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to: Richard A. Rappazzo
Area Counsel, Area 4
(Large Business & International)
Attention: Michael R. Connelly

from: Stephen J. Toomey /s/ SJT
Senior Counsel, Branch 4
(Income Tax & Accounting) CC:ITA:04

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subject: Doctrine of Legislative Reenactment

This Chief Counsel Advice responds to your request for assistance. This advice may not be used or cited as precedent.

LEGEND

Taxpayer	=
Year 1	=
Year 2	=
Year 3	=
Year 4	=
Year 5	=
Date 1	=
$A	=
$B	=
$C	=

ISSUE

Whether, in the present case, the legislative reenactment doctrine permits a 10-year carryback of specified liability losses not attributable to product liability losses for a

taxpayer that has waived its right to carry back its net operating loss (NOL) under section 172(b)(1)(C) of the Internal Revenue Code (**Code**).

CONCLUSION

In the present case, the legislative reenactment doctrine does not permit a 10-year carryback of specified liability losses not attributable to product liability losses for a taxpayer that has waived its right to carry back its NOL under section 172(b)(1)(C) of the Code.

FACTS

Taxpayer is a U.S. corporation that is the parent of an affiliated group that files a consolidated federal income tax return. In both Year 3 and Year 4, Taxpayer incurred consolidated net operating losses ("**NOLs**") of approximately $A each year. In filing its returns, Taxpayer validly elected to waive its 2-year NOL carryback with an election statement under section 172(b)(3) of the Code and § 1.1502-21(b)(3)(i) of the Income Tax Regulations (**Treas. Reg.**).

In Year 5, Taxpayer determined that $B and $C of its Year 3 and Year 4 NOLs, respectively, were actually specified liability losses ("**SLLs**") as it was defined at that time under section 172(f)(1) of the Code; specifically, they were SLLs that were not product liability losses ("**PLLs**") (see below for additional explanation of those terms). As such, in Date 1, Taxpayer timely filed a Form 1120-X for Year 1 and Year 2 to carry the SLLs (specifically, SLLs that were not PLLs) back 10 years to Year 1 and Year 2, resulting in refund claims for those years. In the explanation of the claim, Taxpayer stated that, when originally filing its Year 3 and Year 4 returns, it had intended only to waive the general two-year carryback for NOLs provided by section 172(b)(1)(A), but not the 10-year carryback period for SLLs provided by section 172(b)(1)(C).

LAW AND ANALYSIS

History of Relevant Provisions

In 1976, Congress added section 172(b)(3) to the Code, which allows any taxpayer entitled to a carryback period under section 172(b)(1) to "elect to relinquish the entire carryback period with respect to a net operating loss for any taxable year" (the "**General Carryback Waiver**").

In 1978, Congress added section 172(b)(1)(H) to the Code, which provides for a special 10-year carryback period for NOLs attributable to product liabilities of the taxpayer or expenses incurred in connection with investigating, opposing, or settling such liabilities (i.e., PLLs). Congress also added section 172(i)(3) (the "**PLL Special Waiver Election**"), which allows a taxpayer entitled to the 10-year carryback under section 172(b)(1)(H) (i.e., PLLs) to determine the carryback period for PLLs without regard to

such provision. Thus, section 172(i)(3) allows a taxpayer with an NOL attributable to a PLL to waive the 10-year carryback period and use the carryback period for non-PLL NOLs for its NOLs attributable to PLLs.

In 1984, Congress added section 172(b)(1)(K) to the Code, which provides for a special 10-year carryback period for deferred statutory or tort liability losses ("**DSTLLs**"). Broadly, DSTLLs were defined as the lesser of (A) the NOL for such year, exclusive of any foreign expropriation losses and PLLs, or (B) NOLs incurred "with respect to a liability which arises under a Federal or State law or out of any tort of the taxpayer." With the addition of the DSTLL category, Congress did not revise the section 172(i)(3) PLL Special Waiver Election to apply to DSTLLs. As such, the PLL Special Waiver Election continued to only apply to PLLs (and was moved to section 172(j)(3)).

In 1986, Treasury promulgated Treas. Reg. § 1.172-13. Treas. Reg. § 1.172-13(a)(1) states that "unless an election is made pursuant to paragraph (c) of this section, in the case of a taxpayer which has a *product liability loss* […] for a taxable year beginning after September 30, 1978 […] the *product liability loss* shall be a net operating loss carryback to each of the 10 taxable years preceding the loss year" (emphasis added). Treas. Reg. § 1.172-13(c)(1) - (2) provides for the manner of making the election described in the PLL Special Waiver Election to waive the 10-year carryback that a taxpayer is entitled to as a result of incurring a PLL. Finally, Treas. Reg. § 1.172-13(c)(4) states that "if a taxpayer sustains during the taxable year both a net operating loss not attributable to product liability and a product liability loss […], an election pursuant to section 172(b)(3)(C) (an election to relinquish the entire carryback period) does not preclude *the product liability loss* from being carried back 10 years under section 172(b)(1)(I) and paragraph (a)(1) of this section" (emphasis added).

