Office of Chief Counsel
Internal Revenue Service
memorandum

Number: **201605018**
Release Date: 1/29/2016

CC:CORP:B06: GRGlyer
POSTU-120924-15

Third Party Communication: None
Date of Communication: Not Applicable

UILC: 172.01-01, 1502.21-00

date: October 21, 2015

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subject:

This Chief Counsel Advice responds to your request for assistance dated August 05, 2015 in which you ask us to supplement the rationale provided in a Field Attorney Advice ("FAA"), dated May 09, 2014 (POSTF-107867-14). This office reviewed the FAA prior to its issuance. This advice may not be used or cited as precedent.

LEGEND

FP =

Taxpayer =

Target =

Date 1 =

Date 2 =

Date 3 =

Year 1 =

Year 2 =

ISSUE

Whether we are able to supplement the rationale provided in the FAA: that Taxpayer is not eligible to make an extended carryback election (the “extended carryback election”), as the parent of the Taxpayer Group, for its Year 1 consolidated taxable year, pursuant to section 172(b)(1)(H), because Taxpayer is the successor to an entity (“Target”) that received TARP proceeds (which is not eligible to make that election).

CONCLUSION

We have supplemented the rationale provided in the FAA: TARP status is a section 381(c) attribute of the Target that carries over and becomes an attribute of Taxpayer in the merger. Therefore, it is as if the Taxpayer received the TARP proceeds. Consequently, Taxpayer is prohibited from making the extended carryback election.

TARP status is not listed as an attribute in section 381(c). However, the legislative history of section 381 provides that analogous tax items not listed in section 381(c) can nevertheless be treated as if they were listed therein. Because TARP status is analogous to some of the attributes listed in section 381(c), it can be treated as one. The legislative history also states that taxpayers cannot avoid unfavorable attributes by undergoing a merger. Thus, Target should not be able to remove its TARP taint by merging into another corporation. This action would frustrate Congressional intent to disqualify a TARP recipient from making the extended carryback election. Finally, in addition to the tax attributes listed in section 381(c), there are numerous statutory provisions, the application of which require an acquiring corporation to take into account the activities of a predecessor corporation (for example, former section 921, relating to qualification as a Western Hemisphere Trade Corporation).

FACTS

FP owns all of the stock of Taxpayer. Taxpayer is a holding company that is the common parent of a consolidated group (the “Taxpayer Group”). Taxpayer’s relevant fiscal taxable year is Year 1 (which begins on Date 1 (a date in) and ends on Date 3 (a date in)).

On Date 2 (a date in that is within Year 1), FP acquired all of the stock of Target in a taxable transaction (a reverse subsidiary cash merger). Target was a holding company that was the common parent of a consolidated group (the “Target Group”). Immediately after FP acquired Target, FP caused Target to merge with and into Taxpayer, pursuant to section 368(a)(1)(A), with Taxpayer surviving (the “merger”). As a result, the subsidiaries of Target became subsidiaries of Taxpayer. See Rev. Rul. 69-163, 1969-1 C.B. 217. Prior to the merger, Target was a calendar year taxpayer.

In , the Federal Government acquired shares of preferred stock and warrants in Target in exchange for cash pursuant to the Emergency Economic Stabilization Act of 2008 ("TARP proceeds" and Target is sometimes hereinafter referred to as a "TARP recipient"). As part of its acquisition of Target, FP acquired those shares and warrants from the Federal Government in exchange for cash.

In Year 2, Taxpayer, on behalf of the Taxpayer Group, made the extended carryback election with respect to the consolidated net operating loss ("CNOL") incurred in its Year 1 consolidated return year (the "Taxpayer Group's CNOL") and received a tentative refund.

LAW AND ANALYSIS

Law

Section 13 of the Worker, Homeownership, and Business Assistance Act of 2009 ("WHBAA"), Pub. L. No. 111-92, 123 Stat. 2984, amended sections 172(b)(1)(H) and 810(b) to allow taxpayers to elect to carry back an applicable net operating loss ("NOL") for a period of 3, 4, or 5 years, in lieu of the 2-year period provided by section 172(b)(1)(A)(i).

