Section 368.—Definitions Relating to Corporate Reorganizations

26 CFR 1.368–2: Definition of terms.

T.D. 8885

DEPARTMENT OF THE TREASURY Internal Revenue Service 26 CFR Part 1

The Solely for Voting Stock Requirement in Certain Corporate Reorganizations

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulation.

SUMMARY: This document contains final regulations relating to the solely for voting stock requirement in certain corporate reorganizations under section 368(a)(1)(C). The final regulations provide that a prior acquisition of a target corporation's stock by an acquiring corporation generally will not prevent the solely for voting stock requirement in a "C" reorganization of the target corporation and the acquiring corporation from being satisfied. They affect persons engaging in certain transactions occurring after December 31, 1999.

DATES: Effective Date: These regulations are effective May 19, 2000.
Applicability Date: These regulations apply to transactions occurring after December 31, 1999, unless the transaction occurs pursuant to a written agreement that is (subject to customary conditions) binding on that date and at all times thereafter.

FOR FURTHER INFORMATION CONTACT: Marnie Rapaport, (202) 622-7550 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

On June 14, 1999, the IRS and Treasury issued a notice of proposed rulemaking in the Federal Register (REG–115086–98, 1999–26 I.R.B. 6 [64 F.R. 31770]) setting forth rules relating to the solely for voting stock requirement in reorganizations under section 368(a)(1)(C). The proposed regulations provided that prior ownership of stock of a target corporation by an acquiring corporation will not by itself prevent the solely for voting stock requirement of a "C" reorganization from being satisfied. The regulations propose to reverse the IRS's previous position that the acquisition of assets of a partially controlled subsidiary does not qualify as a tax-free "C" reorganization. See Rev. Rul. 54–396 (1954–2 C.B. 147). This position subsequently was sustained in litigation in *Bausch & Lomb Optical Co. v. Commissioner*, 267 F.2d 75 (2d Cir.), *cert. denied*, 361 U.S. 835 (1959) (the *Bausch & Lomb* doctrine). A public hearing regarding these proposed regulations was held on October 5, 1999. Written comments to the notice were received. After consideration of all the comments, the proposed regulations are adopted as revised by this Treasury decision.

Explanation of Revisions and Summary of Comments

The Applicability Date

The proposed regulations apply to transactions occurring after the date that a Treasury decision adopting the regulations is published in the Federal Register, except that they do not apply to any transactions occurring pursuant to a written agreement which is (subject to customary conditions) binding on the date that the regulations are published as final regulations in the Federal Register, and at all times thereafter.

A commentator requested that taxpayers be allowed to apply the proposed regulations to transactions occurring before the proposed regulations are published as final regulations.

The IRS and Treasury Department determined that the increased flexibility that results from the proposed regulations should be available to taxpayers in structuring transactions before their publication as final regulations. Accordingly, the IRS and the Treasury Department issued Notice 2000–1 (2000–2 I.R.B. 288), which changes the proposed effective date of the proposed regulations to apply to any transactions occurring after December 31, 1999, unless the transaction occurs pursuant to a written agreement binding on that date. Notice 2000–1 further provides that the proposed regulations, when finalized, will adopt this effective date rule and that taxpayers may rely on Notice 2000–1 until final regulations are issued. Accordingly, the final regulations adopt this effective date rule.

Finally, Notice 2000–1 provides that taxpayers may request a private letter ruling permitting them to apply the final regulations to transactions occurring on or after June 11, 1999 (the date the proposed regulations were filed with the Federal Register) to which the final regulations would not otherwise apply, and for which there was not a written agreement (subject to customary conditions) binding on June 11, 1999 and at all times thereafter. The Notice cautions, however, that a private letter ruling will not be issued unless the taxpayer establishes to the satisfaction of the IRS that there is not a significant risk of different parties to the transaction taking inconsistent positions, for U.S. tax purposes, with respect to the applicability of the final regulations to the transaction. Any such requests for a ruling will continue to be considered.

Extension of the Repeal of the *Bausch & Lomb* Doctrine to "B" Reorganizations

A comment was received requesting that the IRS reconsider its position in Rev. Rul. 69–294 (1969–1 C.B. 110), where the *Bausch & Lomb* doctrine was applied to disqualify a purported section 368(a)(1)(B) reorganization that followed a tax-free section 332 liquidation. In Rev. Rul. 69–294, X owned all of the stock of Y and Y owned 80 percent of the stock of Z. Y completely liquidated into X in a section 332 liquidation. As part of the plan, X (now owning 80 percent of the stock of Z) acquired the minority 20 percent stock interest in Z in exchange for X voting stock in a purported "B" reorganization. The ruling holds that the exchange with the 20 percent minority shareholders was not a "B" reorganization. The rationale is that although the acquisition from the minority shareholders was "solely for voting stock," the liquidation of Y, as part of the same plan, resulted in X acquiring 80 percent of the Z stock in exchange for Y stock surrendered back to Y on the liqui-

dation of Y and not solely in exchange for X voting stock.