Treas. Reg. § 1.172-13(c)(4) specifies that the 10-year carryback period *for PLLs* must be waived separately from the waiver of the carryback for non-PLL NOLs. In the preamble to the final regulations, it notes that Treas. Reg. § 1.172-13(c)(4) was added to clarify the relationship between the PLL Special Waiver Election and the election under 172(b)(3)(C) by providing that the latter election does not preclude a product liability loss from being carried back ten years. T.D. 8096, 1986-2 C.B. 39 (1986). No analogous rule was promulgated with respect to DSTLLs, which, as noted, was an existing category at the time of promulgation of Treas. Reg. § 1.172-13. Further, the DSTLLs provisions did not include a rule analogous to the PLL Special Waiver Election

In 1990, Congress added section 172(b)(1)(C) to the Code, which brought PLLs and DSTLLs under a new umbrella category known as specified liability losses or SLLs, defined in section 172(f). Section 172(f)(1)(A) provides the definition of PLLs, and section 172(f)(1)(B) provides the definition of DSTLLs. Section 172(f)(6) was also added which provided for an election to waive the special 10-year carryback for SLLs generally (i.e., losses under section 172(b)(1)(C)) (the "**SLL Special Waiver Election**"). Section 172(f)(6) is structured nearly identically to the PLL Special Waiver Election of section 172(j)(3). See below for a side-by-side comparison:

> **Section 172(j)(3) / PLL Special Waiver Election:** Any taxpayer entitled to a 10–year carryback under subsection (b)(1)(H) from any loss year may elect to have the carryback period with respect to such loss year determined without regard to subsection (b)(1)(H). Such 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 taxpayer's return for the taxable year of the net operating loss. Such election, once made for any taxable year, shall be irrevocable for that taxable year.
>
> **Section 172(f)(6) / SLL Special Waiver Election:** Any taxpayer entitled to a 10-year carryback under subsection (b)(1)(C) from any loss year may elect to have the carryback period with respect to such loss year determined without regard to subsection (b)(1)(C). Such 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 taxpayer's return for the taxable year of the net operating loss. Such election, once made for any taxable year, shall be irrevocable for that taxable year.

The entire SLL carryback framework was subsequently eliminated by the Tax Cuts and Jobs Act of 2017.

Doctrine of Legislative Reenactment

Under the doctrine of legislative reenactment, administrative pronouncements are deemed to receive congressional approval whenever Congress reenacts an interpreted statute without substantial change. Lorillard, Div. of Loew's Theatres, Inc. v. Pons, 434 U.S. 575 (1978); Helvering v. R.J. Reynolds Tobacco Co., 306 U.S. 110 (1939). Here, Taxpayer argues that the relevant administrative pronouncement is Treas. Reg. § 1.172-13 and the relevant "reenacted" statute is the SLL Special Waiver Election (i.e., section 172(j)(3) of the Code reenacted as section 172(f)(6)).

In Lorillard, Congress had adopted a new law incorporating sections of a prior law that had long been interpreted as containing a jury trial requirement for certain discrimination claims. The Supreme Court held that "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change" and when "Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute." Id. at 580-581.

In Casey v. Commissioner, 830 F.2d 1092 (10th Cir. 1987), a Treasury Regulation interpreted a Code provision dealing with the deductibility of sales taxes. At the time of the promulgation of the Regulation, the provision specified that the sales tax deduction only applied with respect to tangible personal property. The Regulation reiterated that

understanding by defining sales tax for those purposes as “a tax imposed upon persons engaged in selling tangible personal property, or upon the consumers of such property […].” A subsequent amendment to the Code provision omitted the specific language regarding tangible person property. In holding that the Regulation’s definition of sales tax was still applicable, the court said that “[w]hen Congress is, or should be, aware of an interpretation of a statute by the agency charged with its administration, Congress' amendment or reenactment of the statutory scheme without overruling or clarifying the agency's interpretation is considered as approval of the agency interpretation.” Id. at 1095.

In another case, Cottage Savings Association v. Commissioner, 499 U.S. 554 (1991), the Supreme Court held that there was a “material difference” requirement for dispositions of property to constitute a realization event for tax purposes. The Court found this in part by noting that section 1001 of the Code had been interpreted to include the material difference requirement through all its historical iterations, as well as in Treas. Reg. § 1.1001-1. The Court stated that “Treasury regulations and interpretations long continued without substantial change, applying to unamended or substantially reenacted statutes, are deemed to have received congressional approval and have the effect of law.” Id. at 561.

In United Dominion Industries, Inc. v. U.S., 532 U.S. 822 (2001), in discussing the treatment of PLLs in the consolidated return context, the Court stated that the omission of PLLs from the list of items requiring consolidated treatment in the 1966 consolidated return regulations lacks significance, as the advent of PLLs and their 10-year carryback period was not until 1978. Per the Court, "the issue, then, is the significance, not of omission, but of failure to include later: has the significance of the earlier regulation changed solely because the Treasury has never amended it, even though PLL is now a separate carryback? We think that is unlikely." Id. at 836.