Section 172(b)(1)(H)(ii) provides that the term "applicable net operating loss" means the taxpayer's NOL for a taxable year ending after December 31, 2007, and beginning before January 1, 2010 ("applicable taxable year").

Section 172(b)(1)(H)(iii)(I) provides that the extended carryback election for an applicable NOL may be made only with respect to 1 taxable year.

Section 172(b)(1)(H)(iii)(II) provides that the extended carryback election shall be made in such manner as may be prescribed by the Secretary and shall be made by the due date (including extensions of time) for filing the return for the taxpayer's last taxable year beginning in 2009. The extended carryback election, once made, is irrevocable.

Section 13(f) of the WHBAA provides that the extended carryback election is not available to certain taxpayers, including TARP recipients. The extended carryback election does not apply to:

> (1) any taxpayer if (a) the Federal government acquired before the date of the enactment of this Act an equity interest in the taxpayer pursuant to the Emergency Economic Stabilization Act of 2008 ("EESA"), Pub. L. No. 110-43, or (b) the Federal government acquired before such date of

> enactment, any warrant (or other right) to acquire any equity interest with respect to the taxpayer pursuant to such act (a TARP recipient);
>
> (2) the Federal National Mortgage Association and the Federal Home Loan Mortgage Corporation; and
>
> (3) any taxpayer which at any time in 2008 or 2009 was or is a member of the same affiliated group (as defined in section 1504 without regard to subsection (b) thereof) as a taxpayer described in paragraphs (1) or (2).

Footnote 23 in The Explanation of the Staff of the Joint Committee on Taxation ("Blue Book") contains an example of a taxpayer with an NOL in 2008 that in 2009 joins an affiliated group with a member in which the Federal government acquired an equity interest pursuant to the Emergency Economic Stabilization Act of 2008. The example reads:

> [A] taxpayer with an NOL in 2008 that in 2009 joins an affiliated group with a member in which the Federal government has acquired an equity interest pursuant to the Emergency Economic Stabilization Act of 2008 may not utilize the extended carryback rules under this provision with regard to the 2008 NOL. The taxpayer is required to amend prior filings to reflect the permitted carryback period.

JCX-44-09. <u>See also</u>, 155 Cong. Rec. S. 11197, Comment of Senate Finance Committee Chairman Baucus, that the technical explanation in the Blue Book expresses the Senate Finance Committee's understanding and intent behind the legislation.

In 2010, the Treasury Department and the IRS promulgated Temp. Treas. Reg. §1.1502-21T(b)(3)(ii)(C) through (b)(3)(v) which contains rules relating to the election of the extended carryback period under section 172(b)(1)(H) for consolidated groups. Temp. Treas. Reg. §1.1502-21T(b)(3)(v)(A)(<u>1</u>) provides that a consolidated group may make an extended carryback election for a CNOL arising in a taxable year ending after December 31, 2007, and beginning before January 1, 2010 ("Applicable CNOL"). However, no such election may be made for a taxpayer described in section 13(f) of the WHBAA. The extended carryback election applies to the entire Applicable CNOL, except as otherwise provided in Temp. Treas. Reg. §1.1502-21T(b)(3)(ii)(C) or in this paragraph (b)(3)(v).

Temp. Treas. Reg. §1.1502-21T(b)(3)(ii)(C)(<u>2</u>) provides that if a member of a consolidated group became a member of another consolidated group, and the acquiring group makes an extended carryback election for the CNOL for an eligible year Applicable CNOL, the group may make an irrevocable election to relinquish the part of the Applicable CNOL attributable to that member for the portion of the carryback period during which the corporation was a member of another group ("election to waive the entire carryback period"). This election could thus operate to relinquish carryback for up to five taxable years.

