

Internal Revenue Service

Number: **200622011**

Release Date: 6/2/2006

Index Number: 382.12-06

Department of the Treasury

Washington, DC 20224

Third Party Communication: None

Date of Communication: Not Applicable

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PLR-128614-05

Date:

February 02, 2006

Legend:

Taxpayer =

X =

Y =

Z =

Date 1 =

Date 2 =

Date 3 =

Date 4 =

a =

\$b =

c =

d =

e =

f =

g =

h =

i =

i =

\$k =

\$l =

\$m =

n =

o =

\$p =

Dear :

This letter responds to your authorized representative's letter dated May 23, 2005, which requests a ruling on the application of section 382(l)(3)(C) to Taxpayer's transactions. The material information submitted for consideration is summarized below.

SUMMARY OF FACTS

Taxpayer is the parent of an affiliated group that files a consolidated return for federal income tax purposes. As of Date 1, Taxpayer's group was a loss group within the meaning of Treas. Reg. § 1.1502-91(c)(1)(i). Taxpayer currently has Voting Common Stock and Non-Voting Common Stock (collectively, the "Common Stock"), Series 1-A Warrants and Series 2-A Warrants, and one class of preferred stock (the "Series A Preferred Stock") outstanding. During the time that these instruments (or their predecessors) have been outstanding, Taxpayer's Common Stock and Series 1-A Warrants have declined in value relative to the value of the Series A Preferred Stock.

As a result, the Series A Preferred Stock shareholders' percentage of the outstanding equity value has increased without regard to any actual owner shifts involving Taxpayer's stock.

As of Date 2, Taxpayer had a shares of Common Stock issued and outstanding. The Common Stock per share market price at the close of the day was \$b. On Date 3 (the day after Date 2), Taxpayer issued and sold, in the aggregate, c shares of Series A Preferred Stock, d Series 1-A Warrants, e Series 2-A Warrants, f shares of Series B preferred stock, g Series 1-B Warrants and h Series 2-B Warrants to entities X, Y and Z. The Series 1-A Warrants and the Series 1-B Warrants were exercisable at any time for i shares of Voting Common Stock and j shares of Non-Voting Common Stock, respectively, at an exercise price of \$k if the trading price of the Common Stock was equal to or greater than \$l. The Common Stock per share market price at the close of the day was \$m. Because the Series 1-A Warrants and Series 1-B Warrants issued on that date were deep-in-the-money when issued, Taxpayer has treated them as stock for purposes of the § 382 owner shift analysis. On Date 3, as a result of the issuances that occurred on Date 3 and other equity changes during the testing period (as defined in section 382(i) and Treas. Reg. § 1.382-2T(d)), Taxpayer had an ownership change within the meaning of section 382(g)(1).

Following Date 3, testing dates (as defined in Treas. Reg. § 1.382-2(a)(4)) arose as a result of the following types of transactions: (1) the acquisition of various company assets and/or stock through the issuance of Common Stock; (2) the issuance of Common Stock through the exercise of options; (3) the issuance of Series A Preferred Stock in lieu of cash dividends; (4) the exercise of Series 1-A Warrants; (5) the additional issuance of Series 1-A Warrants; (6) the issuance of Non-Voting Common Stock; (7) acquisitions of Common Stock by a five-percent shareholder; (8) sales of Common Stock by a five-percent shareholder; (9) offerings of Common Stock; (10) redemptions of Common Stock, and (11) the issuance of Common Stock in settlement of a lawsuit. Also following Date 3, Taxpayer underwent two recapitalizations. In the first recapitalization, Taxpayer converted all of its Series B preferred stock, Series 1-B Warrants, and Series 2-B Warrants into an equal number of Series A Preferred Stock, Series 1-A Warrants and Series 2-A Warrants (the "First Recapitalization"). In the second recapitalization, Taxpayer converted every n shares of its Common Stock into one share of Common Stock (the "Second Recapitalization").

On Date 4, Taxpayer completed an issuance of o shares of Common Stock for \$p in a private placement to a group of institutional investors (the "Completed Issuance"). The Completed Issuance was intended to raise additional equity financing. The time period beginning after Date 3 and continuing through Date 4 is referred to as the "Analysis Period."

REPRESENTATIONS

The following representations have been made in connection with the rulings requested:

- (a) On Date 3, Taxpayer experienced an ownership change within the meaning of section 382(g)(1).
- (b) No share of Non-Voting Common Stock, the Series 1-A Warrants, or Series A Preferred Stock has been redeemed during the Analysis Period.
- (c) Neither the Common Stock nor the Series A Preferred Stock meet the description of stock described in section 1504(a)(4). Accordingly, the Common Stock and the Series A Preferred Stock constitute stock for section 382 purposes.
- (d) The fair market value of the instruments exchanged in the First Recapitalization and the Second Recapitalization were, in each instance, equal to the fair market value of the stock received in exchange therefor.
- (e) To the best of the knowledge of Taxpayer, there have been no material changes in the ultimate beneficial ownership of entities X, Y and Z since Date 3 and no such changes are anticipated.
- (f) To the best of the knowledge of the Taxpayer, Taxpayer has not made any distributions to its shareholders or security holders of the stock and/or securities of any subsidiary corporation.
- (g) To the best of the knowledge of the Taxpayer, there have been no distributions to the shareholders or security holders other than in the normal course of business.

RULINGS

Based solely on the information submitted and the representations as set forth above, we hold that the Taxpayer may apply the following principles during the Analysis Period and on future testing dates in which the testing period includes any portion of the Analysis Period:

- 1) On any testing date, in determining the ownership percentage of any five percent shareholder, the value of such shareholder's stock, relative to the value of all other stock of the corporation, shall be considered to remain constant since the date that shareholder acquired the stock; and the value of such shareholder's stock relative to the value of all other stock of the corporation issued subsequent to such acquisition date shall also be considered to remain constant since that subsequent date.

- 2) In applying the methodology described above, a value-for-value recapitalization of stock of the corporation for other stock of the corporation (including the First Recapitalization and the Second Recapitalization) shall be disregarded, and the exchanging shareholder shall be considered to have acquired such newly issued stock as of the date it acquired the stock exchanged therefor.

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. Further, in the event that any shareholder acquired stock prior to the beginning of the testing period, no opinion is expressed regarding whether the principle described above should apply to factor out the effect of fluctuations in value of such stock relative to the value of other stock that occur prior to the testing period.

The rulings contained in this letter are based upon information and representations submitted by the taxpayer and accompanied by a penalty of perjury statement executed by an appropriate party. Although this office has not verified any of the material submitted in support of the request for rulings, it is subject to verification on examination.

This ruling is directed only to the taxpayer(s) requesting 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.

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

Sincerely,

Mark S. Jennings
Branch Chief, Branch 1
(Corporate)