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December 29, 2010

The Honorable Michael Mundaca
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1111 Constitution Avenue, NW
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The Honorable Douglas H. Shulman
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Re: Report on Certain International Issues Relating to All-Cash Acquisitive D Reorganizations

Dear Sirs,

I am pleased to submit the New York State Bar Association Tax Section's Report No. 1227, offering recommendations for future administrative guidance relating to certain international issues arising in connection with all-cash acquisitive reorganizations under Section 368(a)(1)(D) of the Internal Revenue Code of 1986, as amended. In December 2009, Treasury and the Service issued final regulations addressing the qualification and general treatment of such reorganizations.

Under the final regulations, a transaction otherwise described in Section 368(a)(1)(D) will be treated as satisfying the requirements of Section 368(a)(1)(D) and Section 354(b)(1)(B) even if there is no actual issuance of stock or securities of the transferee corporation, if the same person or persons own, directly or indirectly, all of the stock of the transferor corporation and

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the transferee corporation in identical proportions. If the value of the consideration received in the transaction is equal to the fair market value of the target corporation's assets, the final regulations treat the acquiring corporation as issuing to the target corporation a "nominal share" of the acquiring corporation's stock in addition to the actual consideration. The final regulations then treat the target corporation as distributing the nominal share to its shareholders as part of the exchange for their target stock. The final regulations further provide that, if appropriate, the nominal share will be treated as further transferred through chains of ownership to the extent necessary to reflect the actual ownership of the target and acquiring corporations.

In the preamble to the final regulations, Treasury and the Service requested comments on the application of the final regulations to all-cash acquisitive D reorganizations involving foreign corporations or shareholders. The attached report offers recommendations for administrative guidance regarding the manner in which (i) any Section 1248 amount attributable to the stock of the target corporation can be preserved in the stock of the acquiring corporation or the nominal share, (ii) earnings and profits should be taken into account for purposes of Section 902 when an exchanging shareholder recognizes gain under Section 356(a) that is treated as a dividend under Section 356(a)(2) and how Section 902 should apply when an exchanging shareholder does not actually own stock of the acquiring corporation but recognizes gain under Section 356(a) that is treated as a dividend, and (iii) an exchanging shareholder may access the previously taxed earnings and profits ("PTI") of the target and acquiring corporations under Section 959.

In general, our recommendations aim to (i) preserve the Section 1248 amount in identifiable shares where possible, in a manner that is consistent with the existing Treasury regulations for preserving the Section 1248 amount; (ii) permit, subject to an exception similar to Section 304(b)(5)(A), all amounts treated as dividend income under Section 356(a)(2) to qualify as dividend income for purposes of the Section 902 credit, and (iii) permit exchanging shareholders to access PTI in appropriate circumstances, and preserve any remaining PTI in a manner that is consistent with our recommendation regarding the Section 1248 amount.

We would be pleased to discuss with appropriate personnel the issues addressed in this report if that would be helpful.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Peter H. Blessing", with a long horizontal flourish extending to the right.

Peter H. Blessing
Chair

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