

Part III

Administrative, Procedural, and Miscellaneous

6 CFR 601.201: Rulings and Determination Letters
(Also §§ 1502, 1.1502-13)

Rev. Proc. 2009-31

SECTION 1. PURPOSE

This revenue procedure provides the procedures by which a taxpayer may (1) obtain the consent of the Internal Revenue Service (the "Service") to treat some or all intercompany transactions on a separate entity basis under §1.1502-13(e)(3) of the Income Tax Regulations, (2) revoke such consent, or have such consent revoked by the Service, and (3) obtain the Service's consent to change from separate entity reporting to single entity reporting where a valid consent from the Service to report intercompany transactions on a separate entity basis was not previously obtained.

This revenue procedure modifies and supersedes Rev. Proc. 97-49, 1997-43 I.R.B. 22, 1997-2 C.B. 523.

SECTION 2. BACKGROUND

.01 The consolidated return regulations generally require that intercompany transactions be treated in a manner that produces the effect of transactions between divisions of a single corporation (that is, the regulations treat intercompany transactions on a "single entity basis."). The single entity approach for intercompany transactions is an integral part of the overall tax treatment of affiliated groups filing consolidated returns

("consolidated groups") under §1502 of the Internal Revenue Code. Treating intercompany transactions on a single entity basis is required to clearly reflect consolidated taxable income ("CTI") and consolidated tax liability ("CTL"). However, in certain circumstances, the Service may exercise discretion and grant consent, under §1.1502-13(e)(3), to a consolidated group to treat some or all intercompany transactions (other than intercompany transactions with respect to stock or obligations of members of a consolidated group) on a separate entity basis (that is, without the application of §1.1502-13). Consent under §1.1502-13(e)(3) may require changes in the methods of accounting for intercompany transactions of members of a consolidated group.

.02 Section 4 sets forth the time and manner in which requests for consent under §1.1502-13(e)(3) must be filed.

.03 Section 5 provides a checklist which is substantially similar to the checklist set forth in Rev. Proc. 97-49 to facilitate the filing and handling of requests under § 1.1502-13(e)(3) by specifying the information that should be included so that applications will be as complete as possible when originally filed. The sole revision to such checklist is the reference to CTL in addition to CTI. However, because the information necessary to rule on a particular case depends upon all the facts and circumstances, information in addition to that listed in this revenue procedure may be requested by the Service prior to determining whether consent will be granted.

.04 Section 6 sets forth certain factors and guidelines used by the Service in considering requests for consent under § 1.1502-13(e)(3). This section has been revised to include a reference to CTL in addition to CTI. Additionally, the threshold for determining "Effect on CTI or CTL", as defined in section 5, has been reduced from 10 percent to 5 percent.

.05 Section 7 sets forth the effect of receiving the Service's consent under § 1.1502-13(e)(3).

.06 Section 8 describes the procedures applicable to the revocation of consent under § 1.1502-13(e)(3). Section 8.01, as revised, provides that consent to treat intercompany transactions on a separate entity basis under § 1.1502-13(e)(3) is revoked automatically for any taxable year in which the effect on CTI or CTL, when averaged with the effect on CTI or CTL for each of the two preceding taxable years, is greater than 5 percent. In addition, section 8.03, as revised, provides that the factors and guidelines in section 6, which are used in considering the request for consent, will also be considered in determining whether to revoke consent where such consent is not automatically revoked under section 8.01.

.07 Section 9 sets forth the manner in which requests for consent to change from separate entity reporting to single entity reporting must be filed in cases where a valid

consent from the Service to report intercompany transactions on a separate entity basis was not previously obtained.

.08 The authority and general procedures with respect to the issuance of advance rulings are set forth in Rev. Proc. 2009-1, 2009-1 I.R.B. 1, or its successor, and are applicable to requests under § 1.1502-13(e)(3).

SECTION 3. APPLICATION

This revenue procedure applies to (1) all requests to obtain the Service's consent to treat some or all intercompany transactions on a separate entity basis under § 1.1502-13(e)(3), (2) all revocations of such consent, whether the revocation is made by the consolidated group or by the Service, and (3) all requests to obtain the Service's consent to change from separate entity reporting to single entity reporting in cases where a valid consent from the Service to report intercompany transactions on a separate entity basis was not previously obtained.

SECTION 4. TIME AND MANNER IN WHICH REQUESTS FOR CONSENT UNDER SECTION 1.1502-13(e)(3) MUST BE FILED

.01 Requests for consent under § 1.1502-13(e)(3) must be filed with the Service on or before the due date of the consolidated return (not including extensions of time) for the first taxable year for which the consent would apply (the "consent year"). These requests for consent must be submitted as a private letter ruling request, and not as a request for change in method of accounting, pursuant to Rev. Proc. 2009-1, or its successor. All applicable items of information listed in section 5 must be included in the request.

.02 The filing requirement of § 1.1502-13(e)(3) will be deemed satisfied where the request for consent is timely filed with the Service and contains all available information. The request must provide an explanation of any omitted information, and state that the omitted information will be submitted not later than the earlier of the following two dates: (1) 90 days after the original due date of the return, or (2) the date the consolidated return is filed with the Service Center.