Temporary Treas. Reg. §1.1502-21T(b)(3)(ii)(C)(3) provides for a partial waiver of the pre-acquisition extended carryback period. Specifically, if one or more members of a consolidated group become members of another consolidated group, then, with respect to the Applicable CNOL for which the acquiring group has made the extended carryback election, the acquiring group may make an irrevocable election to relinquish, for the portion of the Applicable CNOL attributable to the member, the extended carryback period (as defined in Temp. Treas. Reg. §1.1502-21T(b)(3)(v)) for taxable years during which the corporation was a member of another group ("election to waive the extended carryback period").

Temporary Treas. Reg. §1.1502-21T(b)(3)(ii)(C)(6) contains an example in which T filed a separate return for 2003 and 2004. T was acquired by X at the end of 2004, and for 2005 and 2006 T was a member of X's consolidated group. At the end of 2007, X sold its T stock to the P consolidated group, and T was included on the P consolidated return for 2008. For 2008, the P group sustained a CNOL, a portion of which was attributable to T under Treas. Reg. §1.1502-21(b)(2)(iv)(A). P elected a Five-Year Carryback for the group's CNOL for 2008, and also elected, pursuant to Temp. Treas. Reg. §1.1502-21T(B)(3)(ii)(C)(2), to waive the portion of the CNOL attributable to T for 2005 and 2006, when T was a member of the X group. Although T's portion of the P group's CNOL for 2008 was not carried back to the consolidated return years of the X group for 2005 and 2006, T's portion was carried back to T's 2003 and 2004 separate return years.

Temporary Treas. Reg. §1.1502-21T(b)(3)(v)(A)(3) provides that if a member ("Electing Member") of a consolidated group makes the extended carryback election with regard to a loss from a separate return year ending before the Electing Member's inclusion in a consolidated group, that extended carryback election will not disqualify the acquiring group from making an otherwise available extended carryback election with regard to an Applicable CNOL incurred in a consolidated return year that includes the Electing Member.

Revenue Procedure 2009-52, 2009-49 I.R.B. 744, provides the time and manner by which a taxpayer may make the extended carryback election. Section 2.10 of the revenue procedure restates the rule contained in section 13(f) of the WHBAA, that the extended carryback election is unavailable to a TARP recipient. Section 4.01(2) of Rev. Proc. 2009-52 provides that "taxpayer" includes an affiliated group filing a consolidated return, and that "applicable NOL" includes a CNOL. Furthermore, the common parent of a consolidated group makes the extended carryback election for the group. Sections 4.01(3) and 4.01(4) of Rev. Proc. 2009-52 permit the extended carryback election to be made for a consolidated group by attaching a statement to the original or amended consolidated return for the taxable year of the Applicable CNOL, by attaching a statement to the taxpayer's amended consolidated return applying the Applicable CNOL to the carryback year, or by attaching a statement to a claim for a tentative carryback adjustment on Form 1139. Section 4.01(4)(a)(i) requires the taxpayer to represent on the extended carryback election statement that the taxpayer is not a TARP recipient, and neither in 2008 nor 2009, an affiliate of a TARP recipient. Sections 4.01(3)(b) and 4.01(4)(b) of Rev. Proc. 2009-52 require the extended carryback election, regardless of the manner in which made, to be filed no later than the due date (including extensions) for filing the return for the taxpayer's last taxable year beginning in 2009.

Analysis

The FAA concluded that, as a result of the merger, Taxpayer was a successor to Target for purposes of applying the attribute carryover rules of section 381(c). That is, Taxpayer succeeded to and was required to take into account all tax attributes of Target. The FAA asserted that one of the attributes to which Taxpayer succeeded, as a result of the merger, was Target's status as a TARP recipient. The following paragraph from the FAA succinctly summarizes the argument:

> Tax attributes carry over to the successor corporation in situations where the reorganization is in the form of a statutory merger. Helvering v. Metropolitan Edison Co., 306 U.S. 522 (1939). In Metropolitan Edison, the court noted that in a statutory merger the corporate personality of the transferor is drowned in that of the transferee. Id. at 529. See also, Dover v Commissioner, 122 T.C. 324, 349 (2004) ("The crucial finding in all of the rulings discussed [above] is that, in any corporate amalgamation involving the attribute carryover rules of section 381, the surviving or recipient corporation is viewed as if it had always conducted the business of the formerly separate corporation(s) whose assets are acquired by the surviving corporation.") Here, is the successor corporation in the statutory merger with and succeeds to the tax attributes of .

