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**From:**

**Sent:** Monday, July 21, 2008 10:05:31 AM

**To:**

**Cc:**

**Subject:** Statute of limitations for refund claim based on NOL carryback

This responds to your request for advice. The following reflects the views of \_\_\_\_\_ and \_\_\_\_\_.

ISSUE

Whether a Form 1120X, filed on \_\_\_\_\_, claiming a refund for the fiscal years ended \_\_\_\_\_ and \_\_\_\_\_, is timely where such claim is based upon the carryback of a net operating loss arising in the short year \_\_\_\_\_ through \_\_\_\_\_?

FACTS

The information provided indicates that during the years at issue Acquiring was the common parent of a consolidated group (the Acquiring group) with a calendar taxable year. On \_\_\_\_\_, a wholly owned subsidiary of Acquiring purchased approximately \_\_\_\_\_% (an amount less than 80%) of the outstanding common stock of Target, the common parent of an unrelated consolidated group (the Target group) with a fiscal year ended \_\_\_\_\_.

On \_\_\_\_\_, another member of the Acquiring group purchased the remaining outstanding common stock of Target from Target's public shareholders through a tender offer (the "Acquisition"). As a result, the Target group terminated and Target and its affiliates became members of the Acquiring group.

The Acquiring group included Target and its affiliates on the Acquiring group's \_\_\_\_\_ consolidated return for the period from \_\_\_\_\_ through \_\_\_\_\_. The Acquiring group's consolidated return was timely filed on \_\_\_\_\_ pursuant to an extension of time granted by Notice 2001-61.

On \_\_\_\_\_, Target timely filed Form 7004 to request an automatic 6-month extension of time until \_\_\_\_\_ with respect to its short year \_\_\_\_\_ through \_\_\_\_\_ (the "Short Year"). On \_\_\_\_\_, Target timely filed its Short Year return.

Without regard to the Acquisition, the original due date for the Target group's consolidated return for the fiscal year ended \_\_\_\_\_, was \_\_\_\_\_.

On \_\_\_\_\_ and \_\_\_\_\_, Target filed amended returns 1120X for its separate return years ended \_\_\_\_\_ requesting refunds attributable to the carryback of a net operating loss arising in its Short Year.

LAW AND ANALYSIS

IRC section 6072 prescribes the time for filing returns. In general, income tax returns of corporations are required to be filed on or before the fifteenth day of the third month following the end of their taxable year. The regulations under section 6072 refer to the consolidated return regulations, §§1.1502-75 and

1.1502-76, for provisions relating to the time for filing consolidated returns and separate returns for short periods not included in consolidated returns. See §1.6072-2(f).

Section 6081(a) provides, in part, that the Secretary may grant a reasonable extension of time for filing any return, declaration, statement, or other document required by subtitle F or by regulations.

Section 1.6081-3(a) prescribes certain requirements under which an affiliated group of corporations filing a consolidated return will be allowed an automatic 6-month extension of time to file its income tax return after the date prescribed for filing the return. In particular, the application must be filed on or before the due date prescribed for the filing of the consolidated return; the group must remit the amount of the properly estimated unpaid tax liability on or before the date prescribed for payment; and the application must include a statement listing the name and address of each member.

Section 6511(a) provides, in relevant part, that a claim for refund shall be filed within 3 years from the time the return was filed. Section 6511(d)(2)(A) provides that in the case of a net operating loss carryback, instead of the 3-year period prescribed in subsection (a), the period shall be that period which ends 3 years after the time prescribed by law for filing the return (including extensions thereof) for the taxable year of the net operating loss.

Section 1.1502-76(c) prescribes the time for filing a separate return for periods not included in a consolidated return. Under §1.1502-76(c)(1), if a group has filed a consolidated return on or before the due date for the filing of a subsidiary's separate return (including extensions of time and determined without regard to any change of its taxable year required as a result of its acquisition), then the separate return for any portion of the subsidiary's taxable year for which its income is not included in the consolidated return of the group must be filed no later than the due date of such consolidated return (including extensions of time).

Section 1.1502-76(c)(2) provides that if the group has not filed a consolidated return on or before the due date for the filing of a subsidiary's separate return (including extensions of time and determined without regard to any change of its taxable year required as a result of its acquisition), then on or before such due date such subsidiary shall file a separate return either for the portion of its taxable year for which its income would not be included in a consolidated return if such a return were filed, or for its complete taxable year.

In this case, Target timely filed Form 7004 to request an automatic 6-month extension of time until \_\_\_\_\_ with respect to its Short Year. However, the Form 7004 incorrectly identified the due date for the Target group's separate return. Nonetheless, based on the information provided it appears that Target has satisfied the requirements prescribed by §1.6081-3(a) for obtaining an automatic 6-month extension of time to file its separate return for its Short Year.

Without regard to the Acquisition, the original due date for the Target group's return for the fiscal year ended \_\_\_\_\_, was \_\_\_\_\_. As noted above, Target appears to have satisfied the requirements for obtaining an automatic 6-month extension of time to file its separate return. Therefore, without regard to the Acquisition but taking into account the 6-month automatic extension, the Target group's separate return for the fiscal year ended \_\_\_\_\_ was due \_\_\_\_\_.

Because the Acquiring group filed its \_\_\_\_\_ consolidated return on \_\_\_\_\_, which date was before the due date for the filing of the Target group's separate return (including extensions and determined without regard to the change of Target's taxable year required as a result of the Acquisition), §1.1502-76(c)(1) applies. Accordingly, the Target group's separate return for its Short Year was due no later than \_\_\_\_\_, the due date of the Acquiring group's consolidated return (including extensions).

Under section 6511(d)(2)(A), the 3-year period for filing a refund claim with respect to the carryback of net operating losses that arose in Target's Short Year ended on . Thus, Target's refund claims with respect to the and fiscal years were timely.

Please call if you have any questions.