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DEPARTMENT OF THE TREASURY

Correction Notice July 9, 2002

Internal Revenue Service

26 CFR Parts 1 and 602

[TD 8997]

RIN 1545-BA76

Carryback of Consolidated Net Operating Losses to Separate Return Years

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Temporary regulations.

SUMMARY: This document contains regulations under section 1502 that affect corporations filing consolidated returns. These regulations permit certain acquiring consolidated groups to elect to waive all or a portion of the pre-acquisition portion of the 5-year carryback period under section 172(b)(1)(H) for certain losses attributable to certain acquired members. The text of these temporary regulations also serves as the text of the proposed regulations set forth in the notice of proposed rulemaking on this subject in the Proposed Rules section in this issue of the **Federal Register**.

DATES: Effective Date: These temporary regulations are effective May 31, 2002.

Applicability Date: These regulations apply to consolidated net operating losses arising in taxable years ending during 2001 and 2002.

FOR FURTHER INFORMATION CONTACT: Marie Milnes-Vasquez of the Office of Associate Chief Counsel (Corporate), (202) 622-7770 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

These regulations are being issued without prior notice and public procedure pursuant to the Administrative Procedure Act (5 U.S.C. 553). For this reason, the collection of information contained in these regulations has been reviewed and, pending receipt and evaluation of public comments, approved by the Office of Management and Budget under control number 1545-1790. Responses to this collection of information are required to obtain a benefit.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number assigned by the Office of Management and Budget.

For further information concerning this collection of information, and where to submit comments on the collection of information and the accuracy of the estimated burden, and suggestions for reducing this burden, please refer to the preamble to the cross-referencing notice of proposed rulemaking published in the Proposed Rules section of this issue of the Federal Register.

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

Background

On July 2, 1999, the IRS and Treasury published in the **Federal Register** (64 FR 36092 (1999-2 C.B. 34)) final regulations regarding certain deductions and losses of members that join a consolidated group. These regulations added §1.1502-21(b)(3)(ii)(B), which permits an acquiring consolidated group to elect to waive, with respect to all consolidated net operating losses attributable to certain acquired members, the portion of the carryback period for which the corporation was a

member of another group.

Section 172(b)(1) provides, in part, that a net operating loss for any taxable year must generally be carried back to each of the 2 taxable years preceding the taxable year of the loss. Section 172(b)(3) provides that any taxpayer entitled to a carryback period under section 172(b)(1) may elect to relinquish the carryback period with respect to a loss for any taxable year. An election to relinquish the carryback period under section 172(b)(3) must be made by the due date (including extensions) of the taxpayer's return for the taxable year of the loss and in the manner prescribed by the Secretary. Normally, this election is irrevocable.

Section 172(b)(1)(H), which was enacted as part of the Job Creation and Worker Assistance Act of 2002 (the Act), extended the 2-year carryback period to 5 years for losses arising in taxable years ending during 2001 and 2002 (hereafter, 2001 and 2002). Section 172(j), which was also enacted as part of the Act, allows a taxpayer entitled to the 5-year carryback period under section 172(b)(1)(H) to elect to relinquish that carryback period with respect to a loss for any taxable year. A taxpayer making this election generally must apply the 2-year carryback period set forth in section 172(b)(1), unless the taxpayer also elects to relinquish that carryback period under section 172(b)(3).

As described in Revenue Procedure 2002-40 (2002-23 I.R.B.), in order to give effect to the intent of Congress to allow taxpayers a 5-year carryback period to the maximum extent possible, the Service is permitting any taxpayer that previously elected under section 172(b)(3) to forgo the carryback period for losses arising in 2001 or 2002 to revoke such election in order to take advantage of the 5-year carryback period, provided the taxpayer revokes the election no later than October 31, 2002. Revenue Procedure 2002-40 also permits a taxpayer that filed an application for a tentative

carryback adjustment or an amended return using the 2-year carryback period for a net operating loss arising in 2001 or 2002 to file certain forms to claim the 5-year carryback period provided under section 172(b)(1)(H).

Given the enactment of section 172(b)(1)(H) and taxpayers' ability to revoke prior elections under section 172(b)(3) and to make certain other filings in order to take advantage of the 5-year carryback period, the IRS and Treasury believe that it is appropriate to afford certain acquiring consolidated groups that did not make an election described in §1.1502-21(b)(3)(ii)(B) with respect to certain acquired members an opportunity to waive the portion of the entire carryback period or the portion of the extended carryback period for 2001 and 2002 losses attributable to the acquired members, for pre-acquisition years. In this regard, the regulations in this Treasury decision add §1.1502-21T(b)(3)(ii)(C), which sets forth two elections.

