OFFICE OF
CHIEF COUNSEL

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

August 30, 1999

Number: **200001003**
Release Date: 1/7/2000
CC:DOM:FS:PROC

UILC: 6621.01-00

INTERNAL REVENUE SERVICE NATIONAL OFFICE FIELD SERVICE ADVICE

MEMORANDUM FOR

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

SUBJECT: Interest netting under I.R.C. § 6621(d)

This Field Service Advice responds to your memorandum dated August 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:

X Corp = Authorized representative:

Y Corp = Z Corp =

YEAR 0, YEAR 1, etc. =

Excise tax =

ISSUES:

1. Whether taxpayer has filed a proper claim, under Revenue Procedure 99-19, to protect its rights to interest netting for interest periods before July 22, 1998.

2. Whether interest netting under Internal Revenue Code section 6621(d), which provides for a zero rate of interest on equivalent underpayments and overpayments "by the same taxpayer," applies to an affiliated group of corporations filing a consolidated income tax return and its individual members, such that interest on a consolidated income tax underpayment may be netted against interest on a separate excise tax overpayment made by a member of the consolidated group.

CONCLUSIONS:

1. X Corp has met the basic requirements for filing a valid refund claim as outlined in Revenue Procedure 99-19.

2. Interest netting under section 6621(d) [redacted]

FACTS:

For all of the tax years in question, X Corp is the common parent of an affiliated group, which files consolidated income tax returns on a calendar year basis. Y Corp is a second-tier subsidiary of X Corp,[1] and is a member of the affiliated group, reporting its income, deductions and credits on the consolidated return. Y Corp separately calculates and pays excise taxes, filing separate excise tax returns under its own taxpayer identification number.

In Years 9 and 12, X Corp, acting as agent for the affiliated group in all matters related to the income tax liability for the group,[2] executed two partial agreements (Forms 870) with the Internal Revenue Service. Pursuant to those agreements, the Service assessed income tax deficiencies totaling $200M for YEAR 3, YEAR 4, and YEAR 5. The agreed deficiencies, plus interest, were paid in August of Year 9, and January of Year 12. [3] Thereafter, Y Corp settled several cases relating to deficiencies in its separate excise taxes, for quarters ended March, YEAR 0 through December, YEAR 6. In addition, Y Corp's subsidiary, Z Corp, filed an excise tax refund claim, which the Service paid in part.[4] With the resolution of the excise tax cases and the refund claim, the Service refunded $150M in excise tax overpayments, plus interest in June of Year 14.

Since interest ran on the income tax underpayments through January of Year 12, and on the excise tax overpayments through June of Year 14, there were overlapping periods where the Service charged interest to X Corp for the affiliated group's consolidated income tax liabilities, and owed interest to Y Corp for its overpayments of excise tax.

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[1] Y Corp is a wholly owned subsidiary of a subsidiary, which X Corp wholly owns.

[2] See Treas.Reg. § 1.1502-77(a).

[3] These payments were not made in final settlement of all liabilities, and indeed, the Service subsequently issued a statutory notice of deficiency asserting deficiencies in income tax for YEARS 3 through 5, totalling over $500M.

[4] It is not clear from the facts whether Z Corp is a member of the affiliated group filing consolidated income tax returns.

X Corp, therefore, filed a refund claim for interest on the underpayments of income tax, recalculating the interest owed using netting principles.[5] To date, the Service has not rendered a decision on the claim.

In Year 17, , the Service issued a notice of deficiency asserting additional income tax deficiencies for YEARS 3 through 5. X Corp has petitioned the Tax Court for a redetermination of the deficiencies, and has affirmatively raised the issue of interest netting with respect to the overlapping periods of excise tax overpayments and income tax underpayments, claiming an overpayment of tax and interest. In addition, X Corp has filed with the Special Trial Attorney handling the Tax Court litigation, a Form 843 for interest netting under new Code section 6621(d) and Revenue Procedure 99-19.

LEGAL ANALYSIS

Section 6621(d) of the Internal Revenue Code provides for a net interest rate of zero to the extent of overlapping tax underpayments and overpayments by the same taxpayer. The statute[6] is captioned "Elimination of Interest on Overlapping Periods of Tax Overpayments and Underpayments," and provides:

> To the extent that, for any period, interest is payable under subchapter A and allowable under subchapter B on equivalent underpayments and overpayments by the same taxpayer of tax imposed by this title, the net rate of interest under this section on such amounts shall be zero for such period.

