DaimlerChrysler Private Letter Ruling

Folgendes Private Letter Ruling, der deutschen verbindlichen Auskunft vergleichbar, wurde von der amerikanischen Bundesfinanzverwaltung Internal Revenue Service – IRS auf Anfrage der von Chrysler beauftragten Rechtsanwaltskanzlei bezüglich Fragen der Steuerneutralität der Einbringung der Anteile an der Chrysler Corp. in die DaimlerChrysler AG durch in den USA ansässige Chrysler-Aktionären erlassen.

Date: September 14, 1998
Refer Reply to: PLR 111971-98

Dear * * *

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1. This is a reply to your letter dated June 2, 1998, requesting rulings under Treas. Reg. section 1.367(a)-3(c), and, whether, based on your representations, the exchange of shares by U.S. person will qualify for an exception to the general rule of section 367(a) of the Internal Revenue Code of 1986, as amended (the Code);

2. the rulings contained in this letter are predicated upon facts and representations submitted by taxpayer and accompanied by penalty of perjury statements executed by an appropriate party. This office has not verified any of the material submitted in support of the request for rulings. Verification of the factual information, representations, and other data may be required as part of the audit process;

3. the relevant facts are as follows: UST is a domestic corporation incorporated under the laws of State A on Date B, and is the surviving corporation following mergers with a number of operating subsidiaries, including a predecessor corporation that was originally incorporated in Date C. UST common stock is traded on various U.S. stock exchanges, as well as on some foreign stock exchanges. UST also has outstanding, convertible preferred shares that are convertible into UST common stock. UST will call the preferred stock for redemption prior to the consummation of the combination described below. UST and its subsidiaries are engaged primarily in business a. Taxpayer represents that UST has at least

one shareholder who could be a 5 per cent transferee shareholder as defined in Treas. Reg. section 1.367(a)-3(c)(5)(ii);

4. FA is a corporation organized under the laws of Country D on Date E, and is the successor corporation to predecessor entities, the first of which was organized on Date F. FA ordinary shares are publicly traded on various Country D stock exchanges, as well as on stock exchanges of other countries. FA also has outstanding convertible notes (Notes N) which are treated by FA as equity for U.S. federal income tax purposes. FA, along with its subsidiaries, are engaged in a series of businesses the primary of which is business b. UST's business a and FA's business b are of the same industry type;

5. JV is a newly formed Country D corporation which will be used to combine UST and FA in the transaction described blow. The United States has a comprehensive income tax treaty with Country D that includes an exchange of information article allowing the exchange of information as necessary for carrying out the provisions of domestic law and the treaty. Accordingly, the following transfers are proposed:

a) JV will first offer to exchange its ordinary shares for outstanding ordinary shares for outstanding ordinary shares of FA. It is possible that less than 80 per cent of the outstanding FA ordinary shares will be acquired by JV in the FA exchange. However, a minimum of * * * per cent of the outstanding FA ordinary shares will be acquired by JV in the FA exchange. Each participating FA shareholder will transfer one outstanding ordinary share of FA in exchange for one ordinary share (or, under certain circumstances, * * * ordinary shares) of JV;

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b) subject to approval by UST shareholders, pursuant to a merger under State A law in which UST survives, all of the then outstanding common shares of UST will be transferred to JV in exchange for ordinary shares of JV. The UST exchange will be executed by an agent on behalf of the UST shareholders for purposes of accomplishing the transfer under Country D law;

c) after the FA and UST stock exchanges, JV will own all of the outstanding common shares of UST and a certain percentage of the shares of FA. FA will then merge into JV, causing the FA ordinary shareholder that did not participate in the exchange of FA stock to receive ordinary shares of JV in exchange for their ordinary shares of FA. After the merger, JV will own all of the assets and liabilities of FA and FA shareholders will have exchanged their shares of FA stock for shares of JV. In addition, FA shareholders who did not participate in the FA exchange may be awarded cash pursuant to a judicial proceeding under Country D law. The merger is pursuant to the overall plan to combine FA and UST in to JV. There is the possibility that one or more of the FA shareholders will challenge the merger under Country

