NOLs and COD: Important Topics in a Down Economy

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This report discusses certain issues under the application of section 382 in light of the economic downturn. In particular, the author asks for clarification regarding the use of cancellation of debt income attributable to prechange debt and a reconsideration of the manner in which the old loss corporation is valued. While the author understands the IRS’s and Treasury’s concern regarding the trafficking of net operating losses, she questions whether the effect of section 382 produces unintentional consequences for already troubled corporations and asks that some rules be revised in a manner that would help those corporations reestablish economic viability.

The downturn has shed light on several tax rules regarding cancellation of debt (COD) and the section 382 limitations. While the government has recently revised these rules to reflect practical business concerns (and these efforts should be applauded), other rules are in need of attention and clarification. This report discusses the impact of section 382 and the revised COD income rule under new section 108(i) in light of the current economic environment, in particular, the application of the net unrealized built-in gain (NUBIG) rules on the increase to the section 382 limitation for prechange COD, the effect of section 108(i) on the section 382 limitation, and the potential for double reduction of the section 382 limitation caused by an overlap of the corporate contraction rule and the substantial nonbusiness asset rule.

Increase in NUBIG to Take Into Account COD

The amount of net operating losses a corporation is entitled to use in each year after an ownership change is generally limited by section 382 to an amount equal to the value of the old loss corporation multiplied by the long-term tax-exempt rate.2 The section 382 rules also provide an additional increase to the section 382 limitation amount for some realized built-in gains (RBIG), which includes specified income items attributable to prechange periods.

Section 382(h)(1)(A) provides that if a loss corporation has a NUBIG, any built-in gain recognized during a tax year within the recognition period (generally the five-year period following the ownership change) will generally increase the section 382 limitation by the amount of RBIG, but only to the extent of the corporation’s NUBIG (reduced by any previously used RBIG). NUBIG is generally equal to the aggregate fair market value of the corporation’s assets immediately before the ownership change minus the aggregate adjusted basis of all assets held by the corporation at that time.3 There is, however, a NUBIG threshold. If the loss corporation’s NUBIG is not more than the lesser of 15 percent of the FMV of the loss corporation’s assets immediately before the change date or $10 million, the corporation is generally treated as

1 Unless otherwise indicated, all section references are to the Internal Revenue Code of 1986, as amended.
3 Section 382(h)(3)(A)(i). Under section 382(h)(3)(A)(ii), the secretary has authority to issue regulations to provide special rules to take into account any redemption or corporate contraction for purposes of determining the amount of NUBIG, although no regulations have yet been issued on the subject.
hav[ing no NUBIG (and therefore no amount of RBIG will increase the section 382 limitation). Also, for purposes of determining asset value to calculate NUBIG, cash, cash items, and any marketable security with a value that is not substantially different from its adjusted tax basis are not taken into account.6

RBIG generally is gain recognized during the recognition period on the disposition of an asset held by the loss corporation to the extent that (1) the corporation establishes that it held the asset immediately before the change date and (2) the gain does not exceed the FMV of the asset over the asset’s adjusted basis on the change date.5 Section 382(h)(6)(A) expands this general definition by providing that any item of income properly taken into account during the recognition period but attributable to prechange periods is treated as RBIG for the tax year during which the item is allowable as a deduction.6 Thus, RBIG includes both built-in gains that are recognized during the recognition period as well as some income items that are attributable to prechange periods.

The IRS has taken the position that COD income recognized during the recognition period should increase RBIG to the extent the income is recognized on prechange debt.7 In Notice 2003-65, the IRS provides two approaches to determine the amount of COD income that will be treated as RBIG for purposes of increasing the section 382 limitation: the “338 approach” and the “1374 approach.”

Under the 338 approach, COD income must be attributable to a prechange debt to increase RBIG; however, COD income attributable to a prechange debt will increase RBIG only to the extent that the debt’s adjusted issue price is greater than its FMV on the change date. Under the 1374 approach, COD income that is properly taken into account within the first 12 months after an ownership change is treated as RBIG if it arises from a debt owed by a loss corporation at the beginning of the recognition period. Any reduction in tax basis resulting from COD income realized within the first 12 months after an ownership change is treated as RBIG because the corporation would be treated as owning the asset immediately before the change for purposes of determining RBIG (although the reduction has no effect on determining NUBIG).5

While the increase in RBIG is helpful in allowing corporations to use prechange NOLs, it may not be of great assistance to all corporations in light of some limitations under existing law. First, the application of the NUBIG threshold could result in a corporation having effectively no NUBIG, such that any increase in RBIG would not increase the loss corporation’s section 382 limitation. As described above, any increase in the section 382 limitation as a result of RBIG is allowed only to the extent a loss corporation has NUBIG. Thus, if a loss corporation’s NUBIG is zero because the threshold has not been met, prechange COD income recognized during the recognition period would not increase the section 382 limitation.

