Internal Revenue Service

Department of the Treasury
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Person to Contact:

Telephone Number

Refer Reply to
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Date:
March 14, 2002

Taxpayer	=
Holding Company	=
Date A	=
Date B	=
Date C	=
Date D	=
Year E	=
Year F	=

Dear

This responds to your letter dated A, as supplemented by letters from the Taxpayer's authorized representative dated B, C, and D, in which you requested a ruling that premiums received by the Taxpayer on policies of insurance or reinsurance of U.S. risks are exempt from the insurance excise tax imposed by § 4371 of the Internal Revenue Code of 1986, as amended ("Code"), pursuant to the United States-Switzerland income tax convention ("Treaty").

The ruling contained in this letter is based upon information and representations submitted by, or on behalf of, the Taxpayer and accompanied by a penalty of perjury statement executed by an appropriate party. Although this office has not verified any of the material submitted in support of the request for a ruling, it is subject to verification on examination.

The Taxpayer is a reinsurance company that was organized in Switzerland in Year E. It is a wholly owned subsidiary of Holding Company, a Swiss holding company whose shares are publicly traded on the Swiss stock exchange. The Taxpayer and Holding Company are residents of Switzerland.

Section 4371 imposes an excise tax on premiums paid on insurance policies issued to U.S. persons and covering risks wholly or partly within the United States, and to foreign persons engaged in a U.S. trade or business and covering risks within the

United States. *See* § 4372(d). Rev. Proc. 92-39, 1992-1 C.B. 860, establishes procedures for entering into a closing agreement to establish an exemption from the § 4371 excise tax when the exemption is claimed under a U.S. income tax treaty.

Article 7(1)(Business Profits) of the Treaty provides as follows:

> The business profits of an enterprise of a Contracting State shall be taxable only in that State unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein.

Paragraph 3 of the Protocol to the Treaty provides with respect to Article 7 as follows:

> The United States tax on insurance premiums paid to foreign insurers shall not be imposed on insurance or reinsurance premiums which are the receipts of a business of insurance carried on by an enterprise of Switzerland, whether or not that business is carried on through a permanent establishment in the United States, except to the extent that the risks covered by such premiums are reinsured with a person not entitled to the benefits of this or any other Convention which provides a similar exemption from U.S. tax.

Article 2(2)(b)(Taxes Covered) includes the § 4371 excise tax within the scope of the Treaty, but contains the following limitation:

> The Convention shall, however, apply to the excise taxes imposed on insurance premiums paid to foreign insurers only to the extent that the risks covered by such premiums are not reinsured with a person not entitled to the benefits of this or any other Convention which provides exemption from these taxes.

The limitation on benefits provision in Article 22 of the Treaty sets forth several alternative safe harbors for claiming benefits under the Treaty. Under the provision, a company qualifies for treaty benefits if a predominant interest in the company is owned by a Swiss publicly traded company. Article 22(1)(e) extends benefits to a company

> i) whose principal class of shares is primarily and regularly traded on a recognized stock exchange; or
>
> ii) if one or more companies described in clause i) are the ultimate beneficial owners of a predominant interest in such company.

The Treaty does not define “primarily and regularly traded.” Article 3(2) of the Treaty provides that an undefined term shall be defined under the domestic law of the contracting state from which treaty benefits are sought. The U.S. definition of “regularly

traded" is found in Treas. Reg. § 1.884-5(d)(4)(i). It requires that the shares be traded in more than *de minimis* quantities on at least 60 days of the taxable year, and that the aggregate number of shares traded must be at least 10 percent of the average number of shares outstanding during the year.

The Treaty also does not define "predominant interest" for purposes of Article 22(1)(e)(ii). According to the Treasury Department technical explanation, a predominant interest is (1) a direct or indirect interest of more than 50 percent of the equity interests in an entity, and (2) a direct or indirect interest of more than 50 percent of the aggregate business interests in the entity.

The Taxpayer represents that Holding Company owns 100 percent of the equity interest and aggregate business interest in the Taxpayer. Holding Company has a single class of stock that trades on the Swiss stock exchange, which is a recognized exchange under Article 22(7)(a)(i) of the Treaty. The Taxpayer also represents that during Year F, Holding Company's shares are expected to be traded in more than *de minimis* quantities on at least 60 days of the taxable year, and the aggregate number of shares traded is expected to be at least 10 percent of the average number of shares outstanding during the year. Based on these representations, we conclude that the Taxpayer satisfies the test for a subsidiary of a publicly traded company under Article 22(1)(e) and is eligible for benefits under the Treaty.

According to paragraph (8)(a) of the Closing Agreement, the liability of the Taxpayer for federal excise tax, as agreed upon, including liability resulting from reinsurance of U.S. risks with persons not entitled to exemption under the Treaty or another convention, will commence on October 1, 2001, the date specified by the Taxpayer. The letter of credit required by paragraph (5)(a) of the Closing Agreement, in the amount of $75,000, must be in effect within 30 days of the date the agreement is signed on behalf of the Commissioner.

Any person otherwise required to remit the federal excise tax on foreign insurance or reinsurance policies issued by the Taxpayer pursuant to § 46.4374-1(a) of the excise tax regulations may rely upon a copy of this letter or an executed copy of the Closing Agreement as authority that they may consider premiums paid to the Taxpayer on and after October 1, 2001, as exempt under the Treaty from the federal excise tax.

Except as expressly provided herein, no opinion is expressed or implied concerning the tax consequences of any aspect of any transaction or item discussed or referenced in this letter. This ruling does not address the issues of whether the Taxpayer is an insurance company or whether premiums paid to the Taxpayer are deductible under § 162 of the Code.

This ruling is directed only to the taxpayer requesting it. Section 6110(k)(3) of the Code provides that it may not be used or cited as precedent.

In accordance with the power of attorney on file with this office, a copy of this letter is being sent to the Taxpayer's representative.

Sincerely yours,
W. EDWARD WILLIAMS
Senior Technical Reviewer, Branch 1
Office of Associate Chief Counsel
(International)