Pursuant to the first election, an acquiring group may waive the portion of the 5-year carryback period for 2001 and 2002 losses attributable to a member acquired from another group after June 25, 1999, for which the member was a member of another group. While this election effectively permits a waiver of the entire 5-year carryback period to the extent that it is prior to the acquisition with respect to a consolidated net operating loss arising in a particular taxable year, it is only available where none of such losses have previously been carried back to a taxable year of a group of which the acquired member was previously a member.

Pursuant to the second election, an acquiring group may waive the portion of the pre-acquisition carryback period for 2001 and 2002 losses attributable to a member acquired from another group to the extent that the Act increased the carryback period for such losses. This second election

effectively permits a waiver of the third, fourth, and fifth carryback years to the extent that such years are prior to the acquisition and is available even where 2001 or 2002 losses have been carried back to the first or second carryback years of the acquired member that are pre-acquisition years. This second election, however, is only available with respect to consolidated net operating losses arising in a particular taxable year where none of such losses have been carried back to a taxable year of a group of which the acquired member was previously a member that is prior to the second taxable year preceding the taxable year of the loss.

Unlike the election under §1.1502-21(b)(3)(ii)(B), the elections provided in these regulations apply only to losses for 2001 and 2002. In addition, the elections are made on a year-by-year basis. That is, one election may be made for 2001 losses while another election, or no election, may be made for 2002 losses. An election that relates to consolidated net operating losses attributable to a taxable year ending during 2001 must be filed with the acquiring consolidated group's timely filed (including extensions) original or amended return for the taxable year ending during 2001, provided that such original or amended return is filed on or before October 31, 2002. An election that relates to consolidated net operating losses attributable to a taxable year ending during 2002 must be filed with the acquiring consolidated group's timely filed (including extensions) original or amended return for the taxable year ending during 2001 or 2002, provided that such original or amended return is filed on or before September 15, 2003.

If the acquiring consolidated group files or filed a valid election described in §1.1502-21(b)(3)(ii)(B) with respect to the acquisition of a member, no election under §1.1502-21T(b)(3)(ii)(C) needs to be (or should be) filed to ensure that 2001 or 2002 losses are not carried back to pre-

acquisition years of the acquired member.

Special Analyses

These temporary regulations are necessary to provide taxpayers with immediate elective relief from section 172(b)(1)(H), which was enacted as the part of the Job Creation and Worker Assistance Act of 2002. These regulations permit certain acquiring consolidated groups to elect to waive the 5-year carryback period with respect to certain acquired members. The regulations apply to losses arising in taxable years ending in 2001 and 2002. 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. Because of the need for immediate guidance, notice and public procedure are impracticable and contrary to the public interest pursuant to 5 U.S.C 553(b)(B) and delayed effective date is not required pursuant to 5 U.S.C 553(d)(1) and (3).

Further, 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. Pursuant to section 7805(f) of the Internal Revenue 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 author of these temporary regulations is Marie Milnes-Vasquez. However, other personnel from the IRS and Treasury Department participated in their development.

List of Subjects

26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

26 CFR Part 602

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 1.1502-21T also issued under 26 U.S.C. 1502. * * *

Par. 2. Section 1.1502-21 is amended by adding paragraph (b)(3)(ii)(C) to read as follows:

§1.1502-21 Net operating losses.

* * * * *

(b) * * *

(3) * * *

(ii) * * *

(C) [Reserved]. For further guidance, see §1.1502-21T(b)(3)(ii)(C).

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Par. 3. Section 1.1502-21T is added to read as follows:

§1.1502-21T Net operating losses (temporary).

(a) through (b)(3)(ii)(B) [Reserved]. For further guidance, see §1.1502-21(a) through (b)(3)(ii)(B).

(C) Partial waiver of carryback period for 2001 and 2002 losses--(1) Application. The acquiring group may make the elections described in paragraphs (b)(3)(ii)(C)(2) and (3) of this section with respect to an acquired member or members only if it did not file a valid election described in §1.1502-21(b)(3)(ii)(B) with respect to such acquired member or members on or before May 31, 2002.

