

Part IV - Items of General Interest

Revenue Procedure 2002-67

Settlement of Section 351 Contingent Liability Tax Shelter Cases

SECTION 1. PURPOSE

.01 This revenue procedure prescribes procedures for Taxpayers who elect to participate in a settlement initiative aimed at resolving cases involving Contingent Liability Transactions that are the same as or substantially similar to those described in Notice 2001-17, 2001-1 C.B. 730, (“Contingent Liability Transactions”).

.02 This revenue procedure provides for two resolution methodologies. The first option is a Fixed Concession Procedure set forth in Section 5. The second option is a Fast Track Dispute Resolution Procedure - Contingent Liability Cases set forth in Section 6; this second method includes the Binding Arbitration Procedure set forth in Section 7. The basic eligibility requirements for both options are set forth in Section 3. Additional eligibility requirements for the Fixed Concession Procedure are set forth in Section 5.01.

.03 Both resolution methodologies are designed to ensure that any tax benefits associated with the Contingent Liability Transactions are claimed no more than once, in the aggregate, by the Taxpayer or an entity that was a member of the Taxpayer’s consolidated group (including any successor to such group) at any time. Any ambiguity in this revenue procedure should be resolved in favor of achieving this purpose.

.04 Both resolution methodologies are also designed to provide flexibility to accommodate a large variety of views on the relative merits of the case. The Arbitration Procedure is intended to require each party to realistically assess the merits of the case and achieve a resolution in the event of irreconcilable differences before a neutral expert who must choose between the divergent settlement proposals without modification. Maximum flexibility, within the stated range of concession, is provided for the negotiations. This resolution should provide strong incentives to resolve disputes with quick, competent review and certainty of repose at a reduced cost for both parties.

SECTION 2. BACKGROUND

.01 The transactions in question generally involve a transfer that purportedly complies with section 351 of the Internal Revenue Code of high basis, high value assets from a transferor corporation (“Taxpayer”) to a transferee corporation controlled by the transferor. The assets are transferred in exchange for stock of the transferee corporation and the transferee’s assumption of a liability of the transferor, which has not yet been taken into account for tax purposes. The Taxpayer takes the position that the basis of the stock of the transferee corporation received by the transferor is equal to the bases in the assets transferred, without a reduction in basis for the liability assumed. The transferor subsequently sells the stock at a reported capital loss equivalent to the present value of the assumed liability. When the liability ultimately is taken into account for tax purposes, the transferee claims the tax benefits associated with the liability.

.02 The Commissioner of the Internal Revenue Service and Treasury have designated these transactions as “listed transactions” for purposes of Temp. Treas. Reg. § 1.6011-4T(b)(2) in Notice 2001-17.

SECTION 3. SCOPE

.01 Except as provided in Section 3.02, this revenue procedure applies to any Taxpayer that has engaged in a Contingent Liability Transaction and timely elects to resolve the issues in dispute using this procedure. In order to participate in the resolution of a Contingent Liability Transaction under the procedures set forth in this revenue procedure, a Taxpayer must provide a written statement under penalties of perjury that each transferor involved in the Contingent Liability Transaction complied with the statutory requirements specified in the application described in Section 4.01. In addition, this statement must include a certification that each transferor involved in the Contingent Liability Transaction carried out the purported section 351 exchanges and subsequent sales in accordance with the applicable operating documents. The scope and contents of these statements are set forth in the application described in Section 4.01. The Service may request further information to verify the certifications described above.

.02 Taxpayers that have engaged in a Contingent Liability Transaction and meet the requirements set forth below (hereinafter referred to as “Eligible Taxpayers”) may elect to participate under this revenue procedure if:

1) The underpayment of tax attributable to the Contingent Liability Transaction is not due to fraud;

2) The contingent liability was assumed on or before October 18, 1999;

3) The Contingent Liability Transaction is not in litigation, i.e., at any time on or after October 4, 2002, a case containing the issue is not docketed in and under the jurisdiction of any court, including the Tax Court, a district court, a bankruptcy court, the Court of Federal Claims, a circuit court of appeals, or the Supreme Court for any year; and

4) The Contingent Liability Transaction issue has not been designated for litigation, or, if not designated for litigation, the Taxpayer has not been notified that the Contingent Liability Transaction issue is under consideration for designation for litigation, as of October 4, 2002. For purposes of this revenue procedure, the Contingent Liability Transaction issue has been designated for litigation if it has been designated under the procedures set forth in CCDM 35.3.14 or any subsequently issued procedures for designation.

