

INTERNAL REVENUE SERVICE
NATIONAL OFFICE TECHNICAL ADVICE MEMORANDUM
May 6, 1999

Number: **199936001**
Release Date: 9/10/1999

Third Party Contact:
Index (UIL) No.: 6402.01-00, 6621.00-00
CASE MIS No.: TAM-100402-99/CC:DOM:IT&A:B1

Taxpayer's Name:
Taxpayer's Address:

Taxpayer's Identification No:
Years Involved: 1988
No Conference Held

LEGEND:

X Corporation =

Y Corporation =

ISSUE(S):

- (1) Where a member of a consolidated group has an overpayment of tax for a taxable year prior to its affiliation with the group, may the Internal Revenue Service (Service) credit such overpayment against an outstanding income tax liability of the group for a taxable year in which the member joined in the filing of a consolidated return?
- (2) Whether the Service may apply the net interest rate of zero under § 6621(d) of the Internal Revenue Code (Code) to a period where there is an equivalent overpayment of one member of a consolidated group and underpayment of the group.

CONCLUSION:

- (1) The Service may credit an overpayment of tax of a member of a consolidated group (attributable to a taxable year prior to the member's affiliation with the group) against an outstanding income tax liability of the group for a taxable year in which the member joined in the filing of a consolidated return.
- (2) The Service should not apply the net interest rate of zero under § 6621(d) to a period where an overpayment may be credited against an outstanding tax liability under § 6402(a). Since we hold that the Service may credit the overpayment of the member against the outstanding tax liability of the group, we need not address the application of § 6621(d) to this situation.

FACTS:

During March 1988, X Corporation, a taxpayer which files returns on a calendar year basis, acquired more than 80 percent of the outstanding stock of Y Corporation. Prior to the date of the acquisition, Y Corporation was not a subsidiary in another consolidated group. Y Corporation filed a tax return for the period ending on the date of acquisition (the "short year return") and paid the tax due for that period. For the period after the date of the acquisition, Y Corporation joined in a consolidated return filed by X Corporation for calendar year 1988 (the "1988 consolidated return").

A later examination by the Service determined that certain expenses deducted by Y Corporation in the 1988 consolidated return should properly have been deducted by Y Corporation in the short year return. The Service disallowed these deductions from the 1988 consolidated return and allowed them in the short year return. This adjustment increases the consolidated group's tax liability for the 1988 taxable year. The adjustment also results in a net operating loss carryback for Y Corporation that creates an overpayment for its 1986 taxable year. An additional overpayment of tax arose in the 1987 taxable year of Y Corporation as a result of the Service's examination.

The additional tax liability attributable to the 1988 taxable year has not been paid, and thus remains outstanding. Likewise, the overpayments attributable to Y Corporation's 1986 and 1987 taxable years have not been refunded or credited against any other tax liability, and therefore remain outstanding.

LAW AND ANALYSIS:

Crediting an Overpayment Under Section 6402(a)

Section 6402(a) of Code provides, in part, that in the case of any overpayment, the Secretary, within the applicable period of limitations, may credit the amount of such

overpayment, including any interest allowed thereon, against any liability in respect of an internal revenue tax on the part of the person who made the overpayment.

Section 301.6402-1 of the Regulations on Procedure and Administration provides, in part, that the Commissioner may credit any overpayment of tax, including interest thereon, against any outstanding liability for any tax owed by the person making the overpayment.

Section 6601(f) of the Code provides, in part, that if any portion of a tax is satisfied by credit of an overpayment, then no interest shall be imposed under § 6601 on the portion of the tax so satisfied for any period during which, if the credit had not been made, interest would have been allowable with respect to such overpayment.

Under § 6402(a), the Service may credit an overpayment as long as the person who made the overpayment is liable for the tax against which the overpayment is to be credited. Generally, a member of a consolidated group is severally liable for the income tax liability of the group. See § 1.1502-6(a) of the Income Tax Regulations. When a tax is jointly and severally owed by two or more taxpayers, the Service has the authority to collect the full amount of the unpaid tax from any of the liable taxpayers. See U.S. Life Title Insurance Company of Dallas v. United States, 784 F.2d 1238, 1243 (5th Cir. 1986).

Accordingly, pursuant to § 6402(a) and § 301.6402-1 of the regulations, the Service may credit the overpayments attributable to Y Corporation's 1986 and 1987 taxable years against the outstanding 1988 consolidated return tax liability. Any interest attributable to the underpayment of the 1988 consolidated return tax liability will be computed subject to the provisions of § 6601(f).

Interest Netting Under Section 6621(d)

Section 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 § 6621 on such amounts shall be zero for such period. Section 6621(d) generally applies to interest accruing on or after October 1, 1998; however, § 6621(d) applies to interest accruing before October 1, 1998, if the provisions of § 3301(c)(2) of the Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, 112 Stat. 741, (RRA 1998) are met.

The legislative history of § 6621(d) states, in part:

. . . It is anticipated that the Secretary will take into account interest paid on previously determined deficiencies or refunds for the purpose of

determining the rate of interest under this provision without regard to whether the underpayments or overpayments are currently outstanding. It is also anticipated that where interest is both payable from and allowable to an individual taxpayer for the same period, the Secretary will take all reasonable efforts to offset the liabilities, rather than process them separately using the net interest rate of zero.

H.R. Conf. Rep. No. 599, 105th Cong., 2d Sess. 257 (1998).

In light of the legislative history accompanying § 6621(d), the Service should not apply § 6621(d) to a situation where the underpayment and overpayment are both outstanding. In such a situation, the Service should credit the overpayment to the underpayment under § 6402(a). Because we hold that the Service may credit the overpayments attributable to Y Corporation's 1986 and 1987 taxable years against the outstanding 1988 consolidated return tax liability under § 6402(a), we need not address the application of § 6621(d) to this situation.

CAVEAT(S)

A copy of this technical advice memorandum is to be given to the taxpayer(s). Section 6110(k)(3) of the Code provides that it may not be used or cited as precedent.

/s/ Lewis J. Fernandez
Deputy Assistant Chief Counsel
Income Tax & Accounting Division