Summary of Taxpayer's position

The Taxpayer takes issue with the conclusion that TARP status is an attribute that carries over to a transferee corporation in a transaction to which section 381(a) applies and advances a number of arguments in support of its position. First, the Taxpayer argues that the attributes listed in section 381(c) and analogous ones (based on court cases and published or private rulings, collectively the "section 381(c) attributes") focus on specific tax return items and do not support a drastic change to the acquiring corporation's own tax characteristics as a result of a merger. Second, the Taxpayer asserts that section 381(c) attributes are found in the Internal Revenue Code and that TARP status is not part of the Code. Third, the Taxpayer maintains that a plain reading of the WHBAA, as interpreted by the Blue Book, does not support a successor rule. Taxpayer argues that EESA was intended to stabilize and provide liquidity to the financial system. Taxpayer argues it was encouraged to acquire such a (Target) and yet is now being penalized for doing just that.

Fourth, the Taxpayer notes that the Service did not apply a successor rule in the following circumstance: (1) in 2009 an acquiring corporation acquired the assets of a target corporation in a section 381(a) transaction, (2) the target corporation had made the extended carryback election for 2008 and was not a TARP recipient, and (3) the acquiring corporation was allowed to make the extended carryback election for 2009 (even though a predecessor corporation (the target corporation) had made the extended carryback election in 2008). See Notice 2010-58, 2010-37 I.R.B. 326, 329, Q&A 20.[1] In light of this prior application of the extended carryback election rules, the Taxpayer argues that the Service should not be able to apply a successor rule to TARP status because any successor rules in the WHBAA should be applied consistently. The Taxpayer asserts that imposing a successor rule in the case of a successor to a TARP recipient would be contrary to the broad legislative intent behind the enactment of EESA and the WHBAA.

Section 381(c)

Notwithstanding the Taxpayer assertions, we continue to maintain that TARP status is a section 381(c) attribute of a target corporation that carries over to the successor corporation in the merger.

Section 381(a) provides that in the case of certain reorganizations, including a reorganization to which section 368(a)(1)(A) applies, the acquiring corporation (here, Taxpayer) shall succeed to and take into account, as of the close of the day of the merger, the items of the transferor corporation (here, Target) described in section 381(c), subject to the operating rules of section 381(b) and the limitations imposed by section 381(c). The Taxpayer argues that because TARP status is not one of the items listed in that subsection, that taint should not carry over to the acquiring corporation. However, the legislative history for section 381 provides that:

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[1] Notice 2010-58, 2010-37 I.R.B. 326, 329:

> **Q—20**. If a corporate taxpayer makes the WHBAA election and merges into another corporation in a later taxable year, is the acquiring corporation that has not previously made a WHBAA election allowed to make the WHBAA election for a taxable year of the acquiring corporation ending after December 31, 2007, and beginning before January 1, 2010?
>
> **A—20**. Yes.

> The section is not intended to affect the carryover treatment of an item or tax attribute not specified in the section or the carryover treatment of items or tax attributes in corporate transactions not described in subsection (a). No inference is to be drawn from the enactment of this section whether any item or tax attribute may be utilized by a successor or a predecessor corporation under existing law.