SECTION 5. INFORMATION TO BE INCLUDED IN REQUESTS FOR CONSENT UNDER SECTION 1.1502-13(e)(3)

.01 Each of the items of information requested in this section 5 must be addressed in the request for consent under § 1.1502-13(e)(3). If an item is not applicable, the letters "N.A." should be inserted after that item. The presentation of the information should follow the format of this revenue procedure as closely as possible.

.02 Information needed in order to make a determination regarding a request for consent to treat some or all intercompany transactions on a separate entity basis:

1. The date the consolidated group elected to file consolidated returns.
2. The taxable year used by the consolidated group.
3. A calculation of the difference, for the consent year and for each of the two taxable years preceding the consent year, between (a) CTI and CTL computed by treating all intercompany transactions on a single entity basis and (b) CTI and CTL, respectively, computed by treating those intercompany transactions for which consent is requested, and those intercompany transactions for which consent has previously been obtained, on a separate entity basis. For any taxable year, the percentage difference between (a) and (b) in the preceding sentence is hereinafter referred to as the "Effect on CTI or CTL."
4. An analysis of all intercompany transactions for the consent year and for each of the two taxable years preceding the consent year. This analysis must include the number and a description of all intercompany transactions and the dollar amounts thereof.
5. An analysis of the effect of treating those intercompany transactions for which consent is requested on a separate entity basis on the following items for the consent year:
 - a. Net operating loss carryovers.
 - b. Capital loss carryovers.
 - c. Tax credits (for example, foreign tax credits) in the consent year as well as carryovers to the consent year.

With respect to any carryover referred to in items (a) through (c) above, the analysis should include amounts for each of the carryover years and the date the losses or credits expire.

6. An analysis of whether any sales of property for which consent is requested between members of the consolidated group that would be depletable or depreciable property in the hands of the buying member would result in long-term capital gain to the selling member, taking into account the provisions of §§ 1239, 1245, and 1250, relating to gain from dispositions of certain depreciable property or certain depreciable realty.

7. An analysis of whether any of the members involved in those intercompany transactions for which consent is requested are subject to the separate return limitation year rules or the change of ownership rules under §§ 382 or 383, and a calculation of any amounts subject to limitation under those rules.
8. A description of the types of property to which the consent would apply.
9. An analysis of the frequency of those intercompany transactions for which consent is requested, whether they occur in the ordinary course of the consolidated group's business, and whether the amounts or prices charged in connection with these intercompany transactions are for fair market value based on arm's-length bargaining, providing examples thereof. Also include a discussion of whether gains from these intercompany transactions have resulted from arm's-length charges or prices.
10. An explanation as to why the consent is being requested, why the consolidated group believes it should not be required to treat these intercompany transactions on a single entity basis, and how treating such transactions on a separate entity basis will clearly reflect CTI under § 446 and CTL.

SECTION 6. FACTORS AND GUIDELINES USED BY THE SERVICE IN CONSIDERING REQUESTS FOR CONSENT UNDER SECTION 1.1502-13(e)(3)

.01 Whether it is difficult for the consolidated group to account for those intercompany transactions for which consent is requested when they are treated on a single entity basis and, if so, why it is difficult to do so.

.02 Whether the Effect on CTI or CTL for the consent year or the average of the Effect on CTI or CTL for the consent year and each of the preceding two taxable years is greater than 5 percent. Consent under § 1.1502-13(e)(3) will not be granted in cases where either (a) the Effect on CTI or CTL is greater than 5 percent for the consent year or (b) the average of the Effect on CTI or CTL for the consent year and each of the two preceding taxable years is greater than 5 percent. However, consent will generally be granted in cases where (a) the Effect on CTI is less than 5 percent for the consent year and the average of the Effect on CTI for the consent year and each of the two preceding taxable years is less than 5 percent and (b) the Effect on CTL is less than 5 percent for the consent year and the average of the Effect on CTL for the consent year and each of the two preceding taxable years is less than 5 percent.

.03 Whether the consolidated group will secure the benefit of any deduction, credit, or other allowance that it would not otherwise secure if consent to treat those intercompany transactions for which consent is requested on a separate entity basis were not granted.

.04 Whether the gains that are the subject of the consent to treat intercompany transactions on a separate entity basis have resulted from arm's-length charges or prices.

SECTION 7. EFFECT OF THE CONSENT UNDER SECTION 1.1502-13(e)(3)

.01 A consent under § 1.1502-13(e)(3) shall, unless revoked pursuant to section 8, apply to all members of the consolidated group for the consent year and all subsequent taxable years ending prior to the first taxable year for which the group does not file a consolidated return.

.02 Section 446(e) consent is granted under § 1.1502-13(e)(3)(iii) for any changes in methods of accounting for intercompany transactions that are necessary solely to conform a member's methods to a consent obtained pursuant to this revenue procedure, provided the changes are made in the consent year. Any such changes in methods are effected on a cut-off basis (that is, no § 481(a) adjustment will be made). For any subsequent taxable year, § 446(e) consent must be separately requested under Rev. Proc. 97-27, 1997-21 I.R.B. 10, or its successor, if a member has failed to conform its accounting practices to the treatment of intercompany transactions required as a result of obtaining a consent pursuant to this revenue procedure. Any such changes in methods are effected on a cut-off basis (that is, no § 481(a) adjustment will be made).

