

Internal Revenue Service

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Department of the Treasury
Washington, DC 20224

Third Party Communication: None
Date of Communication: Not Applicable

Person To Contact:
ID No.

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Refer Reply To:
LB&I ACDDI:PMO, IR 1135

Date:
December 23, 2020

Legend

Taxpayer 1 (Parent) =
Taxpayer 2 (Sub 1) =
Taxpayer 3 (Sub 2) =
Sub 1 CFC =
Sub 2 CFC =
Date 1 =
Date 2 =
Date 3 =
Date 4 =
Date 5 =
Date 6 =
Date 7 =
Date 8 =
Date 9 =
Country 1 =
Country 2 =

Dear :

This letter responds to letters dated Date 1 and Date 2 submitted on behalf of Parent, Sub 1, and Sub 2 (collectively, the "Parent Group," with respect to the years of Sub 1's and Sub 2's existence), requesting that the Commissioner make a determination regarding: (1) the failure of Parent's wholly-owned subsidiary Sub 1 to have consented to the filing of a consolidated return with Parent pursuant to, and in the manner provided by, Treas. Reg. §§ 1.1502-75(a)(1), 1.1502-75(b)(1) and 1.1502-75(h)(2) for the tax year ending Date 3 and for all tax years ending thereafter; and (2) the failure of Parent's wholly-owned subsidiary Sub 2 to have consented to the filing of a consolidated return with Parent pursuant to, and in the manner provided by, Treas. Reg. §§ 1.1502-

75(a)(1), 1.1502-75(b)(1) and 1.1502-75(h)(2) for the tax year ending Date 4 and for all tax years ending thereafter.

The determination contained in this letter is based upon facts and representations submitted by the taxpayers and accompanied by a penalties of perjury statement executed by an appropriate party. This office has not verified any of the material submitted in support of the request for this determination letter.

SUMMARY OF FACTS

Sub 1 was incorporated on Date 5 and Sub 2 was incorporated on Date 6. For the entire time that Sub 1 and Sub 2 have been in existence, Parent has been the sole shareholder, and in sole control, of each of them.

Sub 1 CFC, a non-U.S. private limited liability company (constituting a corporation for U.S. income tax purposes), was formed on Date 7 under the laws of Country 1, with % of its outstanding shares having at all times been owned by Sub 1 and the remaining % of its outstanding shares having at all times been owned by Parent. Since Sub 1 CFC's formation, the Sub 1 CFC shares owned by Sub 1 have constituted Sub 1's principal asset.

At the time of Sub CFC 1's formation, Parent's legal counsel advised Parent that having Sub 1 as the owner of % of the outstanding shares of Sub 1 CFC would minimize the possibility of Sub 1 CFC being considered a disregarded entity under the tax law of Country 1.

Sub 2 CFC, a non-U.S. company (constituting a corporation for U.S. income tax purposes), was formed on Date 6 (the same as Sub 2) under the laws of Country 2, with % of its outstanding shares having at all times been owned by Sub 2 and the remaining % of its outstanding shares having at all time been owned by Parent. Since Sub 2 CFC's formation, the Sub 2 CFC shares owned by Sub 2 have constituted Sub 2's principal asset.

At the time of Sub CFC 2's formation, Parent's legal counsel advised Parent that having Sub 2 CFC as a subsidiary of Sub 2 would provide Parent with an additional layer of protection from legal liability and issues that may arise with the government of Country 2.

Neither Sub 1 nor Sub 2 have ever had any separate or independent business or economic or operational impact, function or role in Parent's overall business and enterprise, and were inserted into the Sub 1 CFC and Sub 2 CFC ownership structure on the advice of Parent's legal counsel to address the potential Country 1 tax issue and the potential Country 2 legal liability and other issues.

From a tax, financial and operational perspective, Parent has always viewed and treated Sub 1 and Sub 2 as constituting part of its unitary and consolidated business

and enterprise and not as separate operating entities, and this is how Parent's financial statements and U.S. income tax returns were prepared.

Accordingly, beginning with the tax year ending Date 3 and for all tax years ending thereafter, Parent's U.S. income tax returns (i.e., Forms 1120) for all of such tax years included and reported all of Sub 1's income and deductions, in addition to Parent's income and deductions. Similarly, beginning with the tax year ending Date 4 and for all tax years ending thereafter, Parent's U.S. income tax returns for all of such tax years included and reported all of Sub 2's income and deductions, in addition to Parent's and Sub 1's income and deductions. In particular, the Parent's Forms 1120 for all of such tax years included all subpart F income generated by Sub 1 CFC and Sub 2 CFC.

None of Parent's U.S. income tax returns for its tax year ending Date 3, nor for any tax year ending thereafter and prior to its tax year ending Date 8, had included a Form 851 Affiliations Schedule or Form 1122 Authorization and Consent of Subsidiary, nor was the "consolidated return" box on the face of any such return checked nor was either Sub 1 or Sub 2 specifically identified or referenced on any such return.¹

Neither Sub 1 nor Sub 2 has ever filed a separate U.S. income tax return for any tax year.

Parent's Form 1120 for its tax year ending Date 9 was examined by the Service, and that examination has closed. No Form 1120 of Parent, Sub 1, or Sub 2, is currently being examined by the Service, or is being considered by an appeals office or a federal court.

REPRESENTATIONS

The following representation is made in support of the Requested Relief:

The amount of U.S. income taxes reported as owing on Parent's U.S. income tax return for its tax year ending Date 3 and for all of its subsequent tax years equaled or exceeded (and was never less than) what the total U.S. income tax liability of Parent, Sub 1, and Sub 2, would have been had each of them filed separate U.S. income tax returns for such tax years. The difference between consolidated and aggregate separate income tax liability would be attributable to the impact of graduated corporate income tax rates.

LAW

Internal Revenue Code ("IRC") § 1501 provides that "An affiliated group of corporations shall ... have the privilege of making a consolidated return with respect to the income tax imposed by chapter 1 for the taxable year in lieu of separate returns. The making of a consolidated return shall be upon the condition that all corporations which at any time

¹ Parent's U.S. income tax return for its tax year ending Date 8 included a Form 851 Affiliations Schedule, had the "consolidated return" box on page 1 checked, and specifically identified and referenced Sub 1 and Sub 2.

during the taxable year have been members of the affiliated group consent to all the consolidated return regulations prescribed under section 1502 prior to the last day prescribed by law for the filing of such return. The making of a consolidated return shall be considered as such consent.”

IRC § 1504(a)(1) and (2) define the term “affiliated group” as “1 or more chains of includible corporations connected through stock ownership with a common parent corporation which is an includible corporation, but only if –

(i) The common parent directly owns stock with at least 80 percent of the total voting power and 80 percent of the total value of at least 1 of the other includible corporation, and

(ii) Stock with at least 80 percent of the total voting power and 80 percent of the total value of each of the includible corporations is directly owned by 1 or more of the other includible corporations.

Treas. Reg. § 1.1502-75(a)(1) provides that: “A group which did not file a consolidated return for the immediately preceding taxable year may file a consolidated return in lieu of separate returns for the taxable year, provided that each corporation which has been a member during any part of the taxable year for which the consolidated return is to be filed consents (in the manner provided in paragraph (b) of this section) to the regulations under section 1502.”

Treas. Reg. § 1.1502-75(b)(1) provides that “The consent of a corporation shall be made by the corporation joining in the making of the consolidated return for such year. A corporation shall be deemed to have joined in the making of a consolidated return if it files a Form 1122 in the manner specified in paragraph (h)(2) of this section.”

Treas. Reg. § 1.1502-75(b)(2) provides that “if a member of the group fails to file Form 1122, the Commissioner may under the facts and circumstances determine that such member has joined in the making of a consolidated return by such group. The following circumstances, among others, will be taken into account in making this determination: (i) Whether or not the income and deductions of the member were included in the consolidated return; (ii) Whether or not a separate return was filed by the member for that tax year; and (iii) Whether or not the member was included in the affiliations schedule, Form 851. If the Commissioner determines that the member has joined in the making of the consolidated return, such member shall be treated as if it had filed a Form 1122 for such year for purposes of paragraph (h)(2) of this section.”

Treas. Reg. § 1.1502-75(b)(3) provides that “If any member has failed to join in the making of a consolidated return under either subparagraph (1) or (2) of this paragraph, then the tax liability of each member of the group shall be determined on the basis of separate returns unless the common parent corporation establishes to the satisfaction of the Commissioner that the failure of such member to join in the making of the consolidated return was due to a mistake of law or fact, or to inadvertence. In such

case, such member shall be treated as if it had filed a Form 1122 for such year for purposes of paragraph (h)(2) of this section, and thus joined in the making of the consolidated return for such year.”

Treas. Reg. § 1.1502-75(h)(2) provides that “If a group wishes to file a consolidated return for a taxable year, then a Form 1122 (Authorization and Consent of Subsidiary Corporation To Be Included in a Consolidated Income Tax Return) must be executed by each subsidiary... For taxable years beginning after December 31, 2002, the group must attach either executed Forms 1122 or unsigned copies of the completed Forms 1122 to the consolidated return. Form 1122 is not required for a taxable year if a consolidated return was filed (or was required to be filed) by the group for the immediately preceding taxable year.

Rev. Proc. 2014-24 allows an affiliated group that satisfies certain requirements to obtain an automatic determination to treat a subsidiary member of the affiliated group as if it filed a Form 1122, even though it failed to do so.

In this case, the Parent Group does not satisfy the requirements of Rev. Proc. 2014-24 necessary to obtain automatic relief to treat Sub 1 and Sub 2 as if they had filed Forms 1122 for the tax years ending Date 3 and Date 4, respectively. However, the Service may act on behalf of the Commissioner to treat Sub 1 as if it had filed such Form 1122 and joined in the making of a consolidated return with and by Parent (and with and by the Parent Group) beginning with the tax year ending Date 3 and for all tax years ending thereafter under the provisions of Treas. Reg. §§ 1.1502-75(b)(2) or (3). The Internal Revenue Service may also act on behalf of the Commissioner to treat Sub 2 as if it had filed such Form 1122 and joined in the making of a consolidated return with and by Parent (and with and by the Parent Group) beginning with the tax year ending Date 4 and for all tax years ending thereafter under the provisions of Treas. Reg. §§ 1.1502-75(b)(2) or (3).

DETERMINATION

It is our position that Treas. Reg. § 1.1502-75(b)(2) applies in this case, and the Parent Group shall be treated as satisfying the requirements for filing a consolidated return.

In order for Treas. Reg. § 1.1502-75(b)(2) to apply, there must be an affiliated group. Since both Sub 1 and Sub 2 have taxpayer identification numbers, each has a separate legal existence. Since there are two chains of includible corporations connected through stock ownership with a common parent corporation which is an includible corporation, and the common parent owns directly stock possessing 100% of the total voting power and 100% of the total value of the two includible corporations, Sub 1 and Sub 2, there is an affiliated group per IRC § 1504(a).

While neither Sub 1 nor Sub 2 were included in the affiliations schedule, Form 851, or otherwise referred to in Parent’s Forms 1120 for tax years prior to the tax year ending

Date 8, all income and deductions of Sub 1 and Sub 2 have been included in Parent's Forms 1120, and separate returns were not filed by Sub 1 and Sub 2.

Accordingly, and based solely on the information submitted and the representations set forth above, the Service has determined that Sub 1 and Sub 2, for tax years ending Date 3 and Date 4, respectively, have consented to join in the making of a consolidated return by the Parent Group and shall be treated as if they had filed a Form 1122 for such years for purposes of Treas. Reg. § 1.1502-75(h)(2).

In addition, since Parent's Forms 1120 have already included all income and deductions of Sub 1 and Sub 2, and in light of the previous examination of Parent's Form 1120, no amended returns need be filed by Parent, Sub 1, and Sub 2 (for tax years ending prior to Date 8) to reflect this determination.

CAVEATS

Except as expressly provided herein, no opinion is expressed or implied concerning the U.S. income tax consequences of any aspect of any transaction or item discussed or referenced in this letter or about the tax treatment of any condition existing at the time of, or effects resulting from, any transaction or item that is not specifically covered by the above determination.

The determination contained in this letter is based upon information and representations submitted by the taxpayers and accompanied by a penalty of perjury declaration executed by an appropriate party.

PROCEDURAL MATTERS

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

This office will associate a copy of this determination letter with the Parent's U.S. income tax returns. A copy of this determination letter should be kept in the Parent's permanent records.

A copy of this determination letter must be attached to any income tax return to which it is relevant. Alternatively, taxpayers filing their returns electronically may satisfy this requirement by attaching a statement to their returns that provides the date and control number of the determination letter.

Sincerely,

By: Nancy Wiltshire
Director, Field Operations (Mid-Atlantic)