

Internal Revenue Service

Number: **200511008**

Release Date: 3/18/05

Index Number: 382.12-06

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:CORP:B01

PLR-146813-04

Date:

December 06, 2004

Legend:

Taxpayer =

Preferred Shareholders =

Date 1 =

Date 2 =

Date 3 =

Date 4 =

a =

\$b =

c =

\$d =

\$e =

f =

\$g =

\$h =

i =

Dear _____ :

This letter responds to your letter dated August 31, 2004, which requests a ruling on the application of section 382(l)(3)(C) to Taxpayer. Additional information was received in a letter dated October 20, 2004. The material information submitted for consideration is summarized below.

SUMMARY OF FACTS

During the time period described below, Taxpayer had one class of Common Stock and one class of Preferred Stock outstanding. During this period, Taxpayer's Common Stock declined in value relative to the value of its Preferred Stock. As a result, the Preferred Shareholders' percentage of the outstanding equity value increased although their actual Preferred Stock ownership did not change.

Immediately prior to Date 1, Taxpayer had a shares of Common Stock issued and outstanding. The Common Stock per share market price at the close of Date 1 was \$b.

On the same date, Taxpayer issued c shares of Preferred Stock to the Preferred Shareholders for an aggregate purchase price of \$d. The Preferred Stock was convertible at any time into Common Stock at a conversion price of \$e per share, which would have resulted in the issuance of f shares of Common Stock if all of the Preferred Stock had been converted. Prior to Date 1 no shares of Preferred Stock were outstanding.

Also on Date 1, the Preferred Shareholders received an Option to purchase approximately \$g of additional Preferred Stock. The Option subsequently expired unexercised.

Within a period of time following Date 1, Taxpayer's business began to deteriorate. As a result, the market price of the Common Stock also declined, falling to \$h per share on Date 2.

On Date 3, Taxpayer filed for relief under chapter 11 of the United States Code. On Date 4, Taxpayer emerged from bankruptcy under a plan, which resulted in the cancellation of its existing Common Stock and Preferred Stock, and the distribution of most of its new common stock to creditors and a new investor. On Date 4, Taxpayer experienced an ownership change within the meaning of section 382(g)(1).

During the period beginning with Date 1 and ending immediately before Date 4 (the "Analysis Period"), Taxpayer issued an aggregate of i additional shares of Common Stock. In addition to the testing dates resulting from these issuances, other testing dates occurred during the Analysis Period from purchases and sales of Common Stock by 5-percent shareholders. Because shares of the Preferred Stock were not publicly traded, Taxpayer has estimated their value on testing dates during the Analysis Period.

REPRESENTATIONS

The following representations have been made regarding ownership of Taxpayer's equity during the Analysis Period:

- (a) Taxpayer's only classes of outstanding stock were the Common Stock and the Preferred stock.
- (b) No shares of Common Stock or Preferred Stock were redeemed.
- (c) The Preferred Stock did not meet the definition of stock described in section 1504(a)(4). Accordingly, the Preferred Stock constituted stock for section 382 purposes.
- (d) Taxpayer has no actual knowledge of any significant change in the ultimate beneficial ownership of the Preferred Shareholders.
- (e) Taxpayer did not make any distributions to shareholders.
- (f) Other than the shares issued to the Preferred Shareholders on Date 1, no Preferred Stock was issued.
- (g) Based on the existence or absence of applicable public filings with the Securities and Exchange Commission: (i) the Preferred Shareholders did not purchase or sell any shares of Preferred stock after Date 1; (ii) the Preferred Shareholders did not own any Common Stock; and, (iii) no direct or indirect owner of the Preferred Shareholders owned, by reason of owning a direct or indirect interest in the Preferred Shareholders, a 5-percent or greater indirect interest in Taxpayer's stock.
- (h) The Option was not issued with a principal purpose of avoiding or ameliorating the impact of an ownership change. Accordingly, the Option is not treated as exercised for purposes of determining whether an ownership change occurs.

RULINGS

Based solely on the information submitted and the representations as set forth above, for purposes of factoring out changes in proportionate ownership of Taxpayer's stock which are attributable solely to fluctuations in the relative fair market values of different classes of stock under section 382(l)(3)(C), we hold that Taxpayer may apply the following principle with respect to all testing dates that occurred during the Analysis Period:

On any testing date, in determining the ownership percentage of any 5% shareholder, the value of such shareholder's stock, relative to the value of all other stock of Taxpayer, 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 Taxpayer issued subsequent to such acquisition date shall also be considered to remain constant since that subsequent date.

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. 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.

This ruling is directed only to the taxpayer(s) requesting it. Section 6110(k)(3) of the Code 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 representatives.

Sincerely,

Mark S. Jennings

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

cc: