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Letter Ruling 00-11: Massachusetts Tax Treatment of a Netherlands BV

August 29, 2000

You request a letter ruling on behalf of the ***** (hereinafter "the Company") regarding the Massachusetts tax treatment of the Company's investments in (i) a Netherlands *besloten vennootschap met beperkte aansprakelijkheid* (hereinafter a "BV") and (ii) a Massachusetts partnership.

STATEMENT OF FACTS

The Company currently owns a 100 percent interest in the BV and a 99.9 percent interest in the Massachusetts partnership. A BV is a type of business organization authorized under the laws of the Netherlands. It has many of the attributes of a corporation. The Dutch term *besloten vennootschap met beperkte aansprakelijkheid* translates into English as "closely held company with limited liability." A BV is not treated as a *per se* corporation for federal tax purposes under the so-called "check-the-box" regulations. See Treas. Reg. § 301.7701-2(b)(8). Thus, for federal tax purposes, a BV can elect to be treated as either (i) a partnership (if it has more than one owner) or disregarded entity (if it has only one owner) or (ii) a corporation. Treas. Reg. § 301.7701-3(a). You state that the BV plans to elect to be treated as a disregarded entity for federal tax purposes. When that election is in effect, the BV will be treated as a division of the Company for federal tax purposes and will have no federal tax liability of its own.

You state that the Company and the Massachusetts partnership are engaged in a related business. You further state that the Massachusetts partnership is eligible to elect to be treated as a corporation for federal tax purposes under Treas. Reg. § 301.7701-3 and has so elected. However, you state that the partnership is treated as a partnership for Massachusetts tax purposes. After the BV makes the election to be treated as a disregarded entity for federal tax purposes, the Company plans to sell the BV at least a five percent interest in the Massachusetts partnership.

You ask the following:

1. Whether the BV will be treated as a foreign limited liability company (LLC) or a foreign corporation for Massachusetts tax purposes;
2. Whether Massachusetts will treat the BV as a disregarded entity if it is so treated for federal

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tax purposes;

3. If Massachusetts does treat the BV as a disregarded entity, whether the BV's property, payroll and sales will be attributed to the Company for purposes of determining the Company's apportionment factors;
4. Whether the Company's sales to the BV will be eliminated in determining the Company's apportionment factors;
5. Whether a portion of the Company's sales to the Massachusetts partnership will be eliminated in determining the Company's apportionment factors; and
6. Whether the BV's tax attributes will flow through to the Company.

DISCUSSION

Ruling 1

The Massachusetts Limited Liability Company Act defines a foreign limited liability company as "a limited liability company formed under the laws of any state other than the Commonwealth or under the laws of any foreign country or other foreign jurisdiction and denominated as such under the laws of such state or foreign country or other foreign jurisdiction." G.L. c. 156C, § 2(4). As noted above, a BV is denominated as a "company with limited liability" under Netherlands law.

For federal classification purposes, the federal check-the-box regulation treats Netherlands BVs in approximately the same manner as LLCs. Like an LLC, a Netherlands BV is eligible to elect to be treated as a partnership (if it has more than one owner) or a disregarded entity (if it has only one owner). In general, the federal regulation provides all business entities that are not clearly corporations the opportunity to make such an election. The regulation sets out a list of foreign business organizations that are *per se* corporations and therefore cannot elect to be treated as partnerships or disregarded entities for federal tax purposes, unless an exception applies. See Treas. Reg. § 301.7701-2(b)(8). A number of specific foreign business organizations appear on that list.^[1] BVs, however, are not on the list of *per se* corporations.

Based on the foregoing, we rule that a Netherlands BV is a foreign LLC and not a foreign corporation for Massachusetts tax purposes.

Ruling 2

The Department of Revenue follows the federal classification of foreign LLCs under the federal check-the-box regulation. See G.L. c. 63, § 30.2; TIR 97-8; Letter Rulings 00-5, 00-8. Thus, because the BV will be disregarded as an entity separate from the Company for federal tax purposes under the check-the-box rules, it will also be disregarded as an entity separate from the Company for Massachusetts corporate excise purposes.

Ruling 3

Because the separate existence of the BV is disregarded, it will be treated as a division of the Company for both federal and Massachusetts tax purposes. Thus, for all purposes under the corporate excise the BV and the Company will be treated as a single taxpayer. Consequently, the BV's property, payroll and sales will be treated as the Company's property, payroll and sales for purposes of determining the Company's apportionment factors. See Letter Ruling 00-8.

Ruling 4

As noted above, the Company and the BV are treated as a single taxpayer under the Massachusetts corporate excise. In order to give effect to this treatment and to avoid double counting, all transactions between the Company and the BV, including inter-company sales, should be eliminated when determining the Company's Massachusetts apportionment factors. See Letter Ruling 00-8; see also 830 CMR 63.38.1(13)(d) and Letter Ruling 99-13 (requiring the elimination of certain related party transactions between corporations and LLCs treated as partnerships).

Ruling 5

In contrast to the BV, the Massachusetts partnership is not an entity whose separate existence is disregarded for Massachusetts tax purposes. The apportionment regulation, 830 CMR 63.38.1(13), governs the corporate excise treatment of corporations that invest in partnerships. These rules allow a corporation to take into account a pro rata share (as defined in 830 CMR 63.38.1(13)(f)) of the partnership's property, payroll and sales, when determining the corporation's apportionment factors, so long as the corporation and the partnership are engaged in a related business. See 830 CMR 63.38.1(13)(a).

Under the facts you state, the Massachusetts Partnership and the Company are engaged in related businesses. Thus, a pro rata share of the Partnership's sales will be attributed to the Company under 830 CMR 63.38.1(13)(a), (f). However, sales by the Company to the Partnership in an amount equal to the total of such sales multiplied by the corporation's interest in the partnership must be eliminated from the numerator and the denominator of the Company's sales factor. 830 CMR 63.38.1(13)(d)3.a. For purposes of this calculation, the interest in the partnership held by the BV must be treated as held by the Company. Other relevant transactions between the Company and the Partnership may be required to be eliminated as provided in 830 CMR 63.38.1(13)(d)1-3.

Ruling 6

As discussed above, the BV and the Company are treated as a single taxpayer under the Massachusetts corporate excise. Therefore, all of the BV's assets will be treated as owned by the Company, all of the BV's income and expenses will be attributed to the Company and all of the BV's activities will be treated as conducted by the Company. See Letter Ruling 00-8. All of these items must be taken into account by the Company for all relevant purposes under chapter 63. *Id.*

Very truly yours,

/s/Frederick A. Laskey

Frederick A. Laskey
Commissioner of Revenue

FAL:DMS:tc

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[1] For example, a Netherlands *naamloze vennootschap* is listed as a *per se* corporation. The term *naamloze vennootschap* translates into English as "public company." The main difference between a *naamloze vennootschap* and a BV is that shares in the former are freely transferable whereas shares in the latter are not.