Pursuant to its effective date, the statute applies to interest for periods beginning after
July 22, 1998, and in special circumstances, will also apply to periods beginning before that date, if the applicable statute of limitation has not expired with regard to either the tax underpayment or overpayment, and the taxpayer reasonably identifies and establishes the overlapping periods for which the zero rate applies, and files a

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[5]

[6] As enacted by section 3301of the Internal Revenue Service Reform and Restructuring Act of 1998 (RRA), Pub. L. No. 105-206, 112 Stat. 741, and amended by section 4402(d) of the Tax and Trade Relief Extension Act of 1998 (TTREA), Pub. L. No. 105-277, 112 Stat. 2681.

request before December 31, 1999.[7] The legislative history indicates that the

[7] RRA section 3301(c), as amended by TTREA section 4002(d) provides for the following:

Effective Dates.---

(1) In General. –Except as provided under paragraph (2), the amendments made by this section shall (continued on next page)

effective date of the statute is for calendar
quarters beginning after the date of enactment, which is the calendar quarter beginning on October 1, 1998. H.R. Rep. No. 364, 105th Cong., 1 Sess. 64 (1997). Moreover, Congress anticipated that, "where interest is payable from and allowable to an individual taxpayer for the same period, the Secretary will take all reasonable efforts to offset the liabilities, rather than process them separately using the net interest rate of zero." H.R. Conf. Rep. No. 599, 105th Cong., 2d Sess. 257 (1998). See also, Joint Committee Print, General Explanation of Tax Legislation Enacted in 1998, 105th Cong., 2d Sess. 290 (1998). Nevertheless, Congress intended a zero interest rate to apply for periods of mutual indebtedness, without regard to whether the underpayments or overpayments were currently outstanding. In this respect, the legislative history makes clear that, "[f]or all periods in which the underpayment and the overpayment run concurrently ... the interest rate ... must be the same so that the net interest rate of zero applies." H.R. Rep. No. 364, 105th Cong., 1 Sess. 64 and n. 41 (1997).

Revenue Procedure 99-19, 1999-13 I.R.B. 10, concerns the application of section 6621(d) to interest for periods prior to July 28, 1998. In order to qualify for interest netting under Rev. Proc. 99-19, both periods of limitation applicable to the tax underpayment and the tax overpayment must have been open on July 22, 1998. Id., Sec. 2.03. See also, Joint Committee Print, General Explanation of Tax Legislation Enacted in 1998, 105th Cong., 2d Sess. 290 (1998). Further, taxpayers are to submit a Form 843 (Claim for Refund and Request for Abatement) with the Service Center where taxpayer filed its most recent return, labeling the top of the

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> apply to interest for periods beginning after the date of enactment of this Act [July 22, 1998].
>
> (2) Special Rule.--- Subject to any applicable statute of limitation not having expired with regard to either a tax underpayment or a tax overpayment, the amendments made by this section shall apply to interest for periods beginning before the date of the enactment of this Act if the taxpayer–
>
> > (A) reasonably identifies and establishes periods of such tax overpayments and under-payments for which the zero rate applies; and
> >
> > (B) not later than December 31, 1999, requests the Secretary of the Treasury to apply section 6621(d) of the Internal Revenue Code of 1986, as added by subsection (a), to such periods.

Form "Request for Net Interest Rate of Zero Under Rev. Proc. 99-19." The Form should indicate (1) the type of tax and return covered by the request; (2) the taxable periods for which taxpayer overpaid and underpaid its tax liability; (3) when the tax was paid if the underpayment is no longer outstanding; (4) when the taxpayer received a refund, if the overpayment is no longer outstanding, and (5) identify and establish the periods for which taxpayer's underpayment and overpayment overlapped. The Form should also state that the periods have not been previously used to obtain a net interest rate of zero. Rev. Proc. 99-19, sec. 4.04(5)(a)-(e).

For those taxpayers with returns under consideration by any office of the Service, Revenue Procedure 99-19 allows taxpayer to submit a letter or written statement to that office, in lieu of submitting a Form 843 to the Service Center. The letter must provide the same information delineated above, including the type of tax and return that affects the interest computation for the taxable period under consideration, as well as when and for what period the refund or payment (that affects the interest computation for the taxable period under consideration) was made. Rev. Proc. 99-19, Sec. 4.06.(1)-(4). Here, X Corp has submitted a Form 843 to the Special Trial Attorney handling the current Tax Court litigation. In the attachments to its Form 843, X Corp has reasonably identified and established the overlapping periods for which it seeks a zero interest rate, as well as a computation of the amount of interest to be refunded.