D law. While there is the possibility that the merger could be delayed or not consummate because of a judicial proceeding, taxpayer represents that based on the advice of Country D counsel, it is very unlikely that the merger will be delayed for more than one year;

6. the taxpayers represent that the exchange of UST stock will qualify as a reorganization within the meaning of section 368(a) of the Code, and/or, when integrated with the exchange of FA stock, and taking into account the FA merger, will be treated as a transaction described in section 351(a) of the Code;

7. the exchange of UST stock by U.S. persons is subject to section 367(a) of the Code, which provides that the transfer of appreciated property (including stock) by a U.S. person to a foreign corporation in a transaction that would otherwise qualify as a non-recognition exchange is treated as a taxable transfer, unless an exception applies. In the case of a section 367(a) transaction in which a U.S. person transfers domestic stock of a foreign corporation, the U.S. transferor will qualify for non-recognition treatment if the requirements of Treas. Reg. section 1.367(a)-3(c)(1) are satisfied;

8. among the Treas. Reg. section 1.367(a)-3(c)(1) requirements is the requirement that the U.S. target company satisfy the reporting requirements of Treas. Reg. section 1.367(a)-3(c)(6), an the requirement that each U.S. transferor who is a 5 per cent shareholder of the transferee foreign corporation immediately after the exchange of target stock enter into a 5-year gain recognition agreement as provided in section 1.367(a)-8. The taxpayers represent that UST, as the U.S. target company, will satisfy the reporting requirements of section 1.367(a)-3(c)(6). The remaining section 1.367(a)-3(c)(1) requirements are as follows:

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a) U.S. persons transferring U.S. target stock must receive, in the aggregate, 50 per cent or less of both the total voting power and total value of the stock in the transferee foreign corporation. The taxpayers represent that U.S. transferors of UST stock will, in the aggregate, receive, actually or constructively, 50 per cent or less of both the total voting power and total and total value of the stock in JV in the UST exchange.

b) U.S. persons who are officers or directors of the U.S. target corporation, or who are 5 per cent shareholders of the U.S. target corporation, will own, in the aggregate, 50 per cent or less of each of the voting power and the total value of the stock of the transferee foreign corporation immediately after the exchange of the U.S. target stock. The taxpayers represent that U.S. persons who are officers, directors, or 5 per cent target shareholders of UST will own, actually or constructively, 50 per cent of less of each of the total voting power and total value of the stock of JV immediately after the UST exchange.

c) the active trade or business test of Treas. Reg. section 1.367(a)-3(c)(3) must be satisfied. The three elements of the active trade or business test are described below:

i) the transferee foreign corporation [or any qualified subsidiary or qualified partnership as defined under section 1.367(a)-3(c)(5)(vii) and (viii)] must have been engaged in the active conduct of a trade or business outside the United States, within the meaning of sections 1.367(a)-2 T(b)(2) and (3), for the entire 36 months period immediately preceding the exchange of U.S. target stock;

ii) at the time of the exchange, neither the transferors nor the transferee foreign corporation (or any qualified subsidiary or qualified partnership engaged in the active trade or business) will have the intention to substantially dispose of or discontinue such trade of business;

iii) the substantiality test as defined in Treas. Reg.1.367(a)-3(c)(3)(iii) must be satisfied.

9. with respect to clause (i), JV, the transferee foreign corporation, will not have been engaged in a active trade or business for the entire 36-month period prior to the exchange nor will it have owned any qualified subsidiaries or partnerships so engaged. A transferee foreign corporation may satisfy the test, however, by acquiring at the time of, or prior to, the exchange a trade or business that has been active for the preceding 36 months. This rule does not apply to the acquisition of a trade or business of a U.S. target company. See Treas. Reg. section 1.367(a)-3(c)(3)(ii)(A). Thus, JV will be treated as satisfying the test if it acquires a 36-month active trade or business of FA or one of FA’s qualified subsidiaries or qualified partnerships;

