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DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[TD 8919]

RIN 1545-AY57

Guidance on Filing an Application for a Tentative Carryback Adjustment in a Consolidated Return Context

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Temporary regulations.

SUMMARY: This document contains temporary regulations relating to the filing of an application for a tentative carryback adjustment. These temporary regulations provide guidance to determine the time for filing such application by a consolidated group. This document also contains temporary regulations relating to the filing of an application for a tentative carryback adjustment by certain corporations for the separate return year created by their becoming a member of a consolidated group. These temporary regulations may affect all consolidated groups. The text of these temporary regulations also serves as the text of proposed regulations set forth in the notice of proposed rulemaking on this subject in the Proposed Rules section of this issue of the **Federal Register**.

DATES: Effective Date: April 4, 2001.

Applicability Date: For dates of applicability for these regulations, see paragraph (g)(2)(v) of this section.

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SUPPLEMENTARY INFORMATION:

Background

This document contains temporary amendments to the Income Tax Regulations (26 CFR Part 1) under section 1502 of the Internal Revenue Code of 1986 (Code). The amendments provide guidance as to the time for filing an application for a tentative carryback adjustment by a consolidated group. The amendments also extend the time for filing an application for a tentative carryback adjustment by certain corporations for the separate return year created by their becoming new members of a consolidated group.

Section 6411(a) requires that an application for a tentative carryback adjustment be filed on or after the date of filing for the return for the taxable year of the loss (or unused business credit) from which the carryback results and within a period of twelve (12) months after the end of such taxable year. Section 6411(c) provides that if the corporation seeking a tentative carryback adjustment made or was required to make a consolidated return for the year in which the loss or credit arose or for the preceding taxable year affected by such loss or credit, the provisions of Section 6411(a) apply only to such extent and subject to such conditions, limitations and exceptions as the Secretary may by regulations prescribe. Section 1.6411-4 refers taxpayers to the consolidated return regulations, specifically §1.1502-78, for further rules applicable to consolidated groups filing for a tentative carryback adjustment.

Section 1.1502-78(a) addresses the proper party to file an application for a tentative carryback adjustment. However, there is no provision addressing the time for filing such application. Section 1.1502-78 does not currently alter the statutory rule as to “when” the end of a taxable year occurs for purposes of determining whether the twelve-month rule of section 6411 has been satisfied. Under §1.1502-76, the due date for the separate return of a new member is generally extended until the due date of the return of the consolidated group. In certain instances, however, such separate return cannot be filed before the expiration of the twelve-month period under section 6411(a). Thus, a new member may be prevented from filing an application for a tentative carryback adjustment.

Section 1.1502-76(b)(1)(i) provides that the consolidated return must include the common parent's items of income, gain, deduction, loss, and credit for the entire consolidated year, and each subsidiary's items for the portion of the year for which it is a member. Items of a corporation for the portion of the year not included in the consolidated return must be included in a separate return (including the consolidated return of another group). Thus, the items of a new member of a consolidated group are included in two returns: first, the consolidated return for the period of time it is a member of the group; and second, a separate return (including the consolidated return of another group) for the pre-affiliation period prior to becoming a member of the consolidated group. This pre-affiliation period is a separate return year as defined in §1.1502-1(e).

The tax returns for the periods that end and begin upon a corporation becoming

(or ceasing to be) a member of a consolidated group are separate taxable years for all Federal income tax purposes. Section 1.1502-76(b)(2)(i). Although these periods are separate taxable years, items of income, gain, deduction, loss, and credit (other than extraordinary items) may be ratably allocated between such years if: (1) the corporation is not required to change its annual accounting period or its method of accounting as a result of its change in status as a member; and (2) a timely ratable allocation election is made. Section 1.1502-76(b)(2)(ii)(A). If a ratable allocation cannot be made (or is not made), the corporation must close its books at the close of the day on which its status as a member changes and its items of income, gain, deduction, loss, and credit for the pre-affiliation period are included in its separate return. Section 1.1502-76(b)(2)(ii).

Section 1.1502-76(c) determines the time for filing the new member's separate return. The provisions of this section apply only to a corporation which, immediately prior to becoming a new member of a group, was the common parent of another consolidated group, or was not required to join in the filing of a consolidated return. Under §1.1502-76(c), the due date of the new member's separate return is dependent upon the filing of the consolidated group's tax return. If the consolidated return for the group has been filed by the due date for the new member's separate return, then the separate return must be filed no later than the due date of the consolidated group's return, including extensions. If the consolidated return for the group has not been filed by the due date for the new member's separate return, then the separate return must be filed on or before such due date. In each case, the due date for the new member's separate return is determined with regard to extensions of time for filing but without

regard to the member's new affiliated status. The close of the new member's separate return year is treated as the close of its normal taxable year. Therefore, §1.1502-76(c) effectively extends the period of time in which a new member is required to file its separate return because otherwise, the taxable year would end on the date it becomes a member. Section 1.1502-76(b)(2).

