2 Common Stock and Controlled2's assumption of certain liabilities. (Sections 361(a) and 357(a)).

11) No gain or loss will be recognized by Controlled2 on the receipt of Business B conducted within Continent Z and the Controlled1 Common Stock in exchange for Controlled2 Common Stock. (Section 1032(a)).

12) The basis of the property received by Controlled2 will be the same as the basis of such property in the hands of Distributing2 immediately prior to the transfer of the assets of Business B conducted within Continent Z and the Controlled1 Common Stock to Controlled 2. (Section 362(b)).

13) The holding period of the property received by Controlled2 will include the period during which Distributing2 held such property. (Section 1223(2)).

14) No gain or loss will be recognized by Distributing2 upon the Public Distribution of all of the stock of Controlled2 to Distributing2's shareholders. (Section 361 (c)).

15) No gain or loss will be recognized by (and no amount shall be includible in the income of) Distributing2's shareholders upon their receipt of the Controlled2 Common Stock in the Public Distribution. (Section 355(a)).

16) The holding period of the Controlled2 Common Stock (including fractional shares, if any) received by Distributing2's shareholders in the Public Distribution will include the holding period of the Distributing2 Common Stock with respect to which the Public Distribution will be made, provided that such shares of the Distributing2 Common Stock are held as a capital asset on the date of the Public Distribution. (Section 1223(1)).

17) The payment of cash, if any, in lieu of fractional shares of Controlled2 Common Stock will be treated for federal income tax purposes as if the fractional shares had been distributed as part of the Public Distribution and then had been

sold by the holders. Accordingly, a shareholder will recognize gain or loss equal to the difference between the cash received and the basis of the fractional share as determined under Section 1001. If the Controlled2 Common Stock is held by the shareholder as a capital asset, the gain or loss will be subject to the provisions and limitations of Subchapter P of Chapter 1 of the Code. (Sections 1221 and 1222).

Proposed Transaction-International Rulings

18) Distributing1's transfer of Business B engaged in outside of Continent Z to Controlled1 is an exchange to which § 1.367(b)-1(c) and § 1.367(b)-4(a) apply.

19) No gain or loss will be recognized under Section 367(b) on Distributing1's transfer of Business B conducted outside of Continent Z to Controlled1. (§ 1.367(b)-4(b)).

20) Distributing1 and Controlled1 will be treated as corporations for purposes of Distributing1's distribution of Controlled1's Common Stock to Distributing2. (§ 1.367(b)-1(b)(1)(i) and § 1.367(b)-5(a) and (c)).

21) Distributing1's distribution of Controlled1's Common Stock to Distributing2 in the Internal Distribution is a distribution to which § 1.367(b)-1(c), § 1.367(b)-5(a), § 1.367(b)-5(c) and § 1.367(b)-5(f) apply. If Distributing2's postdistribution amount with respect to Distributing1 or Controlled1 is less than Distributing2's predistribution amount with respect to Distributing1 or Controlled1, then Distributing2's basis in such stock immediately after the distribution must be reduced by the amount of the difference. However, Distributing2's basis in such stock must not be reduced below zero, and to the extent the foregoing reduction would have reduced basis below zero, Distributing2 must instead include such amount in income as a deemed dividend from such corporation. If Distributing2 reduces the basis in the stock of Distributing1 or Controlled1 (or has an income inclusion with respect to such stock), Distributing2 must increase its basis in the stock of the other corporation to the extent provided in § 1.367 (b)-5(c)(4).

22) The earnings and profits of Controlled1 transferred from Distributing2 to Controlled2, to the extent attributable to such stock under § 1.1248-2 or § 1.1248-3 (whichever is applicable), which were accumulated in taxable years of Controlled1 beginning after December 31, 1962, during the period Distributing2 held Controlled1 (or was considered as holding such stock by application of Section 1223) while Controlled1 was a CFC, will be attributable to Controlled1 stock held by Controlled2. (§ 1.1248-1(a)).

23) The earnings and profits of Controlled1 transferred from Controlled2 to C2Sub, to the extent attributable to such stock under § 1.1248-2 or § 1.1248-3 (whichever is applicable) which were accumulated in taxable years of

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Controlled1 beginning after December 31, 1962, during the period Controlled2 held such Controlled1 stock (or was considered as holding such stock by application of section 1223) while Controlled1 was a CFC will be attributable to Controlled1 stock held by C2Sub. (§ 1.1248-1(a)).

24) Distributing2 will recognize no gain or loss under Section 367(e)(1) on its distribution of Controlled2 Common Stock to its shareholders. (§ 1.367(e)-1(c)).

We express no opinion about the federal income tax treatment of this transaction under other provisions of the Code and regulations or about the tax treatment of any conditions existing at the time of, or effects resulting from, the transaction that are not specifically covered by the above rulings. In particular, we express no opinion on the tax treatment of the Proposed Transaction under Section 355(e) of the Code.

Moreover, no opinion is expressed on whether any or all of the above-described foreign corporations are passive foreign investment companies within the meaning of Section 1297(a). If it is determined that any of the above-described foreign corporations are passive foreign investment companies, no opinion is expressed related to the application of Sections 1291 through 1298 to the Proposed Transaction. Specifically, in a transaction in which gain is not recognized, regulations under Section 1291(f) may require gain recognition notwithstanding any other provision of the Code.

The rulings in this letter are based on the facts and representations submitted under penalties of perjury in support of the request. Verification of that information may be required as part of the audit process.

This ruling has no effect on any earlier documents and is directed only to the taxpayer who requested it. Section 6110(k)(3) provides that it may not be used or cited as precedent.

Each taxpayer involved in this transaction should attach a copy of this ruling letter to the taxpayer's federal income tax return for the taxable year in which the transaction is consummated.

In accordance with the power of attorney on file in this office, a copy of this ruling letter is being sent to the taxpayer.

Sincerely yours,
Gerald B. Fleming
Senior Technician Reviewer
Branch 2
Office of Associate Chief Counsel
(Corporate)