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Legend

Taxpayer =
Corp X =
Y =
Corp Z =
Corp A =
Corp B =
Corp C =
Corp D =

Dear

This letter responds to Taxpayer's request for a private letter ruling, dated December 7, 1998, regarding the federal income tax consequences of a proposed transaction under sections 1221, 1239 and 1253 of the Internal Revenue Code (the"Code").

FACTS

The Taxpayer acts as a holding company and is the common parent of an affiliated groups of corporations that files a consolidated income tax return. Corp X is a wholly-owned subsidiary of Taxpayer and is included in the consolidated return filed by Taxpayer. Corp X's principal business activity is to engage in the exploration of Y and to produce, refine, manufacture, process, transport, distribute and market Y and their products, and to engage in and exploit research in connection with any or all of the forgoing. The common stock of the Taxpayer is owned by Corp Z. The stock of

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Corp Z is owned by Corp A. Corp A and Corp B collectively hold stock, directly or indirectly, in companies throughout the world, including the Taxpayer's affiliated group. The principal offices of Corp A and Corp B are outside the United States; neither Corp A nor Corp B are residents of the United States for tax purposes.

Corp X proposes to distribute the U.S. trademark to the Taxpayer and then the taxpayer proposes to distribute it to Corp Z. These distributions will constitute dividends. The proposed distributions are being done for business reasons arising from the merger of Corp X, Corp C and Corp D into two newly formed U.S. limited liability companies that will use the U.S. trademark under a license. Taxpayer had no reported capital loss carryover available to it at the time it filed this ruling request.

The Taxpayer has requested the following rulings:

1. The U.S. trademark is a capital asset within the meaning of Section 1221 of the Code;
2. Section 1239 of the Code does not apply to Corp X's dividend of the U.S. trademark to Taxpayer;
3. Section 1239 of the Code does not apply to Taxpayer's dividend of the U.S. trademark to Corp Z;
4. Section 1253 of the Code does not apply to Corp X's dividend of the U.S. trademark to Taxpayer;
5. Section 1253 of the Code does not apply to Taxpayer's dividend of the U.S. trademark to Corp Z.

LAW AND ANALYSIS

Section 1221 defines "capital asset" as property held by the taxpayer (whether of not connected with the taxpayer's trade or business), unless the property is one of the listed exceptions. Section 1221 excludes the following five categories of property from the definition of capital assets: (1) inventory; (2) property of a character that is subject to the allowance for depreciation provided in section 167 or real property used in the trade or business; (3) certain copyrights, literary, musical, or artistic compositions, letters or memoranda, or similar property; (4) accounts receivable acquired in the ordinary course of a trade or business; and (5) certain publications of the United States government.

Subsections (1), (3), (4), and (5) are clearly inapplicable based upon the facts as represented by the taxpayer. Thus, the U.S. trademark will be a capital asset unless it is property, used in a trade or business, of a character which is subject to the allowance for depreciation under section 167 as described in section 1221(2).

Section 167(a) provides that a depreciation deduction is allowed for a reasonable allowance for the exhaustion, wear and tear, or obsolescence of property used in a trade or business.

Section 1.167(a)-1(a) of the Income Tax Regulations provides, in part, for a reasonable allowance for depreciation over the estimated useful life of property used in a trade or business. Section 1.167(a)-1(b) provides that the estimated useful life is the period over which the asset may reasonably be expected to be useful to the taxpayer in its trade or business. This period is determined by reference to the taxpayer's experience with similar property taking into account present conditions and probable future developments. Section 1.167(a)-3 provides that an intangible asset is amortizable only if its useful life can be measured with reasonable accuracy.

Section 197(f)(7) provides that any amortizable section 197 intangible is treated as property which is of a character subject to the allowance for depreciation provided in section 167. Section 197(d)(1)(f) provides that the term "section 197 intangible" includes any franchise, trademark, or trade name. Section 197(c)(1) defines the term "amortizable section 197 intangible" as meaning any section 197 intangible acquired by the taxpayer after August 10, 1993, (the day of enactment of section 197), and held in connection with the conduct of a trade or business or an activity described in section 212. Section 197(f)(9)(A) provides, in part, that the term "amortizable section 197 intangible" does not include any section 197 intangible for which depreciation or amortization would not have been allowable but for section 197 and which is acquired after August 10, 1993, if the intangible was held or used at any time on or after July 25, 1991, and on or before August 10, 1993 by the taxpayer or a related person. Section 197(f)(9)(C)(i)(1) defines the term "related person" for purposes of section 197(f)(9) as meaning a person (hereinafter in section 197(f)(9) referred to as the related person) is related to any person if the related party bears a relationship to such person specified in section 267(b). For this purpose, in applying section 267(b), "20 percent" is substituted for "50 percent".

A trademark is an intangible asset. Under section 167, an intangible asset is amortizable only if its useful life can be determined with reasonable accuracy. Trademarks do not have an ascertainable useful life. See, Clarke v. Haberle Crystal Springs Brewing Co., 280 U.S. 384 (1930), Renziehausen v. Lucas, 280 U.S. 387 (1930). Therefore, trademarks are not of a character subject to the allowance for depreciation under section 167.

