



DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

OFFICE OF
CHIEF COUNSEL

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MEMORANDUM FOR M. K. Mortensen
Associate Area Counsel
CC:SB:5:SLC
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FROM: John J. McGreevy
Senior Advisor
CC:PA:APJP

SUBJECT: SCAF-159250-01

This Chief Counsel Advice responds to your memorandum dated May 1, 2003. In accordance with I.R.C. § 6110(k)(3), this Chief Counsel Advice should not be cited as precedent.

LEGEND

Corporation A:

Corporation B:

Corporation C:

Corporation D:

Year 1:

Year 2:

Year 3:

Year 4:

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Year 5:

Year 6:

Year 7:

Year 13:

ISSUES

1. Where Corporation A has an overpayment from Year 1, and in Year 2, Corporation A merges with Corporation B, with Corporation B surviving the merger; whether interest payable on Corporation A's Year 1 overpayment may be netted against interest owed on Corporation B's Year 4 underpayment.
2. Whether interest payable on Corporation A's Year 1 overpayment may be netted against interest owed on Corporation D's Year 4 underpayments.
3. Where Corporation B files a consolidated return with an affiliated group for Year 6 and Year 7, and both years have underpayments, whether interest payable on Corporation A's Year 1 overpayment may be netted against interest owed on the consolidated return's Year 6 and Year 7 underpayments.
4. Whether interest payable on Corporation C's Year 4 overpayment may be netted against interest owed on Corporation D's Year 4 underpayments.
5. Where Corporation C files a consolidated return with an affiliated group for Year 6 and Year 7, and both years have underpayments, whether interest payable on Corporation C's Year 4 overpayment may be netted against interest owed on the consolidated return's Year 6 and Year 7 underpayments.

CONCLUSIONS

1. Because Corporation A and Corporation B merged with Corporation B surviving, and this merger complies with the requirements of I.R.C. § 368(a)(1)(F), Corporation B is both entitled to Corporation A's Year 1 overpayment, and liable for Corporation B's Year 4 underpayment. Interest netting is therefore possible.
2. Interest netting is not possible because no Corporation is both entitled to Corporation A's Year 1 overpayment and liable for Corporation D's Year 4 underpayment.
3. Because Corporation B filed a consolidated return for its Year 6 and Year 7 tax years, Corporation B is severally liable for any tax owed on such return for either

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year. In addition, because of Corporation B's merger with Corporation A, Corporation B is entitled to Corporation A's Year 1 overpayment. Interest netting is therefore possible.

4. Interest netting is not possible because no Corporation is both entitled to Corporation C's Year 4 overpayment and liable for Corporation D's Year 4 underpayment.
5. Because Corporation C filed a consolidated return for its Year 6 and Year 7 tax years, Corporation C is severally liable for any tax owed on such return for either year. In addition, Corporation C is entitled to its Year 4 overpayment. Therefore interest netting is possible because Corporation C is both liable for the Year 6 and Year 7 underpayments, and entitled to its Year 4 overpayment.

FACTS

For Year 1, Corporation A was entitled to an overpayment, which was paid sometime in Year 13. In Year 2, Corporation A merged with Corporation B, with Corporation B surviving. The facts indicate that this merger was a reorganization constituting a mere change in identity, form, or place of organization of one corporation as described in I.R.C. § 368(a)(1)(F).

For Year 4, Corporation B filed a Form 1120, U.S. Corporation Income Tax Return. It has been determined that Corporation B had an underpayment for Year 4, which was paid sometime in Year 13.

For Year 4, Corporation C filed a Form 1120. It has been determined that Corporation C was entitled to an overpayment, which was paid sometime in Year 13.

For Year 4, Corporation D filed a Form 1120 and a Form 1042, Annual Withholding Tax Return for U.S. Source Income of Foreign Persons. It has been determined that Corporation D had underpayments with respect to both returns for Year 4. Both underpayments were paid sometime in Year 13. The underpayments from both returns are hereafter collectively referred to as "Corporation D's Year 4 underpayment."

Beginning with the Year 5 tax year, Corporations B, C, and D ("the affiliated group") together file a consolidated return with D as the parent. There is no overpayment or underpayment attributable to the affiliated group's Year 5 consolidated return. The affiliated group had an underpayment for its Year 6 and Year 7 tax years.

Corporation B wants to net interest from Corporation A's Year 1 overpayment against interest due from B's Year 4 underpayment. In addition, to the extent any portion of A's Year 1 overpayment remains, Corporation D, the parent of the affiliated group, wants to net interest from Corporation A's Year 1 overpayment against interest due from

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Corporation D's Year 4 underpayment, and the respective underpayments from the affiliated group's Year 6 and Year 7 consolidated returns.

In addition, Corporation D wants to net interest from Corporation C's Year 4 overpayment against interest due from Corporation D's Year 4 underpayment, and the respective underpayments from the affiliated group's Year 6 and Year 7 consolidated returns. Of the underpayments discussed in this advisory, you have represented that Corporation C is only liable for the affiliated group's Year 6 and Year 7 underpayments.

LAW AND ANALYSIS

I.R.C. § 6601(a) requires that interest be paid by a taxpayer, if any amount of tax "is not paid on or before the last date prescribed for payment," which is generally the date prescribed by I.R.C. § 6072(b) for filing the return. Any tax that has not been paid on or before the return due date is an underpayment.

