

## Internal Revenue Service

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Department of the Treasury

Washington, DC 20224

Third Party Communication: None

Date of Communication: Not Applicable

Person To Contact:

, ID No.

Telephone Number:

Refer Reply To:

CC:ITA:B06

PLR-102680-09

Date:

January 21, 2009

TY:

Legend

Taxpayer =

Companies =

Bank =

LLC =

Trust =

Assets =

Lending Corporation =

Date 1 =

Date 2 =

Credit Agreement =

Asset Purchase Agreement =

Percent 1 = %

Percent 2 = %

Amount 1 = \$

Amount 2 = \$

Fraction 1 =

Fraction 2 =

Dear :

This is in response to your ruling request on behalf of Taxpayer dated December 5, 2008. You requested rulings that the transfer of certain Assets from Companies to LLC will be treated as a sale or exchange under section 1001; LLC will be disregarded as an entity separate from the Bank under Treasury Regulations section 301.7701-

3(b)(1)(ii); and any loss arising from the sale of the Assets by Companies to LLC in the manner contemplated will not be subject to loss disallowance pursuant to section 267(a)(1) or to loss deferral pursuant to section 267(f)(2).

## FACTS

The United States Treasury has undertaken steps to stabilize and maintain liquidity and order in financial markets, including steps to preserve the viability of certain financial institutions.

Taxpayer and its includible subsidiaries join in the filing of a consolidated federal income tax return. Taxpayer is the common parent corporation of the group which includes Companies. Companies owned or own undivided beneficial interests in Assets that have declined in value from the price for which they were acquired and currently impair the Taxpayer and the Companies' ability to continue normal business operations, which in turn has adversely affected financial markets worldwide. The Companies acquired the Assets through participation in a securities lending operation managed by their affiliate, Lending Corporation. The Assets have been held in the name of Lending Corporation, as agent of Companies.

Financial accounting principles require Companies, as owners of the Assets, to include the Assets in their financial statements, and inclusion of the Assets in Companies' financial statements is a substantial impediment to the financial rehabilitation and recovery of Companies. Companies accordingly intend to sell the Assets in order to remove the Assets from their financial accounting statements.

Bank, which is an instrumentality of the United States Government (described in section 501(c)(1)), as the lender, and Taxpayer, as the borrower, are parties to a Credit Agreement dated Date 1 and amended from time to time, pursuant to which Trust, a trust to be established for the benefit of the United States Treasury, is entitled to receive preferred stock convertible into Percent 1 of the outstanding shares of Taxpayer (by vote and value). Additionally, on Date 2, Taxpayer issued to the United States Treasury warrants for Percent 2 of the outstanding shares of Taxpayer (by vote and value).

All material rights to control and to receive the income of LLC from the Assets are or will be governed by the Credit Agreement and the Asset Purchase Agreement. As of the date hereof, Trust has not been finalized. When finalized, under applicable federal income tax principles, the property and income of Trust will be beneficially owned by the United States Government, either through Bank or the United States Treasury.

Bank, or its agents or attorneys, has established LLC to buy the Assets. The membership interests in LLC are, or will be, owned in their entirety by Bank. LLC will be a special purpose LLC established for the purpose of holding and disposing of the Assets. The Assets and income therefrom will be the only material assets of LLC. LLC

has not, and will not, make an election under section 7701 to be treated as an association taxable as a corporation.

LLC has entered or will enter into a secured credit agreement with Bank pursuant to which Bank has lent or will lend to LLC approximately Amount 1 in cash (the "Senior Loan"). LLC immediately used or will use the proceeds of the Senior Loan to purchase the Assets from Companies (acting in their own name and through their agent, Lending Corporation) under the terms of the Asset Purchase Agreement among Companies, Lending Corporation, and LLC. Under the Credit Agreement, Bank is or will be entitled to receive from LLC, as payments are made on the Assets: (i) an amount equal to the Senior Loan, (ii) compounded interest on the unpaid portion of the Senior Loan at LIBOR plus a spread of a fixed number of basis points, and (iii) after the Companies have received their portion of the Amount 2 deferred purchase price (plus interest), as described below, Fraction 1 of the remaining cash-flow of the Assets (less expenses). Under the terms of the Credit Agreement and the Limited Liability Company Agreement of LLC, Bank is or will be entitled to exercise, directly or through agents appointed by it, control over the operation of LLC.

