INTERNAL REVENUE SERVICE
NATIONAL OFFICE TECHNICAL ADVICE MEMORANDUM

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Index (UIL) No.: 280F.04-03, 280F.05-12, 280F.02-03
CASE-MIS No.: TAM-103779-09

Director
LMSB Territory 7

Taxpayer's Name:
Taxpayer's Address:

Taxpayer's Identification No
Year(s) Involved:
Date of Conference:

LEGEND:

Taxpayer One =
Taxpayer Two =
State =
Owner One =
Owner Two =
Trust =
Business =
Unrelated Owner =
Lessee One =
Lessee Two =
Lessee Three =
Aircraft One =
Aircraft Two =
Aircraft Three =
Aircraft Four =
Aircraft Five =
Year A =

Year B =
Year C =
Date One =
Date Two =
Date Three =
Date Four =
Date Five =
Date Six =
Date Seven =
Date Eight =

ISSUES:

(1) Whether Taxpayer One regularly engaged in the business of leasing aircraft under sections 1.280F-5T(a) and (c) of the Income Tax Regulations, such that the two leased aircraft are exempt under section 280F(c)(1) of the Internal Revenue Code from the depreciation limitations imposed under section 280F.

(2) Whether the Aircraft Three leased by Taxpayer One to Lessee One, a related Subchapter S corporation, is predominantly used in a qualified business use in Year A and therefore exempt from the depreciation limitations pursuant to section 280F(d)(6) of the Code.

(3) Whether Taxpayer Two regularly engaged in the business of leasing aircraft under sections 1.280F-5T(a) and (c) of the regulations, such that the leased aircraft is exempt under section 280F(c)(1) of the Code from the depreciation limitations imposed under section 280F.

(4) Whether the Aircraft Five leased by Taxpayer Two to Lessee One, a related Subchapter S corporation, is predominantly used in a qualified business use in Year B and therefore exempt from the depreciation limitations pursuant to section 280F(d)(6) of the Code.

CONCLUSIONS:

(1) Taxpayer One is not regularly engaged in the business of leasing aircraft under sections 1.280F-5T(a) and (c) of the regulations, and therefore the two leased aircraft are not exempt under section 280F(c)(1) of the Code from the depreciation limitations imposed under section 280F.

(2) Aircraft Three is not predominantly used in a qualified business use in Year A pursuant to section 280F(d)(6) of the Code and therefore is subject to the depreciation limitations of sections 280F(b) and (d).

(3) Taxpayer Two is not regularly engaged in the business of leasing aircraft under sections 1.280F-5T(a) and (c) of the regulations, and therefore the leased aircraft is not exempt under section 280F(c)(1) of the Code from the depreciation limitations imposed under section 280F.

(4) Aircraft Five is not predominantly used in a qualified business use in Year B pursuant to section 280F(d)(6) of the Code and therefore is subject to the depreciation limitations of sections 280F(b) and (d).

FACTS:

Taxpayer One

Taxpayer One, a State limited liability company, was formed on Date One. Taxpayer One is owned percent by Owner One and percent by his wife, Owner Two. Taxpayer One was formed for the purpose of acquiring and leasing non-commercial aircraft and other transportation property to Lessee One.

Taxpayer One is engaged solely in the acquisition and leasing of aircraft and transportation equipment. Taxpayer One identifies equipment for purchase, negotiates purchase contracts, arranges financing for purchases, and negotiates leases. Taxpayer One has purchased a total of four airplanes since its inception in Year C for use in its leasing business.

Taxpayer One purchased Aircraft One and began leasing it in Year C. On Date Two, Taxpayer One purchased Aircraft Two. On Date Three, Taxpayer One traded in Aircraft One towards the purchase of Aircraft Three, and on Date Four, Taxpayer One traded in Aircraft Two towards the purchase of Aircraft Four. During the years at issue in this letter, Taxpayer One owned Aircraft Three and Aircraft Four.

Since its formation, in addition to Lessee One, Taxpayer One has leased its aircraft to Lessee Two, and Lessee Three, all of which are related entities.

Lessee One is directly owned percent in total by Owner One and Owner Two. Specifically, Owner One owns percent and Owner Two owns percent of Lessee One. An additional percent of Lessee One is owned by Trust, a grantor trust created by Owner Two. Unrelated Owner owns the remaining percent of Lessee One. Accordingly, percent of Lessee One is owned by Owner One and Owner Two directly or through Trust. Lessee One is a Subchapter S corporation which operates Business. Lessee Two is percent owned by Owner One. Lessee Three is a single-member LLC. The single-member of Lessee Three is Lessee One.

