OFFICE OF
CHIEF COUNSEL

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

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INTERNAL REVENUE SERVICE NATIONAL OFFICE FIELD SERVICE ADVICE

MEMORANDUM FOR

FROM: Deborah A. Butler
Assistant Chief Counsel (Field Service)
CC:DOM:FS

SUBJECT: Summary Assessments

This Field Service Advice responds to your inquiry received on October 13, 1999. Field Service Advice is not binding on Examination or Appeals and is not a final case determination. This document is not to be cited as precedent.

LEGEND:

Company A =
Company B =
Company C =
Company D =
Date 1 =
Date 2 =
Date 3 =
Date 4 =
Date 5 =
Date 6 =
Date 7 =
Date 8 =
Date 9 =
Date 10 =
Date 11 =
Date 12 =

Date 13 =
Date 14 =
Date 15 =
Date 16 =
Year 1 =
Year 2 =
Year 3 =
Year 4 =
Year 5 =
$a =
$b =
$c =
$d =
$e =
$f =
$g =
$h =
$i =

ISSUE:

Whether the Service may make a summary assessment to recover a tentative refund that was made to a previous member of a consolidated group, if it is later determined that such member who made the request on its own behalf was not authorized to receive the tentative refund on behalf of the group?

CONCLUSION:

Generally, the Service could make a summary assessment against the member of the group that requested and received such tentative refund. However, in the instant case, further factual development is necessary before we can conclude whether a summary assessment can be made at this time or before we can advise what special procedures, if any, need to be followed before making the assessment.

FACTS:

Prior to Date 2, Company A was the common parent of a consolidated group of corporations. The group consisted of various subsidiaries. On Date 1, which is prior to Date 2, Company B was organized in anticipation of a planned restructuring transaction. Company B was a wholly owned subsidiary of Company A and a member of its group prior to Date 2.

On Date 2, the planned restructuring transaction occurred. As a result, Company A became a wholly owned subsidiary of Company B, and Company B became the successor common parent of the continuing group. On that same day, Company A

changed its name to Company C. Company C continued to use the taxpayer identification number of Company A. In the remainder of this memorandum, references to "the group" are to the group of consolidated corporations controlled by Company A before the restructuring transaction and then by Company B after the restructuring transaction.

On Date 3, Company B and Company C entered into a tax indemnification agreement.

On Date 4, Company B distributed, pro rata to its shareholders, all of the issued and outstanding common shares of Company C. As a result, Company C and Company B ceased to be members of the same consolidated group. The companies are not under common control and neither owns any shares of stock in the other or the other's affiliates.

On or about Date 6, Company B and its group filed a consolidated return for the Year 4 tax year. This return was prepared on the basis that Company B was the successor common parent of the group. The consolidated return reported the taxable income or loss of Company B and each member of the group for either the tax year ending Date 5, or the portion of that tax year during which each such corporation was a member of the group. The return reported a consolidated net operating loss (CNOL) in the amount of $a and excess consolidated general business credits in the amount of $b.

On or about Date 7, Company B and its group filed a Form 1139, Corporation Application for Tentative Refund. This form requested a tentative refund of income tax in the amount of $c attributable to the carry back of the Year 4 CNOL and excess consolidated business credits to the group's Year 2 tax year. Attached to the form was a statement detailing the restructuring transaction in which Company B became the successor common parent of the group. On or about Date 8, a service center made a tentative refund allowance to Company B in the amount claimed. The service center charged the tentative refund allowance to the federal income tax account of the group for Year 2 (i.e., to the account of Company C (formerly Company A)).

Company C and its group filed a consolidated return for the Year 4 short tax year, which began on Date 4 and ended on Date 5. This return was prepared on the basis that, after the spinoff, Company C and its consolidated subsidiaries constituted a new consolidated group, which was unrelated to Company B and the group. The return reported a CNOL in the amount of $d, which was entirely attributable to Company C itself.

On or about Date 9, Company C and its group filed two Forms 1139. The first Form 1139 requested a tentative refund of income tax in the amount of $e attributable to the carry back of the short year CNOL to Company C's (i.e., the group's) Year 2 and Year 3 tax years. The second Form 1139 requested a tentative refund of

income tax in the amount of $f attributable to the carry back of certain credits from the Year 2 tax year to the Year 1 tax year. The cover letter stated that Company C expected the refunds available for the Year 2 and Year 3 tax years to be apportioned under Treas. Reg. § 1.1502-21(b)(3)(ii) if Company B also filed a Form 1139 with respect to those years. Included with Company C's Forms 1139 was a Form 8302, Application for Electronic Funds Transfer (EFT) of Tax Refund of $1 Million or More, which identified Company C as the taxpayer. Also included with Company C's Forms 1139 was a copy of Company B's Form 1120X, Amended U.S. Corporation Income Tax Return, for the Year 2 tax year of the group. Company B's Year 2 Form 1120X indicates that Company B is the successor in interest to Company A and consolidated subsidiaries.

