

Internal Revenue Service

Department of the Treasury

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Person to Contact:

Telephone Number:

Refer Reply To:
CC:DOM:CORP:1-PLR-113612-99
Date:
March 21, 2000

Re:

Company =

Investor =

Trustee =

LP =

RIC Fund =

Date C =

Business L =

P =

Q =

State X =

Dear

This letter is in reply to a letter from your authorized representatives, dated August 6, 1999, requesting rulings on a transaction completed on Date C and a proposed transaction. Additional information was submitted in a letter dated March 16, 2000. The information submitted for consideration is summarized below.

Company is a publicly held State X corporation that acts as a holding company for a group of direct and indirect, wholly owned subsidiary corporations. Among other things, Company and its subsidiaries are engaged in Business L. Company has only one class of stock outstanding, its common stock.

Company, as the common parent, and its subsidiaries file a consolidated federal income tax return on a calendar year basis as a consolidated group (the Group). The Group has net operating losses carried over to its 1999 taxable year. It is a loss group within the meaning of § 1.1502-91(c)(1)(i). Most of the net operating losses did not arise in separate return limitation years with respect to the Group.

On Date C, Investor purchased P shares of newly issued Company common stock and a warrant to purchase an additional P shares of newly issued Company common stock. Investor became a first tier entity of Company through this cash purchase. Company has not filed a federal income tax return for the tax year that includes Date C.

Prior to Investor's Date C purchase, RIC Fund, Trustee and LP each owned more than five percent of the outstanding Company stock. After Date C, only Investor, Trustee and LP were five percent shareholders of Company.

RIC Fund acquired its shares of Company common stock before the beginning of the three-year period that ends on the day of the submission of this ruling request. Company has represented that RIC Fund has held the same number of shares of Company common stock at all times during such period and until Investor's purchase of Company common stock caused RIC Fund's percentage ownership interest in Company to be reduced below five percent. Company has represented that no shareholder of RIC Fund owns or has ever owned five percent or more of the shares of Company stock by reason of being a shareholder of RIC Fund.

Trustee holds shares of Company for the benefit of the holders of certain claims approved under the terms of a reorganization plan involving Company and certain of its subsidiaries.

LP is a partnership for federal income tax purposes. LP acquired its shares of Company common stock before the beginning of the three-year period that ends on the day of the submission of this letter. One or more partners may have acquired or

transferred their interests in LP during the same period, although Company has represented that none of the acquisitions or transfers caused a “testing date” to occur within the meaning of § 1.382-2(a)(4). Moreover, no partner of LP owns or has ever owned five percent or more of the shares of Company common stock by reason of being a partner of LP.

By the terms of its partnership agreement, LP was due to dissolve early in 1999. However, because of uncertainty about how a dissolution might affect a section 382 ownership change determination, LP has not been permitted to distribute the shares it owns and dissolve.

Company has represented it is not aware of any binding commitment that will require any of LP’s partners to dispose of any Company shares on receipt (were LP to dissolve). Furthermore, Company is not aware that any two or more partners of LP have or will have any formal or informal understanding among themselves to make an additional acquisition of shares of Company common stock or will have such an understanding at the time of the dissolution of LP (were it to dissolve).

The remaining Company shares are held by PUBLIC GROUP, a direct public group within the meaning of § 1.382-2T(j)(1)(iv) and § 1.382-2T(j)(2)(ii) .

Company’s corporate charter contains restrictions on the transferability of shares of its common stock (the Charter Transfer Restrictions). In general, the charter restricts the ability of any record or beneficial, direct or indirect, holder of five percent or more of the shares of Company common stock (however acquired, including acquisition through exercise of rights to purchase shares granted by Company) to sell, transfer, pledge, encumber, or otherwise dispose of any shares owned by it, or to purchase, acquire, or otherwise receive any additional shares of common stock. The charter also restricts the ability of others to become 5-percent shareholders. These restrictions will apply unless Company and its tax counsel determine that such transaction will not result in an unreasonable risk of an ownership change. The Company stock certificates contain a notation as to the existence of the Charter Transfer Restrictions.

Company intends to pursue strategic acquisitions of assets and target corporations in order to revitalize its historic business and to expand into new businesses (the Expansion Plan). Company has submitted documentation showing it is actively pursuing the Expansion Plan.