S. Rep. No. 1622, 83d Cong., 2d Sess. 277 (1954). Thus, for example, a foreign tax credit carryover of a transferor corporation is not an item listed in section 381(c). However, prior to being included in the Code in section 383 in 1971 (now in section 383(c)), it had been considered a tax attribute to which an acquiring corporation succeeds following a transaction to which section 381(a) applies. See Rev. Rul. 68-350, 1968-2 C.B. 159, modified by Rev. Rul. 72-452, 1972-2 C.B. 438, obsoleted by Rev. Rul. 80-144, 1980-1 C.B. 80.

Moreover, Congress made it clear that a corporation could not eliminate an unwanted tax attribute by merging into another corporation. As stated also in the legislative history:

> The new rules enable the successor corporation to step into the "tax shoes" of its predecessor corporation without necessarily conforming to artificial legal requirements which now exist under court made law. Tax results of liquidations or reorganizations are thereby made to depend less upon the form of the transaction than upon the economic integration of two or more separate businesses into a unified business enterprise. At the same time the new provision makes it difficult to escape the tax consequences of the law by means of a legal artifice such as liquidation and reincorporation or merger into another corporation.

S. Rep. No. 1622, 83d Cong., 2d Sess. at 52.

Taxpayer's assertion that the attributes to which an acquiring corporation succeeds are only the specific tax return items listed in section 381(c) and do not support a "drastic change to the acquiring corporation's own tax characteristics as a result of a merger," is not supported by the Code. For example, for purposes of determining whether a corporation ("X") qualified as a Western Hemisphere Trade Corporation ("WHTC") under former section 921, its gross income for its current taxable year and its two previous taxable years had to satisfy certain tests.

Assume that an unrelated target corporation ("Y") merged into X on January 1, 1970 in a section 381(a) transaction. In determining whether X qualified as a WHTC for calendar year 1970, X would have had to take into account its gross income for the entire taxable year of 1970 (which would include the gross income attributable to the operations of Y), X's gross income for its two previous taxable years and Y's gross income for its two previous taxable years.

In Rev. Rul. 72-356,[2] the IRS concluded that the gross income of a predecessor corporation prior to a merger must be taken into account by the surviving corporation for purposes of determining whether the surviving corporation met the requirements for WHTC status. The revenue ruling contained the following analysis:

> In Adrian & James, Inc. v. Commissioner, 4 T.C. 708 (1945), involving a merger, the court held that the tax liability of a predecessor corporation paid by the surviving corporation was a deduction from its net income in determining its Title 1A net income under section 406(a)(1) of the Revenue Act of 1938 (personal holding company income under current law). Similarly, in The Koppers Coal Company v. Commissioner, 6 T.C. 1209 (1946), the court determined that interest on income tax liabilities of predecessor corporations paid by the successor corporation was deductible by the successor corporation in determining its income tax. Likewise, in Commissioner v. Metropolitan Edison Co., 306 U.S. 522 (1939), the Supreme Court of the United States found that the surviving corporations were entitled to deduct unamortized bond discount and expenses incurred in connection with bonds issued by the predecessor corporations and redeemed by the surviving corporations.

In these cases, the surviving corporations took the respective items of the predecessor corporation into account in determining the survivor's tax liability. These cases argue for the proposition that attributes of the predecessor corporation become elements of the corporate personality of the surviving entity, and must be taken into account in determining the tax status of the surviving corporation for years subsequent to the merger. The proposition is basically that a surviving corporation carries with it all those characteristics which the merged corporation had prior to the merger and that the history of the predecessor corporation carries forward to the survivor corporation. See also Newmarket Manufacturing Company v. United States, 233 F.2d 493 (1956), cert. denied, 353 U.S. 983 (1957).

In the hypothetical described above, Y's gross income history could affect, for better or worse, the ability of X to qualify for WHTC for 1970. That is, to use the Taxpayer's terminology, that history could "fundamentally alter" X's tax characteristics. Nevertheless, Y's gross income history for the previous two years must be taken into account. Similarly, a corporation's status as a TARP recipient cannot be purged by the corporation merging into an acquiring corporation. The acquiring corporation's status as a successor to a TARP recipient may not directly affect its tax liability for the year, but it affects its ability to make an extended carryback election.