The service center notified Company C that it could not process the first Form 1139 because that form did not take into account the tentative refund previously made to Company B with respect to the Year 2 tax year. Company C then filed, on or about Date 10, a revised Form 1139 that took into account the earlier tentative refund made to Company B. The revised Form 1139 requested tentative refunds of income tax for the Year 2 and Year 3 tax years in the amounts of $g and $h, respectively. On or about Date 11, the service center made tentative refunds to Company C in the amounts of $f for Year 1, $g for Year 2, and $h for Year 3.[1] The service center charged the tentative refund allowances to the federal income tax account of the group (i.e., to the account of Company C (formerly Company A)). Neither Company B nor the group received, directly or indirectly, any portion of the tentative refunds paid to Company C.

Assessments were made on or about Date 12 against Company C and Company B to recover certain tentative refunds. By a letter dated Date 13, Company C asserted, among other things, that it was entitled to the tentative refunds and that the matter should be resolved during the normal course of the examination. The assessments were abated later around Date 14.

In Year 5, Company D was formed, and Company C became, and continues to be, a consolidated subsidiary of Company D.

An examination of Company C's return for the Year 4 short tax year resulted in a determination that the CNOL was not in the amount of $d, as claimed on the original return, but instead was $i. All of this CNOL is attributable to Company C itself. The entire $i should be allowed in the group's Year 2 tax year. Consequently, the previous tentative refund allowances to Company C in the amounts of $h for Year 3 and $f for Year 1 are not allowable. Additionally, there was a determination that Company C was not authorized to receive on behalf of the

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group the tentative refunds of $f for Year 1, $g for Year 2, and $h for Year 3.[2] The adjustments related to the Year 1 and Year 2 tax years are covered by other arrangements and are not at issue.[3] The amount of $h previously allowed with respect to the Year 3 tax year is at issue.

The group's Year 3 tax year was

With respect to the previous years of the group, there were

On Date 15, Company C

Pursuant to a Form 872, Consent to Extend the Time to Assess Tax, the period of limitations for Company C's Year 3 tax year was extended to Date 16. Pursuant to another Form 872, the period of limitations for Company C's Year 4 short tax year was extended to Date 16.

DISCUSSION:

Section 6411 of the Code provides rules concerning applications for a tentative carryback adjustment of the tax for the prior taxable year affected by a net operating loss carryback under § 172(b). See also §§ 1.6411-1 to 1.6411-4 of the Income Tax Regulations. Section 1.6411-1(b)(1) provides in part that, in the case of a corporation, the application for a tentative carryback adjustment shall be filed on Form 1139. Section 1.1502-78 provides additional rules applicable to consolidated groups. See § 6411(c); § 1.6411-4.

Section 6213(b)(3) provides in part that if the Secretary determines that the amount applied, credited, or refunded under § 6411 is in excess of the overassessment

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attributable to the carryback with respect to which such amount was applied, credited, or refunded, he may assess, without regard to the abatement provisions of § 6213(b)(2), the amount of the excess as a deficiency as if it were due to a mathematical or clerical error appearing on the return.

Section 301.6213-1(b)(2)(i) provides that if the district director or the director of the regional service center determines that any amount applied, credited, or refunded under § 6411(b) with respect to an application for a tentative carryback adjustment is in excess of the overassessment properly attributable to the carryback upon which such application was based, the district director or the director of the regional service center may assess the amount of the excess as a deficiency as if such deficiency were due to a mathematical error appearing on the return. That is, the district director or the director of the regional service center may assess an amount equal to the excess, and such amount may be collected, without regard to the restrictions on assessment and collection imposed by § 6213(a). Thus, the district director or the director of the regional service center may assess such amount without regard to whether the taxpayer has been mailed a prior notice of deficiency. Either before or after assessing such an amount, the district director or the director of the regional service center will notify the taxpayer that such assessment has been or will be made. Such notice will not constitute a notice of deficiency, and the taxpayer may not file a petition with the Tax Court based on such notice. However, the taxpayer within the applicable period of limitation, may file a regular claim for credit or refund based on the carryback, if he has not already filed such a claim, and may maintain a suit based on such claim if it is disallowed or if it is not acted upon within 6 months from the date the claim was filed.

