

# Internal Revenue Service

Department of the Treasury

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Person to Contact:

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Date:

September 7, 1999

Corporation A =

Sub A =

Corporation B =

Corporation A/B =

Country F =

Date W =

Date X =

a =

b =

c =

d =

e =

f =

g =

h =

i =

j =

k =

l =

m =

n =

o =

p =

q =

Dear

This is in response to your letter of April 27, 1999, submitted by your authorized representative, requesting rulings under section 280G of the Internal Revenue Code. Specifically, you requested a ruling that, under the facts outlined below, the Merger described below will not cause a change in the ownership or effective control of Corporation B, or in the change in the ownership of a substantial portion of the assets of Corporation B within the meaning of section 280G(b)(2) of the Code. The facts as submitted are set forth below.

Corporation A is a Country F corporation. As of Date X, Corporation A had a Ordinary Shares issued and outstanding. These shares are listed on a foreign stock exchange. American depositary receipts representing depositary shares (each of which is equivalent to b Ordinary Shares) are listed on a U.S. stock exchange. As of Date X, Corporation A also had options to purchase c Ordinary Shares issued and outstanding.

Corporation B, a domestic corporation, is the common parent corporation of an affiliated group of companies which files a consolidated federal income tax return. As of Date X, Corporation B had d shares of common stock issued and outstanding. Corporation B also had outstanding four classes of preferred stock (Classes B, C, D, and E).

Class B preferred stock is publicly traded and is convertible into e shares of common stock. As of Date X, there were f shares of Class B preferred stock issued

and outstanding. Class C preferred stock is publicly traded. Each share of Class C preferred stock is convertible into g shares of common stock. As of Date X, there were h shares of Class C preferred stock issued and outstanding. Neither the Class D nor the Class E preferred stock is convertible into common stock. As of Date X, there were i shares of Class D preferred stock and j shares of Class E preferred stock issued and **outstanding**.

**Corporation B** has issued various Share Awards to certain of its officers and employees. As of Date X, Share Awards were outstanding with respect to j shares of Corporation B common stock, of which k shares were vested. Unvested Share Awards will vest at the effective time of the Merger. Pursuant to the Merger Agreement, Share Awards that remain outstanding on the date of the Merger will be converted into rights to acquire Corporation A Ordinary Shares.

Prior to the Merger, each share of Class B preferred stock will automatically be converted into common stock. The Class C preferred stock will be amended to provide the holders with voting rights equivalent to the number of shares of common stock into which the Class C preferred stock is convertible. The Class D preferred stock and the Class E preferred stock will be amended to provide the holders with voting rights equal to l votes for each share held. Pursuant to the Merger Agreement, shares of the Class C preferred stock will become convertible into Ordinary Shares (or depositary shares thereof).

Pursuant to the Merger Agreement, dated as of Date W, between Corporation A, Sub A, a wholly-owned subsidiary of Corporation A, and Corporation B, Sub A will merge with and into Corporation B. Each outstanding share of Corporation B common stock will be exchanged for m Ordinary Shares of Corporation A and a cash payment of \$n. The Ordinary Shares may be delivered in the form of depositary shares (each representing b Ordinary Shares).

Following the Merger, all of the Corporation B common shares will be owned by Corporation A and Corporation A will change its name to Corporation A/B. The Class C preferred stock, Class D preferred stock and Class E preferred stock outstanding at the time of the Merger will remain outstanding as voting stock of Corporation B. The holders of Class C, Class D and Class E preferred shares will not change as a result of the Merger. The pre-Merger Corporation B shareholders will own o percent of Corporation A/B, (a greater than 50 percent interest) counting the rights to acquire Corporation A/B Ordinary Shares that the pre-Merger Corporation B option holders and the Class C preferred shareholders will hold.

Pursuant to the Merger Agreement, the Board of Directors of Corporation B following the Merger will consist of p directors, half selected by the current CEO of Corporation A and half selected by the current CEO of Corporation B. The Board of Directors of Corporation A/B will consist of q directors, half designated by Corporation A and half designated by Corporation B. The Corporation B Board of Directors in

approving the Merger Agreement has approved the composition of the new Board of Directors for each of Corporation A/B and Corporation B.

Certain Corporation B executives may become entitled to benefits at the effective time of the Merger under various employment agreements and benefit plans. Some of these executives are "disqualified persons" under section 280G and 4999 of the Code.

Section 280G of the Internal Revenue Code provides that no deduction will be allowed for any excess parachute payment. Section 280G(b)(1) of the Code defines the term "excess parachute payment" as an amount equal to the excess of any parachute payment over the portion of the base amount allocated to such payment.

Section 280G(b)(2)(A) of the Code defines the term "parachute payment" as any payment in the nature of compensation to (or for the benefit of) a disqualified individual if (i) such payment is contingent on a change (I) in the ownership or effective control of the corporation, or (II) in the ownership of a substantial portion of the assets of the corporation; and (ii) the aggregate present value of the payments in the nature of compensation to (or for the benefit of) such individual which are contingent on such change equals or exceeds an amount equal to three times the base amount.

Section 280G(d)(5) of the Code generally provides that all members of the same affiliated group (as defined in section 1504, determined without regard to section 1504(b)) shall be treated as one corporation for purposes of section 280G.