Taxpayer's contention that tax attributes to which an acquiring corporation succeeds in a transaction to which section 381(a) applies are limited to those items found in section 381(c) is contrary to the legislative history, case law, and historic practice. The absence of any specific language in EESA and WHBAA regarding successors in transactions to

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[2] 1972-2 CB 452.

which section 381(a) applies is far from unusual. If Taxpayer's contention that specific language is necessary for section 381(a) to apply to a tax attribute is correct, it would negate the application of section 381(a) to numerous tax attributes, such as the ones discussed above, for which successor treatment is currently taken for granted.

As mentioned, section 13(f)(1) of the WHBAA prohibits the making of the extended carryback election by any taxpayer that was a TARP recipient. If the Taxpayer is correct that TARP-recipient status is not a tax attribute to which a transferee succeeds in a section 381(a) transaction, then the making of the extended carryback election that is expressly prohibited by the statute could be easily avoided. For example, assume a foreign corporation owns two calendar-year U.S. corporations, X and Y. X was a TARP recipient, but Y was not. Y paid a substantial amount of federal income taxes in years prior to 2009, but has sold off most of its assets, and operates only a small business. At the beginning of 2009, it is anticipated that X will sustain substantial operating losses in the coming year. For the purpose of avoiding the prohibition on extended carrybacks by TARP recipients, X merges into Y at the beginning of 2009 in a transaction qualifying under section 381(a). As expected, X's former operations (conducted by Y during 2009) generate substantial losses, and Y makes an extended carryback election for its 2009 NOL under the theory that X's status as a TARP recipient does not taint Y's ability to make the extended carryback election. Allowing an extended carryback election under such circumstances would be clearly inconsistent with the express statutory rule prohibiting the making of the extended carryback election by TARP recipients.

Finally, Taxpayer's contention -- that the Service's allowance of a successor corporation to make an extended carryback election when the predecessor corporation had also made the extended carryback election in a prior year negates the application of TARP recipient status to the successor of a TARP recipient -- ignores the strong legislative prohibition on allowing the making of the extended carryback election by TARP recipients. Although the legislation generally limits the extended carryback election for an NOL from only one taxable year, the regulations effectively allow those elections for more than one taxable year under certain circumstances.[3] By contrast, an extended carryback election by a TARP is per se verboten.

As mentioned above, section 13(f)(3) of the WHBAA provides that the extended carryback election is not available to "any taxpayer which at any time in 2008 or 2009 was or is a member of the same affiliated group (as defined in section 1504 without regard to subsection (b) thereof) as a [TARP recipient]." In other words, although the

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[3] Specifically, Temp. Treas. Reg. §1.1502-21T(b)(3)(v)(E), Example 3, illustrates a case in which the X group, which included subsidiary T, made an extended carryback election for its 2008 CNOL, a portion of which was attributable to T. At the end of 2008, P acquired all of the stock of T from X. For 2009, the P group sustained a CNOL, a portion of which was attributable to T. P made the extended carryback election for its 2009 CNOL, and did not make an election to relinquish any portion of the CNOL attributable to T. The example concludes that the extended carryback election by the X group for 2008 (which includes a portion of the CNOL attributable to T) does not disqualify the P group from making the extended carryback election for its 2009 CNOL.

statute and regulations tolerate, under certain circumstances, effective extended carryback elections of NOLs for more than one taxable year, they do not allow such an election, under any circumstances, by a TARP recipient or even by a corporation that was affiliated with a TARP recipient at any time in 2008 or 2009. Therefore, Taxpayer's argument -- that the allowance of an extended carryback election by a successor of a predecessor that made the extended carryback election in a prior year (which predecessor by definition could not have been a TARP recipient) supports its contention that TARP status is not a section 381(c) attribute -- is without merit.

