

Internal Revenue Service

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Person To Contact:

Telephone Number:

In Re:

Refer Reply To:
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Date:
August 17, 2005

Taxpayer =
Date 1 =
Employee =
Year 1 =

Dear _____ :

This letter is a response to a request for a private letter ruling submitted on behalf of Taxpayer ("Taxpayer"), dated April 7, 2005. Taxpayer has requested a ruling under section 162(m) of the Internal Revenue Code ("the Code"), regarding whether a former officer of Taxpayer ("Employee") will be considered a "covered employee."

On Date 1, Employee resigned his position as Chief Executive Officer and Director of Taxpayer. Employee will continue to perform services as an employee of Taxpayer for the remainder of Year 1, and possibly in future years. However, Employee will not be an officer of Taxpayer subsequent to his resignation. Employee may be listed as Chief Executive Officer or a highly compensated employee for Year 1, pursuant to the executive compensation disclosure rules under the Securities Exchange Act.

Taxpayer requests a ruling that Employee will not be considered a "covered employee" for Year 1, and accordingly, that no compensation paid to Employee with respect to Year 1 will be subject to the deduction limitation of section 162(m).

Section 162(a)(1) of the Code allows as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered.

Section 162(m)(1) provides that in the case of any publicly held corporation, no deduction shall be allowed for applicable employee remuneration with respect to any covered employee to the extent that the amount of the remuneration for the taxable year exceeds \$1,000,000.

Section 162(m)(2) defines "publicly held corporation" as any corporation issuing any class of common equity securities required to be registered under section 12 of the Exchange Act.

Section 162(m)(3) defines "covered employee" as any employee of the taxpayer if, as of the close of the taxable year, such employee is the chief executive officer of the taxpayer or is an individual acting in such capacity, or the total compensation of such employee for the taxable year is required to be reported to shareholders under the Exchange Act by reason of such employee being among the 4 highest compensated officers for the taxable year (other than the chief executive officer).

Under section 1.162-27(c)(2)(ii) of the regulations, whether an individual is the chief executive officer or one of the four highest compensated officers is determined pursuant to the executive compensation disclosure rules under the Exchange Act.

In the notice of proposed rulemaking containing the proposed regulations under section 162(m), the preamble contains the following language concerning the identification of "covered employee":

The regulations clarify which employees are "covered employees" for purposes of section 162(m). The legislative history to section 162(m) provides that "covered employees" are defined by reference to the SEC rules governing executive compensation disclosure under the Exchange Act. Under the regulations, an individual generally is a "covered employee" if the individual's compensation is reported on the "summary compensation table" under the SEC's executive compensation disclosure rules, as set forth in Item 402 of Regulation S-K, 17 CFR 229.402, under the Exchange Act. However, the regulations specifically provide that, in order to be a "covered employee" for section 162(m) purposes, an individual must be employed as an executive officer on the last day of the taxable year. Thus, only those employees who appear on the "summary compensation table" and who are also employed on the last day of the taxable year are "covered employees."

Therefore, based on the facts submitted, we rule as follows:

For purposes of section 162(m) of the Code, Employee will not be considered a "covered employee" during Year 1. Therefore, any compensation paid to Employee with respect to Year 1 will not be subject to the deduction limitation of section 162(m). Except as specifically ruled above, no opinion is expressed as to the federal tax consequences of the transaction described above under any other provision of the Code.

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. The taxpayer should attach a copy of this ruling 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 yours,

Robert B. Misner
Senior Technician Reviewer Executive
Compensation Branch
Office of the Division Counsel/Associate
Chief Counsel (Tax Exempt and
Government Entities)