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From:
Sent: Wednesday, July 14, 2010 4:28:21 PM
To:
Cc:
Subject: Memo

Dear

We have reviewed your memo on , dated May 20, 2010. In the memo, you posed several questions. I have included below our conclusions to each question.

1. Whether distributions received by non-U.S. shareholders in exchange for shares of stock in constitute distributions taxable under section 301 or section 302?

Conclusion: Distributions received by non-US shareholders come under the purview of section 301, and should be treated as dividends to the extent of earnings and profits. They do not qualify for any safe harbor provision in section 302.

a. Whether the redemption of former employees should be considered as part of a Series of Redemptions under section 302(b)(2)(D) for purposes of applying the safe harbor provisions of section 302(b)(2)?

Conclusion: The redemptions of former employees and the redemptions of family members and current employees are part of the same transaction. They form parts of the same overall plan. They occurred in temporal proximity. According to facts provided, the taxpayer discussed the redemption of former employees as part and parcel of the recapitalization plan at a board meeting.

b. Whether the limitation in voting power of the Series A Convertible Preferred Stock purchased by must be taken into account in applying the safe harbor provisions of section 302(b)(2)?

Conclusion: should be considered, for 302(b)(2) purposes, as holding 24.9 percent of the stock.

2. If a non-U.S. shareholder fails to satisfy the provisions of section 302(b)(2), might the shareholder be entitled to sale or exchange treatment pursuant to section 302(b)(1)?

Conclusion: Based on facts presented, no shareholder qualifies for sale or exchange treatment under 302(b)(1). A redemption must result in a meaningful reduction in interest to qualify for sale or exchange treatment under 302(b)(1). The "family" shareholders who redeemed stock preserved their investment interest, and arguably gained additional interest, by acquiring control of the new LLC, into which had dropped substantial assets. The "redemptions" were, it appears, merely a device to facilitate a dividend transfer. This argument receives significant support from the fact that the family entities who, as a block, control the stock, received over $ per share upon redemption, while former employees received only $ per share upon redemption. The taxpayer argued that the price difference was to the presence of ESPP with the former employees. However, this argument is undercut by the fact that 1) the $ redemption was not pursuant to the terms of the ESPP and 2) current employees (members of the same ESPP that are also family members) redeemed their stock at the higher price. In addition, the family members and entities, as a block, held a controlling share in before and after the transaction. A small reduction in interest in a closely held corporation, where shareholders act in concert with one another to exercise control, is not like a minority shareholder reduction in a large corporation, where minority shareholders cannot act in concert with a few other shareholders to exercise control.

3. If the amounts paid to the non-U.S. shareholders are distributions taxable as dividends under section 301, is the taxpayer liable for withholding tax under sections 1441 and 1442?

Conclusion: This question lies outside the expertise of the .

We hope this information proves useful as you consider the issues in your case. Please let us know if we may be of further assistance.