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From:

Sent: Tuesday, November 18, 2008 11:42:13 AM

To:

Cc:

Subject: RE: Question(s) re Interest Netting

My responses are inserted below.

I just finished studying CCA 200707002. I have a few questions which somewhat relates to a statement made and its' corresponding Footnote 4 which reads as follows:

In the scenario of an underpayment by A Inc. and a subsequent overpayment by B Inc. and its subsidiaries (including A), the Service could not of its own accord offset the overpayment against the underpayment. [FN4]

FN4. In the reverse situation--i.e., an overpayment by A Inc. for TY 1 and an underpayment by B Inc & Subs. (including A Inc.) for TY 2--the Service may, without consent, offset A Inc.'s overpayment against the group's underpayment because A Inc. (as already explained) is severally liable for the underpayment for the year in which A joined in filing a consolidated return. The Service is authorized to collect the underpayment from any member, including A, through setoff or otherwise.

1. Now assuming A Inc is the parent of a consolidated group (ie A Inc and Subsidiaries, which files a consolidated return) has an overpayment in year 1. In year 2 A inc is merged into B Inc & Subs with B Inc & Subs surviving. B Inc assumes the liabilities of A. B Inc & Subs (including A Inc which is no longer in existence and A's Subs which continue to exist now as subs of B) has underpayments in Year 3. A Group's designated agent requests that the overpayment interest be netted against B Inc & Subs Year 1 and Year 3 underpayments under Section 6621(d). Is A Inc and Subsidiaries, which are separate taxpayers who collectively filed a consolidated return prior to acquisition, considered the "same taxpayer" as B Inc & Subs after acquisition? **Yes, I think so, for purposes of the netting request.** Is B Inc entitled to the Overpayments of A group since it assumed the liabilities of A group. **In my opinion, no, but A group presumably can (thru its designated agent) turn over any refunded overpayment to B group or request that the overpayment be credited to a liability of B group (and the Service should honor that request).** What if B Inc only assumed the liabilities of A Inc only is B entitled to the Group A's overpayment? **Same answer. One t/p's assumption of another t/p's liability for a tax underpayment for one year (or type of tax) does not entitle the first t/p to an overpayment of the second t/p for a different year (or type of tax).** If the A group has liability for Year 3 underpayment and is also entitled to A Groups Year 1

overpayment are they allowed to net? **Yes, it's the same t/p.**

2. Is the A Group considered one taxpayer collectively or is each member considered a separate taxpayer? **I'm not sure this question can be answered definitively, or that it really matters. As I recall, under the consolidated-return regulations, members of the consolidated group are jointly and severally liable for the group's taxes for the year of the consolidated filing. I think that _____ would tell you that the group and each member thereof is the "taxpayer" w/ respect to the consolidated income and other items reported on the consolidated return as well as the resulting tax.** I believe the CCA makes this somewhat clear that each member is a separate taxpayer for underpayments but one taxpayer for overpayments. **I would not take that away from the CCA. The central point of the CCA was that if a t/p has (or had) a pre-consolidation income-tax underpayment (or an excise or employment tax underpayment) and the consolidated group, including the particular t/p, has (or had) an income-tax overpayment, interest on the overpayment may not be netted against interest on the underpayment because the group (including all members other than the relevant t/p w/ the underpayment) did not incur and are not liable for the underpayment. Hence, the t/p subject to underpayment interest is not the "same taxpayer" as the one to which overpayment interest is payable.**

3. If A Inc. was a consolidated group with an overpayment in Year 1 and Year 2 subsidiary C and D are spun off and are no longer part of the consolidated group and were not part of the Merger with B. In year 2 C and D have an underpayment. The former Group A collectively is not liable the underpayment of B Inc & Subs in year 3. Can the IRS apply the Group A's overpayment to a tax due of B Inc and Subs or of anyone one of the former members of Group A? **In the context of netting, the conclusion and rationale above would seem to apply the same here: interest on a group overpayment cannot be netted against interest on a member's separate underpayment. I know I used the word "pre-consolidation" above, but pre- or post-consolidation is not significant; what is significant is that a member of a consolidated group has a separate underpayment and the group (including that member) has its own overpayment. Interest, therefore, on "Group A's overpayment" cannot be netted against interest on "a tax due . . . of any one of the former members of Group A." Likewise, interest on "Group A's overpayment" cannot be netted against interests on "a tax due of B Inc and Subs." A Group is not liable for B Group's underpayment, so, again, they are not the same t/p.**

