

Internal Revenue Service

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Department of the Treasury

Washington, DC 20224

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Person To Contact:

, ID No.

Telephone Number:

Refer Reply To:

CC:CORP:B01

PLR-138013-04

Date:

November 16, 2004

Legend:

Distributing =

Controlled =

Distributing LLC =

Controlled LLC =

Sub A =

Sub B =

Sub C =

Sub D =

Sub B1 =

Sub B2 =

Sub B3 =

Sub B4 =

Business A =

Business B =

Acquiring =

Acquiring Sub =

Country A =

Country B =

Country C =

Country D =

Country E =

a =
b =
c =
d =
e =
f =
g =
h =
i =
i =
k =
l =
m =

Dear _____ :

This letter responds to your letter dated July 15, 2004, which requests rulings on certain federal income tax consequences of a proposed transaction. Additional information was received in a subsequent letter dated November 9, 2004. The material information submitted for consideration is summarized below.

The rulings contained in this letter are based on facts and representations submitted by the taxpayer and accompanied by a penalty of perjury statement executed by an appropriate party. This office has not verified any of the materials submitted in support of the request for rulings. Verification of the information, representations, and other data may be required as part of the audit process. Moreover, no information provided by the taxpayer has been reviewed and no determination has been made regarding whether the proposed transaction: (i) satisfies the business purpose requirement of § 1.355-2(b) of the Income Tax Regulations, (ii) is used principally as a device for the distribution of the earnings and profits of Distributing or Controlled or both (see § 355(a)(1)(B) of the Internal Revenue Code and § 1.355-2(d)), or (iii) is part of a plan (or series of related transactions) pursuant to which one or more persons will

acquire directly or indirectly stock representing a 50-percent or greater interest in Distributing or Controlled (see § 355(e)(2)(A)(ii) and § 1.355-7T).

Section 3.01(30) of Rev. Proc. 2003-4, 2004-1 I.R.B. 114, provides that the Service will not rule on the qualification of a transaction as a reorganization under section 368(a)(1)(A) unless the Service determines that there is a significant issue that is not clearly and adequately addressed by published authority. The taxpayer has submitted information indicating that a significant issue exists with respect to the two section 368(a)(1)(A) transactions described below.

SUMMARY OF FACTS

Distributing, a publicly traded corporation with a single class of voting common stock outstanding, is the common parent of an affiliated group of corporations that files a consolidated federal income tax return (the “Distributing Group”). Distributing owns all of the outstanding stock of Controlled, Sub A, Sub B, and Sub C (a Country A corporation), and approximately a percent of the outstanding stock of Sub D (a Country B corporation). Distributing also owns 100 percent of the outstanding stock of various other subsidiaries.

Sub B owns all the outstanding stock of Sub B1 (a Country C corporation) and Sub B2 (a Country D corporation). Sub B also owns b percent of Sub D, c percent of Sub B3 (a Country B corporation), and d percent of Sub B4 (a Country E corporation). Both Sub B1 and Sub B2 own the stock of various other subsidiaries.

The Distributing Group is engaged in various businesses, including Business A and Business B. Distributing directly engages in Business A and Business B. Each of Controlled, Sub C, Sub D, and Sub B2 directly engages in Business B.

Acquiring, a publicly traded corporation unrelated to the Distributing Group, is the common parent of an affiliated group of corporations that files a consolidated federal income tax return. Acquiring has outstanding one class of voting common stock and one class of nonvoting convertible preferred stock. Acquiring and its subsidiaries are primarily engaged in a business similar to Business B. Acquiring indirectly engages in a business similar to Business A through its wholly owned subsidiary, Acquiring Sub.

The parties have submitted financial information indicating that each of Distributing and Controlled has gross income and operating expenses representing the active conduct of a trade or business for each of the past five years.

Distributing is interested in divesting itself of Business B because it is no longer a strategic fit for the Distributing Group. In addition, the divestiture of Business B will facilitate the business combination of Controlled and Acquiring.

The following transactions are proposed (the “Proposed Transaction”):

(i) SubB2 will declare and pay a dividend to Sub B in an amount estimated not to exceed €f.