Taxpayer One uses the accrual method of accounting and files its annual partnership returns on a calendar year basis.

Taxpayer One is depreciating the Aircraft Three (including improvements that were made to Aircraft Three on Date Five) under section 168(a) of the Code over seven years using the percent declining balance method of depreciation.

Personal travel of Aircraft Three by Owner One, his family and friends accounted for percent of the total use of Aircraft Three during Year A. The log for Aircraft Three noted each personal trip. Mileage attributable to the presence of Owner One on business trips comprise another percent. Qualified business use by Lessee One (exclusive of flights to influence legislation, entertainment flights, and maintenance flights) accounted for percent of the plane's use during Year A. Flights to influence legislation and entertainment flights accounted for percent of the plane's use during Year A. Maintenance flights accounted for percent of the plane's use during Year A.

Taxpayer Two

Taxpayer Two, a State limited liability company, was formed on Date Six. Taxpayer Two was formed for the purpose of acquiring and leasing non-commercial aircraft to Lessee One. Owner One and his wife Owner Two are each percent partners of Taxpayer Two.

Taxpayer Two uses the accrual method of accounting and files its annual partnership returns based on a December 31 year end.

Taxpayer Two leased Aircraft Five to Lessee One pursuant to a lease agreement, dated Date Seven. Taxpayer Two has not leased Aircraft Five to any other parties.

Taxpayer Two purchased Aircraft Five and placed it in service on Date Eight. The partnership claimed the additional first-year depreciation allowance provided by section 168(k)(1) of the Code (i.e., "bonus depreciation") in Year B and is depreciating the remaining basis of the plane under section 168(a) over 5 years using the percent declining balance method of depreciation.

Personal travel of Owner One, his family and friends accounted for percent of the use of Aircraft Five in Year B. Maintenance flights accounted for percent of the use of Aircraft Five during Year B. Business travel, with and without Owner One aboard the plane, accounted for percent of the flight time of Aircraft Five during Year B. Aircraft Five was sold after Year B and Taxpayer Two currently owns no aircraft.

LAW AND ANALYSIS:

Section 167(a) of the Code allows as a depreciation deduction a reasonable allowance for the exhaustion, wear and tear of property used in a trade or business or of property held for the production of income. Section 168(a) provides that, generally, the depreciation deduction provided by section 167(a) for any tangible property shall be determined using the applicable depreciation method, the applicable recovery period, and the applicable convention. Typically, aircraft that are not used in the commercial or contract carrying of passengers or freight are classified under asset class 00.21 of Rev. Proc. 87-56, 1987-2 C.B. 674, and are depreciated under section 168(a) using the 200 percent declining balance method over a period of five years. Aircraft used in the commercial or contract carrying of passengers or freight are classified under asset class 45.0 of Rev. Proc. 87-56 and are generally depreciated under section 168(a) using the 200 percent declining balance method over a period of seven years.

Section 280F of the Code defines, and is applicable to, a class of property designated as "listed property". Section 280F(d)(4)(A) provides that, subject to certain exceptions, listed property means any passenger automobile, any other property used as a means of transportation (e.g., a bus, boat, or airplane), any property of a type generally used for purposes of entertainment, recreation, or amusement, any computer or peripheral equipment, and any cellular telephone (or other similar telecommunications equipment). Enacted as part of the Tax Reform Act of 1984, section 179, 1984-3 (Vol.1) C.B. 221, section 280F was designed to reduce two specific abuses of the tax system by business taxpayers by deferring a portion of the depreciation deduction for listed property to later years in certain cases. The first of these abuses relates only to passenger automobiles, and is not relevant to the present case. The second, however, is directly relevant.

With regard to all types of listed property (including aircraft), Congress sought to limit the use of accelerated depreciation for such property where there is excessive personal use by business owners and their employees. The Joint Committee on Taxation explained that Congress was concerned about the use of accelerated depreciation with respect to property used primarily for personal or investment use rather than in the conduct of a trade or business, and that the incentive of accelerated depreciation was not designed to subsidize the purchase of personal property that is used incidentally or occasionally in the taxpayer's business. Joint Committee on Taxation Staff, General Explanation of the Revenue Provisions of the Deficit Reduction Act of 1984, 98th Cong., 2d Sess. 559 (1984).