That said, in your question you did not mention netting; rather, you asked about whether the Service could "apply" the overpayment to the liability (i.e., an offset or credit under section 6402, as opposed to netting under section 6621(d)). That's a more difficult issue, and although the CCA touches on it, I'm not inclined to opine further in this email. If you have an actual case or cases involving the issue and National Office advice is needed, please submit a written request (email or paper) thru your local counsel, listing all the material facts, and we'll issue a formal opinion after managerial review.

As the return is that of the group, the overpayment, and interest on the overpayment, is also the group's, not that of any single member **or subgroup of members.**

4. If A Inc is merged into B Inc & Subs and A Inc ceases to exist. the Subs of A may be liable for B Inc & Subs tax in future years since they are part of the group. But the Group A as a whole no longer exist because A ceased to exist. According to the Statement above the overpayment of the group A could not be used to pay the liabilities of the former members of group A. True? **No, I disagree. If A no longer exists and all of the other members of A group are part of B group, then all remaining members of A group are jointly and severally liable for a B group**

underpayment. All of those same remaining A group members jointly overpaid tax for another period. Thus, I believe the "taxpayer" w/ regard to the overpayment is the "same taxpayer" w/ regard to the underpayment. To put it another way, although we're dealing w/ more than one company, I don't see any fundamental difference from the footnote 4 situation you quote at the top. But note, if A Inc. were still in existence and not a member of B group, I might have a different opinion. Lastly, your question is phrased in terms of setoff under §6402, but I've focused on netting.

5. If a Consolidated Group is acquired and the Purchaser assumes the past liabilities of the Group does this entitle the purchaser to the past overpayments of the group? **No (see 1, above).** Is this the "Same Taxpayer"? **No.** The assumption of liabilities does not make it the same taxpayer. **Right.** The Purchaser could be liable for one member of the former making the purchase liable for the groups whole tax but this does not make the Purchaser the same taxpayer. Even if the whole Group A continued to exist in B and B assumed the liabilities of Group A this does not make them the Same Taxpayer. **I agree.**

5. If I reword footnote 4 as follows is it still true? **I'm doubtful it's true, at least as you've reworded it (limiting the A members of the B group to A Inc., and apparently not including all members of what was at one time A group).**

FN4. In the reverse situation--i.e., an overpayment by A Inc & Subs. for TY 1 and an underpayment by B Inc & Subs. (including A Inc.) for TY 2--the Service may, without consent, offset A Inc & Sub's overpayment against the group's underpayment because A Inc. (as already explained) is severally liable for the underpayment for the year in which A joined in filing a consolidated return. The Service is authorized to collect the underpayment from any member, including A, through setoff or otherwise.

If differently worded, however, I think the footnote could still be correct.

FN4. In the reverse situation--i.e., an overpayment by A Inc & Subs. for TY 1 and an underpayment by B Inc & Subs. (including A Inc. **and the other A group members**) for TY 2--the Service may, without consent, offset A Inc & Sub's overpayment against the group's underpayment because A **group** (as already explained) is severally liable for the underpayment for the year in which **the A members** joined in filing a consolidated return. The Service is authorized to collect the underpayment from any member, including A **or its former subsidiaries (now B's subs)**, through setoff or otherwise.

Is there any instance where a "**consolidated group**" would be the considered the "same taxpayer" following an acquisition of any kind? **Yes. See responses above.** If not, I are we willing to defend such a position? Because I have several claims that could be denied simple because I have two consolidated groups involved.

Let me know if you have questions or if I am not clear about something. Thanks