(2) Partial waiver of entire pre-acquisition carryback period. If one or more members of a consolidated group become members of another consolidated group after June 25, 1999, then, with respect to all consolidated net operating losses attributable to the member for the taxable year ending during either 2001 or 2002, or both, the acquiring group may make an irrevocable election to relinquish the portion of the carryback period for such losses for which the corporation was a member of another group, provided that any other corporation joining the acquiring group that was affiliated with the member immediately before it joined the acquiring group is also included in the waiver and that the conditions of this paragraph are satisfied. The acquiring group cannot make the election described in this paragraph with respect to any consolidated net operating losses arising in a particular taxable year if any carryback is claimed, as provided in paragraph (b)(3)(ii)(C)(4) of this section, with respect to any such losses on a return or other filing by a group of which the acquired member was previously a member and such claim is filed on or before the date the election described in this paragraph is filed. The election must be made in a separate statement entitled “THIS IS AN ELECTION UNDER SECTION 1.1502-21T(b)(3)(ii)(C)(2) TO WAIVE THE PRE-[insert first day of the first taxable year for which the member (or members) was a member of the acquiring group] CARRYBACK PERIOD FOR THE CNOLS ATTRIBUTABLE TO THE [insert taxable year of losses] TAXABLE YEAR(S)

OF [insert names and employer identification numbers of members].” Such statement must be filed as provided in paragraph (b)(3)(ii)(C)(5) of this section.

(3) Partial waiver of pre-acquisition extended carryback period. If one or more members of a consolidated group become members of another consolidated group, then, with respect to all consolidated net operating losses attributable to the member for the taxable year ending during either 2001 or 2002, or both, the acquiring group may make an irrevocable election to relinquish the portion of the carryback period for such losses for which the corporation was a member of another group to the extent that such carryback period includes one or more taxable years that are prior to the taxable year that is 2 taxable years preceding the taxable year of the loss, provided that any other corporation joining the acquiring group that was affiliated with the member immediately before it joined the acquiring group is also included in the waiver and that the conditions of this paragraph are satisfied. The acquiring group cannot make the election described in this paragraph with respect to any consolidated net operating losses arising in a particular taxable year if a carryback to one or more taxable years that are prior to the taxable year that is 2 taxable years preceding the taxable year of the loss is claimed, as provided in paragraph (b)(3)(ii)(C)(4) of this section, with respect to any such losses on a return or other filing by a group of which the acquired member was previously a member and such claim is filed on or before the date the election described in this paragraph is filed. The election must be made in a separate statement entitled “THIS IS AN ELECTION UNDER SECTION 1.1502-21T(b)(3)(ii)(C)(3) TO WAIVE THE PRE-[insert first day of the first taxable year for which the member (or members) was a member of the acquiring group] EXTENDED CARRYBACK PERIOD FOR THE CNOLS ATTRIBUTABLE TO THE [insert taxable year of losses] TAXABLE

YEAR(S) OF [insert names and employer identification numbers of members].” Such statement must be filed as provided in paragraph (b)(3)(ii)(C)(5) of this section.

(4) Claim for a carryback. For purposes of paragraphs (b)(3)(ii)(C)(2) and (3) of this section, a carryback is claimed with respect to a consolidated net operating loss if there is a claim for refund, an amended return, an application for a tentative carryback adjustment, or any other filing that claims the benefit of the net operating loss in a taxable year prior to the taxable year of the loss, whether or not subsequently revoked in favor of a claim based on a 5-year carryback period.

(5) Time and manner for filing statement. A statement described in paragraph (b)(3)(ii)(C)(2) or (3) of this section that relates to consolidated net operating losses attributable to a taxable year ending during 2001 must be filed with the acquiring consolidated group’s timely filed (including extensions) original or amended return for the taxable year ending during 2001, provided that such original or amended return is filed on or before October 31, 2002. A statement described in paragraph (b)(3)(ii)(C)(2) or (3) of this section that relates to consolidated net operating losses attributable to a taxable year ending during 2002 must be filed with the acquiring consolidated group’s timely filed (including extensions) original or amended return for the taxable year ending during 2001 or 2002, provided that such original or amended return is filed on or before September 15, 2003.

(iii) through (h) [Reserved]. For further guidance, see §1.1502-21(b)(3)(iii) through (h).

PART 602--OMB CONTROL NUMBERS UNDER THE PAPERWORK REDUCTION ACT

Par. 4. The authority citation for part 602 continues to read as follows:

Authority: 26 U.S.C. 7805.

Par. 5. In §602.101, paragraph (b) is amended by adding an entry to the table in numerical order to read as follows:

§602.101 OMB Control numbers.

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(b) * * *

CFR part or section where identified and described	Current OMB control No.
* * * * * 1.1502-21T * * * * *	1545-1790

David A. Mader

Acting Deputy Commissioner of Internal Revenue.

Approved: May 20, 2002

Pamela F. Olson

Acting Assistant Secretary of the Treasury.