.03 A Taxpayer ineligible to participate in the resolution methodologies set forth in the revenue procedure solely because of the restrictions set forth in Section 3.02(4), relating to issues designated for litigation, becomes an Eligible Taxpayer upon written receipt of notification from the Service that it will not designate the Contingent Liability Transaction issue for litigation (or that the Service will remove the designation in a previously designated case). After the Taxpayer becomes an Eligible Taxpayer, the Taxpayer may apply to participate as set forth in Section 4 on or before the 90th day after the mailing date of the written notification from the Service of the decision not to designate (or to remove the designation of) the Contingent Liability Transaction issue. For purposes of this revenue procedure, a day means a calendar day.

.04 Further eligibility requirements for Taxpayers electing the Fixed Concession Procedure are set forth in Section 5.01.

.05 Eligible Taxpayers who do not elect to participate in one of the resolution methodologies provided for under this revenue procedure may not take advantage of the settlement, mediation or arbitration procedures under Notice 2001-67 (LMSB/Appeals Fast Track Dispute Resolution Program), 2001-2 C.B. 544; Announcement 2002-60 (Extension of Test of Arbitration Procedure for Appeals), 2002-

26 I.R.B. 28; and Rev. Proc. 2002-44 (Mediation Procedure for Appeals), 2002-26 I.R.B. 10.

SECTION 4. APPLICATION PROCESS

.01 An Eligible Taxpayer who wants to participate in one of the resolution methodologies provided under this revenue procedure must mail or deliver to the Service a written application on or before January 2, 2003. The application must be made on a completed Agreement to Participate and Selection of Settlement Option in the form appended to this revenue procedure as Exhibit 1. A separate application must be submitted for each Contingent Liability Transaction for which the Taxpayer elects to participate in one of the resolution methodologies provided for under this revenue procedure. Such applications must be sent to the Office of Tax Shelter Analysis ("OTSA"), LM:PFTG:OTSA, Attn: 351, 1111 Constitution Ave., N.W., Washington, DC 20024.

.02 With each application, the Taxpayer must submit the following:

1) A statement identifying the total capital loss reported on the Taxpayer's income tax return(s) for the sale(s) of any stock issued by the transferee corporation in the Contingent Liability Transaction, including the tax years affected and the amount of the capital loss used in each year (including any carryback and carryforward periods);

2) A description of each class of stock issued and outstanding by the transferee corporation at the completion of the purported section 351 exchanges, including the number of shares issued in each class in the exchanges, to whom the stock was issued, the issuing prices of the stock, the par values and any voting rights;

3) A statement identifying any shares issued in the purported section 351 exchanges in connection with the assumption of the contingent liability that have not been sold or otherwise disposed of by the Taxpayer;

4) A statement indicating the average selling price per share of any stock issued by the transferee corporation in the Contingent Liability Transaction;

5) A description of the type and bases of the assets transferred by the Taxpayer in the Contingent Liability Transaction; and

6) A description of the type and amount of the liability assumed by the transferee corporation in

the Contingent Liability Transaction.

.03 An Eligible Taxpayer that elects the Fast Track Dispute Resolution Procedure - Contingent Liability Cases, described in Section 6, must also submit with its application a completed Arbitration Agreement in the form appended to this revenue procedure as Exhibit 2. If the Arbitration Agreement is executed by a person pursuant to a power of attorney executed by the Taxpayer, that power of attorney must clearly express the grant of authority by the Taxpayer to consent to disclose the returns and return information of the Taxpayer by the Service to third parties, and a copy of that power of attorney must be attached to the Arbitration Agreement.

.04 The Taxpayer will be notified in writing within 15 calendar days of the receipt of a complete application as to whether the Taxpayer's election has been accepted as in compliance with the eligibility and application requirements of this revenue procedure for the resolution methodology selected in the application. A Taxpayer becomes an electing taxpayer ("Electing Taxpayer") for purposes of this revenue procedure, after it has been notified that its application has been accepted.

.05 If the Service denies a Taxpayer's application for participation under the Fixed Concession Procedure because the Taxpayer does not satisfy either criterion under Section 5.01, the application may be amended in writing within 10 days of receipt of the notice issued under Section 4.04 to elect the Fast Track Dispute Resolution Procedure - Contingent Liability Cases set forth in Section 6.