Company intends to create a new series of warrants (the ABC Warrants) to efficiently and flexibly finance the Expansion Plan by adopting a warrant plan (the ABC Warrant Plan). The ABC Warrant Plan will incorporate the following provisions:

- (i) Company will have the power to issue a series of up to three call notices (an “A” call, a “B” call, or a “C” call). Each call notice will set the terms and conditions

under which a shareholder can exercise the ABC Warrant and acquire additional Company stock.

- (ii) One ABC Warrant will be “stapled” to each share of Company common stock such that a transfer of ownership of the share will also transfer ownership of the ABC Warrant with respect to which it is issued.
- (iii) Each call notice will provide an ABC Warrant holder with a reasonable period of time in which to exercise its ABC Warrants. All exercises related to a particular call will be effective as of a single date. All ABC Warrant holders will be permitted to exercise at the same price for a particular call.
- (iv) If Company issues a call notice, an ABC Warrant holder will be permitted to tender solely cash to Company for the requisite number of shares of Company common stock with additional stapled ABC Warrants as described below. An ABC Warrant holder will be free to exercise all, or any portion, of the ABC Warrants owned by such warrant holder which will be subject to the particular call notice. An ABC Warrant holder will be free to decline to participate in an earlier call without waiving rights to participate in later calls. However, an ABC Warrant holder forfeits rights to participate in a particular call with respect to a particular call once the time for electing to participate has expired. Also, Company will reserve the right to issue simultaneous calls (A and B, B and C, or A, B, and C).
- (v) Any share of Company common stock issued either pursuant to the exercise of any part of an ABC Warrant or otherwise will have the same material terms including the same rights regarding any unexpired part of the ABC Warrants as the stock upon which the original ABC Warrant was issued. For example, any stock issued as the result of an A call will have stapled rights allowing its holder to participate in future B and C calls. Any stock issued as the result of an AB or a B call will have stapled rights allowing its holder to participate in any future C call. Any stock issued as the result of an ABC, BC or C call will not have any ABC Warrant rights attached.
- (vi) Company will establish Escrow Protection Mechanics to guard against an unreasonable risk of an ownership change as a result of the exercise of any part of an ABC Warrant. The Escrow Protection Mechanics will be applied in conjunction with the Charter Transfer Restrictions and will provide Company with a means to help it to enforce those restrictions with regard to an exercise of the ABC Warrants. Under the Escrow Protection Mechanics, Company will provide its electing ABC Warrant holders with sufficient information to permit each ABC Warrant holder to determine whether its exercise would result in its becoming a 5-percent shareholder. If exercise would result in an ABC Warrant holder becoming a 5-percent shareholder, the ABC Warrant holder would be obligated

to inform Company by a date certain. The escrow agent for Company may refuse to honor the ABC Warrant holder's exercise to the extent such exercise might result in ownership of five percent or more of the shares of Company stock.

- (vii) Company will also determine the appropriate level of participation by any ABC Warrant holder that it knows to be a record or beneficial, direct or indirect, holder of five percent or more of the shares of Company common stock, in accordance with its Charter Transfer Restrictions and the Escrow Protection Mechanics. Such ABC Warrant holders may be restricted from exercising all or a portion of their ABC Warrants.

Company intends to issue the A call of the ABC Warrants within one year of the date of this ruling letter at a price discounted from a specified closing trading price for a share of Company stock. Furthermore, Company intends to issue the B call and C call of the ABC Warrants within two years of the date of the issuance of the A call, but not later than three years from the date of this ruling letter. Company represents that the terms of the B call and C call will be substantially similar to the terms of the A call.

Company has received an opinion from State X counsel that the Charter Transfer Restrictions are valid and binding on all present and future holders of Company stock and enforceable under State X law. Furthermore, State X counsel has reviewed a draft of the Escrow Protection Mechanics and, upon adoption of the ABC Warrant Agreement, is prepared to issue an opinion the Escrow Protection Mechanics are enforceable under State X law.

Company submitted the following representations:

- (a) The Charter Transfer Restrictions on transferability that apply to the shares of Company common stock and the similar restrictions in the Escrow Protection Mechanics that will apply to the call notices on any part of the ABC Warrants are or will be legal, valid, binding, and enforceable against present and future holders of the shares or warrants under applicable state law, except as such enforceability may be limited by bankruptcy and equitable principles. Company intends to vigorously challenge and pursue by all available means any attempts to violate the Charter Transfer Restrictions or Escrow Protection Mechanics.
- (b) No ABC Warrant (or any part thereof) will provide to its holder, or to a person related to its holder, with any right to participate in management of Company, or any right to influence management of Company, or with any other rights that ordinarily would be afforded to shareholders of Company.

