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From:

Sent: Monday, March 30, 2009 12:59:55 PM

To:

Cc:

Subject: FW: 280G Assistance

, this is in response for your request on our views on the 280G cases involving the agreements and the . I agree with your conclusion that payments made pursuant to the were payments made on account of a change in ownership or control within the meaning of § 280G. The following is a suggested approach for analyzing the issue based on the facts provided. Please provide the taxpayer's contact information so we can process this as CCA. You may pass this along to .

The taxpayer makes two arguments: 1. Q/A-25 does not apply because the were an amendment to the agreements, which were entered into more than one year before the change in ownership, and 2. based on Q/A-24(c), the portion of the payments made under the that were non-vested upon the change in ownership or control were not parachute payments. The taxpayer asserts that if the were new agreements, it has met the "clear and convincing" standard for purposes of the final two payments.

The analysis in the present case should begin by considering whether the payments at issue would have been made in the absence of the change in ownership. In determining whether a payment is made on account of a change in ownership or control, Q/A-22 provides that a payment is treated as "contingent" on a change in ownership or control if "the payment would not, in fact, have been made had no change in ownership or control occurred. ... A payment generally is treated as one which would not, in fact, have been made in the absence of a change in ownership or control unless it is substantially certain, at the time of the change, that the payment would have been made whether or not the change occurred." This language is nearly verbatim from the legislative history of § 280G. See H.R. 98-861, at 851. See also Cline, 34 F3d 480 (7th Cir. 1994). Here, the facts establish that the payments would not have been made in the absence of the change in ownership of the taxpayer.

Taxpayer asserts that the were an amendment of the agreement, apparently for the purpose of avoiding the presumption that payments made pursuant to an agreement entered into within one year of a change in ownership or control are contingent on a change in ownership or control, and for the purpose of using Q/A-24(c).

The were entered into with executives of the taxpayer within one year from the change in ownership, but the agreements were entered into more than one year before the change in ownership. Q/A-25 provides that agreements entered into within 1 year of the change in ownership or control are presumed to be on account of a change in ownership or control. The were separate agreements from the agreements. The created new rights and obligations independent of the . Although certain terms of the are based on provisions of the , the were new, independent agreements enforceable against the parties without regard to the . Therefore, the presumption under Q/A-25 applies based on the present facts.

The result does not change even if the are considered an amendment of the or an agreement entered into pursuant to the . Under § 280G(b)(2), parachute payments include "any" payment made on account of a change in ownership or control. Q/A-25 merely creates a presumption in the case of payments made pursuant to an agreement entered into within one year from the change in ownership or control. Whether or not the are considered an amendment of the agreements, the facts here establish that the payments made pursuant to the would not have been made in the absence of the change in ownership or control.

In addition, the taxpayer argues, assuming that Q/A-25 does not apply, that based on Q/A-24(c), the portion of the payments made under the that were subject to a vesting schedule should not be treated as payments made on account of a change in control. Under the , one-third of the payments due to the executives was paid upon the change in control, with the remaining two-thirds subject to a vesting schedule. The taxpayer's application of Q/A-24(c) is incorrect. Q/A-24(c) applies to payments that would have been made in the absence of the change in ownership or control. Q/A-22(c) provides:

"A payment that would in fact have been made, had no change in ownership or control occurred is treated as contingent on a change in ownership or control if the change in ownership or control . . . , accelerates the time at which the payment is made. Thus, for example, if a change in ownership or control accelerates the time of payment of deferred compensation that is vested without regard to the change in ownership or control, the payment may be treated as contingent on the change. See Q/A-24 of this section regarding the portion of a payment that is so treated."

Q/A-24(a) provides: "Paragraph (c) of this A-24 applies to a payment that becomes vested as a result of the change in ownership or control if, without regard to the change in ownership or control, the payment was contingent only on the continued performance of services for the corporation for a specified period of time." Q/A-24(c)(1)(i) provides similar language.

See also Q/A-24(f) ex. 1 (unvested amounts not attributable to services performed prior to the change in ownership or control are contingent on the change), and ex. 3 ("the payment of the \$500,000 [retention bonus] was contingent only on F's performance of

services for a specified period and is attributable, in part, to the performance of services before the change in ownership or control.")

Thus, Q/A-24(c) applies only to payments that would have been made absent the change in ownership or control if pre-existing vesting conditions were met, and that become vested because of the change in ownership or control. Q/A-24(c) does not apply to payment rights arising solely on account of the change in control. For example, nonqualified deferred compensation that is subject to a vesting schedule is a payment that would have been made if no change in ownership or control had occurred. See Q/A-24(d). Another example of a payment covered by Q/A-24(c) is a retention bonus that would be paid regardless of the change in control, provided the executive continues to be employed by the taxpayer for a specified period of time. Here, because the payments under the _____ would not have been made absent the change in ownership, Q/A-24(c) has no applicability under the present facts.

Assuming that Q/A-25 applies, taxpayer has not established by "clear and convincing" evidence, that the payments made pursuant to the _____ were reasonable compensation for services. The agent should review the standards relating to "clear and convincing" and explain in his or her report why the standard is not met here.

Please let me know if we can help further.