.06 Denial of a Taxpayer's request to participate in either resolution methodology is not subject to judicial review.

SECTION 5. FIXED CONCESSION PROCEDURE

.01 The Fixed Concession Procedure is available to Eligible Taxpayers who have engaged in a Contingent Liability Transaction and meet the requirements set forth in Section 3.02 as well as the following additional requirements:

1) The Taxpayer filed a disclosure statement under the provisions set forth in Announcement 2002-02, 2002-2 I.R.B. 304; or

2) The Contingent Liability Transaction was already raised during an examination and, as a result, the Taxpayer was unable to make a disclosure as outlined in Announcement 2002-02. A Taxpayer

qualifying under this provision must agree to provide the information required by Announcement 2002-02 and certify under penalties of perjury that the person signing the disclosure has examined the disclosure and that to the best of that person's knowledge and belief, the information provided contains all relevant facts and is true, correct and complete.

.02 Under the Fixed Concession Procedure, an Electing Taxpayer is permitted a capital loss deduction equal to 25% of the amount of the capital loss reported for the sale of the transferee stock received in the Contingent Liability Transaction. In order to prevent a duplication of the tax benefits associated with the Contingent Liability Transaction, the Electing Taxpayer must include an amount equal to the permitted capital loss as ordinary income in equal amounts per year over a period of 15 years beginning with the 2003 taxable year, unless no member of the Electing Taxpayer's consolidated group (including any successor to such group) is at any time entitled to any tax benefits associated with the deduction resulting from the liability assumed in the Contingent Liability Transaction. The Electing Taxpayer has the option of an alternative method to achieve the same economic result as the 15-year recovery based on a discount rate of ten percent. The closing agreement referenced in Section 5.07 shall ensure that no entity that was a member of the Electing Taxpayer's consolidated group (including any successor to such group) at any time will be entitled to both the permitted capital loss deduction and the tax benefits associated with the deduction resulting from the liability assumed in the Contingent Liability Transaction.

.03 No adjustment will be made to transactional cost deductions taken in connection with the Contingent Liability Transaction.

.04 When the assumed liability is ultimately taken into account for tax purposes, the tax benefits associated with it will be allowed, as appropriate, under applicable legal principles in accordance with the method of accounting of the corporation entitled to those benefits.

.05 No penalties under section 6662 will be imposed for any deficiency attributable to the resolution of the Contingent Liability Transaction under this Fixed Concession Procedure.

.06 The following conditions apply to any stock or property held on or after October 4, 2002. The tax basis of any unsold stock shall be equal to the average selling price per share of the stock that was

sold that generated the reported capital losses ("Sold Stock"). Also, if the basis of any property other than the stock received in the purported section 351 exchanges was determined directly or indirectly by reference to the basis of the stock received in the purported section 351 exchanges, then the basis of such property as of the date of the Contingent Liability Transaction shall be computed as if the basis of the stock received in the purported section 351 exchanges was equal to the average selling price per share of the Sold Stock. For example, if the transferor contributed the stock received to another corporation ("Corporation 2") in return for stock in Corporation 2, then the transferor's basis in the stock of Corporation 2 shall be computed as if its basis in the stock contributed to Corporation 2 equaled the average selling price per share of the Sold Stock. This basis redetermination requirement applies to the Electing Taxpayer and to any person within the effective control of the Electing Taxpayer. The closing agreement referenced in Section 5.07 shall ensure that the basis of any property in the hands of any member of the Electing Taxpayer's consolidated group (including any successor to such group), having a carryover or substituted basis determined directly or indirectly by reference to the basis of the stock received in the purported section 351 exchanges, shall be computed as if the basis of the stock received in the purported section 351 exchanges was equal to the average selling price per share of the Sold Stock. The Electing Taxpayer shall provide all information needed to effect this provision. Taxpayers who cannot or will not provide this information cannot elect to participate under this revenue procedure.

.07 An Electing Taxpayer must enter into a closing agreement with the Commissioner that reflects the terms described above. The Compliance function within the Service will close the case using established issue or case closing procedures, including the preparation of a Form 906, Closing Agreement on Final Determination Covering Specific Matters.