10. with reference to clause (i), the taxpayers represent that FA or one or more of FA’s qualified subsidiaries or qualified partnerships, as defined under section 1.367(a)-3(c)(5)(vii) and (viii), will have been engaged in the active conduct of a trade or business outside the Unites States, within the meaning of sections 1.367(a)-2T(b)(2) and (3), for the entire 36-month period immediately preceding the exchange of UST stock. The taxpayers also represent, for purposes of clause (ii), that, at the time of the UST exchange, none of the transferors of UST stock, JV, FA, or any qualified subsidiary or qualified partnership of FA, will have the intention to substantially dispose of or discontinue such trade or business;

11. under the substantiality test, the transferee foreign corporation must be equal or greater in value that the U.S. target corporation at the time of the U.S. target stock exchange [see section 1.367(a)-3(c)(3)(iii)(A)]. For this purpose, the value of the transferee foreign corporation shall include assets acquired outside the ordinary course of business by the

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transferee foreign corporation within the 36-month period preceding the exchange if certain requirements are met;

12. the taxpayers represent that at the time of the UST exchange, the fair market value of JV will be at least equal to the fair market value of UST. For purposes of this fair market value representation, the taxpayers represent that the fair market value of FA will not include the fair market value of any asset acquired outside the ordinary course of business within the 36-month period preceding the UST exchange for the principal purpose of satisfying the substantiality test of section 1.367(a)-3(c)(3)(iii). Also for purposes of this fair market value representation, the taxpayers represent that the fair market value of FA will include assets producing, or held for the production of, passive income as defined in section 1297(b) [formerly section 1296(b)] which assets were acquired outside the ordinary course of business within the 36-month period preceding the UST exchange only to the extent such assets were acquired in a transaction (or series or related transactions) which was not undertaken for a purpose of satisfying the substantiality test of section 1.367(a)-3(c)(3)(iii);

13. the taxpayers request a ruling under section 1.367(a)-3(c)(9) that there will be substantial compliance with the active trade or business test, notwithstanding that less than 80 per cent of the outstanding FA shares may be acquired by JV in the FA exchange and that the merger of FA into JV may be delayed or may not occur due to a legal challenge brought by one or more of the FA shareholders, and notwithstanding that the substantiality test as described in section 1.367(a)-3(c)(3)(iii)(B) may not be met due to the acquisition by FA or any qualified subsidiary or qualified partnership of FA of certain passive assets not undertaken for a purpose of satisfying the substantiality test;

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14. under Treas. Reg. section 1.367(a)-3(c)(9), the Service may, in limited circumstances, issue a private letter ruling to permit the taxpayer to qualify for an exception to section 367(a)(1) if the taxpayer is unable to satisfy all of the requirements of the active trade or business test but is in substantial compliance with such test and meets all of the other requirements of section 1.367(a)-3(c)(1);

15. based solely on the information submitted and on the representation set forth above, it is held as follows:

a) the transfer or f the UST shares by U.S. persons in exchange for shares of JV will qualify for an exception to section 367(a)(1) [section 1.367(a)-3(c)(1) and section 1.367(a)-3(c)(9)];

b) any U.S. person transferring UST shares who is a 5 per cent transferee shareholder [as defined section 1.367(a)-3(c)(5)(ii)] will qualify for the exception to section

367(a) only upon entering into a 5-year gain recognition agreement pursuant to section 1.367(a)-8;

16. no opinion is expressed as to the tax treatment of the transaction under other provisions of the code and regulations, and no opinion is expressed about the tax treatment of any conditions existing at the time of, or effects resulting from, the transactions that are not specifically covered by this ruling;

17. in particular, no opinion was requested and no opinion is provided as to whether UST stock exchange qualifies as a reorganization within the meaning of section 368(a) of the Code and/or, when integrated with the FA stock exchange and taking into account the merger of FA into JV; will be treated as a transaction described in section 351(a) of the Code. In addition, no opinion is expressed as to the reporting requirements of U.S. persons exchanging UST stock under section 6038B and the regulations thereunder;

18. this ruling is directed only to the taxpayer who requested it. Section 6110(j)(3) of the Code provides that it may not be used or cited as precedent;

19. it is important that a copy of this letter be attached to the federal income tax return of the taxpayer involved for the taxable year in which the transaction covered by this ruling letter is consummated;

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20. pursuant to the power of attorney on file in this office, a copy of this letter is being addressed to the taxpayer's authorized representative."