

## Internal Revenue Service

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Department of the Treasury

Washington, DC 20224

Third Party Communication: None

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Person To Contact:

, ID No.

Telephone Number:

Refer Reply To:

CC:CORP:B05

PLR-113917-13

Date:

July 22, 2013

### Legend

X =

Member 1 =

Date 1 =

Date 2 =

Date 3 =

Y =

Company Official =

Tax Professional =

Dear :

This letter responds to a letter dated March 22, 2013, submitted on behalf of X by Member 1, requesting an extension of time under § 301.9100-3 of the Procedure and

Administration Regulations to file an election. In particular, Member 1 is requesting an extension of time for the consolidated group of which X was the common parent to elect an extended carryback period (the "Election") for a consolidated net operating loss ("CNOL"). Member 1 has represented that it is the successor to X as defined in § 1.1502-77(a)(1)(iii), that it is the default substitute agent (as set forth in § 1.1502-77(d)(2)) of the X Group for all of the X Group's taxable years, and has provided notification of its status as default substitute agent to the Commissioner. See § 1.1502-77(d). Additional information was submitted in letters dated April 9 and April 30, 2013. The material information submitted for consideration is summarized below.

X was the common parent of a consolidated group (the "X Group"). The X Group incurred a CNOL for its taxable year ending Date 2 (the "Year 2 CNOL"). As the default substitute agent for the X Group, Member 1 seeks to carry back the Year 2 CNOL y years, to the X Group's taxable year ending on Date 1, under § 172(b)(1)(H)(i) of the Internal Revenue Code.

X (or Member 1 as the default substitute agent) was required to file the Election in order to carry back the Year 2 CNOL to the X Group's taxable year ending on Date 1 and to obtain the benefit of § 56(d)(1)(A)(ii)(I). The Election was due on Date 3, but for various reasons, neither X nor Member 1 filed the Election. Subsequently, Member 1 submitted this request, under § 301.9100-3, for an extension of time to file the Election. Member 1 has represented that it is not seeking to alter a return position for which an accuracy related penalty has been or could be imposed under § 6662 at the time it requested relief on behalf of X and X's subsidiaries (taking into account any qualified amended return filed within the meaning of § 1.6664-2(c)(3)) and for which the new return position requires or permits a regulatory election for which relief is requested.

Section 172(b)(1)(A)(i) generally permits a taxpayer to carry back a net operating loss ("NOL") to each of the 2 taxable years preceding the taxable year of the NOL.

Section 172(b)(1)(H)(i) permits a taxpayer to elect to carry back an applicable net operating loss ("applicable NOL") to each of the 3, 4, or 5 taxable years preceding the taxable year of the applicable NOL, in lieu of the 2-year period provided by § 172(b)(1)(A)(i). Section 172(b)(1)(H)(ii) provides that an "applicable NOL" is the taxpayer's NOL for a taxable year ending after December 31, 2007, and beginning before January 1, 2010.

Section 172(b)(1)(H)(iii) provides that the election under § 172(b)(1)(H) shall be made by the due date (including extension of time) for filing the return for the taxpayer's last taxable year beginning in 2009. The election is irrevocable and, in general, may be made only with respect to one taxable year.

Section 1502 provides that the Secretary shall prescribe such regulations as he may deem necessary in order that the tax liability of any affiliated group of corporations

making a consolidated return and of each corporation in the group, both during and after the period of affiliation, may be returned, determined, computed, assessed, collected, and adjusted, in such manner as clearly to reflect the income tax liability and the various factors necessary for the determination of such liability, and in order to prevent avoidance of such tax liability. In carrying out the preceding sentence, the Secretary may prescribe rules that are different from the provisions of chapter 1 that would apply if such corporations filed separate returns.

Section 1.1502-21(b) provides that losses taken into account in determining a CNOL may be carried to other taxable years (whether consolidated or separate) only under paragraph (b) of § 1.1502-21.

Section 1.1502-21(b)(1) provides that NOL carryovers and carrybacks to a taxable year are determined under the principles of § 172 and § 1.1502-21.

Section 1.1502-21T(b)(3)(v)(A)(1) provides that a consolidated group may elect an extended carryback period pursuant to § 172(b)(1)(H) with regard to a CNOL arising in a taxable year ending after December 31, 2007, and beginning before January 1, 2010.

Rev. Proc. 2009-52, 2009-49 I.R.B. 744, provides when and how a taxpayer may make an election under § 172(b)(1)(H). Section 4.01(2) of Rev. Proc. 2009-52 provides that the common parent of a consolidated group makes the election for the group. Sections 4.01(3) and 4.01(4) of Rev. Proc. 2009-52 permit the election to be made for consolidated taxpayers by attaching a statement to the original or amended consolidated return for the taxable year of the applicable CNOL, by attaching a statement to the taxpayer's amended consolidated return applying the applicable CNOL to the carryback year, or by attaching a statement to a claim for a tentative carryback adjustment on Form 1139, Corporation Application for Tentative Refund. Sections 4.01(3)(b) and 4.01(4)(b) of Rev. Proc. 2009-52 require the election, regardless of the manner in which made, to be filed no later than the due date (including extensions) for filing the return for the taxpayer's last taxable year beginning in 2009.

Under § 301.9100-1(c), the Commissioner has discretion to grant a reasonable extension of time to make a regulatory election or a statutory election (but no more than six months except in the case of a taxpayer who is abroad), under all subtitles of the Internal Revenue Code except subtitles E, G, H, and I.

Sections 301.9100-1 through 301.9100-3 provide the standards the Commissioner will use to determine whether to grant an extension of time to make a regulatory election. Section 301.9100-1(a). Requests for relief under § 301.9100-3 will be granted when the taxpayer provides evidence to establish to the satisfaction of the Commissioner that the taxpayer acted reasonably and in good faith, and that granting relief will not prejudice the interests of the government. Section 301.9100-3(a).

The election by a consolidated group to extend the carryback period under § 172(b)(1)(H) for a CNOL is a regulatory election. Therefore, the Commissioner has discretionary authority under § 301.9100-3 to grant an extension of time for Member 1 to file the Election, provided Member 1 establishes to the satisfaction of the Commissioner that X and Member 1 acted reasonably and in good faith, the requirements of §§ 301.9100-1 and 301.9100-3 are satisfied, and granting relief will not prejudice the interests of the government.

Information, affidavits, and representations submitted by Member 1, Company Official, and Tax Professional explain the circumstances that resulted in the failure to timely file a valid Election. The information establishes that X and Member 1 reasonably relied on a qualified tax professional who failed to make, or advise them to make, the Election, and that the request for relief was filed before the failure to timely make the Election was discovered by the Internal Revenue Service. See §§ 301.9100-3(b)(1)(i) and (v).

Based on the facts and information submitted, including the affidavits submitted and the representations made, we conclude that Member 1 has shown that X and Member 1 acted reasonably and in good faith, the requirements of §§ 301.9100-1 and 301.9100-3 are satisfied, and granting relief will not prejudice the interests of the government. Accordingly, provided that, and to the extent that, the X Group qualifies substantively to file the Election, we grant an extension of time under § 301.9100-3, until 60 days from the date on this letter, for Member 1 to file the Election. This letter does not extend the period of time described in § 6511 by which a taxpayer is required to file a claim for credit or refund of an overpayment of tax.

The time in which Member 1 may file a Form 1139 for the Year 2 CNOL has expired. However, Member 1 may file the Election under § 172(b)(1)(H)(i) to carry back the X Group's Year 2 CNOL to the X Group's taxable year ending on Date 1, on Form 1120X, Amended U.S. Corporation Income Tax Return, for the taxable year ending Date 2, according to the procedures set forth in Rev. Proc. 2009-52. A copy of this letter must be attached to the Form 1120X. If Member 1 files Form 1120X electronically, Member 1 may satisfy the requirement of attaching a copy of this letter by attaching a statement to the X Group's amended return that provides the date and control number (PLR-113917-13) of this letter ruling.

The above extension of time is conditioned on the X Group's tax liability, if any, not being lower in the aggregate for all years to which the Election applies than it would have been if the Election had been timely made (taking into account the time value of money). We express no opinion as to the X Group's tax liability for the years involved. A determination thereof will be made by the Director's office upon audit of the income tax returns involved.

Except as expressly provided herein, no opinion is expressed or implied concerning the tax consequences of any item discussed or referenced in this letter. In particular, we express no opinion with respect to whether the X Group qualifies substantively to make the Election or whether Member 1 qualifies to make the election on behalf of the X Group. In addition, we express no opinion as to the tax effects or consequences of filing the Election late under the provisions of any other section of the Internal Revenue Code or regulations, or as to the tax treatment of any conditions existing at the time of, or resulting from, filing the Election late that are not specifically set forth in this letter.

For purposes of granting relief under § 301.9100-3, we relied on certain statements and representations made under penalty of perjury by Member 1, Company Official, and Tax Professional. The Director, however, should verify all essential facts. In addition, notwithstanding that an extension is granted under § 301.9100-3 to file the Election, any penalties and interest that would otherwise be applicable continue to apply.

This letter ruling is directed only to the taxpayer who requested it. Section 6110(k)(3) provides that it may not be used or cited as precedent.

Pursuant to the power of attorney on file in this office, copies of this letter are being sent to your authorized representatives.

Sincerely,

*Ken Cohen*

Ken Cohen  
Senior Technician Reviewer, Branch 3  
Office of Associate Chief Counsel (Corporate)

cc: