

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

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date: August 28, 2012

to: Coordinator
Manager

from:

(Large Business & International)

subject:

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

LEGEND

Taxpayer =
Subsidiary =
TP Group =

Year 1 =
Year 2 =
3rd Party =
Date 1 =
Date 2 =
Date 3 =

ISSUES

1. Whether the Year 2 return filed by the 3rd Party is timely.

2. Whether the Service can reject the 5 year carryback election made by the TP in its Year 2 return and accept the 5 year carryback election made by the 3rd Party in its Year 2 return.

CONCLUSIONS

Issue 1: Since the 3rd Party satisfied the requirements of Treas. Reg. § 301.9100-2, the Year 2 Form 1120 return it filed on behalf the taxpayer group is considered timely filed.

Issue 2: Pursuant to Treas. Reg. § 301.6402-7(f), the Service can reject the 5 year carryback election made by the common parent of a group that includes an insolvent financial institution and accept the 5 year carryback election made by the 3rd Party as an additional agent for the group.

FACTS

Taxpayer (“TP”) is a common parent of an affiliated group of corporations filing a consolidated federal income tax return (“TP Group”). One of Taxpayer’s subsidiaries is Subsidiary. For the years in question, Subsidiary generated all or substantially all of the losses reported by the TP Group. On Date 1, TP filed (1) an amended Year 1 return making the 5 year carryback election pursuant to § 172(b)(1)(H) ¹ and (2) a Year 2 return waiving the carryback of the CNOL for that year. Date 1 is a date that was prior to the unextended due date for the Year 2 return (“the original Year 2 due date”). On Date 2 (which is a date that was after the original Year 2 due date), the 3rd Party was appointed as the receiver of Subsidiary. Under Treas. Reg. § 301.6402-7(c), the 3rd Party became an additional agent for the TP Group. On Date 3, the 3rd Party filed, on behalf of the TP Group, an alternative consolidated return to each of the returns filed by TP on Date 1. Date 3 is a date that is after the original Year 2 due date, but prior to the date that is 6 months after the original Year 2 due date (“the hypothetical extended Year 2 due date”). Specifically, the 3rd Party filed (1) a Form 1120X claiming the normal 2 year carryback for Year 1 and (2) a Form 1120 making the 5 year carryback election for Year 2. The returns have the following handwritten notation at the top:

Year 1—Claim For Refund Under Section 6402(k) of the Code, and Filed Pursuant to Reg. 301.9100-2 (To the Extent Necessary)

Year 2—Loss Year Return Under Section 6402(k) of the Code Filed Pursuant to Reg. 301.9100-2

¹ Unless otherwise noted, all section references are to the Internal Revenue Code of 1986, as amended, in effect for the years at issue.

LAW AND ANALYSIS*Issue 1:*

As noted above, TP filed the original Year 2 return on behalf of the TP Group before the original Year 2 due date. Consequently, it had no reason to file for a 6 month extension of that date. Thus, since the alternative return filed by the 3rd Party on behalf of the TP Group for the Year 2 year was not filed by the original Year 2 due date, it was not, on its face, timely filed. However, as noted above, it was filed before the hypothetical extended 2009 due date. Thus, if the 3rd Party can retroactively extend the original Year 2 due date by 6 months, its Year 2 return for the TP Group would be timely filed.

Treas. Reg. § 301.9100-2(b) provides that an automatic extension of 6 months from the due date of a return excluding extensions is granted to make regulatory or statutory elections whose due dates are the due date of the return or the due date of the return including extensions provided the taxpayer timely filed its return for the year the election should have been made and met other requirements specified therein. Treas. Reg. § 301.9100-2(d) provides that any return, statement of election, or other form of filing that must be made to obtain an automatic extension must provide the following statement at the top of the document: "FILED PURSUANT TO § 301.9100-2".

As noted above, the Year 2 return for the TP Group was timely filed by TP. However, the 3rd Party, a different agent for the TP Group, is seeking the application of the automatic 6 month extension provision of Treas. Reg. § 301.9100-2(b) in order to file an alternative Year 2 return on behalf of the TP Group. Treas. Reg. § 301.9100-2(b) requires that the "taxpayer" timely files its return for the year the election should have been made and also files the later return meeting the requirements of Treas. Reg. § 301.9100-2. In this case, the "taxpayer" is the TP Group. Its first Year 2 return was timely filed by the original Year 2 due date by its agent, TP. Its second Year 2 return was timely filed by the hypothetical extended Year 2 due date by its alternative agent, the 3rd Party. Since Treas. Reg. § 301.9100-2(b) looks only to the taxpayer and not to the identity or number of its agent(s), it does not matter to the application of that provision that the two Year 2 returns were filed by different agents. Therefore, since the 3rd Party satisfied the requirements of Treas. Reg. § 301.9100-2, the Year 2 return it filed on behalf of the TP Group is considered timely filed.

Note that the amended Year 1 return filed by the 3rd Party is a claim for refund. Section 6511(a) provides that a taxpayer must file a claim for refund by the later of 3 years from the time the return was filed or 2 years from the time the tax was paid. As noted above, the 3rd Party filed that claim within no longer than 18 months (1 ½ years) from the date TP filed the Year 1 return (if TP filed that return by the unextended due date; 1 year if TP filed that return by the extended due date). Therefore, since the 3rd Party timely filed its claim for refund, it is not necessary for the 3rd Party to request 9100 relief with respect to that claim.

Issue 2:

Normally, an election that is properly made by a taxpayer is accepted by the Service and any refund to be paid as a result of that election is paid to the taxpayer. However, Congress has provided special rules in the case of a refund to be paid to an insolvent financial institution represented by a fiduciary.

Section 6402(k) provides that, notwithstanding any other provision of law, in the case of an insolvent corporation which is a member of an affiliated group of corporations filing a consolidated return for any taxable year and which is subject to a statutory or court appointed fiduciary, the Secretary may by regulation provide that any refund for such taxable year may be paid on behalf of such insolvent corporation to such fiduciary to the extent that the Secretary determines that the refund is attributable to losses or credits of such insolvent corporation. The underlying regulation is found in Treas. Reg. § 301.6402-7.

Treas. Reg. § 301.6402-7 anticipates that the Service Center could receive two consolidated returns for any year in which an insolvent financial institution is a member of a consolidated group. The first return would be filed by the common parent of that group. The second return would be filed on behalf of that group by the 3rd Party (and would generally be filed after the return for that year was filed by the common parent). See Treas. Reg. § 301.6402-7(e).

Treas. Reg. § 301.6402-7(f)(1) provides that the Internal Revenue Service may, in its sole discretion, adjust a loss year return filed by the common parent of a loss year group to take into account information filed by the fiduciary in accordance with paragraph (e) of this section, or accept or adjust a loss year return for the loss year group filed by the fiduciary. Treas. Reg. § 301.6402-7(f)(2) provides a similar rule for a claim for refund.

Thus, given the broad language of § 6402(k), we interpret the language in Treas. Reg. § 301.6402-7(f)(1) "adjust a loss year return...to take into account information filed by the fiduciary" to mean that the Service can reject the 5 year election made by TP. Further, that regulation allows the Service to accept the 5 year election made by the 3rd Party. Finally, it is clear that the Service can reject the waiver of the CNOL carryback to the extent that it is attributable to the insolvent financial institution. Treas. Reg. § 301.6402-7(e)(5).

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Please call _____ if you have any further questions.

By: _____

(Large Business & International)