

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

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to: Revenue Agent  
Large Business & International

from: Paul Colleran  
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(Large Business & International)

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subject:

Railroad Track Maintenance Credit Computation

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

LEGEND

ISSUES

Whether intragroup transfers pursuant to an assignment between members of the same controlled group are permissible under the provisions of I.R.C. 45G.<sup>1</sup>

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<sup>1</sup> All section references are to the Internal Revenue Code and the regulations thereunder.

CONCLUSIONS

Intragroup transfers pursuant to an assignment between members of the same controlled group are not permissible under the provisions of §45G.

FACTS<sup>2</sup>

The following facts are those found by the examination team. Any additions to or changes in these facts could affect the conclusions set forth below under "Law and Analysis."

(Taxpayer) is a holding company that is taxable as a corporation under Subchapter C of the Internal Revenue Code. Taxpayer filed Forms 1120 as the parent of a consolidated group for its taxable years ended ( tax year) and ( tax year). Taxpayer owns two ( companies ), and ( both of which are disregarded as entities separate from their owners pursuant to Treas. Reg. § 301.7701-3. As disregarded entities, the items of income, expense and credit of ( and ( are includable in the Taxpayer's tax return for the ( tax year. Both Taxpayer and ( own ( by the Taxpayer and ( . Taxpayer is controlled by ( .

Members of ( also control ( and its subsidiary, ( filed Forms 1120 as the parent of a consolidated group for its taxable years ended ( and ( .

You have determined that Taxpayer and ( are members of the same controlled group pursuant to § 45G(e)(2) and Treas. Reg. § 1.45G-1(f).

In ( , ( its railroad that has at least ( miles of track and ( miles of side track. In ( , ( miles of track and ( miles of side track from ( . The railroad track that ( from ( needed numerous repairs and upgrades ( and ( transports property on both ( and ( tracks.

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<sup>2</sup> Our understanding of the facts of this case is limited to the information that you have provided us unless otherwise stated. We have not undertaken any independent investigation of the facts of this case. If the facts known to us are incorrect or incomplete in any material respect, you should not rely on this advice, but instead you should contact our office immediately.

and  
 (Railroads) entered into a Track Maintenance Agreement with  
 dated as of (Track Maintenance Agreement). In the Track  
 Maintenance Agreement, . assigned miles of  
 track to and assigned  
 miles of track to solely for the purposes of IRC § 45G. As  
 consideration for the assignment of track, agreed to make  
 payments to the Railroads in an aggregate amount of up to \$ . The Track  
 Maintenance Agreement recites that the payments to be made by  
 to the Railroads are based upon the expenditures incurred by the Railroads during  
 for maintaining the railroad track that constitute certified expenditures within the  
 meaning of § 45G. In a document entitled “ ”  
 dated as of , the Railroads certified that they made total  
 expenditures of \$ within the meaning of § 45G.  
 which assigned miles of track reported that it  
 incurred \$ in maintenance expenses.  
 which assigned miles of track reported that it incurred  
 \$ in maintenance expenses.<sup>3</sup>

The Track Maintenance Agreement provides that as consideration for  
 payments for the assignment of track, the Railroads agree to execute and deliver  
 to credits in an amount equal to % of the qualified  
 expenditures that had been assigned to . The credits  
 could only be applied to amounts or its affiliates owed to the  
 Railroads for transportation services on the Railroads' tracks from  
 till . was permitted to assign the  
 credits to any other shipper using the Railroads' track facilities that owed the Railroads  
 for transportation services from till . Upon  
 written request by , the Railroads would redeem for cash any  
 credits that had not been utilized (or such other date as  
 the parties agreed).

Taxpayer filed a Form 1120 consolidated income tax return for its tax year but did  
 not include Form 8900, Qualified Railroad Track Maintenance Credit or any  
 related information. Taxpayer requested an extension of time under Treas. Reg. §  
 301.9100-1 to file Form 8900, for its tax year . Taxpayer's request for an extension  
 of time was granted. Taxpayer filed amended Form 1120X consolidated income tax  
 returns in for its and tax years. On the Form 8900 attached to  
 its amended return for , Taxpayer reported qualified railroad track maintenance  
 expenses (QRTME) of \$ along with miles of railroad track assigned to it  
 by owners or lessors. Taxpayer claimed a railroad track maintenance credit (RTMC) of  
 \$ on the Form 3800, General Business Credit attached to its amended tax

<sup>3</sup> This memorandum does not address whether the expenses reported by the Railroads constitute  
 qualified railroad track maintenance expenditures within the meaning of § 45G. We recommend that you  
 verify that the claimed expenditures are qualifying expenditures.

return for . Due to limitations, Taxpayer was not able to absorb the entire RTMC for its year. Taxpayer claimed a general business credit carryover of \$ on its Form 1120X for its tax year from its tax tax year consisting of an RTMC carryover.