- (c) The amount of shares of Company common stock to be issued as a result of a call notice on any part of the ABC Warrants will likely exceed the small issuance limitation set forth in § 1.382-3(j)(2)(iii). The call notice will provide a ABC Warrant holder with a reasonable period of time to decide whether to elect to exercise the ABC Warrant. In this way, Company intends to assure that, prior to exercise, no ABC Warrant holder (alone or in combination) will have rights, powers, or control greater than any other ABC Warrant holder over (1) the attributes of ownership of the stock that is to be received upon the exercise of the ABC Warrant, (2) the control over Company, or (3) the creation of income, as those rights to ownership, control, and income are described in § 1.382-4(d).
- (d) LP will continue to own (and its public group should be treated as continuing to own) the same number of shares that it owns on the day of the submission of this letter until the day that the IRS closes out its consideration of this ruling request (through issuance of a private letter ruling or otherwise).

Based solely on the information submitted and the representations set forth above, we hold as follows:

1. The reduction of RIC Fund's ownership interest in Company to less than five percent as a result of Investor's purchase of Company stock will cause the public group of RIC Fund to be aggregated into PUBLIC GROUP at the close of the testing date on which such reduction takes place and on all subsequent testing dates on which the public group of the RIC Fund continues to be treated as owning less than five percent of Company common stock. Treas. Reg. § 1.382-2T(j)(1)(iv). Because Company will have "actual knowledge" that RIC Fund and the public group of RIC Fund will have owned all of the aggregated shares at all times since before the beginning of the testing period ending on the testing date on which such reduction occurs, Company will treat the resulting increase in the number of shares owned by PUBLIC GROUP, as if such shares had been owned by PUBLIC GROUP at all times since before the beginning of such testing period.
2. Immediately after the reduction in percentage ownership of the RIC Fund referred to in Ruling 1, and for as long as the RIC Fund continues to own a direct ownership interest in Company of less than five percent, the segregation rules will not apply to any disposition of shares of Company common stock by RIC Fund. Treas. Reg. § 1.382-2T(j)(3)(i). The public trading rule of Treas.

Reg. § 1.382-2T(e)(1)(ii) will apply to any disposition or acquisition of shares by the RIC Fund that were aggregated into PUBLIC GROUP as long as the RIC Fund continues to own (directly or indirectly) less than five percent of Company.

3. Because Treas. Reg. § 1.382-2T(h)(2)(i) treats any Company common stock owned by LP as being owned by LP's partners, the distribution by LP of its shares of Company common stock to its partners in proportion to their partnership interests will not be considered an "owner shift" within the meaning of Treas. Reg. § 1.382-2T(e)(1)(i) and will not cause a "testing date" to occur within the meaning of Treas. Reg. § 1.382-2(a)(4).
4. A distribution of shares of Company common stock by the LP to its partners in proportion to their partnership interests will result in a segregation event with respect to the distributed shares of Company common stock. Treas. Reg. § 1.382-2T(j)(3). Immediately after receiving the distribution of shares of Company common stock from LP, the distributee partners of LP will be treated as public shareholders (within the meaning of Treas. Reg. § 1.382-2T(f)(11)) and will be members of a direct public group of Company (PUBLIC GROUP II) that is separate from PUBLIC GROUP.
5. Because Company will have "actual knowledge" that LP and the public group of LP will have owned all of the distributed shares at all times since before the three-year period ending on the day of the distribution, Company will treat the resulting increase in the number of shares owned by PUBLIC GROUP II as if such shares had been owned by PUBLIC GROUP II at all times since before the beginning of such three year period ending on the day of the distribution. The public trading rule of Treas. Reg. § 1.382-2T(e)(1)(ii) will apply to any disposition or acquisition of shares of Company common stock by any distributee partner who remains a public shareholder at the time of such disposition or acquisition so that a disposition of such shares will not result in a segregation event.