SECTION 6. FAST TRACK DISPUTE RESOLUTION PROCEDURE - CONTINGENT LIABILITY CASES:

.01 A Taxpayer electing the Fast Track Dispute Resolution Procedure - Contingent Liability Cases must participate in binding arbitration to resolve any issues that are not resolved in the accelerated settlement negotiations. See Section 7 below. A Taxpayer that elects the Fast Track Dispute Resolution Procedure - Contingent Liability Cases will not be eligible for any other settlement, mediation or arbitration procedure.

.02 The following issues will be considered in the Fast Track Dispute Resolution Procedure - Contingent Liability Cases:

1) The amount of capital loss permitted for the sale of stock received in the Contingent Liability Transaction;

2) The identity of the corporation that is entitled to the tax benefits associated with the deduction resulting from the assumed liability and whether that corporation is or has been a member of the Electing Taxpayer's consolidated group (including any successor to that group);

3) With respect to the Electing Taxpayer or any member of the Electing Taxpayer's consolidated group (including any successor to such group), the manner and timing of the reduction in the tax benefits necessary to eliminate any duplication in the tax benefits associated with the Contingent Liability Transaction in amounts that in the aggregate equal the capital loss permitted; and

4) The penalties under section 6662 applicable to any deficiency attributable to the resolution of the Contingent Liability Transaction under this Fast Track Dispute Resolution Procedure - Contingent Liability Cases, except that no penalties will be asserted if the Electing Taxpayer previously disclosed the Contingent Liability Transaction in accordance with Announcement 2002-02, or if the Electing Taxpayer did not disclose solely because the Contingent Liability Transaction was already raised during an examination and, as a result, the Electing Taxpayer was unable to make a disclosure as outlined in Announcement 2002-02. An Electing Taxpayer that qualifies for a waiver of penalties under this provision must agree to provide the information required by Announcement 2002-02 and certify under penalties of perjury that the person signing the disclosure has examined the disclosure and that to the best of that person's knowledge and belief, the information provided contains all relevant facts and is true, correct and complete.

.03 Under the Fast Track Dispute Resolution Procedure - Contingent Liability Cases, an Electing Taxpayer must concede between 50% and 90% of the amount of the capital loss reported for the sale of the stock, depending on the merits of the case. Electing Taxpayers may negotiate or arbitrate the identity of the corporation that is entitled to the tax benefits associated with the deduction resulting from the assumed liability, and the manner and timing of the reduction in the tax benefits associated with the

Contingent Liability Transaction; provided that no reduction of such tax benefits is required unless the tax benefits associated with the deduction resulting from the assumed liability are taken into account by the Electing Taxpayer or an entity that was a member of its consolidated group (including any successor to such group) at any time. No adjustment will be made to transactional cost deductions taken in connection with the Contingent Liability Transaction. In addition, Electing Taxpayers may negotiate or arbitrate the applicability of any penalty proposed by the Service under section 6662 associated with the capital loss deduction. The tax basis of any unsold stock (or property the basis of which was determined directly or indirectly by reference to the basis in the hands of the Electing Taxpayer of the stock received in the purported section 351 exchanges), as of October 4, 2002, will be adjusted in the same manner as described in Section 5.06.

.04 When the assumed liability is ultimately taken into account for tax purposes, the tax benefits associated with it will be allowed, as appropriate under applicable legal principles in accordance with the method of accounting of the corporation entitled to those benefits.

.05 To the extent that the tax benefits associated with the deduction resulting from the liability assumed in the Contingent Liability Transaction are taken into account by the transferor or an entity that was a member of the transferor's consolidated group (including any successor to such group) at any time, the Electing Taxpayer must negotiate or arbitrate to eliminate any duplication in the tax benefits associated with the Contingent Liability Transaction using one of the following options: 1) reduce the amount of the deduction resulting from the liability assumed in connection with the Contingent Liability Transaction; or 2) recoup an amount equal to the permitted capital loss by including the amount of the permitted capital loss as ordinary income. The manner and time period over which such reduction or recoupment will occur is also subject to negotiation or arbitration.

.06 Within 90 days from the date of the notification to the Electing Taxpayer of its acceptance into the procedure, the Electing Taxpayer will provide to LMSB all of the information and documents specified in Exhibit 3. The Electing Taxpayer's failure to provide all of the information and documents specified in Exhibit 3 constitutes grounds for elimination from the Fast Track Dispute Resolution Procedure - Contingent Liability Cases and Binding Arbitration Procedure as set forth in Section 6.09. In cases not

governed by this settlement initiative, the Service and the Department of Justice will not be limited to seeking the information set forth, described or requested in Exhibit 3.