(ii) Controlled will form Controlled LLC, a wholly owned limited liability company. An election under Treas. Reg. § 301.7701-3 will not be filed to treat Controlled LLC as an association.

(iii) Distributing will form Distributing LLC, a wholly owned limited liability company. An election under Treas. Reg. § 301.7701-3 will not be filed to treat Distributing LLC as an association.

(iv) Sub B will merge with and into Distributing LLC under applicable state law, with Distributing LLC surviving (the "Sub B Merger").

(v) At least one day following step (iv) above, Distributing LLC will transfer all of the outstanding stock of Sub B2 to Controlled and the b percent stock interest in Sub D to Controlled LLC.

(vi) Distributing will contribute its entire interest in Distributing LLC to the capital of Sub A (the "Sub A Contribution").

(vii) Distributing will transfer to Controlled (a) assets utilized in Business B, (b) its a percent stock interest in Sub D, (c) all of the outstanding stock of Sub C, and (d) a non-exclusive, royalty-free license permitting Controlled to use, solely in Business B, patents and other intellectual property of Distributing not currently used exclusively in Business B. Together with the transfers described in step (v) above, these transfers are collectively hereinafter referred to as the "Controlled Contribution." No stock of Controlled will be issued to Distributing in the exchange. Controlled will assume certain Distributing liabilities, which could include a portion of Distributing's line of credit equal to the amount of transaction expenses that will be allocated to Controlled and Acquiring pursuant to the Agreement and Plan of Merger.

(viii) Distributing will deliver (or cause to be delivered) a certificate representing all of the outstanding stock of Controlled to an exchange agent acting on behalf of the shareholders of Distributing (the "Distribution").

(ix) Immediately after the Distribution, Controlled will merge with and into Acquiring under applicable state law, with Acquiring surviving (the "Controlled Merger"). The Controlled Merger will be approved before the Controlled Distribution by Distributing as the sole shareholder of Controlled. Except for cash received in lieu of fractional shares, if any, the shareholders of Controlled will receive solely Acquiring common stock in exchange for their Controlled stock. Any fractional shares of Acquiring stock will be aggregated and transferred to an exchange agent on behalf of the Controlled shareholders for sale on the open market. The proceeds from such sales will

then be delivered to the Controlled shareholders who would otherwise have received the fractional shares. After the Controlled Merger, the former Controlled shareholders will own in the aggregate approximately g percent of the total combined voting power of all classes of outstanding Acquiring stock entitled to vote and approximately g percent of the total value of shares of all classes of outstanding Acquiring stock.

After the Controlled Merger, the Acquiring Board of Directors will consist of h members, divided into i classes. It is expected that j of the h directors will be persons who currently are officers or directors of Distributing, and k of the h directors will be persons who currently are directors of Acquiring. The Distributing directors are expected to be l of its current officers and l current non-officer members of the Distributing Board. Each of the l officers of Distributing are expected to resign from the Acquiring Board within m months following the Controlled Merger, at which time the Acquiring Board may nominate successors. Also, the terms of the l non-officer members of the Distributing Board who will serve on the Acquiring Board are not expected to exceed a period of k years following the Controlled Merger. The initial Chairman of the post-merger Acquiring Board will be a person who currently is a member of the pre-merger Acquiring Board.

It is intended that Distributing, Controlled and Acquiring will enter into various agreements (the "Ancillary Agreements") in connection with the Controlled Contribution, Distribution and Controlled Merger that will result in continuing transactions between Distributing and Controlled (or its successor, Acquiring), including a Contribution Agreement, Transition Services Agreements, Agreement and Plan of Merger, and Supply Agreements.

Also, prior to the Controlled Merger, Distributing will purchase from Acquiring all of the outstanding stock of Acquiring Sub for cash. Distributing and Acquiring will each elect to treat the stock acquisition as a deemed asset purchase pursuant to section 338(h)(10).

REPRESENTATIONS

In connection with the Sub B Merger described above in step (iv), the following representations have been made:

(a) At least 50 percent of the proprietary interest in Sub B will be deemed exchanged for a direct interest in Sub B's assets and will be preserved (within the meaning of Treas. Reg. §1.368-1(e)(1)(i)).

(b) Except for the transactions described herein, Distributing has no plan or intention to sell or otherwise dispose of any of the assets of Sub B deemed acquired in the Sub B Merger.