To this end, Congress enacted section 280F(b)(1) of the Code (the "predominant use limitation"), which provides that if any listed property is not predominantly used in a qualified business use for any taxable year, the deduction allowed under section 168 with respect to such property for such taxable year and any subsequent taxable year shall be determined under section 168(g) (relating to the alternative depreciation system, which provides only straight-line depreciation). Section 280F(b)(3) clarifies that property shall be treated as predominantly used in a qualified business use for any taxable year if the business use percentage for such taxable year exceeds 50 percent. Section 280F(d)(1) states that any deduction allowable under section 179 for listed property is subject to the limitations of section 280F(b) as if it was a depreciation deduction allowable under section 168.

Section 280F(d)(6)(A) of the Code clarifies that the term "business use percentage" means the percentage of the use of any listed property during any taxable year which is a qualified business use. Section 280F(d)(6)(B) defines "qualified business use" as any use in the trade or business of the taxpayer except for uses listed in section 280F(d)(6)(C). The exceptions under section 280F(d)(6)(C) were designed to prevent a taxpayer from disguising excessive personal use by business owners and their employees by structuring the use as a lease or a compensation arrangement.

Section 280F(d)(6)(C)(i)(I) of the Code provides that qualified business use does not include leasing property to any 5-percent owner or related person. Section 1.280F-6(d)(2)(ii) of the regulations clarifies that the exclusion in section 280F(d)(6)(C)(i)(I) applies only to the extent that the use of the listed property is by an individual who is a related person or a 5-percent owner with respect to the owner or lessee of the property. Without this regulatory clarification to the statute, all use under a lease to a 5-percent owner or related person would be excluded from qualified business use for purposes of the predominant use test of section 280F(b) (or, in the case of an aircraft, both the 25-percent threshold of section 280F(d)(6)(C)(ii) and the predominant use test of section 280F(b)). In the case where more than 75 percent of the overall use of an aircraft is use under such a lease, absent section 1.280F-6(d)(2)(ii) the aircraft would fail to meet the 25-percent threshold (discussed below) without regard to whether the aircraft was actually used by the 5-percent owner or related person. The regulatory clarification limits the exclusion under section 280F(d)(6)(C)(i)(I) instead to actual use by the individual who is a 5-percent owner or related person, in accord with the concerns expressed by Congress in enacting section 280F(b).

Sections 280F(d)(6)(C)(i)(II) and (III) provide additional exclusions from qualified business use that are not subject to the restriction found in section 1.280F-6(d)(2)(ii).

Section 280F(d)(6)(C)(ii) of the Code provides that section 280F(d)(6)(C)(i) does not apply with respect to an aircraft if at least 25 percent of the total use of the aircraft during the taxable year consists of qualified business use not described in (i.e., not excluded under) section 280F(d)(6)(C)(i).

Section 280F(d)(6)(D) of the Code provides that, for purposes of section 280F(d)(6), the term "5-percent owner" means any person who is a 5-percent owner with respect to the taxpayer (as defined in section 416(i)(1)(B)(i)), and the term "related person" means any person related to the taxpayer (within the meaning of section

267(b)). The definition of related person includes under section 267(b)(1) members of a family (including brothers and sisters, spouse, ancestors, and lineal descendants). It also includes under section 267(b)(10) a corporation and a partnership if the same persons own (A) more than 50 percent in value of the outstanding stock of the corporation; and (B) more than 50 percent of the capital interest, or the profits interest, in the partnership.

Section 280F(c)(1) of the Code provides that section 280F does not apply to any listed property leased or held for leasing by any person regularly engaged in the business of leasing such property. Section 1.280F-5T(a) of regulations restates this rule, specifically referencing the predominant use limitation.

Section 1.280F-5T(c) of the regulations states that, for purposes of section 1.280F-5T(a), a person shall be considered regularly engaged in the business of leasing listed property only if contracts to lease such property are entered into with some frequency over a continuous period of time. The determination shall be made on the basis of the facts and circumstances in each case, taking into account the nature of the person's business in its entirety. Occasional or incidental leasing activity is insufficient. For example, a person leasing only one passenger automobile during a taxable year is not regularly engaged in the business of leasing automobiles. In addition, an employer that allows an employee to use the employer's property for personal purposes and charges the employee for the use of the property is not regularly engaged in the business of leasing with respect to the property used by the employee.