Under the Asset Purchase Agreement, the aggregate purchase price paid by LLC consisted or will consist of: (i) cash in the amount of the Senior Loan and, after LLC has repaid the Senior Loan plus interest, (ii) a deferred purchase price of Amount 2, to be paid by LLC as payments are received on the Assets, (iii) interest on the unpaid portion of the Amount 2 at LIBOR plus a spread of a fixed number of basis points, which is or will be greater than the spread received by Bank, described above, and (iv) after the Amount 2 has been paid with interest to Companies, a contingent purchase price of Fraction 2 of the remaining cash-flow on the Assets (less expenses).

#### LAW

Section 1001(a) provides that the gain from the sale or other disposition of property shall be the excess of the amount realized therefrom over the adjusted basis provided in section 1011 for determining gain, and the loss shall be the excess of the adjusted basis provided in such section for determining loss over the amount realized.

Treasury Regulations section 301.7701-3(b)(1)(ii) provides, in relevant part, that unless an entity elects otherwise, a domestic eligible entity is disregarded as an entity separate from its owner if it has a single owner.

Section 267(a)(1) provides, in part, that no deduction shall be allowed in respect of any loss from the sale or exchange of property, directly or indirectly, between persons specified in any of the paragraphs of section 267(b). Section 267(b)(3) specifies that two corporations which are members of the same controlled group (as defined in section 267(f)) are persons to which section 267(a)(1) refers. Section 267(b) describes other relationships that are covered by section 267(a).

Section 267(b)(3) provides that two corporations are related for purposes of section 267 only if they are members of the same controlled group (as defined in section 267(f)).

Section 267(d) provides, in part, that in the case loss from the sale or exchange of property is disallowed under section 267(a)(1), any gain to the transferee of the property is recognized only to the extent it exceeds the disallowed loss.

Section 267(f)(1) provides that the term “controlled group” has the meaning given to such term by section 1563(a), except that “more than 50 percent” shall be substituted for “at least 80 percent” each place it appears in section 1563(a).

Section 267(f)(2) provides that in the case of any loss from the sale or exchange of property which is between members of the same controlled group and to which section 267(a)(1) applies (determined without regard to section 267(f)(2)), (A) sections 267(a)(1) and (d) shall not apply to such loss, but (B) such loss shall be deferred until the property is transferred outside such controlled group and there would be recognition of loss under consolidated return principles or until such other time as may be prescribed by regulations.

Section 1563(a) provides that certain groups of corporations, as described therein, constitute a “controlled group of corporations”. Sections 1563(a)(1), (2), (3), and (4) provide certain requirements for a group of corporations to constitute a controlled group.

## ANALYSIS

The terms of the Asset Purchase Agreement result in a contingent price sale.

The sole membership interest in LLC is owned by Bank, resulting in LLC being disregarded as an entity separate from its owner, Bank. Treasury Regulations section 301.7701-3(b)(1)(ii). Because LLC is disregarded as an entity separate from Bank, the transfer of the Assets from Companies to LLC is treated, for federal income tax purposes, as a transfer of the Assets from Companies to Bank.

Taxpayer and Bank are not members of a controlled group for purposes of section 267. Percent 1 of the outstanding shares of Taxpayer is owned for federal income tax purposes by the United States Treasury or an instrumentality of the United States Government. Neither the United States Treasury nor Bank, as an instrumentality of the United States Government described in section 501(c)(1), can be a member of a controlled group for purposes of section 267. Additionally, Companies and Bank do not have a relationship otherwise described in section 267(b).

Based on the facts described above:

- 1) The transfer of the Assets from Companies to LLC will be treated as a sale or exchange under section 1001;
- 2) LLC will be disregarded as an entity separate from Bank under Treasury Regulations section 301.7701-3(b)(1)(ii);
- 3) Any loss arising from the sale of the Assets by Companies to LLC in the manner contemplated above will not be subject to loss disallowance pursuant to section 267(a)(1) or to loss deferral pursuant to section 267(f)(2). This determination is made regardless of whether Bank or the United States Treasury is properly treated as the owner of the property and income of Trust for federal income tax purposes.

#### PROCEDURAL STATEMENTS

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. While this office has not verified any of the material submitted in support of the request for rulings, it is subject to verification on examination.

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, including the amount of any loss arising from the sale of the Assets by Companies to LLC.

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.

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

A copy of this letter must be attached to any income tax return to which it is relevant. Alternatively, taxpayers filing their returns electronically may satisfy this requirement by attaching a statement to their return that provides the date and control number of the letter ruling.

Sincerely,

Andrew James Keyso, Jr.  
Deputy Associate Chief Counsel