1. X Corp has met the basic requirements for filing a valid refund claim under Revenue Procedure 99-19.

Retroactive application of section 6621(d) to interest periods before July 22, 1998, requires that both relevant statutes of limitation remain open as of the statute's effective date, and that taxpayer file a request before December 31, 1999. Here, there is no dispute; the limitations period for claiming additional interest on Y Corp's excise tax overpayments under 28 U.S.C. §§ 2401 and 2501, and for claiming a refund of interest on the consolidated income tax underpayments under Code section 6511(c), were open as of July 22, 1998.[8] Further, we are of the view that X Corp complied with the special procedures outlined in section 4.06 of Revenue Procedure 99-19, having submitted a Form 843 to the Special Trial Attorney

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[8] With respect to seeking a refund of underpayment interest, the limitations period was suspended by virtue of the Service having issued a valid notice of deficiency on June 6, Year 17, and by X Corp having, thereafter, filed a timely petition to the Tax Court.

handling the current Tax Court litigation. That office has authority to consider the returns for the years at issue before the Tax Court. See Chief Counsel Directives Manual (CCDM) (35)800.

While the Tax Court may not in the present proceedings redetermine interest on a deficiency, because Code section 6601(e) excludes interest from the definition of tax imposed under section 6211(a) and therefore, interest is not part of a deficiency, Code section 7481(c) now allows the court's jurisdiction to be invoked to redetermine interest related to a deficiency by filing a motion within one year after the court's decision becomes final. Were the court to determine there are no deficiencies for the years at issue, Code section 6512(b) defines the Tax Court's jurisdiction to determine overpayments. In general, the court has jurisdiction to determine the amount of an overpayment in income tax for a taxable year where it finds "that there is no deficiency and further finds that the taxpayer has made an overpayment of income tax for the same taxable year," or where the court finds "there is a deficiency but that the taxpayer has made an overpayment of such tax." Id., §6512(b)(1). Further, in determining whether X Corp has overpaid its taxes, the court has jurisdiction to determine whether X Corp overpaid interest by virtue of its entitlement to a zero interest rate on underpayments for the years before court. Winn-Dixie Stores, Inc. v. Commissioner, 110 T.C. 291 (1998).[9] See also, Estate of Baumgardner v. Commissioner, 85 T.C. 445, 452 (1985). Before reaching this issue, however, the Court would be required to determine there are no deficiencies for the years at issue. Alternatively, X Corp and the Service would have to settle the deficiencies, with
X Corp paying the deficiency amounts and interest so that the Tax Court's jurisdiction to determine overpayments could be invoked.

CASE DEVELOPMENT, HAZARDS AND OTHER CONSIDERATIONS:

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[9] In Winn-Dixie Stores, Inc. v. Commissioner, 110 T.C. 291 (1998), the Tax Court held it had jurisdiction to review the taxpayer's claim of having overpaid interest on underpayments for years before the court, that the taxpayer had settled. There, taxpayer and the Commissioner had also agreed to overpayments for certain prior years not before the court, and when the Service failed to offset the overpayments from the prior years against the settled underpayments, taxpayer paid the settled underpayments with interest, and then claimed the Service's failure to offset had caused it to overpay interest for the years before the court. The court held that an overpayment can include interest, and accordingly, under Code section 6512(b), it had jurisdiction to review taxpayer's claim of an overpayment of interest on the settled underpayments. Id., 110 T.C. at 295. Thus, in determining whether X Corp has made an overpayment of tax, the court will be called upon in the present proceedings to determine the application of Code section 6621(d), and whether X Corp and Y Corp are the same taxpayers for purposes of interest netting.

If additional income tax deficiencies are determined, the Tax Court's overpayment jurisdiction cannot be invoked absent X Corp paying the deficiencies and interest. See Code § 7481(c); Winn-Dixie Stores, Inc. v. Commissioner, 110 T.C. 291 (1998). What follows, however, [redacted]

2. X Corp and Y Corp [redacted]

Section 6621(d) provides for a zero rate of interest on equivalent underpayments and overpayments by the same taxpayer. [redacted]

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10 [redacted]

[redacted]

[redacted]

[redacted]

By: _____
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