Leasing exemption

The principal issue in this technical advice memorandum is whether the three aircraft leased by Taxpayer One and Taxpayer Two to related entities during Year A and Year B are exempt from the annual depreciation limitation by virtue of section 280F(c)(1) of the Code. Under that section, if Taxpayer One and Taxpayer Two are "regularly engaged in the business of leasing aircraft", as clarified by section 1.280F-5T(c) of the regulations, the aircraft are excluded from the operation of any provision of section 280F, including the predominant use test of section 280F(b).

The phrase "occasional or incidental" in §1.280F-5T(c) of the regulations is drawn directly from the Joint Committee on Taxation explanation that the incentive of accelerated depreciation was not designed to "subsidize the purchase of personal property that is used incidentally or occasionally in the taxpayer's business", and its use in the regulations was meant to expand on the meaning of the phrase "entered into with some frequency over a continuous period of time." This meaning is illustrated by the example in the next sentence of the regulation, which states that a person leasing only one automobile during a taxable year is not regularly engaged in the business of leasing automobiles.

In order to make the determination whether Taxpayer One and Taxpayer Two are regularly engaged in the business of leasing, the particular facts and circumstances of the instant case must all be taken into account. The Service accepts the taxpayers' assertion that the aircraft leases at issue are valid leases. However, leasing activities rise to the standard of being "regularly engaged in the business of leasing" property for purposes of section 280F(c) of the Code only if they satisfy the requirements enunciated in section 1.280F-5T(c) of the regulations.

Taxpayer One and Taxpayer Two have never leased aircraft to persons other than related parties. The leases of Aircraft Three, Aircraft Four, and Aircraft Five during Year A and Year B have been multi-year leases, arguably in violation of the requirement that leases be entered into "with some frequency," entered into with related parties without competition. Beginning with the purchase of Aircraft Two, Taxpayer One has leased only two aircraft at any time, and leased Aircraft Three and Aircraft Four under a joint lease to Lessee One during Year A and Year B. Similarly, Taxpayer Two has leased only one aircraft at any time. Both of these leases are analogous to the example in the regulations stating that a taxpayer leasing only one automobile during a taxable year is not regularly engaged in the business of leasing automobiles.

The commonality of ownership between both Taxpayer One and Taxpayer Two and the lessee companies, combined with the considerable degree of personal use of Aircraft Three and Aircraft Five by Owner One and Owner Two, demonstrates that Owner One and Owner Two as individuals have retained a significant degree of personal control over the use of these two aircraft despite the ownership and leasing arrangements. The predominant use of Aircraft Three while under joint lease by Taxpayer One to Lessee One, and of Aircraft Five while under lease by Taxpayer Two to Lessee One, has been personal use by Owner One and Owner Two as individuals without regard to the leases, suggesting that the aircraft are in practice the personal property of Owner One and Owner Two that are used occasionally or incidentally in the taxpayers' business.

On the basis of the totality of these factors, we conclude that Taxpayer One and Taxpayer Two are not regularly engaged in the business of leasing aircraft, and, as such, are subject to the 50-percent qualified business use test (or "predominant use test") imposed by section 280F(b) of the Code, subject to the restrictions under section 280F(d)(6)(C)(i), in order to determine whether the taxpayers may depreciate the aircraft under section 168(a).

<u>Qualified business use</u>

Determining whether a taxpayer has met the predominant use test of section 280F(b)(1) of the Code in the case of an aircraft is a two-stage process. First, it must be determined whether the qualified business use of the aircraft satisfies the 25-percent threshold of section 280F(d)(6)(C)(ii), exclusive of uses listed under section

280F(d)(6)(C)(i). If the 25-percent threshold is met, the business uses excluded under section 280F(d)(6)(C)(i) may be taken into account as qualified business use to determine whether more than 50 percent of the total use of the aircraft is qualified business use for purposes of section 280F(b)(1). If section 280F(b)(1) is satisfied, then depreciation under section 168(a), the additional first-year depreciation allowance ("bonus depreciation") under section 168(k)(1), and the deduction under section 179 become available for recovering the cost of the aircraft. If section 280F(b)(1) is not satisfied, the cost of the aircraft must be recovered using the alternative depreciation system under section 168(g).