Similarly, if the loss corporation’s NUBIG is less than any prechange COD income recognized during the recognition period, a loss corporation would not realize the full benefit of an increase in RBIG resulting from the recognized COD income. Although it is clear under Notice 2003-65 that some COD income increases RBIG under both the 338 approach and the 1374 approach, the notice does not provide that the amount of COD income recognized increases NUBIG. Thus, if COD income on prechange debt is recognized in excess of NUBIG, the benefit of the RBIG increase to a loss corporation could be insufficient to offset COD income recognized during the recognition period.

For example, assume a loss corporation (X) incurs $100 million of debt in year 1. In year 3, when X has $100 million of NOLs, it undergoes an ownership change. At the time of the ownership change, X has NUBIG of $20 million. In year 5, X undergoes a restructuring transaction under which some creditors exchange $50 million of debt for X stock (while the corporation is solvent). The FMV of the stock received is equal to $15 million, so the corporation recognizes $35 million of COD income under section 108(e)(8). Assuming no RBIG has yet been taken into account to increase the section 382 limitation, $15 million of COD income will not be offset by prechange losses because X’s NUBIG amount is only $20 million.

This seems to be an unfair result. If the rationale in allowing loss corporations to increase their section 382 limitation by RBIG is that prechange NOLs would have offset those gains had the gains been recognized in a prechange period, a similar reasoning should apply regarding COD income. In other words, if prechange NOLs would have offset COD income attributable to prechange debt had the debt been canceled before the ownership change, those NOLs should be available in a postchange year to offset NOLs, and NUBIG should be increased by COD income attributable to prechange debt that is recognized during the recognition period. If this were the rule, the threshold would still apply, but only after taking into account the applicable amount of COD income (and other built-in gain items) to determine the prethreshold NUBIG.

Guidance from the IRS would be helpful, and such a rule would not be novel in the context of section 382. In fact, a similar rule is provided for actual elections made under section 338. Section 382(h)(1)(C) provides that if a section 338 election is made in connection with an ownership change and NUBIG is reduced to zero as a result of the threshold requirement, the section 382 limitation will still be increased for that postchange year in which the section 338 election gains are recognized by the lesser of either the RBIG resulting from that election or the NUBIG determined without regard to the threshold requirement. It is recommended that a rule similar to that applicable to actual section 338 elections apply to the prechange COD income treated as RBIG, particularly given the 338 approach of Notice 2003-65, which treats

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6Section 382(h)(3)(B)(ii).
7Section 382(h)(2)(A).
8NUBIG is similarly adjusted to take into account these special items of RBIG. Section 382(h)(6)(C).
10The 1374 approach differs from that under Notice 87-79, which generally required that COD income be “intelligently related” to the ownership change, but that it occur after the change date.
the taxpayer as if a section 338 election had been made.9 However, this rule should apply equally to situations under the 1374 approach in light of the purpose behind Notice 2003-65, assuming the 1374 approach survives.10

Section 108(i) and Deferral of COD Income
An exciting development in federal income tax law was the enactment of section 108(i) earlier this year. Section 108(i) allows corporations that recognized COD income in tax years 2009 and 2010 as a result of some reacquisition transactions of applicable debt instruments to elect to defer recognition of the income until tax year 2014 and to thereafter include the income ratably over a five-year period. Rev. Proc. 2009-3711 clarified that a taxpayer could elect to defer the COD income either in whole or in part.

While this rule will benefit many struggling corporate taxpayers that have recognized COD income in restructuring and other transactions, some questions remain. For COD income attributable to prechange debt, it is unclear whether the amounts subject to deferral and included in a corporation’s income after the relevant recognition period (as a result of the five-year ratable inclusion provision in section 108(i)) should be entitled to treat that COD income as RBIG under either the 338 approach or the 1374 approach. One could argue that because the taxpayer received a benefit from deferral, amounts recognized after the recognition period on prechange debt should not increase RBIG, particularly because the corporation made the decision to elect deferral and should therefore be subject to the consequences of the election. The better approach is that the deferral benefit should not change the characterization of debt as prechange debt; rather, prechange NOLs should be available to offset COD income recognized on prechange debt if the income was recognized after the recognition period as a result of deferral.