(c) Any liabilities of Sub B deemed assumed (within the meaning of section 357(d)) by Distributing will have been incurred by Sub B in the ordinary course of its business.

(d) Following the Sub B Merger, Distributing will continue the historic business of Sub B or use a significant portion of Sub B's historic business assets in a business, either directly or through one or more members of Distributing's qualified group (within the meaning of Treas. Reg. §1.368-1(d)(4)(ii)) or one or more partnerships in which Distributing and members of its qualified group own an aggregate interest representing a significant interest in such business or have active and substantial management functions as partners in such business.

(e) Distributing and Sub B each will pay its expenses, if any, incurred in the Sub B Merger.

(f) No intercorporate indebtedness exists or will exist between Sub B and Distributing that was issued, acquired, or will be settled at a discount.

(g) No two parties to the transaction are investment companies (as defined in section 368(a)(2)(F)(iii) and (iv)).

(h) Sub B is not under the jurisdiction of a court in a title 11 or similar case (within the meaning of section 368(a)(3)(A)).

(i) The fair market value of the Sub B assets deemed transferred to Distributing will equal or exceed the liabilities deemed assumed (within the meaning of section 357(d)) by Distributing.

(j) The merger of Sub B into Distributing LLC will qualify as a statutory merger under applicable state law.

In connection with the Controlled Contribution and Distribution described above in steps (v), (vii), and (viii), the following representations have been made:

(a) No part of the Controlled stock to be distributed by Distributing to its shareholders is being received by a Distributing shareholder as a creditor, employee, or in any capacity other than that of a shareholder of Distributing.

(b) The 5 years of financial information submitted on behalf of Distributing is representative of Distributing's present operations, and with regard to Distributing, there have been no substantial operational changes since the date the last financial statement was submitted.

(c) The 5 years of financial information submitted on behalf of Controlled is representative of Controlled's present operations, and with regard to Controlled, there

have been no substantial operational changes since the date the last financial statement was submitted.

(d) Following the Proposed Transaction, Distributing and Acquiring (as successor to Controlled) will each continue the active conduct of their respective businesses, independently and with their own separate employees, except for services to be provided by Distributing to Acquiring, or vice versa, for a transitional period following the Controlled Merger pursuant to the Transition Services Agreement.

(e) The Distribution will be carried out for the corporate business purpose of achieving Distributing's strategic divestiture objectives for Business B and to facilitate the Controlled Merger. The Distribution is motivated, in whole or substantial part, by such corporate business purpose.

(f) The Distribution is not used principally as a device for the distribution of earnings and profits of Distributing or Controlled or both. See section 355(a)(1)(B).

(g) The total fair market value of the assets transferred to Controlled by Distributing will equal or exceed the amount of liabilities assumed (as determined under section 357(d) of the Code) by Controlled.

(h) The total adjusted basis of the assets transferred to Controlled by Distributing will equal or exceed the amount of liabilities assumed (as determined under section 357(d) of the Code) by Controlled.

(i) The liabilities to be assumed (as determined under section 357(d)) by Controlled in the Proposed Transaction will have been incurred in the ordinary course of business and (i) will be associated with the assets being transferred or (ii) are being assumed to establish the appropriate liquidity and capital structure for Controlled (and its successor, Acquiring).

(j) The income tax liability for the taxable year in which investment credit property (including any building to which section 47(d) applies) is transferred will be adjusted pursuant to section 50(a)(1) or (a)(2) (or section 47, as in effect before amendment by Public Law 101-508, Title 11, 104 Stat. 1388, 536 (1990), if applicable) to reflect an early disposition of the property.

(k) Distributing neither accumulated its receivables nor made extraordinary payment of its payables in anticipation of the Proposed Transaction.

(l) Except for obligations for payments made under the Ancillary Agreements, no intercorporate debt will exist between Distributing and Controlled (or its successor) at the time of, or subsequent to, the distribution of Controlled's stock. Any such indebtedness owed by Controlled to Distributing will not constitute stock or securities.

