

Effective Date of Consolidated Overall Foreign Loss Provisions

Notice 98-40

This notice announces that Treasury and the Service intend to issue regulations permitting taxpayers to elect to delay the effective date of Treas. Reg. § 1.1502-9T, published in the **Federal Register** on January 12, 1998 (63 F.R. 1740), and modified on March 16, 1998 (63 F.R. 12641).

On January 12, 1998, Treasury and the Service published in the **Federal Register** final, temporary and proposed regulations (the "January 1998 regulations") relating to limitations on the use of certain tax credits and related attributes by corporations filing consolidated income tax returns. In general, the January 1998 regulations relate to the separate return limitation year ("SRLY") provisions for general business credits, alternative minimum tax credits, foreign tax credits and overall foreign loss accounts. The January 1998 regulations were generally applicable to consolidated return years beginning on or after January 1, 1997.

On March 16, 1998, Treasury and the Service published in the **Federal Register** final, temporary, and proposed regulations (the "March 1998 regulations") modifying the effective date of the January 1998 regulations. The March 1998 regulations provide that the provisions of the January 1998 regulations will apply for consolidated return years for which the due date (without extensions) of the income tax return is after March 13, 1998. In lieu of applying this effective date, however, the March 1998 regulations permit a consolidated group to choose to apply the effective date provisions under the January 1998 regulations. The March 1998 regulations provide that taxpayers making this choice must apply all those effective date provisions for all relevant years. Thus, under the March 1998 regulations, such taxpayers are not permitted to apply one provision of the January 1998 regulations (*e.g.*, the general business credit effective date) and not another (*e.g.*, the foreign tax credit effective date).

On May 7, 1998, a public hearing was held regarding the proposed January and

March regulations. At the hearing and in written submissions, commentators expressed concern regarding the effective dates contained in the January 1998 and March 1998 regulations with respect to the overall foreign loss account provisions of Treas. Reg. § 1.1502-9T. The commentators' principal concern was that these effective dates resulted in adverse tax consequences not anticipated by taxpayers with respect to business transactions that occurred prior to the issuance of the January 1998 regulations. Treasury and the Service now believe that certain of these consequences are inappropriate.

Accordingly, this notice announces that Treasury and the Service intend to issue regulations permitting taxpayers to elect not to apply Treas. Reg. § 1.1502-9T (the overall foreign loss account provisions) to consolidated return years beginning before January 1, 1998. A taxpayer that chooses under the March 1998 regulations to apply the effective date provisions under the January 1998 regulations may also make the election under this notice.

To make the election under this notice, a taxpayer must write "Election Pursuant to Notice 98-40" across the top of page 1 of an original or amended tax return for each consolidated return year subject to the election. For the first consolidated return year to which the overall foreign loss provisions of Treas. Reg. § 1.1502-9T apply (*i.e.*, the first year beginning on or after January 1, 1998), such taxpayer must write "Notice 98-40 Election in Effect in Prior Years" across the top of page 1 of the consolidated tax return for that year. For purposes of applying Treas. Reg. § 1.1502-9T with respect to such year, any member with a balance in an overall foreign loss account from a separate return limitation year on the first day of such year shall be treated as joining the group on such first day.

Treasury and the Service intend to amend the regulations under section 1502 to incorporate the guidance set forth in this notice. Until the regulations are amended, taxpayers may rely on the guidance set forth in this notice.

For further information regarding this notice, contact Trina Dang of the Office of Associate Chief Counsel (Interna-