Taxpayer One and Taxpayer Two have requested that we address whether three particular types of use of the aircraft will qualify as qualified business use for purposes of the 25-percent threshold of section 280F(d)(6)(C)(ii). These uses are 1) business flights on which one or more passengers are 5 percent owners or related persons; 2) maintenance flights; and 3) certain other flights without a direct relation to the business of the lessee.

Business flights with a five percent owner or related person on board

Section 1.280F-6(d)(2)(ii)(1) of the regulations provides that qualified business use does not include leasing property to any 5-percent owner or related person, but only to the extent that the use of the listed property is by an individual who is a related party or a 5-percent owner with respect to the owner or lessee of the property. In other words, where the lessee of listed property is a related person or a 5-percent owner with respect to the owner or the lessee of the property, any use of the listed property by an individual who is a related person or a 5-percent owner with respect to either the owner or the lessee of the property is not qualified business use of the property for purposes of determining whether the owner of the property has satisfied the 25-percent threshold of section 280F(d)(6)(C)(ii) of the Code. Use of the leased listed property by persons other than a related person or a 5-percent owner with respect to the owner or the lessee of the property is not excluded from qualified business use under this rule, but might be excluded under sections 1.280F-6(d)(2)(ii)(2) or (3).

In order to implement section 1.280F-6(d)(2)(ii)(1), a reasonable allocation must be performed when an aircraft flight transports both (1) a 5-percent owner, a related person, or an employee described in section 280F(d)(6)(C)(i) of the Code and (2) one or more other persons. Pursuant to proposed section 1.274-10(e) of the regulations and Notice 2005-45, 2005-1 C.B. 1228, the Service will accept as a reasonable allocation an allocation made on the basis of the occupied seat hours or miles method. This method is designed for determining the amount of entertainment use of an aircraft by a particular individual, but is equally applicable to determining the amount of use by a particular individual for purposes of section 280F. Qualified business use must be reduced by any occupied seat hours or miles allocable to use by any 5-percent owner, related person, or employee described in section 280F(d)(6)(C)(i). Occupied seat hours or miles related to business use on the same flight by persons not described in section 280F(d)(6)(C)(i) are considered qualified business use for purposes of section 280F.

In the instant case, Taxpayer One and Taxpayer Two both lease listed property (Aircraft Three and Aircraft Five, respectively) to Lessee One. Lessee One is a related person (within the meaning of section 267(b)(10) of the Code) with respect to both Taxpayer One and Taxpayer Two, so section 280F(d)(6)(C)(i)(I) applies to the leases. To the extent that an individual that is a 5-percent owner or a related person (within the meaning of section 267(b)) with respect either to Taxpayer One or Taxpayer Two or to Lessee One (e.g., Owner One, Owner Two, their children, etc.) uses the aircraft either for personal or business use, the allocable amount of their use must be excluded from the qualified business use of the aircraft by Taxpayer One and Taxpayer Two pursuant to section 280F(d)(6)(C)(i)(I) and section 1.280F-6(d)(2)(ii) of the regulations for purposes of determining whether the 25 percent threshold of section 280F(d)(6)(C)(ii) has been met.

The taxpayers argue that the Service is misinterpreting section 1.280F-6(d)(2)(ii). In their interpretation, the language of section 1.280F-6(d)(2)(ii) establishes that a taxpayer who leases listed property to a 5-percent owner or related person may not treat all such activity as qualified business use simply on the basis of having leased the property, but must instead determine it's qualified business use based upon the qualified business use of the lessee. Under the taxpayers' analysis, this qualified business use is the business use of the property by the taxpayer, without regard to whether that business use is by a 5-percent owner or related person.

While we agree with the taxpayers that leasing listed property to a 5-percent owner or related person does not disqualify all use of the property pursuant to the lease from being qualified business use for purposes of the 25-percent threshold, we disagree with the remainder of the taxpayers' interpretation of our regulations. As detailed elsewhere in this memorandum, the flush language of section 1.280F-6(d)(2)(ii) limits the use excluded from qualified business use under section 1.280F-6(d)(2)(ii)(1) to that portion of the overall use of the listed property that is used by a 5-percent owner or related person rather than excluding all use by any person under the lease. The taxpayers' assertion that the flush language is meant to show not only that use by persons other than a 5-percent owner or related person is not excluded from qualified business use, but also that use by a 5-percent owner or related person for business purposes is not excluded from qualified business use, is contrary to the clear meaning of the regulatory language and is incorrect.