The deferred recognition in this situation is similar to that under the installment sale rules of section 453. In an installment sale situation subject to section 453, built-in gains recognized after the recognition period on prechange debt will not increase RBIG, particularly because the corporation made the decision to elect deferral and should therefore be subject to the consequences of the election. The better approach is that the deferral benefit should not change the characterization of debt as prechange debt; rather, prechange NOLs should be available to offset COD income recognized on prechange debt if the income was recognized after the recognition period as a result of deferral.

Potential Overlap of Sections 382(h)(6) and (I)(4)(A)
The application of section 382 and multiple decreases in stock value can occur in many different transactions, including stock issuances, debt conversions, redemptions, mergers, and stock purchases. Although the rules applicable to the section 382 limitation were designed to prevent corporations from manipulating the corporation’s value (and thereby increasing the FMV of the corporation’s stock for purposes of the section 382 limitation), these rules can also overlap to potentially decrease the corporation’s value more than once for a particular transaction. Treasury was aware that there was potential for double-counting reductions when it issued reg. section 1.382-8, which provides that, at least in the context of consolidated groups, section 382 and that regulation generally should not apply to duplicate a reduction of the loss corporation’s value in a manner that would produce unintended consequences.13

Treasury’s foresight on the double-counting problem for consolidated groups is commendable but should be applied as an overarching principle to section 382 generally for purposes of determining the FMV of a loss corporation. In other words, if one provision of section 382 reduces the loss corporation’s value, another provision should not also apply to reduce its value by any amount that was substantively taken into account to reduce the corporation’s value in the first instance. While some may think this rule should be obvious, the decision in Berry Petroleum v. Commissioner14 raises some doubt about the current state of the law.15

In Berry, the target loss corporation (Target) was engaged in the heavy oil business through various leases, holdings, including a leasehold called Placerita. Target’s then parent (P) wanted to get out of the heavy oil business and therefore planned to sell Target. A potential bidder (Tenneco) desired to purchase only Placerita and approached P about the possibility of such a sale. However, P was uninterested in selling only Placerita — Target’s “crown jewel” — and instead wanted to sell all of Target. As a result, Tenneco entered into an agreement with Bush Oil, a wholly owned subsidiary of Berry Petroleum, whereby Bush Oil would bid for Target and, if Bush Oil acquired all of Target’s stock for a specified price, it would then sell Placerita to Tenneco for $7.75 million and the income under section 108(i), the COD income should still increase RBIG (and NUBIG) as long as the transaction that caused the COD income to be realized occurred within the recognition period.

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9The IRS could also consider whether such a rule would also be helpful in other prechange item situations.
13See reg. section 1.368-8(d).
14104 T.C. 584 (1995), Doc 95-5157, 95 TNT 100-21, aff’d, 142 F.3d 442 (9th Cir. 1998), Doc 98-14717, 98 TNT 89-6.
15For an excellent discussion of this case, see Gordon D. Henderson and Stuart J. Goldring, Tax Planning for Troubled Corporations, para. 508.4.1.1 (2009).
assumption of some liabilities. Target had no cash on its balance sheet just before the acquisition, but it did have various assets, including Placerita, accounts receivable, a note receivable for selling some other properties to an unrelated party in a prior transaction, and NOLs of approximately $8.1 million. Immediately after the sale, C.J. Co. had approximately $7.75 million of cash on hand from the sale of Placerita to Tenneco.

C.J. Co. made two advances to Bush Oil, its new parent, of approximately $3.6 million total over the course of several months following the transaction. These advances were later canceled, however, as dividends to Bush Oil.

The IRS challenged the use of some prechange NOLs of Target (then C.J. Co.) used by Berry Petroleum and its affiliated group to offset postchange income. Although Berry Petroleum applied the section 382 limitation to these NOLs, the IRS asserted that the FMV of the loss corporation’s stock was inflated by Berry Petroleum’s failure to reduce the FMV as required under section 382.16

First, the IRS asserted that section 382(e)(2) applied to reduce the value of Target’s stock by the amount of cancelled advances made to Bush Oil by C.J. Co. Generally, the value of an old loss corporation is equal to the value of its stock (including any pure preferred stock and any cancellation advances made to Bush Oil by C.J. Co. Gener-
ally, the value of an old loss corporation is equal to the value of its stock (including any pure preferred stock described in section 1504(a)(4)) immediately before the ownership change. The amount of the reduction is generally equal to the excess of the FMV of the nonbusiness assets of the old loss corporation over the nonbusiness asset share of the old loss corporation’s debt, but only if the new loss corporation has substantial nonbusiness assets immediately after the ownership change. The amount of the reduction is generally equal to the excess of the FMV of the nonbusiness assets of the old loss corporation over the nonbusiness asset share of debt for which the old loss corporation is liable. Nonbusiness assets are generally treated as substantial if at least one-third of the value of the corporation’s assets is comprised of nonbusiness assets.19 Nonbusiness assets are generally defined as “assets held for investment.”

In applying the substantial nonbusiness asset rule, the Tax Court determined that the new loss corporation (C.J. Co.) did in fact have substantial nonbusiness assets. Based on the agreement between Bush Oil and Tenneco, the Tax Court agreed with the IRS that C.J. Co. never intended to run the business operations of Placerita and that immediately after Bush Oil’s acquisition of C.J. Co., C.J. Co. would sell Placerita to Tenneco. Thus, in the hands of C.J. Co., Placerita was a nonbusiness asset. Therefore, after taking account the value of the note receivable (originally acquired by C.J. Co.’s predecessor from a prior sale of assets) and the value of Placerita, the amount of nonbusiness assets held by C.J. Co. after the ownership change far surpassed the one-third substantiality threshold required under section 384(l)(4)(B).

Next, the court had to determine the amount of the reduction. As mentioned above, the reduction is equal to the excess of the FMV of the nonbusiness assets of the old loss corporation over the nonbusiness asset share of the corporation’s debt. Although Placerita was a nonbusiness asset of C.J. Co. (the new loss corporation), the Tax Court determined that Placerita was a not a business asset of Target (the old loss corporation), because, among other things, Target had earned income and inurred expenses in operating Placerita (that is, Placerita was a going concern). Moreover, Target and its former parent never intended (and in fact did not want) to sell Placerita separately as an investment property, and neither Target nor its former parent were parties to the Placerita sale agreement between Bush Oil and Tenneco. Therefore, while section 382(l)(4)(A) applied because C.J. Co. had substantial nonbusiness assets, the FMV of Target stock was reduced only by the value of Target’s substantial nonbusiness assets, which included only the note receivable, not Placerita.

Although the outcome of Berry does not result in double-counting the value of Placerita, the case presents a difficult position for taxpayers. As noted above, Target did not have any cash on its balance sheet at the time of its acquisition by Bush Oil; rather, the cash of C.J. Co. on hand to make the distributions to Bush Oil was generated from the proceeds of the Placerita sale. Had Placerita been treated as a nonbusiness asset of Target, the value of Target stock would presumably have been reduced twice by $3.6 million of the inherent value of Placerita: first, as part of the $3.6 million of cash distributed to Bush Oil by Target under section 382(e)(2); and second, as a portion of

16Section 382(e)(2). Notably, the statutory language refers to what constitutes substantial nonbusiness assets for the old loss corporation, but the Tax Court applied the language to the new loss corporation. An analysis of that issue is beyond the scope of this report; however, it appears to create an appropriate result.

17Section 382(e)(1).

18Section 382(e)(1).

19Section 382(e)(2).
the value of a nonbusiness asset held by Target immediately before the ownership change under section 384(l)(4)(A).

The Tax Court’s decision under the facts of Berry leads to the correct result (no double-counting) simply because Placerita was not treated as a nonbusiness asset of the former parent. If, however, the facts had been slightly different, it is unclear what the result would have been. For instance, if before the ownership change Target had entered into a contract to sell Placerita and the sale took place after the change, that modification should not merit reducing the value of the old loss corporation by $11.35 million ($3.6 million as a dividend/cancelled advance and $7.75 million for the value of Placerita). Notably, had the value of Placerita been treated as a nonbusiness asset, the section 382 limitation would effectively be zero (before taking into account any RBIG or other increases), because the old loss corporation’s stock would have negative value after all the reductions.

