

**Office of Chief Counsel  
Internal Revenue Service  
Memorandum**

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to: John Priest  
Internal Revenue Agent  
(Large Business & International)

from: Marie C. Milnes-Vasquez  
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subject: Section 382(h)(4)

This Chief Counsel Advice responds to your request for assistance. This advice may not be used or cited as precedent.

ISSUE

Whether section 382(h)(4) limits the amount of RBIL that a taxpayer may include in the computation of its NOL where the taxpayer has no taxable income for the year of recognition without regard to RBIL.

CONCLUSION

Section 382(h)(4) and its legislative history indicate that Congress intended any RBIL in excess of a taxpayer's section 382 limitation to become a special attribute that may be carried forward only. Therefore, a taxpayer may include in its computation of taxable income or NOL only an amount of RBIL equal to its section 382 limitation, whether or not the taxpayer has taxable income without regard to RBIL.

FACTS

Taxpayer, a C corporation and the common parent of a consolidated group, experienced an ownership change within the meaning of section 382(g). At the time of the ownership change, Taxpayer had a net unrealized built-in loss (NUBIL) within the meaning of section 382(h)(3).

Following the ownership change, and during a recognition period taxable year as defined in section 382(h)(7)(B) (Recognition Year), Taxpayer had a recognized built-in loss (RBIL) as defined by section 382(h)(2)(B). The RBIL was ordinary in character, and it exceeded the Taxpayer's section 382 limitation for the Recognition Year. Without regard to the RBIL, taxpayer had no taxable income for the Recognition Year.

Taxpayer asserts that it is entitled to include the entire amount of its RBIL in the computation of its NOL for the Recognition Year. Taxpayer argues that no amount of RBIL is disallowed under section 382(a) where a taxpayer has no taxable income for the Recognition Year before taking into account RBIL, and, therefore, that section 382(h)(4) does not prevent the entire RBIL from being included in the computation of its NOL.

## LAW

Section 382(a) provides:

The amount of the taxable income of any new loss corporation for any post-change year which may be offset by pre-change losses shall not exceed the section 382 limitation for such year.

Section 382(h)(1)(B)(i) provides:

If the old loss corporation has a net unrealized built-in loss, the recognized built-in loss for any recognition period taxable year shall be subject to limitation under this section in the same manner as if such loss were a pre-change loss.

Section 382(h)(4) provides:

If a deduction for any portion of a recognized built-in loss is disallowed for any post-change year, such portion—

(A) shall be carried forward to subsequent taxable years under rules similar to the rules for the carrying forward of net operating losses \* \* \*, but

(B) shall be subject to limitation under this section in the same manner as a pre-change loss.

## ANALYSIS

Under section 382(h)(4), to the extent that a deduction for an RBIL is “disallowed,” that portion of the RBIL becomes part of a special attribute that may be carried forward only, subject to section 382 limitations on use. The loss is not included in any NOL for the year, and thus cannot be carried back to preceding years. Therefore, whether section 382(h)(4) precludes a taxpayer from including any particular portion of its RBIL in the computation of its NOL depends on the meaning of the word “disallowed,” as used in that section. The term “disallowed” is not defined in section 382, and there are no applicable regulations.

Taxpayer argues that section 382(a) is inapplicable where there is no taxable income (before RBIL), and therefore, that section cannot “disallow” any loss. Taxpayer further argues that, because no loss is disallowed, section 382(h)(4) also has no application, and thus, the full amount of the RBIL is included in the taxpayer’s NOL for the year of recognition.

Based solely on the statute, it is unclear what meaning should be assigned to the term “disallowed.” However, with respect to section 382(h)(4), the Conference Report to the legislation states that:

Under the conference agreement, the amount of any recognized built-in loss that exceeds the section 382 limitation for any post-change year must be carried forward (not carried back) under rules similar to the rules applicable to net operating loss carryforwards and will be subject to the special limitations in the same manner as a pre-change loss.

H.R. Rep. No. 841, p.49, 99<sup>th</sup> Cong., 2d Sess., Sept. 18, 1986. The legislative history provides no further discussion of section 382(h)(4). Nevertheless, the conference report clearly states that Congress intended “disallowed” to mean any portion of an RBIL that exceeds the section 382 limitation. In light of this legislative history, any amount of an RBIL that exceeds the section 382 limit must be excluded from the NOL computation. Instead, such RBIL must be carried forward as a special attribute under section 382(h)(4).

#### CASE DEVELOPMENT, HAZARDS AND OTHER CONSIDERATIONS

This writing may contain privileged information. Any unauthorized disclosure of this writing may undermine our ability to protect the privileged information. If disclosure is determined to be necessary, please contact this office for our views.

Please call (202) 622-7530 if you have any further questions.

Sincerely,

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