In addition, where a taxpayer has made an overpayment with respect to any internal revenue tax, I.R.C. § 6611(a) requires that interest be paid to the taxpayer who made the overpayment. Neither the Code nor the regulations promulgated thereunder define the term "overpayment." The United States Supreme Court defines "overpayment" as "any payment in excess of that which is properly due." Jones v. Liberty Glass Co., 332 U.S. 524, 531 (1947); see also United States v. Dalm, 494 U.S. 596 (1990).

I.R.C. §§ 6621(a)(1) and (2) establish the interest rates for both overpayments and underpayments of tax. I.R.C. § 6621(d) provides that to the extent interest is payable for any period under subchapter A and allowable under subchapter B on equivalent underpayments and overpayments by the same taxpayer of tax imposed by the Code, the net rate of interest under I.R.C. § 6621 on such amounts shall be zero for such period.

Each overpayment or underpayment is only considered once in determining whether equivalent overpayments and underpayments exist. However, if the full amount of the overpayment or underpayment has not been used in a netting calculation, the remaining portion may be used in another netting calculation. See Rev. Proc. 2000-26, 2000-1 C.B. 1257; Rev. Proc. 99-43, 1999-2 C.B. 579.

I.R.C. § 1501 allows affiliated corporations to file a consolidated return with respect to income tax. A condition for filing a consolidated return is that all members of the affiliated group must consent to be bound by all regulations promulgated under I.R.C. § 1502. Id. The making of a consolidated return is considered to be such consent. Id.

Treas. Reg. § 1.1502-6(a) provides that in general all members of an affiliated group that filed a consolidated return are severally liable for the tax for such year.

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Corporation A's Year 1 Overpayment

Corporation B's Year 4 Underpayment

Where there is a corporate reorganization, there is a question of whether the surviving corporation may net its overpayments or underpayments against the merged corporation's underpayments or overpayments. The Tax Court, though not interpreting I.R.C. § 6621(d), has held that the surviving corporation of a reorganization that complies with I.R.C. § 368(a)(1)(F) is the same taxpayer as the merged corporation. See Stauffer v. Commissioner, 48 T.C. 277, 297 (1967) rev'd without reaching issue, 403 F.2d 611 (9th Cir. 1968). Our office believes that if a reorganization complies with I.R.C. § 368(a)(1)(F), then the surviving corporation will be treated as the same taxpayer as the merged corporation.

Here, the Year 2 merger between Corporation A and Corporation B complies with I.R.C. § 368(a)(1)(F). Corporation B is therefore the same taxpayer as Corporation A with respect to Corporation A's Year 1 overpayment. In addition, Corporation B is liable for its Year 4 underpayment. Because Corporation B is the same taxpayer with respect to the Year 1 overpayment and the Year 4 underpayment, interest netting is possible in this situation.

Corporation D's Year 4 Underpayment

As described above, I.R.C. § 6621(d) requires that the same taxpayer both be liable for the underpayment of tax, and entitled to the overpayment of tax. Here, Corporation B is the same taxpayer with respect to Corporation A's Year 1 overpayment. However, neither Corporation A nor Corporation B is the taxpayer with respect to Corporation D's Year 4 underpayment. Therefore it is not possible to net interest from the Year 1 overpayment against interest owed on Corporation D's Year 4 underpayment.

The Affiliated Group's Year 6 and Year 7 Underpayments

Where a corporation files a consolidated return, such corporation is severally liable for the tax owed for the year such corporation filed a consolidated return with the affiliated group. Here, Corporation B was a member of the affiliated group in Year 6 and Year 7. Accordingly, Corporation B is severally liable for the affiliated group's Year 6 and Year 7 underpayments. In addition, for the reasons described above, Corporation B is the same taxpayer with respect to Corporation A's Year 1 overpayment. Because Corporation B is the same taxpayer with respect to the Year 1 overpayment and the affiliated group's Year 6 and Year 7 underpayments, interest netting is possible in this situation.

Before interest netting is allowed, however, the Service must take into account any portions of the Year 1 overpayment that has been previously used as part of a netting

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calculation. Because it is only possible to use an overpayment once in a netting calculation, the amount of the Year 1 overpayment that is available for interest netting will be reduced by the amount netted against Corporation B's Year 4 underpayment.

Corporation C's Year 4 Overpayment

Corporation D's Year 4 Underpayment

Interest netting is not possible in this situation. I.R.C. § 6621(d) requires that the same taxpayer both be liable for the underpayment of tax, and entitled to the overpayment of tax. Corporation C is not the same taxpayer with respect to both its own Year 4 overpayment and Corporation D's Year 4 underpayment because Corporation C is not severally liable for Corporation D's Year 4 underpayment.

The Affiliated Group's Year 6 and Year 7 Underpayments

Interest netting is possible in this situation. As described above, where a corporation files a consolidated return, such corporation is severally liable for the tax owed for the year such corporation filed a consolidated return with the affiliated group. Here, Corporation C was part of the affiliated group in Year 6 and Year 7. Accordingly, Corporation C is severally liable for the affiliated group's Year 6 and Year 7 underpayments. Because Corporation C is the same taxpayer with respect to its own Year 4 overpayment, and the affiliated group's Year 6 and Year 7 underpayments, the affiliated group would be entitled to interest netting for the overlapping period to the extent Corporation C's Year 4 overpayment has not already been used in another interest netting calculation.

Please call if you have any further questions.