

## Section 1502.—Regulations

26 CFR 1.1502–28T: Consolidated section 108 (temporary).

T.D. 9098

### DEPARTMENT OF THE TREASURY Internal Revenue Service 26 CFR Part 1

### Guidance Under Section 1502; Application of Section 108 to Members of a Consolidated Group

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Temporary regulations.

SUMMARY: This document contains amendments to temporary regulations under section 1502 that govern the application of section 108 when a member of a consolidated group realizes discharge of indebtedness income. These temporary regulations affect corporations filing consolidated returns. The text of the temporary regulations also serves as the text of the proposed regulations (REG–153319–03) set forth in the notice of proposed rulemaking on this subject in this issue of the Bulletin.

DATES: *Effective Date:* These regulations are effective December 10, 2003.

FOR FURTHER INFORMATION CONTACT: Amber Renee Cook or Marie C. Milnes-Vasquez at (202) 622–7530 (not a toll-free number).

## SUPPLEMENTARY INFORMATION:

### Background

Section 61(a)(12) of the Internal Revenue Code (Code) provides that gross income includes income from the discharge of indebtedness, except as provided by law. Section 108(a) provides that, in certain cases, gross income of a C corporation does not include certain amounts of discharge of indebtedness income that would otherwise be includible in gross income. In these cases, however, the taxpayer must reduce its tax attributes, including the basis of property, by the excluded amount of discharge of indebtedness income (excluded COD income). This provision reflects Congressional intent of “deferring, but eventually collecting within a reasonable period, tax on ordinary income realized from debt discharge.” See H.R. Rep. 96–833 at 9 (1980); S. Rep. No. 96–1035 at 10 (1980).

On September 4, 2003, the IRS and Treasury Department published in the **Federal Register** a notice of proposed rulemaking (REG–132760–03, 2003–43 I.R.B. 933 [68 FR 52542]) and temporary regulations (T.D. 9089, 2003–43 I.R.B. 906 [68 FR 52487]) under section 1502 (the original regulations). The original regulations provide guidance regarding the determination of the attributes that are available for reduction when a member of a consolidated group realizes excluded COD income and the method for reducing those attributes. As explained in the preamble to the original regulations, those regulations adopt a consolidated approach that is intended to reduce all attributes that are available to the debtor member and contain a rule governing the order in which attributes are reduced. In particular, under the original regulations, the attributes attributable to the debtor member are first subject to reduction. For this purpose, attributes attributable to the debtor member include (1) consolidated attributes attributable to the debtor member, (2) attributes that arose in separate return limitation years of the debtor member, and (3) the basis of property of the debtor member. To the extent that the excluded COD income exceeds the attributes attributable to the debtor member, the original regulations require the reduction of consolidated attributes attributable to other members and

attributes attributable to other members that arose (or are treated as arising) in a separate return limitation year to the extent that the debtor member is a member of the separate return limitation year subgroup with respect to such attribute.

### Explanation of Provisions

The IRS and Treasury Department have become aware that the original regulations may not provide for the reduction of all the attributes that are in fact available to the debtor member. In particular, those regulations may not require the reduction of tax attributes attributable to members other than the debtor member that arise in a separate return year and that are not subject to a SRLY limitation. Such attributes, for example, include attributes from separate return limitation years that are not subject to a SRLY limitation as a result of the application of the overlap rule of §1.1502–15(g) or §1.1502–21(g).

These temporary regulations, therefore, amend the original regulations to include among the tax attributes that are subject to reduction, after the reduction of the tax attributes attributable to the debtor member, tax attributes attributable to members other than the debtor member (other than asset basis) that arose in a separate return year or that arose (or are treated as arising) in a separate return limitation year to the extent that no SRLY limitation applies to the use of such attributes by the group. This amendment is consistent with the approach of the original regulations to make available for reduction all of the attributes that are available to offset income of the debtor member.

### Effective Date

These amendments to the original regulations generally apply to discharges of indebtedness that occur after August 29, 2003, but only if the discharge occurs during a taxable year the original return for which is due (without regard to extensions) after December 10, 2003.