That result seems unintentional and could have unfortunate tax consequences in the current market environment. For example, assume a corporation (X) has approximately $100 million of cash on hand before an ownership change and that X also has business assets equal to $100 million, so that the total value of the loss corporation’s assets immediately before the ownership change is $200 million. The corporation decides to redeem $50 million of its stock in a transaction that results in an ownership change during the relevant testing period. The trading value of the corporation’s stock is $150 million immediately before the ownership change. Under section 382(e)(2), the redemption would reduce the value of the old loss corporation’s stock by $50 million, leaving the value of the loss corporation at $100 million under section 382(e).

Under the principles of Berry, however, it appears that section 382(l)(4)(A) could also apply. Assuming the $100 million of cash held by X before the ownership change and the $50 million of cash held by X after the ownership change are treated as substantial nonbusiness assets, one-third of X’s assets are nonbusiness assets after the ownership change. As a result, the FMV of X must be reduced by the FMV of the old loss corporation’s nonbusiness assets, or $100 million, leaving the value of the old loss corporation’s stock at $0.

This result seems illogical, given that $50 million of the cash was already counted under section 382(e)(2). If there were a rule that provided for no double-counting, the value of the old loss corporation for purposes of section 382 would be $50 million, because the first $50 million would have been counted under section 382(e)(2) and the remaining $50 million would reduce the value as a nonbusiness asset under section 382(l)(4)(A).

Nonbusiness Assets Under Section 382(l)(4)

The preceding example brings into question whether and to what extent cash and marketable securities should be treated as nonbusiness assets under section 382(l)(4). The legislative history to section 382(l)(4) provides that nonbusiness assets include cash and marketable securities, but that assets held as an integral part of a trade or business (for example, amounts for funding reserves of a bank or an insurance company) are not treated as non-business assets.20 Thus, it appears that a certain amount of cash used to fund a company’s reserves should be excluded from the definition of a nonbusiness asset.

However, the Tax Court in Berry and the IRS in 2001 field service advice21 take the position that the amount of cash or marketable securities that will not be treated as nonbusiness assets (that is, integral to a trade or business) would be determined based on a “stringent test of need,” a test that is presumably tempered by the fact that a company could have a significant amount of cash or marketable securities under the one-third test for substantiality. In the field service advice, the IRS stated that while nonbusiness assets generally include any cash or marketable securities held for investment, cash and marketable securities can be treated as nonbusiness assets, even if they are not strictly held for investment. The IRS reiterated Congress’s position that cash and marketable securities held by some investment entities (for example, regulated investment companies, real estate investment trusts, and real estate mortgage investment conduits) and assets held as an integral part of the conduct of a trade or business are not considered nonbusiness assets. The IRS, however, determined that nonbusiness assets:

are to be differentiated from assets held for future acquisitions and other business needs. The test used for section 382 is more stringent than the “reasonable needs of business” test of section 537. . . . Section 382 allows a corporation to hold up to one-third of its assets as working capital before section 382(l)(4) applies. It appears that section 382(l)(4) would apply where a new loss corporation holds working capital in excess of one-third of the value of its total assets unless the cash is an "integral" part of the business or meets the "stringent" test suggested in Berry Petroleum.22

In the field service advice, a holding corporation (P) had raised cash in an initial public offering (IPO) to be used by its subsidiary to make loans to third parties as part of its reverse mortgage lending business. After the IPO, however, P had not used all of the cash raised for its lending business. Rather, a portion of the cash raised was never used to make new reverse mortgage loans and was instead distributed to P’s parent for it to make investments. Thus, the IRS determined that P had raised cash in excess of its anticipated needs and that the excess should be treated as a nonbusiness asset.

The field service advice raises some questions about the amount of working capital that would escape nonbusiness asset classification. If a corporation raises more cash in an IPO than what is ultimately necessary to run the business, it seems strange to penalize the corporation for not wasting the cash raised. Moreover, it is unclear whether cash used to purchase another entity’s business would constitute a trade or business asset, since the cash is not used in an existing trade or business, especially if the entity is not engaged in the same business as the loss

22Id.
corporation. A question also arises regarding whether a corporation has additional cash on hand as a result of a recent sale of a business. Based on Berry, it appears that any cash or notes received as a result of such a sale would be treated as nonbusiness assets. It is questionable whether this amount of cash would also be so treated if the cash were intended to be used as working capital for the existing business.