Section 301.6213-1(b)(2)(ii) provides that the method described in § 301.6213-1(b)(2)(i) to recover any amount applied, credited, or refunded in respect of an application for a tentative carryback adjustment that should not have been so applied, credited, or refunded is not an exclusive method. Two other methods are available to recover such amount: (a) By way of a deficiency notice under § 6212; or (b) by a suit to recover an erroneous refund under § 7405. Any one or more of the three available methods may be used to recover any amount which was improperly applied, credited, or refunded in respect of an application for a tentative carryback adjustment.

In the instant case, Company C requested on its revised Form 1139 a tentative refund of income tax for the group's Year 3 tax year in the amount of $h. The service center made a tentative refund to Company C in that amount and charged this tentative refund allowance to the federal income tax account of the group (i.e., to the account of Company C (formerly Company A)). Later, as a result of the examination, it was determined that none of Company C's CNOL from the Year 4 short tax year is allowable in the Year 3 tax year. Additionally, it was determined that Company C was not authorized to receive on behalf of the group the tentative refund. Consequently, the tentative refund made to Company C was not a rebate refund with respect to Company B and the other members of the

group, and as such the tentative refund was not part of the consolidated tax liability of the members of the group other than Company C. However, the tentative refund is a rebate refund solely with respect to Company C, and as such it could create a tax liability solely for Company C.

The surrounding facts and circumstances demonstrate that Company C filed the revised Form 1139 so that it would receive the tentative refund.[4] In the cover letter dated Date 9, which forwarded the original Forms 1139, Company C stated that it believed Company B may also be filing a request for the same years, and, if that happened, Company C assumed that the refunds would be apportioned between the two taxpayers. Additionally, Company C requested that the amount be wired to its bank account pursuant to the Form 8302. In short, Company C made a request for a tentative refund and received it. This refund was issued on the basis of a substantive recalculation of the tax owed. Accordingly, such a tentative refund was a rebate refund to Company C.[5] See § 6211(b)(2); Pesch v. Commissioner, 78 T.C. 100 (1982); Baldwin v. Commissioner, 97 T.C. 704 (1991); O'Bryant v. United States, 839 F. Supp. 1321, 1325-26 (C.D. Ill. 1993), aff'd, 49 F.3d 340 (7th Cir. 1995).[6] Moreover, such a tentative refund, even if made because of a mistake of law, could be subject to the summary assessment procedures. See Pesch, 78 T.C. at 117, 119; Neri v. Commissioner, 54 T.C. 767 (1970) (tentative refunds made for improper years); Blansett v. United States, 283 F.2d 474 (8th Cir. 1960).

CASE DEVELOPMENT, HAZARDS, AND OTHER CONSIDERATIONS:

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[4]We note that both the version of the Form 1139 at issue and the current version (Rev. May 1999) ask whether a consolidated return was filed for any year on the application. If the answer is yes, the current version then asks for identification of the year and the name of the common parent and its EIN, if different from the above lines. The older version asks only for identification of the year and the EIN, if different from the above line.

[5] Accordingly, we do not need to address whether a summary assessment is permitted for nonrebate tentative refunds.

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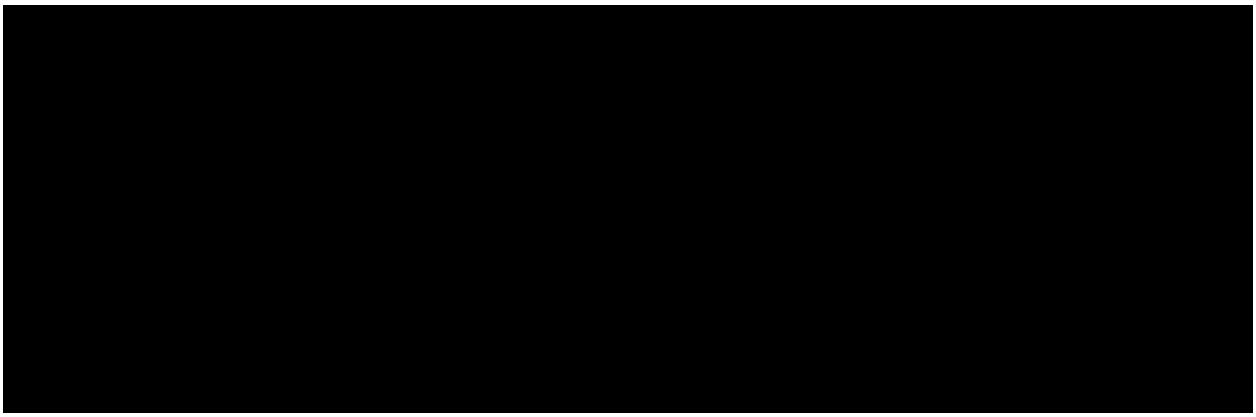

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If you have further questions, please call the branch telephone number.