Maintenance flights

Maintenance flights for an aircraft used both for qualified business use and for other use pertain to all uses, not simply to qualified business use. Allocating all maintenance flights to flights flown for qualified business use is not a reasonable method of allocation in such a circumstance, whether the maintenance flights are required on a fixed basis (due whether the plane is otherwise flown or not) or a variable basis (based on hours flown). The allocable portion of any maintenance flight that relates to use by an individual who is a 5-percent owner or related person with respect to the owner or lessee must itself be treated as use by such person as an individual for purposes of section 280F(d)(6)(C) of the Code. Therefore, taxpayers must ratably allocate maintenance flights between flight hours or miles that are for qualified business use and flight hours or miles that are not for qualified business use, taking into account the exclusions under section 280F(d)(6)(C)(i). For example, if 40 percent of the flight hours (or miles) of an aircraft (other than maintenance flights) are qualified business use, then only 40 percent of maintenance flight hours (or miles) may be taken into account as qualified business use.

In the instant case, personal use by Owner One and his family members accounts for 73.58 percent of the overall use of Aircraft Three in Year A and 71.09 percent of the overall use of Aircraft Five in Year B. Allocating maintenance flights to these figures causes use by Owner One and his family to exceed 75 percent of the overall use of both aircraft, even without excluding an allocation of occupied seat hours or miles on business flights that included Owner One. Thus, an allocation of maintenance flights between personal and business flights, even without any further determinations, is dispositive in showing that neither Taxpayer One nor Taxpayer Two have met the 25-percent threshold of section 280F(d)(6)(C)(ii) of the Code with respect to Aircraft Three or Aircraft Five. As a consequence, Taxpayer One is not permitted to claim deductions for depreciation under section 168(a) for Aircraft Three in Year A, Year B, or any subsequent taxable year, and Taxpayer Two is not permitted to claim deductions for depreciation under section 168(a) for Aircraft Five in Year B or any subsequent taxable year. In addition, Taxpayer Two is not permitted to claim the additional first-year depreciation allowance under section 168(k)(1), or the deduction under section 179(a) for Aircraft Five in Year B. Instead, Taxpayer One and Taxpayer Two must recover the cost of Aircraft Three and Aircraft Five using the alternative depreciation system described in section 168(g). Any deduction claimed by Taxpayer One or Taxpayer Two in excess of the amount permitted under section 168(g) is “excess depreciation” under section 280F(b)(2)(B) and must be recaptured pursuant to section 280F(b)(2)(A). In addition, an income inclusion in the taxable income of Lessee One must be calculated under section 1.280F-7(b) of the regulations.

<u>Other flights not directly related to the business of Lessee One or Lessee Two</u>

Lessee One has used Aircraft Three for certain flights to transport legislative representatives and competitors to various destinations, sometimes without any employees of Lessee One aboard. While these flights are likely personal in nature with respect to Lessee One, they represent qualified business use (leasing) with respect to Taxpayer One as the lessor unless it is determined that one of the exclusions under section 280F(d)(6)(C)(i) applies to the flight. For instance, if it is determined that a particular flight had no connection to the business activities of Lessee One and was essentially a favor done at the behest of Owner One or one of his family members for a passenger on the flight, then, taking into account the commonality of ownership between Taxpayer One and Lessee One, the flight arguably may be excluded from qualified business use under section 280F(d)(6)(C)(i)(I) as use by a 5-percent owner or related person without regard to whether a 5-percent owner or related person was physically present on the flight.

CAVEAT:

Temporary or final regulations pertaining to one or more of the issues addressed in this memorandum have not yet been adopted. Therefore, this memorandum will be modified or revoked by the adoption of temporary or final regulations to the extent the regulations are inconsistent with any conclusions in the memorandum. See section 13.03 of Rev. Proc. 2009-2, 2009-1 I.R.B. 87, 103 (or any successor). However, a technical advice memorandum that modifies or revokes a letter ruling or another technical advice memorandum generally is not applied retroactively if the taxpayer can demonstrate that the criteria in section 13.02 of Rev. Proc. 2009-2, are satisfied.

A copy of this technical advice memorandum is to be given to the taxpayers. Section 6110(k)(3) of the Code provides that it may not be used or cited as precedent.