

Internal Revenue Service

Department of the Treasury
Washington, DC 20224

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Person To Contact:

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Telephone Number:

Refer Reply To:

CC:TEGE:EB:EC – PLR-134451-01

Date:

January 13, 2004

Target =

Acquiring =

Parent =

Country A =

Stock Exchange 1 =

Date A =

Date B =

Form Y =

Year X =

Dear :

This is in reply to your letter dated June 3, 2003, requesting rulings concerning the deduction limitation of section 162(m) of the Internal Revenue Code. The facts, as represented by Acquiring, are as follows.

Acquiring is a wholly owned subsidiary of Parent, a Country A corporation. Parent's shares are traded on Stock Exchange 1 in the form of American Depositary Shares. Parent is a "foreign private issuer" under 17 C.F.R. section 240.3b-4(c) because it is incorporated under the laws of Country A and does not fit the following description:

- (1) More than 50 percent of the issuer's outstanding voting securities are directly or indirectly held of record by residents of the United States; and
- (2) Any of the following apply:
 - (i) The majority of the issuer's executive officers or directors are United States citizens or residents;
 - (ii) More than 50 percent of the assets of the issuer are located in the United States; or
 - (iii) The business of the issuer is administered principally in the United States.

Parent is required to file Form Y with the United States Securities and Exchange Commission (SEC). Because there is no summary compensation table requirement for foreign private issuers that sets out the compensation paid to each employee, the Form Y filed by Parent does not contain a summary compensation table described in Item 402(b) of Regulation S-K under the Securities Exchange Act of 1934 (the "Exchange Act").

On Date B, Target merged with and into Acquiring with Acquiring as the surviving corporation (the "Merger"). Acquiring will continue as the parent of Target's operating subsidiaries. Target's final separate consolidated tax year ended on Date B. Acquiring represents that after the Merger, neither Acquiring nor any of its United States subsidiaries will be a "publicly held corporation" under section 162(m)(2) of the Code.

Acquiring represents that, because the Merger occurred prior to the deadline for filing proxy statements with its shareholders for its taxable year ending on Date A, Target will not be required to file any proxy statements with the SEC that disclose executive compensation under Item 402 of Regulation S-K for that year or for the short taxable year that ended with the Merger on Date B.

There are executives of Target who are expected to continue to serve as executives of Acquiring. Acquiring represents that the compensation paid to these executives will not be reported by Acquiring because as a wholly owned subsidiary of a foreign private issuer, it will not be required to file a summary compensation table.

Section 162(a)(1) of the Code allows as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered.

Section 162(m)(1) of the Code provides that in the case of any publicly held corporation, no deduction shall be allowed for applicable employee remuneration with respect to any covered employee to the extent that the amount of the remuneration for the taxable year exceeds \$1,000,000.

Section 162(m) (2) defines “publicly held corporation” as any corporation issuing any class of common equity securities required to register under section 12 of the Exchange Act.

Under section 1.162-27(c)(1)(ii) of the Income Tax Regulations, a publicly held corporation includes an affiliated group of corporations, as defined in section 1504 (determined without regard to section 1504(b)).

Section 162(m)(3) defines “covered employee” as any employee of the taxpayer, if as of the close of the taxable year, such employee is the chief executive officer of the taxpayer or is an individual acting in such capacity, or the total compensation of such employee for the taxable year is required to be reported to shareholders under the Exchange Act by reason of such employee being among the 4 highest compensated officers for the taxable year (other than the chief executive officer).

Under section 1.162-27(c)(2)(ii) of the regulations whether an individual is the chief executive officer or one of the four highest compensated officers is determined pursuant to the executive compensation disclosure rules under the Exchange Act.

In the notice of proposed rulemaking containing the proposed regulations under section 162(m), the preamble contains the following language concerning the identification of “covered employee”:

The regulations clarify which employees are “covered employees” for purposes of section 162(m). The legislative history to section 162(m) provides that “covered employees” are defined by reference to the SEC rules governing executive compensation disclosure under the Exchange Act. Under the regulations, an individual generally is a “covered employee” if the individual’s compensation is reported on the “summary compensation table” under the SEC’s executive compensation disclosure rules, as set forth in Item 402 of Regulation S-K, 17 CFR 229.402, under the Exchange Act. However, the regulations specifically provide that, in order to be a “covered employee” for section 162(m) purposes, an

individual must be employed as an executive officer on the last day of the taxable year. Thus, only those employees who appear on the “summary compensation table” and who are also employed on the last day of the taxable year are “covered employees.”

Therefore, based on the facts submitted, we rule as follows:

1. For purposes of section 162(m) of the Code, Target’s officers will not be “covered employees” with respect to the taxable year ending on Date A or the short taxable year ending on Date B, provided that no summary compensation table listing Target’s officers is included in any Target proxy statement that is sent to the shareholders and filed by Target with the SEC for the taxable year ending on Date A or the short taxable year ending on Date B.
2. For purposes of section 162(m) of the Code, Target’s executives who continue to serve as executives of the post-Merger company will not be “covered employees” with respect to compensation paid in Year X because as a wholly-owned subsidiary of a “foreign private issuer” their compensation is not required to be reported to shareholders under the Exchange Act.

Except as specifically ruled above, no opinion is expressed as to the federal tax consequences of the transaction described above under any other provision of the Code.

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.

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

Sincerely yours,

ROBERT B. MISNER
Senior Technician Reviewer
Executive Compensation Branch
Office of the Division Counsel/Associate Chief
Counsel (Tax Exempt and Government
Entities)

PLR-134451-03

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Enclosure:

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