.07 Within 120 days from receipt of the Electing Taxpayer's information and documents, LMSB will complete its review of the submission, issue additional document requests to the Electing Taxpayer, if necessary, and conduct any necessary interviews.

.08 Within 20 days after any supplemental requests for information by LMSB, the Electing Taxpayer will respond to the outstanding requests for information. Electing Taxpayers may request an extension of this period; however, the Service will grant extensions only in exceptional circumstances and subject to its sole discretion.

.09 If the Electing Taxpayer fails to provide the requested information that is in its possession or control, LMSB may elect to eliminate the Electing Taxpayer from the Fast Track Dispute Resolution Procedure - Contingent Liability Cases and Binding Arbitration Procedure and the case will be subject to the full range of Service audit and deficiency procedures. In addition, the Contingent Liability Transaction issue will not be considered under the settlement, mediation or arbitration procedures under Notice 2001-67 (LMSB/Appeals Fast Track Dispute Resolution Program), 2001-2 C.B. 544; Announcement 2002-60 (Extension of Test of Arbitration Procedure for Appeals), 2002-26 I.R.B. 28; and Rev. Proc. 2002-44 (Mediation Procedure for Appeals), 2002-26 I.R.B. 10. Elimination from the Fast Track Dispute Resolution Procedure - Contingent Liability Cases and Binding Arbitration Procedure will be reviewed and approved by the applicable LMSB Director of Field Operations. Such decision shall be final and not subject to judicial review.

.10 Within 30 days after the end of the period for examination (see Sections 6.07 and 6.08 above), the Electing Taxpayer and LMSB will exchange a written summary of the facts, law and argument applicable to the issues being considered under the Fast Track Dispute Resolution Procedure - Contingent Liability Cases. After all the facts and circumstances have been evaluated, LMSB will determine whether penalties should be proposed.

.11 LMSB will promptly submit the administrative file related to the Contingent Liability Transaction and the written summaries to Appeals. Appeals and the Electing Taxpayer will schedule an

initial meeting for the purpose of starting settlement discussions. Such meeting will be held on a date agreeable to the parties, but no later than 30 days from the receipt by Appeals of the administrative file and the summaries. A representative of the Electing Taxpayer with decision-making authority must participate in the settlement negotiation session or sessions.

.12 Appeals will attempt to facilitate an agreement between LMSB and the Electing Taxpayer regarding the Fast Track Dispute Resolution Procedure - Contingent Liability Cases issues, including penalties, if applicable. Under the Fast Track Dispute Resolution Procedure - Contingent Liability Cases, Appeals will evaluate the penalties based on the merits inherent in the penalty issue. Appeals may make a recommendation regarding the settlement of any or all issues. The parties have 60 days from the date of the first meeting to reach an agreed settlement on all disputed issues identified in Section 6.02.

.13 Any proposed settlement is subject to review and concurrence by an Appeals Coordinator. If the parties reach a basis of settlement, Appeals will effectuate the settlement of agreed issues using established issue or case closing procedures, including the preparation of a Form 906, Closing Agreement on Final Determination Covering Specific Matters.

SECTION 7. BINDING ARBITRATION

01. After the earlier of the expiration of the 60-day period for reaching agreement under Section 6.12, or the time the parties agree they will not reach a settlement under the Fast Track Dispute Resolution Procedure - Contingent Liability Cases, the parties will take part in Binding Arbitration procedures. The Binding Arbitration will be conducted in accordance with the provisions in the Arbitration Agreement, set forth in Exhibit 2. The provisions in the Arbitration Agreement are mandatory and the agreement must be executed by the Electing Taxpayer when the application to participate in the Fast Track Dispute Resolution Procedure - Contingent Liability Cases is filed, or, at the latest, when the application for the Fixed Concession Procedure is amended to elect the Fast Track Dispute Resolution Procedure - Contingent Liability Cases.

.02 The Service will have 30 days for additional factual development from the date that the Electing Taxpayer is notified that the Service has determined that the Fast Track Dispute Resolution Procedure - Contingent Liability Cases was unsuccessful.