.03 A consent shall not preclude the application of § 482 to members of a consolidated group.

.04 A consent granted under § 1.1502-13(e)(3) to treat intercompany transactions on a separate entity basis does not apply for purposes of taking into account losses and deductions deferred under § 267(f).

SECTION 8. REVOCATION OF CONSENT UNDER SECTION 1.1502-13(e)(3)

.01 Consent to treat intercompany transactions on a separate entity basis under § 1.1502-13(e)(3) is revoked automatically for any taxable year in which the Effect on CTI or CTL, when averaged with the Effect on CTI or CTL for each of the two preceding taxable years, is greater than 5 percent. The consolidated group must attach a statement to its original return for the taxable year in which the consent is revoked, indicating that the consent under § 1.1502-13(e)(3) has been revoked pursuant to this section 8.01.

.02 The Service's consent under § 1.1502-13(e)(3) is granted for any consolidated group to revoke a valid consent received from the Service under § 1.1502-13(e)(3) to treat intercompany transactions on a separate entity basis, and thus treat intercompany transactions on a single entity basis, provided a statement is attached to

the consolidated group's original return for the taxable year in which the revocation is to be effective indicating its revocation of the consent pursuant to this section 8.02. In cases where a valid consent from the Service to report intercompany transactions on a separate entity basis was not previously obtained and the consolidated group wants to change from separate entity reporting to single entity reporting, see section 9.

.03 Notwithstanding that the Service has granted consent under § 1.1502-13(e)(3) and that such consent has not been revoked pursuant to section 8.01 or 8.02, the Director of Field Operations may, upon examination of tax returns for years subsequent to the consent year, recommend that the ruling granting such consent be modified or revoked if the conditions and circumstances under which the ruling was granted have changed substantially and it is determined that single entity reporting is necessary in order to clearly reflect CTI under § 446 or CTL under § 1502. If the Director of Field Operations recommends that the ruling granting such consent be modified or revoked, the Director of Field Operations will forward the matter to the national office for consideration before any further action is taken. Such a referral to the national office will be treated as a request for technical advice, and the provisions of Rev. Proc. 2009-2, 2009-1 I.R.B. 87, or its successor, will be followed.

In determining whether the conditions and circumstances under which the ruling was granted have changed substantially, the Service will consider the factors and guidelines under section 6 (with the exception of section 6.02 which is addressed in section 8.01) of this revenue procedure, and may also consider other factors that may be relevant to clearly reflect the CTI and CTL of the consolidated group.

.04 When consent under § 1.1502-13(e)(3) is revoked pursuant to section 8.01, 8.02 or 8.03, each member of the consolidated group must report those intercompany transactions for which consent has been revoked on a single entity basis for the taxable year of the revocation and all subsequent taxable years (ending prior to the first taxable year for which the group does not file a consolidated return) unless consent is received pursuant to a new request submitted under section 4.

05. Section 446(e) consent is granted under § 1.1502-13(e)(3)(iii) for any changes in methods of accounting for intercompany transactions that are necessary solely to conform a member's methods to a revocation of consent made pursuant to this revenue procedure, provided the changes are made in the taxable year for which the revocation is made. Any such changes in methods are effected on a cut-off basis (that is, no § 481(a) adjustment will be made). For any subsequent taxable year, § 446(e) consent must be separately requested under Rev. Proc. 97-27, or its successor, if a member has failed to conform its accounting practices to the treatment of intercompany transactions required as a result of a revocation made pursuant to this revenue procedure. Any such changes in methods are effected on a cut-off basis (that is, no § 481(a) adjustment will be made).

SECTION 9. REQUESTS FOR CONSENT TO CHANGE FROM SEPARATE ENTITY REPORTING TO SINGLE ENTITY REPORTING IN CASES WHERE A VALID CONSENT FROM THE SERVICE TO REPORT INTERCOMPANY TRANSACTIONS ON A SEPARATE ENTITY BASIS WAS NOT PREVIOUSLY OBTAINED

Requests for consent to change from separate entity reporting to single entity reporting, where a valid consent from the Service to report intercompany transactions on a separate entity basis was not previously obtained, must be separately requested as a change in method of accounting under Rev. Proc. 97-27, or its successor. Any such changes in methods of accounting are effected on a cut-off basis (that is, no § 481(a) adjustment will be made).

SECTION 10. EFFECT ON OTHER DOCUMENTS

Rev. Proc. 97-49 is modified and superseded.

SECTION 11. EFFECTIVE DATE This revenue procedure is effective for taxable years ending on or after July 6, 2009.

SECTION 12. DRAFTING INFORMATION

The principal author of this revenue procedure is Bruce A. Decker of the Office of Associate Chief Counsel (Corporate). For further information regarding this revenue procedure contact Bruce A. Decker at (202) 622-7550 (not a toll free call).