The commentator's suggestion is beyond the scope of this regulations project, which relates to "C" reorganizations. In light of these regulations, the IRS and Treasury Department may reconsider Rev. Rul. 69–294.

Effect on Other Documents

The following publication is obsolete as of January 1, 2000: Rev. Rul. 54–396 (1954–2 C.B. 147).

Special Analyses

It has been determined that this Treasury decision is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations and, because these regulations do not impose a collection of information on small entities, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Therefore, a Regulatory Flexibility Analysis is not required. Pursuant to section 7805(f) of the Internal Revenue Code, these regulations were submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Drafting Information

The principal author of these regulations is Marnie Rapaport of the Office of the Assistant Chief Counsel (Corporate), IRS. However, other personnel from the IRS and Treasury Department participated in their development.

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Adoption of Amendments to the Regulations

Accordingly, 26 CFR part 1 is amended as follows:

PART 1—INCOME TAXES

Paragraph 1. The authority citation for part 1 continues to

read in part as follows:

Authority: 26 U.S.C. 7805 * * *

Par. 2. Section 1.368–2 is amended by adding paragraph (d)(4) to read as follows:

§1.368–2 Definition of terms.

* * * * *

(d) * * *

(4) (i) For purposes of paragraphs (d)(1) and (2)(ii) of this section, prior ownership of stock of the target corporation by an acquiring corporation will not by itself prevent the solely for voting stock requirement of such paragraphs from being satisfied. In a transaction in which the acquiring corporation has prior ownership of stock of the target corporation, the requirement of paragraph (d)(2)(ii) of this section is satisfied only if the sum of the money or other property that is distributed in pursuance of the plan of reorganization to the shareholders of the target corporation other than the acquiring corporation and to the creditors of the target corporation pursuant to section 361(b)(3), and all of the liabilities of the target corporation assumed by the acquiring corporation (including liabilities to which the properties of the target corporation are subject), does not exceed 20 percent of the value of all of the properties of the target corporation. If, in connection with a potential acquisition by an acquiring corporation of substantially all of a target corporation's properties, the acquiring corporation acquires the target corporation's stock for consideration other than the acquiring corporation's own voting stock (or voting stock of a corporation in control of the acquiring corporation if such stock is used in the acquisition of the target corporation's properties), whether from a shareholder of the target corporation or the target corporation itself, such consideration is treated, for purposes of paragraphs (d)(1) and (2) of this section, as money or other property exchanged by the acquiring corporation for the target corporation's properties. Accordingly, the transaction will not qualify under section 368(a)(1)(C) unless, treating such consideration as money or other property, the requirements of section 368(a)(2)(B) and paragraph (d)(2)(ii) of this section are met. The determination of whether there has been an acquisition in connection with a potential reorganization under section 368(a)(1)(C) of a target corporation's stock for consideration other than an acquiring corporation's own voting stock (or voting stock of a corporation in control of the acquiring corporation if such stock is used in the acquisition of the target corporation's properties) will be made on the basis of all of the facts and circumstances.

(ii) The following examples illustrate the principles of this paragraph (d)(4):

Example 1. Corporation P (P) holds 60 percent of the Corporation T (T) stock that P purchased several years ago in an unrelated transaction. T has 100 shares of stock outstanding. The other 40 percent of the T stock is owned by Corporation X (X), an unrelated corporation. T has properties with a fair market value of $110 and liabilities of $10. T transfers all of its properties to P. In exchange, P assumes the $10 of liabilities, and transfers to T $30 of P voting stock and $10 of cash. T distributes the P voting stock and $10 of cash to X and liquidates. The transaction satisfies the solely for voting stock requirement of paragraph (d)(2)(ii) of this section because the sum of $10 of cash paid to X and the assumption by P of $10 of liabilities does not exceed 20% of the value of the properties of T.

Example 2. The facts are the same as in *Example 1* except that P purchased the 60 shares of T for $60 in cash in connection with the acquisition of T's assets. The transaction does not satisfy the solely for voting stock requirement of paragraph (d)(2)(ii) of this section because P is treated as having acquired all of the T assets for consideration consisting of $70 of cash, $10 of liability assumption and $30 of P voting stock, and the sum of $70 of cash and the assumption by P of $10 of liabilities exceeds 20% of the value of the properties of T.

(iii) This paragraph (d)(4) applies to transactions occurring after December 31, 1999, unless the transaction occurs pursuant to a written agreement that is (subject to customary conditions) binding on that date and at all times thereafter.

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David A. Mader,
Acting Deputy Commissioner of Internal Revenue.

Approved May 9, 2000.

Jonathan Talisman,
Deputy Assistant Secretary of the Treasury.

(Filed by the Office of the Federal Register on May 18, 2000, 8:45 a.m., and published in the issue of the Federal Register for May 19, 2000, 65 F.R. 31805)