## LAW AND ANALYSIS

### Background

Section 38 allows a credit for, among other things, the current year business credit. The current year business credit is the sum of the credits listed in § 38(b). Section 245(c)(1) of the American Jobs Creation Act of 2004, Public Law 108-357 (118 Stat. 1418) (AJCA) amended § 38(b) to add to the list of credits the RTMC determined under § 45G(a).

Section 45G was added to the Code by section 245(a) of the AJCA, and was modified by section 403(f) of the Gulf Opportunity Zone Act of 2005, Public Law 109-135 (119 Stat. 2577), and section 423(a) of the Tax Relief and Health Care Act of 2006, Public Law 109-432 (120 Stat. 2922) (TRHCA).

Section 45G provides for a RTMC in an amount equal to 50 percent of the QRTME paid or incurred by an eligible taxpayer during the taxable year.

Treas. Reg. § 1.45G-1(a) provides a taxpayer claiming the RTMC must do so by filing Form 8900, Qualified Railroad Track Maintenance Credit, with its timely filed (including extensions) Federal income tax return for the taxable year the RTMC is claimed.

Section 45G(b) imposes a limitation on the amount of the credit for any taxable year. The credit allowed under § 45G(a) shall not exceed the product of \$3,500 multiplied by the sum of (1) the number of miles of railroad track owned by, or leased to, the eligible taxpayer as of the close of the taxable year, and (2) the number of miles of railroad track assigned to the eligible taxpayer by a Class II railroad or Class III railroad that owns or leases the track as of the close of the taxable year.

Treas. Reg. § 1.45G-1(c)(2)(iii) provides that amounts that exceed the limitation under §45G(b) may never be carried over to another taxable year.

Section 45G(c) defines an eligible taxpayer to mean any Class II railroad or Class III railroad, and any person who transports property using the rail facilities of such a railroad, or who furnishes railroad-related property or services to such a railroad, but only with respect to miles of railroad track assigned to such person by a Class II railroad or Class III railroad.

Section 45G(d) defines the term QRTME to mean gross expenditures (whether or not chargeable to capital account) for maintaining railroad track (including roadbed, bridges,

and related track structures) owned or leased as of January 1, 2005, by a Class II or Class III railroad (determined without regard to any consideration for such expenditures given by the Class II or Class III railroad which made the assignment of such track).

Section 45G(b)(2) provides any assignment of a mile of railroad track may be made only once per taxable year of the Class II or Class III railroad and shall be treated as made as of the close of such taxable year.

Sections 45G(b)(2)(B) and (C) provide any assigned mile may not be taken into account under § 45G by the assignor railroad for such taxable year, and the assignment shall be taken into account for the taxable year of the assignee which includes the date that such assignment is treated as effective.

Treas. Reg. §1.45G- 1(c)(3)(i) provides any amount that an eligible taxpayer (assignee) pays a Class II railroad or Class III railroad (assignor) in exchange for an assignment of eligible railroad track is treated as QRTME paid or incurred by the assignee, and not by the assignor, at the time and to the extent the assignor pays or incurs QRTME.

Treas. Reg. §1.45G-1(d)(1) provides an assignment of any mile of eligible railroad track is a designation by a Class II railroad or Class III railroad that is made solely for purposes of section 45G of a specific number of miles of eligible railroad track as being assigned to another eligible taxpayer for a taxable year. A designation must be in writing and must include the name and taxpayer identification number of the assignee, and the information required under the rules of Treas. Reg. §1.45G-1 (d)(4)(iii)(B). A designation requires no transfer of legal title or other indicia of ownership of the eligible railroad track, and need not specify the location of any assigned mile of eligible railroad track. Further, an assigned mile of eligible railroad track need not correspond to any specific mile of eligible railroad track with respect to which the eligible taxpayer actually pays or incurs the QRTME.

Treas. Reg. § 1.45G-1(d)(4)(iii) provides an eligible taxpayer (assignee) that has received an assignment of miles of eligible railroad track during its taxable year from a Class II railroad or Class III railroad, and that claims the RTMC for that taxable year, must attach to the assignee's Form 8900 for that taxable year a statement: (A) Providing the total number of miles of eligible railroad track assigned to the assignee for the assignee's taxable year; and (B) Attesting that the assignee has in writing, and has retained as part of the assignee's records for purposes of Treas. Reg. § 1.6001-1(a), the following information from each assignor: (1) The name and taxpayer identification number of each assignor;(2) The date of each assignment made by each assignor to the assignee; and (3) The number of miles of eligible railroad track assigned by each assignor to the assignee for the assignee's taxable year.

Section 45G(e)(1) defines the terms Class II railroad and Class III railroad to have the respective meanings given those terms by the Surface Transportation Board. You have

determined that \_\_\_\_\_, and \_\_\_\_\_ both qualify as either Class II or Class III railroads.

### Controlled Group of Corporations

Treas. Reg. § 1.45G-1(f)(3) provides that all members of a controlled group are treated as a single taxpayer for purposes of computing the RTMC. The group credit is computed by applying all of the § 45G and regulatory computational rules on an aggregate basis.

Section 45G does not provide its own rules for controlled groups, but rather incorporates the rules of Section 41(f)(1)(dealing with the credit for increasing research activities or research credit) by reference. Section 41(f)(1) was amended by section 301(c) of the American Taxpayer Relief Act of 2012, P.L. 112-240, for taxable years beginning after December 31, 2011.

Former § 41(f)(1)(A) provided that in determining the amount of the research credit (i) all members of the same controlled group of corporations shall be treated as a single taxpayer, and (ii) the research credit (if any) allowable to each such member shall be its proportionate share of the qualified research expenses, basic research payments, and amounts paid or incurred to energy research consortiums, giving rise to the credit.

Former § 41(f)(1)(B) provides that under regulations prescribed by the Secretary, in determining the amount of the research credit (i) all trades or businesses (whether or not incorporated) which are under common control shall be treated as a single taxpayer, and (ii) the research credit allowable to each such member shall be its proportionate share of the qualified research expenses, basic research payments, and amounts paid or incurred to energy research consortiums, giving rise to the credit. Section 41(f)(1)(B) further provides that regulations prescribed under this subparagraph shall be based on principles similar to the principles which apply in the case of §41(f)(1)(A).

Treas. Reg. § 1.45G-1(f)(1)(i) and (ii) provide in general if a taxpayer is a member of a controlled group of corporations, the group credit is computed in the manner described in Treas. Reg. § 1.45G-1(f)(3) and is then allocated among the members of the group in the manner described in paragraph Treas. Reg. § 1.45G-1(f)(4).

Treas. Reg. § 1.45G-1(f)(2)(ii) provides that group and controlled group means a controlled group of corporations, as defined in §41(f)(5), or a group of trades or businesses under common control. Treas. Reg. §1.52-1(b) through (g) provide the rules for determining whether trades or businesses are under common control.

Section 41(f)(5) provides that the term “controlled group of corporations” has the same meaning given to such term by §1563(a), except that “more than 50 percent” is substituted for “at least 80 percent” each place it appears in § 1563(a)(1), and the determination is made without regard to subsections (a)(4) and (e)(3)(C) of

§1563(insurance company controlled group rules and the qualified employer plan constructive ownership exception) .

Section 1563(a) provides that controlled group of corporations means any group of- (1) parent-subsiary controlled group, (2) brother sister controlled group, (3) combined group, and (4) certain insurance companies (not relevant here).

Section 1563(a)(1) provides a parent-subsiary controlled group is one or more chains of corporations connected through stock ownership with a common parent corporation, if stock possessing at least 80 percent of the total combined voting power of all classes of stock entitled to vote or at least 80 percent of the total value of all classes of stock of each of the corporations, except the common parent corporation is owned by one or more of the other corporations. Also the common parent corporation must own stock possessing at least 80 percent of the total combined voting power of all classes of stock entitled to vote or at least 80 percent of the total value of shares of all classes of stock of at least one of the other corporations, excluding, in computing such voting power or value, stock owned directly by such other corporations.

Section 1563(a)(2) provides a brother-sister controlled group is two or more corporations if 5 or fewer persons who are individuals, estates, or trusts own stock possessing more than 50 percent of the total combined voting power of all classes of stock entitled to vote or more than 50 percent of the total value of shares of all classes of stock of each corporation, taking into account the stock ownership of each such person only to the extent such stock ownership is identical with respect to each such corporation.

Section 1563(a)(3) provides a combined group is three or more corporations each of which is a member of a group of corporations described in paragraph (1) or (2) of § 1563(a)), and one of which-- (A) is a common parent corporation included in a group of corporations described in §1563(1), and also (B) is included in a group of corporations described in §1563(2).

You have determined that Taxpayer \_\_\_\_\_ are members of the same controlled group pursuant to § 45G(e)(2) and Treas. Reg. § 1.45G-1(f).

#### Group RTMC and Intra-group Transactions

Treas. Reg. § 1.45G-1(f)(2)(iii) provides that the group credit means the RTMC allowable to a controlled group.

You have determined that Taxpayer and \_\_\_\_\_ are members of the same controlled group.

and  
assignment to Taxpayer must be disregarded for purposes of determining the RTMC because it is a transfer between group members. Taxpayer, \_\_\_\_\_, and \_\_\_\_\_ are all members of a group under common control. Because they are a group under common control, Taxpayer, \_\_\_\_\_, and \_\_\_\_\_ are treated as a single taxpayer for purposes of determining the RTMC. Treas. Reg. § 1.45G-1(f)(8).

To permit the assignment from Railroads to Taxpayer would be to allow manipulation of the statute. Under the regulation, transfers between members of a group under common control are generally disregarded because the members are treated as a single taxpayer for purposes of determining the RTMC. Treas. Reg. § 1.45G-1(f)(8). Since Taxpayer and Railroads are treated as a single taxpayer under the regulation, the attempted assignment must fail because to allow the assignment would in effect be allowing an assignment to oneself. Accordingly, Taxpayer's attempted assignment of miles from \_\_\_\_\_ and \_\_\_\_\_ must be disregarded.

#### 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 (617) 788-0804 if you have any further questions.

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