(m) Immediately before the Distribution, items of income, gain, loss, deduction, and credit will be taken into account as required by the applicable intercompany transaction regulations (See Treas. Reg. §1.1502-13 and §1.1502-14 in effect before the publication of T.D. 8597, 1995-32 I.R.B. 6, and as currently in effect; Treas. Reg. §1.1502-13 as published by T.D. 8597). Furthermore, Distributing's excess loss account, if any, with respect to Controlled will be included in income immediately before the Distribution (See Treas. Reg. §1.1502-19).

(n) Payments made in connection with all continuing transactions, if any, between Distributing and Controlled (or its successor) will be for fair market value based on terms and conditions arrived at by the parties bargaining at arm's length.

(o) No two parties to the Proposed Transaction are investment companies as defined in section 368(a)(2)(F)(iii) and (iv).

(p) The Controlled Merger is or may be part of a plan or series of related transactions (within the meaning of Treas. Reg. §1.355-7T) that includes the Distribution. Taking the Controlled Merger into account, stock representing a 50 percent or greater interest (within the meaning of section 355(d)(4)) in Distributing or Controlled (including any predecessor or successor of any such corporation) will not be acquired by any person or persons.

In connection with the Controlled Merger described above in step (ix), the following representations have been made:

(a) The fair market value of the Acquiring stock and cash in lieu of fractional shares, if any, received by each Controlled shareholder will be approximately equal to the fair market value of the Controlled stock surrendered in exchange therefor.

(b) At least 50 percent of the proprietary interest in Controlled will be exchanged for Acquiring's stock and will have been preserved within the meaning of Treas. Reg. §1.368-1(e).

(c) In connection with the Controlled Merger, neither Acquiring, nor any person related to Acquiring (within the meaning of Treas. Reg. §1.368-1(e)(3)) has any plan or intention to reacquire any Acquiring stock issued in the Controlled Merger with respect to Controlled stock in exchange for any consideration other than Acquiring stock.

(d) Acquiring has no plan or intention to sell or otherwise dispose of any of the assets of Controlled acquired in the Controlled Merger, except for (i) dispositions made in the ordinary course of business, (ii) the consolidation or closure of certain distribution and manufacturing facilities, and (iii) the closure of certain overlapping branch locations.

(e) The liabilities of Controlled assumed (within the meaning of section 357(d)) by Acquiring will have been incurred in the ordinary course of business and (i) will be

associated with the assets being transferred or (ii) are being assumed to establish the appropriate liquidity and capital structure for Acquiring.

(f) Following the Controlled Merger, Acquiring will continue the historic business of Controlled or use a significant portion of Controlled's historic business assets in a business.

(g) Except as otherwise provided in the Ancillary Agreements, Acquiring, Controlled, and the Controlled shareholders will pay their respective expenses, if any, incurred in connection with the Controlled Merger.

(h) There is no intercorporate indebtedness existing between Controlled and Acquiring that was issued, acquired, or will be settled at a discount.

(i) No two parties to the Controlled Merger are investment companies as defined in section 368(a)(2)(F)(iii) and (iv).

(j) Controlled is not under the jurisdiction of a court in a title 11 or similar case under section 368(a)(3)(A).

(k) The fair market value of the Controlled assets to be transferred to Acquiring will equal or exceed the sum of the liabilities assumed (as determined under section 357(d)) by Acquiring.

(l) The merger of Controlled into Acquiring will qualify as a statutory merger under applicable state law.

(m) None of the compensation received by any shareholder/employee of Controlled will be separate consideration for, or allocable to, any of their shares of Controlled stock; none of the shares of Acquiring stock received by any shareholder/employee of Controlled will be separate consideration for, or allocable to, any employment agreement; and the compensation paid to any shareholder/employee of Controlled will be for services actually rendered and will be commensurate with amounts paid to third parties bargaining at arm's length for similar services.

(n) The payment of cash in lieu of fractional shares, if any, of Acquiring stock will be solely for the purpose of avoiding the expense and inconvenience to Acquiring of issuing fractional shares and will not represent separately bargained-for consideration. It is expected that the total cash consideration that will be paid to the Controlled shareholders instead of issuing fractional shares of Acquiring stock will not exceed one percent of the total consideration that will be issued in the Controlled Merger to the Controlled shareholders in exchange for their shares of Controlled stock. Any fractional share interests of each Controlled shareholder will be aggregated, and it is intended that no Controlled shareholder will receive cash in an amount equal to or greater than the value of one full share of Acquiring stock.