Similarly, if a corporation has substantial nonbusiness assets but it is clear that the corporation is a going concern, it is questionable whether the corporation’s value should be reduced by the value of any cash it holds. Section 382(c) already provides a stringent test that reduces the value of an old loss corporation if the continuity of business requirement is not met. Thus, if a corporation is clearly a going concern, the value of its nonbusiness assets should not affect the amount of NOLs it is entitled to use. The limitation under section 382 is sufficient to prevent trafficking in NOLs, and the additional limitation appears unwarranted given that the corporation has suffered an economic loss — that is, the NOLs are not simply paper losses.

Moreover, it is possible that the only reason section 382(l)(4)(A) is triggered is that the economic climate has reduced the value of the loss corporation’s business assets to far below what the value would be in an otherwise healthy economy. A company already strapped for cash and in need of significant capital injections could be further harmed as a result of the application of section 382(l)(4)(A).

Finally, it is unclear whether a reduction for the entire amount of substantial nonbusiness assets (minus a share of the company’s liabilities) is appropriate. If a one-third threshold is generally acceptable, perhaps the reduction in value should occur only to the extent that the substantial nonbusiness assets equal or exceed that threshold.

Determining the FMV of the Loss Corporation

It is recommended that Treasury and the IRS reconsider the manner in which a corporation’s FMV is determined under section 382(e). While it is understandable that the value of a corporation’s stock can track the value of the corporation’s assets, this is often not the case, particularly for publicly traded corporations, as is apparent in the current marketplace. In fact, stock of many companies is trading at well below the total net asset value and to use alternative methods to determine the value of those companies. Although the IRS has issued private letter rulings to allow taxpayers to disregard trading value of stock and to use alternative methods to determine the value of a loss corporation’s stock, especially in light of exceptional circumstances,23 the time and expense of obtaining a private letter ruling may not be practicable for most acquisition transactions.

The reductions under section 382(e)(2) (for redemptions and corporate contractions) and under section 382(l)(4)(A) (for substantial nonbusiness assets) may also need some revision. If the value of a loss corporation is determined based on the value of assets held by the loss corporation immediately before the ownership change, a reduction for the full amount of redemptions or corporate contractions and some substantial nonbusiness assets may be warranted. The value of a corporation, however, is generally determined based on the corporation’s stock value. If, after a redemption or other corporate contraction, the value of a publicly traded loss corporation’s stock does not significantly decrease, it seems inappropriate for the value of the loss corporation’s stock to be reduced under section 382(e)(2) or section 382(l)(4)(A). If the issue is a lack of information by investors, perhaps the FMV of the loss corporation’s stock could be determined using a trading day average for a period, or the reduction should be based on a percentage equal to the amount of the reduction as compared with the corporation’s total asset value, although this approach could also cause skewed results.

Conclusion

The availability of NOLs has become an important concern for many corporations in the current economic environment. Once the recession has subsided and companies are again profitable, the ability to use past losses to offset future profits will be an important tool in maintaining a corporation’s postrecession economic health. Since the beginning of the downturn, corporations have incurred significant financial losses. These losses can be measured in real dollars — they are not paper losses, as is apparent by the now commonplace bankruptcy restructurings. Congress and Treasury’s attempts to increase the availability of NOLs and subject COD income to deferral should be applauded; however, additional assistance may be necessary, and deferral may not be the only solution. In a sense, corporations that are insolvent or undergoing bankruptcy are benefiting under sections 382 and 108 from their insolvency as a result of sections 382(l)(5) and 108, whereas corporations that have managed to avoid insolvency or bankruptcy (even just barely) are being penalized. Perhaps one stitch in a silver lining is that the recession has allowed tax practitioners to reconsider the effects of the section 382 limitation and COD income rules on corporations that are not trying to structure tax-avoidance schemes, but rather, are simply trying to prevent additional economic losses.

23See TAM 200513027 (Dec. 22, 2004), Doc 2005-6737, 2005 TNT 63-8 (ruling that market capitalization as of the date of ownership change, taking into account any exceptional circumstances, is the proper method for valuing a loss corporation’s stock for section 382 purposes); LTR 9332004 (Apr. 30, 1993), 93 TNT 170-5 (concluding that FMV of loss corporation’s stock could be determined using methods and evidence other than simply relying on exchange trading price).