1) During this period the Service may request additional information or documents to complete a record for submission to the Arbitrator and the Electing Taxpayer will provide a written response or documents within 15 days of receipt of the written request;

2) The Service may conduct interviews, transcribed and under oath, of individuals involved in any capacity with the transaction. Such identified witnesses, internal or external to the Electing Taxpayer's organization, may be interviewed in this manner regardless of whether such individuals were interviewed by LMSB representatives at an earlier phase of this resolution process or during audit. The Electing Taxpayer will make all witnesses who are employed by Electing Taxpayer's organization in any capacity available upon request and will make good faith efforts to make all other witnesses available during this 30-day period.

.03 The Arbitration Agreement provides that the parties agree to be bound by the decision of the Arbitrator in respect of the issue to be resolved.

.04 Appeals will assign an employee to act as the Administrator ("Administrator") to manage and supervise the arbitration proceeding and to act as liaison between the parties and between the parties and the Arbitrator.

.05 The Electing Taxpayer will select a neutral arbitrator from a qualified list ("Qualified List") that the Service is in the process of developing and that will be announced at a later time. The Qualified List will consist of persons not employed by the Department of the Treasury having expertise and experience in federal tax matters. The Qualified List will be used to provide a pool of candidates from which one arbitrator will be selected. Within 15 days of the date that the Service notifies the Electing Taxpayer that the Service has determined that the Fast Track Dispute Resolution Procedure - Contingent Liability Cases was unsuccessful, the Electing Taxpayer must select three names from the Qualified List and rank them in order of preference. The Administrator will arrange for the hiring of the Arbitrator, subject to applicable rules and regulations for Government procurement. If the first candidate is unavailable, the Administrator will contact the other candidates in the order indicated by the Electing Taxpayer.

.06 The Arbitrator shall have no official, financial, or personal conflict of interest with respect to the parties, unless such interest is fully disclosed in writing to the parties and the Administrator, and the

parties agree to the continued participation of the Arbitrator. A selected arbitrator who has represented or currently represents a promoter or investor in a Contingent Liability Transaction, or whose firm has done so, is not neutral and, therefore, will be ineligible to serve as an arbitrator in a proceeding under this revenue procedure. Each party will pay one half of the Arbitrator's compensation, expenses, and related fees and costs.

.07 The Arbitrator will be disqualified from representing the Electing Taxpayer in any pending or future action that involves the transactions or issues that are the particular subject matter of the arbitration. This disqualification extends to representing any other parties involved in the transactions or issues that are the particular subject matter of the arbitration. Members or employees of the Arbitrator's firm will also be disqualified from representing the Electing Taxpayer or any other parties involved in the transactions or issues that are the particular subject matter of the arbitration in an action that involves the transactions or issues that are the particular subject matter of the arbitration, unless: (i) the Arbitrator disclosed the potential of such representation prior to the parties' acceptance of the Arbitrator; (ii) such action relates to a taxable year that is different from the taxable year(s) under arbitration; (iii) the firm's internal controls preclude the Arbitrator from any form of participation in the matter; and (iv) the firm does not allocate to the Arbitrator any part of the fee therefrom.

The Arbitrator will not be prohibited from receiving a salary, partnership share, or corporate distribution established by prior independent agreement. The Arbitrator and the firm are not disqualified from representing the Electing Taxpayer or any other parties involved in the arbitration in any matter unrelated to the transactions or issues that are the particular subject matter of the arbitration.

.08 The arbitration will be conducted using Final Offer Arbitration, also known as "baseball" arbitration. Because the parties may continue negotiations during the arbitration proceeding, the final settlement offers ("Final Offers") proposed by each party shall be clearly labeled as such. The Final Offers of both parties shall result in a concession by the Electing Taxpayer of between 50% and 90% of the capital loss reported by the Electing Taxpayer on the sale of the stock. The Final Offers will identify the corporation that the party contends is entitled to the tax benefits associated with the deduction resulting from the assumed liabilities, indicate whether that corporation is a member of the Electing

Taxpayer's consolidated group (including any successor to such group), and state the means for eliminating any duplication in the tax benefits associated with the Contingent Liability Transaction. In addition, the Final Offers shall make clear whether any penalty is proposed and accepted or rejected. Not more than 10 days after submission of the memorandums supporting their respective positions ("Memorandum in Support"), see Section 7.12 below, the parties shall submit their Final Offers.

