

**Office of Chief Counsel
Internal Revenue Service
memorandum**

Number: **202119001**

Release Date: 5/14/2021

CC:FIP:RAMartin

POSTS-107405-17

UILC: 6110.05-00

date: February 03, 2021

to: Area Counsel (Area 3)
(Large Business & International)
Attn: Dan Trevino, Senior Attorney, CC:LBI:3:CHI:1

from: Robert A. Martin
Senior Technician Reviewer, Branch 1
(Financial Institutions & Products)

subject:

This Chief Counsel Advice responds to your request for assistance. This advice may not be used or cited as precedent.

LEGEND

Taxpayer =
Target =
State A =

Date A =
Date B =
Date C =
Industry =
TPEntity 1 =
TPEntity 2 =
TPEntity 3 =
TPEntity 4 =
Amount A =
B =
Amount C =
Amount D =
E =

F =
 GGG =
 H =
 J =
 K =
 L =
 Amount M =

ISSUES

(1) Whether a fee that Taxpayer is treated as a I.R.C. under I.R.C.

(a) Whether there the

(b) Whether case law

under section

(c) Whether the Treasury Regulations accompanying I.R.C. § under section and

(d) section in this case, if applied in other cases, under I.R.C.

(2) Whether the form of the proposed Transaction, which contemplated that stock would be acquired by a newly formed subsidiary of Taxpayer precludes application of section section

CONCLUSIONS

1. The Service is correct that section resulting in a we conclude that (a) there

With respect to Taxpayer’s specific arguments,

(b) the case

law pertaining to

section (c) the regulations accompanying section do not require that the
be treated as section and (d) the Service's
interpretation of section

section

2. The phrase
of section
Taxpayer
language of section

The provided
We read the plain

to be completed.

FACTS

On Date A, Taxpayer, a publicly traded corporation incorporated in State A, and
a publicly traded company

Also, on Date A, Taxpayer
and Target entered into

set forth the consideration that
shareholders would receive in exchange for their stock under the proposed
Transaction, i.e., a corporation.

explained Taxpayer's

the proposed Transaction, which included:

”

Accordingly, on the date _____, Taxpayer's _____
who held shares in _____ The _____ directors
_____ at the
_____ on the matter.

To facilitate the Transaction and pursuant to its obligations
_____ among other entities, TPEntity 1 and TPEntity 2, both formed under
the laws of _____ and TPEntity 3 and TPEntity 4, both formed as State A
limited liability companies.

_____ To accommodate this requirement, Taxpayer would have formed a
_____ of TPEntity 1. On
the closing date of the Transaction,

_____ The
would have been implemented as follows:

¹ The _____ refers to _____ as "a newly formed Subsidiary of Taxpayer."

2

The implementation of the Transaction had numerous conditions. In particular, these conditions included: The approval of the _____ by the _____ shareholders and the approval by the _____

3

Taxpayer reported

Form 1120, U.S. Corporation Income Tax Return, as-filed. On audit, the Service

its

I.R.C. §

2
include Taxpayer; the terms of the

defines the term _____
are set forth at

of

to

3

Taxpayer's position is that section

section

LAW AND ANALYSIS

Section

Application of section begins with the plain language of the statute. See

The plain language of section sets forth the following requirements in determining whether a transaction is subject to section

In determining whether to apply section

In concluding that Taxpayer's

section

applying the plain language of section
⁴ as it is
and that the common meaning of

the Service interpreted the phrase

In

Issue 1: Whether the

under section
under section

a. Whether there was

Section implicitly requires that there be

Section

resulted in a section
section

and that section

The legislative history of

reflects Congress' assumption that

the statute. Section

to apply

Congress understood the phrase
first to the legislative history

To address how
when enacting section we turn
which explains:

type

further provides, as an example of a
section the following
or securities:

-

understanding that

This example reflects Congress's

Congress enacted section

of section

that a

Congress did not have to provide
prior to enactment of section

In Congress amended section to apply it
As originally enacted in section

Section at that time defined The
amendment broadened the scope of section

The legislative history of the amendment, consistent with the legislative history
from also confirms Congress' belief that, before the enactment of section

which some taxpayers were treating The legislative
history also confirms that section was intended to provide that

A Senate Report describing the
amendment explains:

The legislative history from reaffirms Congress' concerns, expressed in that

⁵ The parties in a case cited in the legislative history, assumed that

taxpayers could legislative history from further explains that Congress amended section The

The affect in describing how the amendment to section would explain as follows:

The case cited in the above-quoted language from the is of particular relevance in the present case because it also involved a In a taxpayer entered

The taxpayer became concerned that

The Court

⁶ The Court nevertheless concluded that the

6

Although the court concluded that , the court further explained that it “need not decide” whether the raising the possibility that the item could have been

Accordingly, the clear: Congress understood that the fact pattern result in that case section thereby overriding the

Although did not concern a , courts have treated and have treated the of section

⁷ Accordingly, we conclude that meaning of I.R.C. § which resulted in a In doing when it so, we note that Taxpayer's

set forth the rationale for Taxpayer's

considerable value in the The Taxpayer saw was not merely a itself.