Taxpayer contends that under law, it was required to merge Target into Taxpayer immediately after Target was acquired by FP. But for this requirement, Taxpayer argues that Target could have been contributed to Taxpayer and become a subsidiary in Taxpayer's consolidated group. Taxpayer argues that had Target become a subsidiary, it would have been able to carry back the full CNOL of the group and should not be penalized for its forced compliance with law.

Taxpayer is correct that Treas. Reg. §1.1502-21T(b)(3)(v)(A)(1) generally provides that the extended carryback election applies to the entire Applicable CNOL. However, that regulation also provides that an extended carryback election may not be made by a TARP recipient. The question is how this exception applies if a TARP recipient were a member of a consolidated group otherwise eligible to make the extended carryback election.

Contrary to Taxpayer's assertion, for several reasons, had Target become a subsidiary in the Taxpayer consolidated group, the portion of any CNOL attributable to Target would not have been eligible for an extended carryback election.

Although a consolidated group has a single consolidated return year, each member has its own taxable year. See Treas. Reg. §1.1502-76. When the stock of an includible corporation is acquired by a member of a consolidated group, the corporation's taxable year terminates at the end of the day of the acquisition, and a new taxable year begins on the following day as a member of the group. Treas. Reg. §1.1502-76(b)(2)(i) provides that the returns for the years that end and begin with a corporation becoming or ceasing to be a member are separate tax years for all Federal income tax purposes. Thus, had Target become a subsidiary of Taxpayer's consolidated group on Date 2 (a), it would have had a new taxable year beginning on the day after Date 2. Section 172(b)(1)(H)(ii) provides that the term "applicable net operating loss" means the taxpayer's NOL for an applicable taxable year. Consequently, any portion of the Taxpayer Group's CNOL attributable to Target for that consolidated return would not have been an Applicable CNOL because it would have been incurred in a taxable year beginning after .

Moreover, even if the fact that the loss was not incurred in a taxable year beginning before , were alone insufficient to disallow an extended carryback election for the Target's allocable portion of the group's CNOL, the Target's prior receipt of TARP funds would disqualify the Taxpayer from making an extended carryback election with respect to the Target's portion of the group's CNOL. Otherwise, the Taxpayer Group would be able to carry back five years the portion of that CNOL attributable to a TARP recipient, contrary to the clear language of section 13(f) of the WHBAA, as interpreted by the Blue Book.

Under Treas. Reg. §1.1502-77(a)(1)(i) and section 4.01(2) of Rev. Proc. 2009-52, the common parent files the extended carryback election for the Applicable CNOL. Although a CNOL is generally treated as a single tax attribute of a consolidated group, the Supreme Court, in United Dominion Industries, Inc. v. United States,[4] specifically held that the CNOL is not treated as a single attribute when carried to a member's separate return year.[5] Accordingly, the portion of the CNOL that would have been attributable to Target, which was a TARP recipient, would be disqualified from the extended carryback election.

We recognize that under our conclusion the Taxpayer ends up with a worse tax result than it would have had if it had undertaken any of the alternative transactions discussed above (no merger of Target (with the Target stock owned by either FP or the Taxpayer) or a merger of Target into a subsidiary of the Taxpayer). We also recognize that the Taxpayer did not have a choice about the form of the transaction (because, as explained earlier, for regulatory reasons it could not have undertaken any of those transactions). Nevertheless, Congress laid out a clear prohibition against a TARP recipient being able to make the extended carryback election – a prohibition that also applies to losses incurred by any non-TARP recipients that were affiliated with a TARP recipient in 2008 or 2009. The taxpayers in those circumstances also did not have a choice. In those cases the affiliated corporations were disqualified from making the extended carryback election and could not remove any pre-existing TARP taint. The Taxpayer, having received the operating assets of a TARP recipient in a transaction to which section 381(a) applied, should not be in a better position than those taxpayers.

CASE DEVELOPMENT, HAZARDS AND OTHER CONSIDERATIONS

[redacted]

[4] 532 U.S. 822 (2001).
[5] Id. at 833.

[redacted]

[redacted]

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Please call (202) 317-6065 if you have any further questions.

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