### Other Issues

The IRS and Treasury Department are aware that there are a number of other technical issues that have been identified regarding the operation of the original regulations. The IRS and Treasury Department

are currently studying these issues, including the application of section 1245 to property the basis of which has been reduced, the timing of certain basis adjustments, and the timing of taking into account certain excess loss accounts. It is expected that guidance regarding these issues will be issued in the near future and may be available on a retroactive basis.

### 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. These temporary regulations are necessary to provide taxpayers with immediate guidance regarding the application of section 108 when a member of a consolidated group realizes discharge of indebtedness income that is excluded from gross income and the application of previously promulgated regulations regarding such application. Accordingly, good cause is found for dispensing with notice and public procedure pursuant to 5 U.S.C. 553(b)(B) and with a delayed effective date pursuant to 5 U.S.C. 553(d)(3). For applicability of the Regulatory Flexibility Act, please refer to the cross-reference notice of proposed rulemaking published elsewhere in this issue of the **Federal Register**. Pursuant to section 7805(f) of the Code, these temporary 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 regulations is Marie C. Milnes-Vasquez of the Office of Associate Chief Counsel (Corporate). However, other personnel from the IRS and Treasury Department participated in their development.

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### 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 continues to read in part as follows:

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

Section 1.1502–28T also issued under 26 U.S.C. 1502. \* \* \*

Par. 2. Section 1.1502–28T is amended by revising paragraphs (a)(4) and (d) to read as follows:

*§1.1502–28T Consolidated section 108 (temporary).*

(a) \* \* \*

(4) *Reduction of certain tax attributes attributable to other members.* To the extent that, pursuant to paragraph (a)(2) of this section, the excluded COD income is not applied to reduce the tax attributes attributable to the member that realizes the excluded COD income, after the application of paragraph (a)(3) of this section, such amount shall be applied to reduce the remaining consolidated tax attributes of the group as provided in section 108 and this section. Such amount also shall be applied to reduce the tax attributes attributable to members that arose (or are treated as arising) in a separate return limitation year to the extent that the member that realizes excluded COD income is a member of the separate return limitation year subgroup with respect to such attribute if a SRLY limitation applies to the use of such attribute. In addition, such amount shall be applied to reduce the tax attributes attributable to members that arose in a separate return year or that arose (or are treated as arising) in a separate return limitation year if no SRLY limitation applies to the use of such attribute. The reduction of each tax attribute pursuant to the three preceding sentences shall be made in the order prescribed in section 108 and pursuant to the principles of §1.1502–21T(b)(1). Except as otherwise provided in this paragraph (a)(4), a tax attribute that arose in a separate return year or that arose (or is treated as arising) in a separate return limitation year is not subject to reduction pursuant to this paragraph (a)(4). Basis in assets is not subject to reduction pursuant to this paragraph (a)(4). Finally, to the extent that the realization of excluded COD income by a member pursuant to paragraph (a)(3) does not reduce a tax attribute attributable to such lower-tier member, such

excess shall not be applied to reduce tax attributes attributable to any member pursuant to this paragraph (a)(4).

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(d) *Effective dates.* This section other than paragraph (a)(4) of this section applies to discharges of indebtedness that occur after August 29, 2003. Paragraph (a)(4) of this section applies to discharges of indebtedness that occur after August 29, 2003, but only if the discharge occurs during a taxable year the original return for which is due (without regard to extensions) after December 10, 2003. However, groups may apply paragraph (a)(4) of this section to discharges of indebtedness that occur after August 29, 2003, and during a taxable year the original return for which is due (without regard to extensions) on or before December 10, 2003. For discharges of indebtedness that occur after August 29, 2003, and during a taxable year the original return for which is due (without regard to extensions) on or before December 10, 2003, paragraph (a)(4) of this section shall apply as in effect on August 29, 2003.

Mark E. Matthews,  
*Deputy Commissioner for  
Services and Enforcement.*

Approved December 2, 2003.

Gregory Jenner,  
*Deputy Assistant Secretary of  
the Treasury.*

(Filed by the Office of the Federal Register on December 10, 2003, 8:45 a.m., and published in the issue of the Federal Register for December 11, 2003, 68 F.R. 69024)