Analysis

Taxpayer notes that, under the doctrine of legislative reenactment, "as described by the Supreme Court in Lorillard v. Pons, [434 U.S. 575 (1978)] the legislative canon provides that when Congress substantially reenacts statutory text that has previously been the subject of judicial or administrative interpretation it is presumed to have adopted such prior interpretations of the reenacted text."

Taxpayer argues that when Congress created the SLL category in 1990 - pulling in the PLL and DSTLL definitions under its umbrella and creating the SLL Special Waiver Election - it adopted the 1986 Treasury Regulations with respect to the entire SLL category, including DSTLLs. Specifically, Taxpayer purports that Congress adopted the Treas. Reg. § 1.172-13(c)(4) interpretation of the PLL Special Waiver election when enacting the similarly worded SLL Special Waiver Election, thus requiring a taxpayer to make such an election according to the procedures prescribed in Treas. Reg. § 1.172-

13(c)(1) - (2) in addition to an election under section 172(b)(3)(C) in order to waive the 10-year carryback period for any DSTLLs.

However, the logic underlying the legislative reenactment doctrine undermines Taxpayer's argument. The 1986 Treasury Regulations explicitly created a carryback waiver framework that by its terms only applied to one of the future subcategories of SLLs: PLLs. DSTLLs existed but did not have an analogous regulatory provision. Treas. Reg. § 1.172-13(c)(4) explicitly states that an election under section 172(b)(3)(C) to waive the general NOL carryback does not have the effect of waiving the special 10-year carryback for PLLs. Instead, the taxpayer must first make an election in the manner prescribed by Treas. Reg. § 1.172-13(c)(1) - (2) to waive the 10-year carryback. Congress later enacted the SLL Special Waiver Election to apply to SLLs, which included PLLs and DSTLLs. However, to the extent that there was an administrative interpretation of the SLL Special Waiver Election, it was only applicable with respect to PLLs, as that is the only category of losses addressed by Treas. Reg. 1.172-13. DSTLLs existed when that Regulation, titled "Product Liability Losses", was promulgated. As noted, Taxpayer argues that the relevant legislative reenactment was the SLL Special Waiver Election. By "reenacting" the PLL Special Waiver Election as the SLL Special Waiver Election, Taxpayer asserts that Congress adopted the interpretation of that provision contained in Treas. Reg. § 1.172-13(c)(4) with respect to all sub-categories of SLL, including DSTLLs.

However, Taxpayer's argument misidentifies what was reenacted for purposes of the legislative reenactment doctrine. The SLL Special Waiver Election was enacted in connection with the creation of a new category of NOLs in section 172(b)(1)(C), which included DSTLLs. While the PLL and DSTLL categories were indeed reenacted by their incorporation into the SLL category, that latter category (SLLs) is itself a new statutory provision. As the SLL Special Waiver election applies to the new SLL provision, the two provisions considered in conjunction are new provisions. As such, it is clear that there is no "interpretatio[n] long continued without substantial change, applying to [an] unamended or substantially reenacted statut[e]." Cottage Savings at 561. Instead, there is a new statute that incorporates two categories previously subject to distinct administrative interpretations: (i) PLLs, which were subject to the 1986 interpretation contained in Treas. Reg. § 1.172-13; and (ii) DSTLLs, which Treasury may be presumed for these purposes to have been intentionally excluded from that interpretive framework. To the extent that part (i) can be said to include the new SLL Special Waiver Provision, it is only to the extent that the SLL Special Waiver Provision is applicable to PLLs. See Casey at 1095.

Contrary to the position of Taxpayer, the legislative reenactment doctrine does not entail expansive reinterpretations or additions to the text of regulations, such as expanding the regulatory exception under Treas. Reg. § 1.172-13(c)(4) from PLLs to SLLs. This understanding is supported by the Supreme Court's view of the legislative reenactment doctrine, which it has held to be applicable when Congress "re-enacts a statute without change." Lorillard at 580.

Citing United Dominion, Taxpayer notes that that "when Congress adds a new category to a preexisting statute, existing IRS regulations apply to the new category, even though the IRS has not updated the regulations to reflect the new category." The DSTLL category was not new, however; it was merely folded into a new part of section 172. DSTLLs were not a new category at any point relevant for Taxpayer's argument. The category of DSTLLs post-dated PLLs but pre-dated the PLL regulations. And each of those pre-dated the 1990 amendment which added the SLL category. If Congress "can be presumed to have had knowledge of the interpretation given to the incorporated law"[1], that included the knowledge that Treasury had excluded DSTLLs from Treas. Reg. § 1.172-13 and effectively chose not to include language that would have brought DSTLLs under the same waiver framework as PLLs.

Please call Jonathan Dunlap at (202) 317-5350 if you have any further questions.

[1] Lorillard at 581.