.09 Only the following issue will be submitted to the Arbitrator:

Which of the two Final Offers presented by the parties best reflects the hazards of litigating the Electing Taxpayer's entitlement to a capital loss deduction from the sale of stock received as part of the Contingent Liability Transaction?

.10 The Arbitrator is not permitted to make any conclusions of law or provide reasoning that represents an interpretation of the law; however, it is necessary for the Arbitrator to refer to the existing applicable law in considering the submitted issue. Legal guidance will be provided by the parties for purposes of establishing context, limited to guidance on the specific arguments presented in the Fast Track Dispute Resolution Procedure - Contingent Liability Cases. With respect to factual information, the Electing Taxpayer may only submit to the Arbitrator for consideration material that was previously provided to LMSB and Appeals in the Fast Track Dispute Resolution Procedure - Contingent Liability Cases. The Service may also present facts developed under Section 7.02. The Arbitrator is not permitted to make any findings of fact, except for resolving the issue stated in Section 7.09.

.11 The parties to the arbitration will be the Electing Taxpayer and the Commissioner. The Electing Taxpayer may choose to have the representation of counsel or an authorized representative assist in preparing for and conducting the arbitration proceeding. The Office of Chief Counsel will represent the Commissioner in the arbitration proceeding.

.12 Within 60 days of the date the proposed arbitrator is selected, the parties will submit to the Administrator for submission to the Arbitrator, the administrative record developed prior to and during the Fast Track Dispute Resolution Procedure - Contingent Liability Cases and a stipulation of facts based on the record. The Service is permitted to include additional factual information developed pursuant to Section 7.02 in these submissions. In addition, each party will submit the legal guidance on which it

intends to rely as set forth in section 6 of the Arbitration Agreement. The legal guidance will consist of a list of citations or copies of relevant cases and legal authority. Each party will also submit a Memorandum in Support, not to exceed 30 pages, stating each party's respective legal and factual contentions. The memorandum shall be typed only on one side of opaque unglazed paper, 8 1/2 inches wide by 11 inches long. All pages shall have margins on both sides of each page that are no less than 1 inch wide, and margins on the top and bottom of each page that are no less than 3/4 inch wide. Text and footnotes shall appear in consistent typeface no smaller than 12 characters per inch, with double spacing between each line of text and single spacing between each line of indented quotations and footnotes. Quotations in excess of five lines shall be set off from the surrounding text and indented.

.13 The Administrator will ensure that each party receives the materials submitted by the opposing party. Any objections to statements of fact, not previously presented, will be submitted to the Administrator within 10 days. If there are no objections, the Administrator will forward the submissions to the Arbitrator no earlier than the date the employment contract with the Arbitrator has been approved.

.14 Within 45 days of the date the Arbitrator receives the information set forth in Section 7.12 above, the Arbitrator will contact the parties through the Administrator and set the time for an arbitration hearing, if the Arbitrator decides that a hearing is necessary. Any such hearing will not exceed 8 hours, which shall include any oral arguments or the presentation of witnesses, as the Arbitrator may deem necessary. Alternatively, the Arbitrator may elect to render a decision based on the written record alone, without a hearing.

.15 If, at any time prior to the date set for the arbitration hearing, or if no hearing is ordered, prior to the decision of the Arbitrator, the parties reach an agreement resolving all issues relating to the Contingent Liability Transaction, the parties may withdraw from the arbitration process by notifying the Administrator. Any such settlement negotiated by Appeals will be subject to the concurrence of Counsel. If a settlement is reached, Appeals will effectuate the settlement of agreed issues using established issue or case closing procedures.

.16 Within 30 days after the hearing, the Arbitrator will select one of the Final Offers proposed by the parties. After the Arbitrator renders a decision and advises the Administrator and the parties of the

decision, the case or issues will be closed using established procedures for case closing, including preparation of a Form 906, Specific Matters Closing Agreement.

.17 The tax basis of any unsold stock (or property the basis of which was determined directly or indirectly by reference to the basis in the hands of the Electing Taxpayer of the stock received in the purported section 351 exchanges), as of October 4, 2002, will be adjusted in the same manner as described in Section 5.06.

SECTION 8. GENERAL PROVISIONS

These provisions apply to any Taxpayer who has elected to participate in any of the resolution methodologies set forth in this revenue procedure.