Section 4999(a) of the Code imposes on any person who receives an excess parachute payment a tax equal to 20 percent of the amount of the payment.

Section 1.280G-1 of the Proposed Income Tax Regulations, Q&As 27, 28 and 29, published in the Federal Register on May 5, 1989, (54 Fed. Reg. 19,390), provides guidance concerning when a corporation will be considered to have undergone a change in ownership or effective control, or a change in the ownership of a substantial portion of its assets.

Q&A 27(a) provides that a change in the ownership or control of a corporation occurs on the date that any one person, or more than one person acting as a group, acquires ownership of stock of the corporation that, together with stock held by such person or group, possesses more than 50 percent of the total fair market value or total voting power of the stock of such corporation. Q&A 27(b) provides that persons will not be considered to be "acting as a group" merely because they happen to purchase or own stock of the same corporation at the same time, or as a result of the same public offering. However, persons will be considered to be "acting as a group" if they are owners of an entity that enters into a merger, consolidation, purchase or acquisition of stock, or similar business transaction with the corporation.

Example (3) of Q&A 27 deals with a corporate merger. There, Corporation P merged into Corporation O and the shareholders of P received O stock in exchange for their P stock. The example concludes that because the P shareholders received a greater than 50 percent interest in O, O experienced a change in ownership. By implication, the example concludes that P did not experience such a change.

Q&A 28(a) provides, in part, that a change of effective control of a corporation is presumed to occur on the date that either (1) any one person, or more than one person acting as a group, acquires (or has acquired during the 12-month period ending on the date of the most recent acquisition by such person or persons) ownership of stock of the corporation possessing 20 percent or more of the total voting power of the stock of such corporation; or (2) a majority of the members of the corporation's board of directors is replaced during any 12-month period by directors whose appointment or election is not endorsed by a majority of the members of the corporation's board of directors prior to the date of the appointment or election.

The presumption of Q&A 28(a)(1) and (2) may be rebutted by establishing that the acquisition or acquisitions of the corporation's stock, or the replacement of the majority of the members of the corporation's board of directors, does not transfer the power to control (directly or indirectly) the management and policies of the corporation from any one person (or more than one person acting as a group) to another person (or group). Q&A 28(b) contains the same language as Q&A 27(b) concerning when persons will be considered to be "acting as a group."

It has been represented that, immediately following the Merger, the pre-Merger Corporation B shareholders will hold interests that directly and indirectly represent more than 50 percent of the total value and voting power of Corporation A/B. It has also been represented that to the best knowledge of the management of Corporation B, no shareholder of Corporation B or Corporation A have any agreement, written or unwritten, express or implied, to act in concert to control the management and policies of Corporation B.

Viewing the merger from Corporation B's perspective, Corporation B surrendered potential ownership or control when it issued its stock to Corporation A/B in consideration for Corporation A/B's common stock. Since Corporation B's shareholders received a greater than 50 percent interest in Corporation A/B in both stock value and voting power, the merger will not cause Corporation B to experience a change of ownership under Q&A 27.

Also viewing the merger from Corporation B's perspective, all of Corporation B's stock was transferred to Corporation A in consideration for the issuance of Corporation A/B stock to Corporation B's shareholders, which resulted in Corporation A's shareholders receiving a greater than 20 percent indirect voting interest in Corporation B. Accordingly, under Q&A 28, it is presumed that Corporation B experienced a change in effective control.

However, the facts submitted indicate that the Corporation A shareholders will not act in a concerted way to control the management and policies of Corporation B. The facts also indicate that post-Merger Corporation A/B's board of director's was endorsed by a majority of Corporation B's board of directors prior to the date of appointment.

Accordingly, based strictly on the information submitted, we rule as follows:

- 1) Provided that after the Merger the pre-Merger Corporation A shareholders do not act in a concerted way to control the management and policies of Corporation B, the Merger will not cause a change in the ownership or effective control of Corporation B, nor will it cause a change in the ownership of a substantial portion of Corporation B's assets within the meaning of section 280G of the Code.
- 2) The provisions of section 280G of the Code do not apply to any payments that are received by employees or former employees of Corporation B that are contingent upon the Merger.
- 3) The provisions of section 4999 of the Code do not apply to any payments that are received by employees or former employees of Corporation B that are contingent upon the Merger.

Except as specifically ruled on above, no opinion is expressed or implied concerning the tax consequences of any aspect of any transaction or item discussed or referenced in this letter.

This ruling is directed only to the taxpayer requesting it. Section 6110(k)(3) of the Code provides that it may not be used or cited as precedent. The Taxpayer should attach a copy of this ruling to any income tax return to which it is relevant.

Temporary or final regulations pertaining to one or more of the issues addressed in this ruling have not been adopted. Therefore, this ruling will be modified or revoked by the adoption of temporary or final regulations to the extent that the regulations are inconsistent with any conclusion in the ruling. However, when the criteria in section 12.05 of Rev. Proc. 99-1, 1999-1 I.R.B. 6, 47 are satisfied, a ruling is not revoked or modified retroactively, except in rare or unusual circumstances.

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

Sincerely yours,

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ROBERT B. MISNER  
Assistant Chief, Branch 4  
Office of the Associate  
Chief Counsel  
(Employee Benefits and  
Exempt Organizations)

Enclosure:  
Copy for 6110 purposes