Further, the U.S. trademark is not an amortizable section 197 intangible because of the anti-churning provisions of section 197(f)(9). Taxpayer, Corp X and Corp Z are related persons under section 197(f)(9)(C). Because the U.S. trademark was not amortizable under the Code prior to the enactment of section 197 and was held for use

by Corp X on or after July 25, 1991, and on or before August 10, 1993, the U.S. trademark is not an amortizable section 197 intangible pursuant to section 197(f)(9)(A). Therefore, the U.S. trademark, in the hands of either the Taxpayer or Corp Z, is not of a character subject to an allowance for depreciation under section 167.

Therefore, even though Corp X uses the trademark in its trade or business, the trademark is not of a character subject to the allowance for depreciation under section 167. Therefore, the trademark is not described in section 1221(2). The Tax Court has also held that the sale of a trademark would be the sale of a capital asset. See, Rainer Brewing Co. v. Commissioner, 7 T.C. 162 (1946); Seattle Brewing Co. v. Commissioner, 6 T.C. 856 (1946).

The U.S. trademark is not described in any of the categories of property that are not capital assets. Thus, we conclude that the trademark is a capital asset under section 1221.

Section 1239(a) provides that in the case of a sale or exchange of property, directly or indirectly, between related persons, any gain recognized to the transferor shall be treated as ordinary income if such property is, in the hands of the transferee, of a character which is subject to the allowance for depreciation provided in section 167. Section 1239(b)(1) defines the term "related persons" as meaning a person and all entities which are controlled entities with respect to such person. Section 1239(c)(1)(A) and (C) define the term "controlled entity" as meaning, with respect to any person, a corporation more than 50% of the value of the outstanding stock of which is owned (directly or indirectly) by or for such person, and any entity which is a related person to such person under section 267(b)(3), (10), (11), or (12). Section 267(b)(3) identifies such an entity as including two corporations which are members of the same controlled group.

For the reasons discussed above, the U.S. trademark is not depreciable or amortizable by the Taxpayer or Corp X under sections 167 or 197. Corp X, Taxpayer, and Corp Z are members of the same controlled entity as defined in section 1239(c)(1)(A) and, consequently, are related persons under section 1239(b)(1). While the U.S. trademark is being distributed between related persons, the U.S. trademark, in the hands of Taxpayer or Corp Z is not of a character subject to an allowance for depreciation under section 167. Therefore, any gain recognized to the transferor is not treated as ordinary gain under section 1239(a).

Section 1253(a) provides that a the term "significant power, right, or continuing interest" includes, but is not limited to, the following rights with respect to the interest transferred:

(A) A right to disapprove any assignment of such interest, or any part thereof.

(B) A right to terminate at will.

(C) A right to prescribe the standards of quality of products used or sold, or of services furnished, and of the equipment and facilities used to promote such products or services.

(D) A right to require that the transferee sell or advertise only products or services of the transferor.

(E) A right to require that the transferee purchase substantially all of his supplies and equipment from the transferor.

(F) A right to payments contingent on the productivity, use, or disposition of the subject matter of the interest transferred, if such payments constitute a substantial element under the transfer agreement.

Taxpayer has represented that neither the Taxpayer nor Corp X will retain any significant power, right, or continuing interest, within the meaning of section 1253, in the U.S. trademark. Section 1253(a) provides, in part, that the transfer of a trademark or trade name shall not be treated as a sale or exchange of a capital asset if the transferor retains any significant power, right, or continuing interest with respect to the subject matter of the trademark or trade name. Section 1253(b)(2) provides that the term "significant power, right, or continuing interest" includes, but is not limited to, certain rights with respect to the interest transferred. Taken together, these provisions indicate that the relevant inquiry is whether a taxpayer is retaining a significant power, right, or continuing interest with respect to the subject matter of the trademarks or with respect to the interests transferred. See Stokely USA, Inc. v. Commissioner, 100 T.C. 439 (1993).

In the instant case, Taxpayer has represented that both Taxpayer and Corp-X will transfer all of their powers, rights, and interests with respect to the use of the U.S. trademark to Corp Z. Further Taxpayer represents that neither Corp X nor Taxpayer will retain any control over Corp Z. Therefore, based on the facts represented, we conclude that Corp X's and Taxpayer's distribution of the trademark, including all right, title, and interest in the trademark, will not result in the retention of a significant power, right, or continuing interest within the meaning of section 1253(a).

This private letter ruling is restricted to the specific rulings requested, and expresses no opinion with respect to any other issue or Code section not specifically addressed herein. Taxpayer has not requested, nor do we express any opinion not

specifically addressed herein with respect to potential issues regarding or arising our of the distribution, licencing, or other transfers of trademarks, trade names, or other intangibles, including, without limitation, any issues arising under section 311 or section 367 of the Code, or any transfer pricing issues under section 482 of the Code.

Taxpayer should attach a copy of this letter to its federal income tax return for the year in which the transfer of U.S. trademark occurs.

This ruling is directed only to the taxpayer that requested it. Section 6110(k)(3) provides that it may not be used or cited as precedent.

Sincerely yours,

Assistant Chief Counsel
(Income Tax & Accounting)

B David L. Crawford
David L. Crawford
Chief, Branch 5