.01 Any issue that is not resolved through the resolution methodologies set forth in this revenue procedure will be resolved using normal audit and deficiency procedures.

.02 If applicable, a settlement entered into as a result of any of the resolution methodologies set forth in this revenue procedure will be reported to the Joint Committee on Taxation in accordance with section 6405.

.03 Any Taxpayer electing to participate in any of the resolution methodologies set forth in this revenue procedure agrees to waive the prohibition against ex parte communications between Appeals employees and other Service employees, provided by section 1001(a) of the Internal Revenue Service Restructuring and Reform Act of 1998, for purposes of pursuing settlement under this revenue procedure.

.04 The Binding Arbitration Procedure set forth in this revenue procedure is confidential. Any dispute resolution communication related to the arbitration proceeding is confidential and may not be disclosed by any party, nonparty participant, or arbitrator except as provided under 5 U.S.C. § 574. A dispute resolution communication includes all oral or written communications prepared for purposes of a dispute resolution proceeding. See 5 U.S.C. § 571(5).

.05 The results of any settlement reached through the resolution methodologies set forth in this revenue procedure, including the decision of the Arbitrator, may not be used as precedent by any Taxpayer and will not be binding on, or otherwise control, the parties for taxable years not covered by a specific matters closing agreement executed by the parties.

.06 Service and Treasury employees who participate in any way in the settlement procedures described in this revenue procedure and, pursuant to section 6103(n) of the Internal Revenue Code of 1986, as amended, any person under contract to the Service, including the Arbitrator, that the Service invites to participate will be subject to the confidentiality and disclosure provisions of the Code, including sections 6103, 7213, and 7431. See also 5 U.S.C. § 574.

.07 A Taxpayer that elects to participate in any of the resolution methodologies set forth in this revenue procedure consents to the disclosure by the Service of the Taxpayer's returns and return information incident to the settlement procedures provided in this revenue procedure to the Arbitrator and any participant identified in any list of participants provided for in the Arbitration Agreement, to any participant for the Taxpayer identified in writing by the Taxpayer subsequent to execution of the Agreement, and to any persons, including witnesses, who participate in the arbitration proceeding on behalf of either party.

.08 Any Taxpayer electing to participate in any of the resolution methodologies set forth in this revenue procedure acknowledges that employees of the Service and all other Treasury employees involved in these proceedings are bound by section 7214 (a)(8) and must report information concerning violations of any revenue law to the Secretary.

.09 The Commissioner is not precluded or impeded under section 7605(b) or any administrative provisions adopted by the Commissioner from conducting a later examination or inspection of records with respect to any taxable year of a participating Taxpayer by inspecting information, documents and materials supplied in connection with this revenue procedure.

SECTION 9. EFFECTIVE DATE

This revenue procedure is effective October 4, 2002.

SECTION 10. PAPERWORK REDUCTION ACT

The collection of information contained in this revenue procedure has been reviewed and approved by the Office of Management and Budget in accordance with the Paperwork Reduction Act (44 U.S.C. § 3507) under control number 1545-1801. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a

valid OMB number.

The collection of information in this revenue procedure is in the sections titled APPLICATION PROCESS, FIXED CONCESSION PROCEDURE and FAST TRACK DISPUTE RESOLUTION PROCEDURE - CONTINGENT LIABILITY CASES. This information is required to apply the terms of the settlements set forth in this revenue procedure and determine the appropriate amount of penalties due, if any. The information will be used to determine whether the taxpayer has reported the disclosed items properly for income tax purposes. The collection of information is required to obtain the benefits described in this revenue procedure. The likely respondents are businesses or other for-profit institutions.

The estimated total annual reporting burden is 7,500 hours.

The estimated annual burden per respondent is an average of 50 hours, depending on individual circumstances. The estimated number of respondents is 150.

The estimated frequency of responses is one time per respondent.

Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally tax returns and tax return information are confidential, as required by 26 U.S.C. § 6103.

CONTACT INFORMATION

For information regarding this revenue procedure, call Jo Ann Prager, Manager at (202) 283-8445 (not a toll-free call). Ms. Prager may also be reached by fax at (202) 283-8406 or electronically at the following email address: otsa@irs.gov. Please include "Revenue Procedure 2002-67" in the subject line of any electronic communication.