(o) Payments made in connection with all continuing transactions between Distributing (and its affiliates) and Acquiring (and its affiliates) will be for fair market value based on terms and conditions arrived at by the parties bargaining at arm's length.

RULINGS

Based solely on the information submitted and the representations as set forth above, with respect to the Sub B Merger described in step (iv) above we hold as follows:

(1) Provided that the merger of Sub B with and into Distributing LLC qualifies as a statutory merger under the applicable state law, the Sub B Merger will qualify as a reorganization described in section 368(a)(1)(A) and Distributing and Sub B will each be treated as a "party to a reorganization" within the meaning of section 368(b).

(2) No gain or loss will be recognized by Sub B on the deemed transfer of its assets to Distributing and the deemed assumption by Distributing of the liabilities of Sub B (sections 357(a) and 361).

(3) Section 1248(f)(1) is not applicable to the Sub B Merger.

(4) No gain or loss will be recognized by Distributing upon its deemed receipt of the assets of Sub B (section 1032(a)).

(5) The basis of the assets of Sub B deemed to be in the hands of Distributing will be the same as the basis of such assets in the hands of Sub B immediately before the Sub B Merger (section 362(b)).

(6) The holding period of the assets of Sub B deemed to be in the hands of Distributing will include the period during which such assets were held by Sub B immediately before the Sub B Merger (section 1223(2)).

(7) No gain or loss will be recognized by Distributing upon the receipt, or deemed receipt, of shares of Distributing stock in constructive exchange for shares of Sub B stock surrendered in exchange therefor (section 354(a)(1)).

(8) Distributing will succeed to and take into account those attributes of Sub B described in section 381(c) (section 381(a) and Treas. Reg. §1.381(a)-1). These items will be taken into account by Distributing subject to the conditions and limitations specified in sections 381, 382, 383 and 384 of the Code and the Regulations thereunder.

Based solely on the information submitted and the representations as set forth above, with respect to the Controlled Contribution and Distribution described in steps (v), (vii), and (viii) above we hold as follows:

(1) The Controlled Contribution, followed by the Distribution, will qualify as a reorganization within the meaning of section 368(a)(1)(D) of the Code. Distributing and Controlled will each be “a party to reorganization” within the meaning of section 368(b).

(2) No gain or loss will be recognized by Distributing on the Controlled Contribution (sections 357 and 361(a). Section 1248(a) is not applicable to the Controlled Contribution.

(3) No gain or loss will be recognized by Controlled on the Controlled Contribution (section 1032(a)).

(4) The basis of each asset received or deemed received by Controlled as a result of the Controlled Contribution will equal the basis of that asset in the hands of Distributing immediately before the transfer (section 362(b)).

(5) The holding period of each asset received or deemed received by Controlled as a result of the Controlled Contribution will include the period during which Distributing held the asset (section 1223(2)).

(6) No gain or loss will be recognized by Distributing on the Distribution (sections 355(c) and 361(c)).

(7) No gain or loss will be recognized by (and no amount will be included in the income of) the shareholders of Distributing on the receipt of Controlled stock in the Distribution (section 355(a)). Section 355(a)(3)(B) will not treat as “other property” any part of the Controlled stock considered constructively issued by Controlled to Distributing in exchange for the license described in step (vii).

(8) The aggregate basis of the Controlled stock in the hands of each shareholder of Distributing immediately after the Distribution will equal the aggregate basis of the Distributing stock held by that shareholder immediately before the Distribution, allocated between the Distributing stock and the Controlled stock in proportion to the fair market value of each in accordance with sections 358(b)(2) and 358(c) and Treas. Reg. §1.358-2(a)(2).

(9) The holding period of the Controlled stock received by each shareholder of Distributing will include the holding period of the Distributing stock on which the Distribution is made, provided that the Distributing stock is held as a capital asset on the date of the Distribution (section 1223(1)).

(10) As provided in section 312(h), proper allocation of earnings and profits between Distributing and Controlled will be made in accordance with section 312(h) and Treas. Reg. §§1.312-10(a) and 1.1502-33.