⁷

Our conclusion is consistent with the legislative history of section which, by citing indicates that Congress considered the and intended that section apply to

b. Whether case law pertaining to supports Taxpayer’s position that the under section

Taxpayer next argues that the referring to three lines of cases, the first involving the second involving the , and a third involving the

Taxpayer first cites cases involving the

Taxpayer’s reliance upon these cases is misplaced. The threshold question in the present case is whether the under section ⁸ to which section could apply, rather than a under section The cases cited by Taxpayer do not consider that distinction under section versus under section Instead, they primarily concern whether under section or section (or both) when the instead must be

Nevertheless, each of the cases cited by Taxpayers lends support for the Service’s position that

In at issue was whether section when the

8

were section the court further concluded that the

under section that became ⁹ Under the court's under

analysis in Taxpayer's section because it was the

The opinions in and are even more applicable to the present case than because they involve In both and the taxpayers were

was similar to the issue that was addressed in The issue in and

.¹⁰ The courts rendered

⁹ The took place before expansion of the scope of section

¹⁰ In the government argued that the

under either sections or The courts rejected the government's arguments, reasoning instead that the

section and section The courts concluded that the
 under section because the
 and the
 courts alternatively concluded that the section

¹¹

Taxpayer suggests that
 under sections
 and mean that its

section The section rationale in and
 however, is not applicable to the present case because the

Rather, Taxpayer
 . More importantly, the issue in this
 case is whether there which was not in issue in those cases.
 Given that the legislative purpose of section was to
 we disagree that
 taxpayers can rely upon case law

. Section requires that if the

¹¹ The court in found

and further held in the alternative

The
 court in likewise held that the section and alternatively concluded that the
 taxpayer was

Neither nor considered whether section could apply to
 those cases occurred before the
 amendment to section

Taxpayer also cites other cases that section as authority for its position that

taxpayers These are cases in which In both of these cases, the courts concluded that the taxpayers should As discussed previously, however, the cited to clarify that

section generally applies. Thus, have no bearing on the applicability of section in this case.

Lastly, Taxpayer argues that the under section because it was This appears to be a reference to the

to determine its tax consequences. Taxpayer provides little evidence that the would not affect our analysis under section . Taxpayer had

.12

¹² The development of

This lends further support to the notion that which section a section

that the

was applicable in this case, we further note

¹³ A

would fall squarely within section

The case law is clear: A taxpayer who makes

in this case that would warrant our departure from this general rule.

We have seen no evidence

c. Whether the Treasury Regulations accompanying section provide that
under section

The next authority Taxpayer relies on is Treas. Reg. §
that this regulation provides that

Taxpayer asserts

Taxpayer further asserts that the Service is disregarding this regulation by

Thus, Taxpayer makes the inference that if the

¹³ The use of

15

The preambles to the proposed and final regulations similarly

¹⁶ In addition, with regard to the preamble to the final regulations states:

The final regulations clarify

.17

Contrary to Taxpayer's assertion, the Service is not disregarding Treas. Reg. § or any other regulation. Treas. Reg. § does not control whether

¹⁵

¹⁶ See the preamble to Proposed Treas. Regs. §§

section

section

section

d. Whether the Service's interpretation of section
other cases, will allow

in this case, if applied in

section

Taxpayer makes the hypothetical argument that if the Service applies section

under section

which would be a result that Congress did not intend by amending section

Given that Taxpayer's argument is not actually at issue, we can only offer a
general analysis of how section

The

actual application of section in a given case would be specific to each taxpayer
and transaction.

Section provides as follows:

In this case, Taxpayer
 Taxpayer had
 because that the Transaction
 was of strategic value to Taxpayer and its shareholders.

Additionally, if Taxpayer's arguments were accepted, section would be rendered

supports the Service's conclusion that section This further
 can apply to a taxpayer that has

Service is not contending that Taxpayer We note that the

.²⁰ Rather, the Service instead contends that, if
 Taxpayer's position were accepted, the statute

that expanded the scope of section explains that
 the amendment was intended to apply and make
 the tax results more uniform.²¹ Section is not limited to tax-avoidance

²⁰ On the other hand, under Taxpayer's interpretation

²¹ The legislative history of the amendment to section makes clear that eliminating the ability
 for the taxation was another. See, e.g., Establishing clearer rules

transactions in which a taxpayer intended from the

In accordance with the plain language of section

phrase the Service uses its ordinary meaning, i.e. In applying the
 fact that Taxpayer and Target Accordingly, the
 has no bearing on whether section applies to

CASE DEVELOPMENT, HAZARDS AND OTHER CONSIDERATIONS

This writing may contain privileged information. Any unauthorized disclosure of this writing may undermine our ability to protect the privileged information. If disclosure is determined to be necessary, please contact this office for our views.

Please call if you have any further questions.

By: _____
 Robert A. Martin
 Senior Technician Reviewer, Branch 1
 (Financial Institutions & Products)

POSTS-107405-17

23

cc:

-