Based solely on the information submitted and the representations set forth above, we hold as follows with respect to the proposed issuance of the ABC Warrants, provided that (i) Company issues the A call of the ABC Warrants within one year of the date of this ruling letter, as described above, and (ii) if Company issues the B call of the ABC Warrants, such issuance will occur within two years of the date of the issuance of the A call, as described above, and (iii) if Company issues the C call of the ABC

Warrants, such issuance will occur within two years of the date of the issuance of the A call, as described above, and (iv) prior to issuing any of the ABC Warrant calls, Company obtains an opinion from State X counsel that the Escrow Protection Mechanics are valid and binding on all of the then current and future holders of Company stock and enforceable under State X law:

6. No ABC Warrant or any part thereof (the A call, the B call, or the C call) will constitute an option within the meaning of Treas. Reg. § 1.382-4(d)(9) at any time prior to the time that a call notice is issued with respect to such part. Therefore, no ABC Warrant or any part thereof will be subject to the option attribution rules of Treas. Reg. § 1.382-4(d), nor will any ABC Warrant or any part thereof otherwise have any effect upon the computation of an ownership change prior to the time that a call notice is issued with respect to such part.
7. The issuance by Company of a call notice with regard to any part of the ABC Warrant will result in such part being treated as an option within the meaning of Treas. Reg. § 1.382-4(d), which option will be treated as issued at the time of the issuance of such call notice. For this purpose, however, the option will only consist of the part or parts of an ABC Warrant to which the call notice applies. Thus, for example, when Company issues an A call, an option will be treated as issued only with respect to the stock that may be acquired upon exercise of the A call (but not stock that may be acquired if Company were to subsequently issue a B call, a C call or a BC call). Similarly, if Company thereafter issues a B call, an option will be treated as issued only with respect to the stock that may be acquired on exercise of the B call.
8. An acquisition of shares of Company common stock under the terms of an option described in Ruling 7 will be an acquisition solely for cash for purposes of Treas. Reg. § 1.382-3(j)(3).
9. No option described in Ruling 7 will be deemed exercised at the time of its issuance or transfer under Treas. Reg. 1.382-4(d)(2).
10. Company will have “actual knowledge” for all purposes of section 382 that are relevant to the determination of whether an ownership change occurs that an option described in Ruling 7 issued to PUBLIC GROUP and to any other direct public group that might arise prior to such issuance will continue to be owned by PUBLIC GROUP and such other group (if any) to the extent that such option is not subsequently transferred to or acquired by any person

(including a 5-percent shareholder, an individual, a first tier entity or a higher tier entity) whose ownership interest would have to be separately determined and, therefore, would not be included as part of a direct public group of Company (a "Separately Determined Shareholder").

11. Company will have "actual knowledge" for all purposes of section 382 that are relevant to the determination of whether an ownership change occurs that the shares of its common stock issued as a result of the exercise of an option described in Ruling 7 must have been issued to PUBLIC GROUP to the extent that such shares are not issued to any person (including a 5-percent shareholder, an individual, a first tier entity or a higher tier entity) whose ownership interest would have to be separately determined and, therefore, would not be included as part of a direct public group of Company (a "Separately Determined Shareholder"). If Company has more than one direct public group immediately prior to such issuance, Company will have actual knowledge that any shares not issued to a Separately Determined Shareholder will be issued to each such direct public group pro rata based upon the relative percentage ownership interests of each such direct public group in Company immediately prior to the issuance.
12. Provided that the Escrow Protection Mechanics and the charter restrictions on the transferability of shares of Company common stock are enforceable and enforced pursuant to their terms, a person who purports to acquire shares of Company common stock through the exercise of ABC Warrants will not be treated as having exercised the ABC Warrants and acquiring direct ownership of the underlying stock to the extent that such exercise of the ABC Warrants and exercise of shares would violate the provisions of the Escrow Protection Mechanics or the charter of the Escrow Protection Mechanics or the charter restrictions on the transferability of Company's common stock.

We express no opinion about the tax treatment of the transaction under other provisions of the Internal Revenue Code or the 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.

Temporary or final regulations pertaining to one or more of the issues addressed in this ruling letter have not yet been adopted. Therefore, this ruling will be modified or revoked if adopted temporary or final regulations are inconsistent with any conclusions in the ruling. See, section 12.04 of Rev. Proc. 2000-1, 2000-1 I.R.B. 4, 46 (January 3,

2000). However, when the criteria in section 12.05 of Rev. Proc. 2000-1 are satisfied, a ruling is not revoked or modified retroactively except in rare or unusual circumstances.

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

A copy of this letter should be attached to the federal income tax returns of the taxpayers involved for the taxable year in which the transaction covered by this letter ruling is consummated.

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

Sincerely yours,
Assistant Chief Counsel (Corporate)

By: _____
Mark S. Jennings
Acting Chief, Branch 1