(11) Any payments made between Distributing and Controlled, or their subsidiaries or successors, under the Tax Sharing Agreement regarding tax liabilities that (a) relate to a taxable period ending on or before the Proposed Transaction or to a taxable period beginning before and ending after the Proposed Transaction, and (b) do not become fixed and ascertainable until after the Proposed Transaction, will be treated as occurring immediately before the Distribution.

Based solely on the information submitted and the representations as set forth above, with respect to the Controlled Merger described in step (ix) above we hold as follows:

(1) Consummation of the Controlled Merger will not affect the rulings described above.

(2) Provided that the merger of Controlled with and into Acquiring qualifies as a statutory merger under the applicable state law, the Controlled Merger will qualify as a reorganization within the meaning of section 368(a)(1)(A). Controlled and Acquiring will each be "a party to reorganization" within the meaning of section 368(b).

(3) Controlled will recognize no gain or loss on the Controlled Merger (sections 357 and 361). Section 1248(a) is not applicable to the Controlled Merger.

(4) No gain or loss will be recognized by Acquiring on the Controlled Merger (section 1032(a)).

(5) The basis of each asset received by Acquiring in the Controlled Merger will be the same as the basis of such asset in the hands of Controlled immediately before the Controlled Merger (section 362(b)).

(6) The holding period of each asset received by Acquiring in the Controlled Merger will include the period during which such asset was held by Controlled (section 1223(2)).

(7) No gain or loss will be recognized by the Controlled shareholders on the exchange of their Controlled stock for Acquiring stock in the Controlled Merger (section 354(a)(1)).

(8) The basis of the Acquiring stock (including any fractional share interest to which the shareholder may be entitled) received by each shareholder of Controlled will be the same as the basis of the Controlled stock surrendered by that shareholder in exchange therefor (section 358(a)(1)).

(9) The holding period of the Acquiring stock (including any fractional share interest to which the shareholder may be entitled) to be received by each shareholder of Controlled will include the holding period of the Controlled stock surrendered by that shareholder in exchange therefor, provided that such Controlled stock is held as a capital asset on the date of the Controlled Merger (section 1223(1)).

(10) Acquiring will succeed to and take into account those attributes of Controlled described in section 381(c) (section 381(a) and Treas. Reg. §1.381(a)-1). These items will be taken into account by Acquiring subject to the conditions and limitations specified in sections 381, 382, 383 and 384 and the Regulations thereunder.

(11) If cash is received by a Controlled shareholder as a result of a sale of a fractional share of Acquiring stock by the exchange agent on behalf of such shareholder, the Controlled shareholder will recognize gain or loss measured by the difference between the amount of the cash received and the basis of the fractional share (section 1001). Provided the fractional share interest is a capital asset in the hands of the exchanging shareholder, the gain or loss will be capital gain or loss subject to the provisions and limitations of Subchapter P of Chapter 1 of the Code (sections 1221 and 1222).

No opinion is expressed about the tax treatment of the Proposed Transaction under other provisions of the Code or regulations or the tax treatment of any conditions existing at the time of, or effects resulting from, the Proposed Transaction that are not specifically covered by the above rulings. In particular, no opinion is expressed regarding: (i) whether the Distribution satisfies the business purpose requirement of § 1.355-2(b); (ii) whether the Proposed Transaction is used principally as a device for the distribution of earnings and profits of Distributing or Controlled or both (see § 355(a)(1)(B) and § 1.355-2(d)); (iii) whether the Distribution and an acquisition or acquisition are part of a plan (or series of related transactions) under § 355(e)(2)(A); and (iv) whether the license granted to Controlled in step (vii) constitutes the transfer of property (see Rev. Rul. 69-156, 1969-1 C.B. 101). In addition, with respect to the Sub B Merger, no opinion is expressed about the application of Treas. Reg. § 1.367(a)-8 to Sub B if it entered into or is subject to any gain recognition agreement under section 367(a).

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.

A copy of this letter must be attached to any income tax return to which it is relevant.

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

Sincerely,

Michael J. Wilder _____

Michael J. Wilder
Senior Technician Reviewer, Branch 1
Office of Associate Chief Counsel
(Corporate)

cc: