

**Internal Revenue Service**

Department of the Treasury  
Washington, DC 20224

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Person to Contact:

Telephone: Phone:

Refer Reply To:  
LB&I Eastern Compliance

Date: September 7<sup>th</sup>, 2023

Dear :

This letter responds to the letter, dated Year plus 7, submitted on behalf of Taxpayer (“Parent”) and each of Subsidiary 2 and Subsidiary 1 (together the “affiliated group” for purposes of this letter and to the extent these entities meet the definition provided by Section 1504(a) of the Internal Revenue Code), requesting that the Commissioner make a determination regarding the failure of Parent’s wholly-owned subsidiary, Subsidiary 2, to have consented to the filing of a consolidated return with Parent pursuant to, and in the manner provided by, Treasury Regulation sections 1.1502-75(a)(1), and 1.1502-75(h)(2) for the taxable year ended December 31, Year and for all taxable 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.

**Summary of Facts**

Parent was organized under the laws of State 1 in Year minus 16. Subsidiary 1 and Subsidiary 2 were organized under the laws of State 2 in Year minus 28 and Year minus 40, respectively.

Parent acquired a sufficient number of shares of stock of Subsidiary 1 in Year minus 2, such that, immediately after this acquisition, Subsidiary 1 first became a member of Parent’s affiliated group. Parent acquired a sufficient number of shares of stock of Subsidiary 2 on January 1, Year, a date subsequent to Year minus 2, such that, immediately after this acquisition, Subsidiary 2 became a member of Parent’s affiliated group. Since the respective acquisitions, Parent has been the sole shareholder, and in sole control of each of Subsidiary 1 and Subsidiary 2.

On October 15, Year plus 1, a date subsequent to Year minus 2 and January 1, Year, Parent timely filed an initial consolidated return for the taxable year ending December 31, Year. Parent filed this return on behalf of its affiliated group, including Subsidiary 1. However, Subsidiary 2’s items of income, gain, deduction, loss and credit were not included in this return, nor was Form

1122 (“Authorization and Consent of Subsidiary Corporation to be Included in a Consolidated Income Tax Return”) included in this return for Subsidiary 2, and Subsidiary 2 was not included in the Form 851 (“Affiliation Schedule”) attached to this return. Instead, due to a mistake of law concerning the requirements to include all members of the affiliated group in a consolidated return, a separate return was filed of Subsidiary 2 for the taxable year ending December 31, Year. As a result of this mistake, the requirements for filing a valid consolidated return for the taxable year ending December 31, Year, were not satisfied.

### **REPRESENTATIONS**

Parent, on behalf of its affiliate group, makes the following representations:

1. At all times since at least January 1, Year, Parent, Subsidiary 1, and Subsidiary 2 have been the only members of an affiliated group as to which Parent is the common parent.
2. No return for the taxable year in which the consent and the inclusion of Subsidiary 2 in Parent’s consolidated return should have been made (or any taxable years that would have been affected by such failures had they been timely made) is being examined by a Director, or is being considered by an appeals office or a federal court;
3. The granting of the relief will not result in the Parent’s consolidated group having a lower tax liability in the aggregate for all years to which the relief applies than it would have had if the consolidated return year was properly filed including Subsidiary 2;
4. The affiliated group has not used hindsight to request relief; and
5. No specific facts have changed since the due date for filing a valid consolidated return for the taxable year ending December 31, Year that make the inclusion of Subsidiary 2 in the consolidated return for the affiliated group more advantageous to the affiliated group than if Subsidiary 2 had been so included, and the amount of tax liability reported as owing on Parent’s consolidated return for its taxable year ending December 31, Year was not less than what the tax liability on Parent’s consolidated return would have been had Subsidiary 2 been included in such return.

### **Determination Requested**

Parent requests that Treas. Reg. 1.1502-75(b)(3) be applied to its affiliated group for the tax year ending December 31, Year and subsequent tax years. Accordingly, Parent requests that Subsidiary 2 would be treated as if it had filed a Form 1122 for purposes of Treas. Reg. 1.1502-75(h)(2) and thus joined in the making of a consolidated return by Parent’s affiliated group beginning with the taxable year ending December 31, Year, notwithstanding that it failed to actually file Form 1122 and to join in the Parent’s consolidated return. If request is granted both Parent and Subsidiary 2 would amend their respective returns accordingly, for their respective years ended on December 31, Year, and any subsequent returns filed by the Parent or Subsidiary 2 as necessary.

### **Law**

The Internal Revenue Code (“IRC”) § 1501 provides (in part) 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 during the taxable year have been members of the affiliated group consent to all the consolidated return

regulations prescribed under Treas. Reg. §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) defines the term “affiliated group” as follows:

(a) Affiliated group defined

For purposes of this subtitle –

(1) In general

The term “affiliated group” means –

(A) One or more chains of includible corporations connected through stock ownership with a common parent corporation which is an includible corporation, but only if –

(B) (i) the common parent owns directly stock meeting the requirements of paragraph (2) in at least one of the other includible corporations, and (ii) stock meeting the requirements of paragraphs (2) in each of the includible corporations (except the common parent) is owned directly by one or more of the other includible corporations.

(2) 80-percent voting and value test

The ownership of stock of any corporation meets the requirements of this paragraph if it –

(A) possesses at least 80 percent of the total voting power of the stock of such corporation, and

(B) has a value equal to at least 80 percent of the total value of the stock of such corporation.

Treas. Reg. § 1.1502-75(a)(1) provides (in part) 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 Treas. Reg. § 1502.”

Treas. Reg. § 1.1502-75(b)(1) provides that “The consent of a corporation referred to in paragraph (a)(1) of this section 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 Treas. Reg. § 1502-75(h)(2).

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, under the provisions of paragraph (a)(1) of this section, 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. Rev. Proc. 2014-24, Section 1.03 provides that if an affiliated group cannot satisfy such requirements, a determination by the Commissioner under Treas. Reg. § 1.1502-75(b) is available only pursuant to a determination letter issued by a Director.

### **Analysis**

In this case, the affiliated group does not satisfy the requirements to obtain automatic relief under Rev. Proc. 2014-24 to treat Subsidiary 2 as having filed Form 1122 and thus as having joined in the making of a consolidated return by the affiliated group for the taxable year ending December 31, Year. However, the Service may act on behalf of the Commissioner to treat Subsidiary 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 affiliate group) beginning with the taxable year ending December 31, Year and for all taxable years ending thereafter under the provisions of Treas. Reg. 1.1502-75(b)(2) or (3).

### **DETERMINATION**

Based on the information submitted and the representations made in the letter submitted in Year plus 7, Treas. Reg. 1.1502-75(b)(3) may be applied in this case. Accordingly, Subsidiary 2 can be treated as if it had filed a Form 1122 for purposes of Treas. Reg. 1.1502-75(h)(2) and thus joined in the making of a consolidated return by Parent's affiliated group beginning with the taxable year ending December 31, Year, notwithstanding that it failed to actually file Form 1122 and to join in the Parent's consolidated return. Both Parent and Subsidiary 2 shall amend their respective returns accordingly, for their respective years ended on December 31, Year, and any subsequent returns filed by the Parent or Subsidiary 2 as necessary.

### **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 §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:

Khin M Chow

Title: Director, Field Operations North Central

Section 6110(k)(3) of the Internal Revenue Code

This document may not be used or cited as precedent.