While §1.1502-76(c) extends the due date for filing the new member's separate return, there is no similar provision that extends the due date for filing an application for a tentative carryback adjustment for the separate return year. Neither section 6411(a) nor §1.1502-78 interprets the close of the new member's separate return year as the close of its normal taxable year. Therefore, an application for a tentative carryback adjustment must be filed: (1) on or after the extended date for filing the return for the taxable year; and (2) within a period of twelve months after the close of such taxable year. Since the separate return year is treated as a separate taxable year for all Federal income tax purposes under §1.1502-76(b)(2)(i), a new member that chooses to file an application for a tentative carryback adjustment under section 6411 must do so within twelve (12) months after the close of its separate return year (not its normal taxable year).

The practical effect of extending the due date for filing the new member's separate return under §1.1502-76(c) without extending the time period for filing an application for a tentative carryback adjustment is that a corporation that becomes a member of a consolidated group early in its taxable year may effectively be precluded from filing the application. This results because the twelve-month period for filing the

refund application may expire prior to the due date (extended or unextended) for the filing of the new member's separate return.

The problem is illustrated by the following example:

On April 30, 2000, 100% of the stock of Corporation X, a stand-alone corporation, is acquired by Group Y. Both Corporation X and Group Y file their returns on a calendar year basis. Under §1.1502-76(c), Corporation X's separate return for the period, January 1-April 30, 2000 (the April 2000 Year), is due on or before September 15, 2001 (with extensions). However, its application for a tentative carryback adjustment for the April 2000 Year is due no later than April 30, 2001, twelve months after the end of the April 2000 Year.

As a practical matter, the separate return of some new members cannot be filed before the group's consolidated return is filed. As previously noted, §1.1502-76(b)(2) provides, under certain circumstances, that the new member's items of income, gain, deduction, loss, and credit may be ratably allocated between the pre-affiliation and the post-affiliation periods. The new member may not know whether the common parent will elect to ratably allocate its items. Such allocation would alter the income or loss of the new member for its separate return year. The new member also may not know the proper amount of income and loss to report and thus cannot file its separate return or its application for a tentative carryback adjustment until the group's consolidated return has been filed. Furthermore, Rev. Rul. 75-327 (1975-2 C.B. 481) holds that, because the IRS must rely on the information provided by the taxpayer in its application for a tentative carryback adjustment and much of that information (such as NOLs) is based

on the return for the loss year, section 6411(a) requires that the return for the loss year be filed before the application for a tentative refund can be filed.

This problem is not generally faced by corporations that become members of a consolidated group in the latter part of their taxable year. For example, if Corporation X had been acquired on October 15, 2000, rather than April 15, 2000, its application for a tentative carryback adjustment would be due on or before October 15, 2001, a month after its separate return is due (with extensions).

Explanation of Provisions

The consolidated return regulations do not address the time for filing an application for a tentative carryback adjustment. Rather, the consolidated return regulations rely upon the general provisions of section 6411 for guidance. The amendments to §1.1502-78 provide a general rule for all consolidated taxpayers stating that the provisions of section 6411(a) shall apply to determine the time for filing an application for a tentative carryback adjustment by a consolidated group.

In addition, the amendments provide a special rule designed to remedy the problem faced by some corporations that become new members of a consolidated group. For such members, the amendments extend the period of time for filing an application for a tentative carryback adjustment resulting from losses or credits arising in the new member's last separate return year. For these purposes, the amendments treat the separate return year as ending on the same date as the end of the current taxable year of the consolidated group.

The special rule of these temporary regulations will apply only to a corporation

that, immediately prior to becoming a new member of a group, was the common parent of another consolidated group, or was not required to join in the filing of a consolidated return. The situation not covered involves the acquisition of a member of another consolidated group. In this case, the corporation's items of income, gain, deduction, loss and credit for the period prior to becoming a member of the new consolidated group will be included in the consolidated return of its former group. The due date for the former group's consolidated return is not affected by the acquisition and the due date for its application for a tentative carryback adjustment relates back to the end of the former group's taxable year.

The approach taken attempts to provide consistency between §1.1502-76(c) and §1.1502-78. In addition, this approach provides certainty to taxpayers and allows for simplicity of administration by the IRS.

Special Analyses

It has been determined that this Treasury decision is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required.

This Treasury decision ensures that all new members of consolidated groups have the opportunity to file an application for a tentative carryback adjustment, a benefit currently unavailable to some new members. Issuing this regulation in proposed form would continue the difficulty of filing an application for a tentative carryback adjustment for affected new members. Based on these considerations, it is determined that this temporary regulation will provide taxpayers with the necessary

guidance and authority to ensure equitable administration of the tax laws. Therefore, it would be contrary to the public interest to issue this Treasury decision with prior notice under section 553(b) or subject to the effective date limitation of section 553(d) of title 5 of the United States Code.

Pursuant to section 7805(f) of the Code, these regulations will be submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on their impact on small business.

Drafting Information

The principal authors of these temporary regulations are Christopher M. Bass and Frances L. Kelly, Office of the Associate Chief Counsel (Corporate). However, other personnel from the IRS and Treasury Department participated in their development.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Adoption of Amendments to the Regulations

Accordingly, 26 CFR part 1 is amended as follows:

PART 1 -- INCOME TAXES

Paragraph 1. The authority citation for part 1 is amended by adding an entry in numerical order to read in part as follows:

Authority: 26 U.S.C. 7805 * * *

Section 1.1502-78T also issued under 26 U.S.C. 1502 and 6411(c). * * *

Par. 2. Section 1.1502-78T is added to read as follows:

§1.1502-78T Rules for filing applications for tentative carryback adjustments.

(a) through (f) [Reserved]. For further guidance, see §1.1502-78(a) through (f).

(g) Time for filing application--(1) General rule. The provisions of section 6411(a) apply to the filing of an application for a tentative carryback adjustment by a consolidated group.

(2) Special rule for new members--(i) New member. A new member is a corporation that, in the preceding taxable year, did not qualify as a member, as defined in §1.1502-1(b), of the consolidated group that it now joins.

(ii) End of taxable year. Solely for the purpose of complying with the twelve-month requirement for making an application for a tentative carryback adjustment under section 6411(a), the separate return year of a qualified new member shall be treated as ending on the same date as the end of the current taxable year of the consolidated group that the qualified new member joins.

(iii) Qualified new member. A new member of a consolidated group qualifies for purposes of the provisions of this paragraph (g)(2), if immediately prior to becoming a new member, either--

(A) It was the common parent of a consolidated group; or

(B) It was not required to join in the filing of a consolidated return.

(iv) Examples. The provisions of this paragraph (g)(2) may be illustrated by the following examples:

Example 1. Individual A owns 100 percent of the stock of X, a corporation filing returns on a calendar year basis. On January 31 of year 1, X becomes a member of the Y consolidated group, which also files returns on a calendar year basis. X is a

qualified new member as defined in paragraph (g)(2)(iii)(B) of this section because, immediately prior to becoming a new member of the Y consolidated group, X was not required to join in the filing of a consolidated return. As a result of its becoming a new member of Group Y, X's separate return for the short taxable year (January 1 of year 1 through January 31 of year 1) is due September 15 of year 2 (with extensions). Section 1.1502-76(c). Group Y's consolidated return is also due September 15 of year 2 (with extensions). Section 1.1502-76(c). Solely for the purpose of complying with the twelve-month requirement for making an application for a tentative carryback adjustment under Section 6411(a), X's taxable year for the separate return year is treated as ending on December 31 of year 1. X's application for a tentative carryback adjustment is therefore due on or before December 31 of year 2.

Example 2. Assume the same facts as in Example 1 except that immediately prior to becoming a new member of Group Y, X was a member of the Z consolidated group. Because X was required to join in the filing of the consolidated return for Group Z, X is not a qualified new member as defined in paragraph (g)(2)(iii) of this section. X's items for the one-month period will be included in the consolidated return for Group Z. Group Z's application for a tentative carryback adjustment, if any, continues to be due within 12 months of the end of its taxable year, which is not affected by X's change in status as a new member of Group Y.

(v) Effective date. The provisions of this paragraph (g)(2) apply for applications by new members of consolidated groups for tentative carryback adjustments resulting from net operating losses, net capital losses, or unused business credits arising in separate return years of new members that begin on or after January 1, 2001.

Robert E. Wenzel

Deputy Commissioner of Internal Revenue

Approved:

Jonathan Talisman

Acting Assistant Secretary of the Treasury