INTERNAL REVENUE SERVICE
NATIONAL OFFICE TECHNICAL ADVICE MEMORANDUM

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Index (UIL) No.: 7805.04-01, 925.01-01
CASE-MIS No.: TAM-114601-07

Taxpayer's Name:
Taxpayer's Address:

Taxpayer's Identification No
Year(s) Involved:
Date of Conference: Not Applicable

LEGEND:

USCorp =
USCorp-FSC =
Taxable Year 1 =
Taxable Year 2 =
Taxable Year 3 =

ISSUES:

1. Whether the Service should grant Taxpayer's[1] request for relief under section 7805(b)(8) to apply Conclusions 1 and 2 of TAM 200705028, 2007 WL 294395 (October 3, 2006) without retroactive effect.

[1] Although USCorp and USCorp-FSC are separate and distinct taxpayers, for simplicity, we refer to them collectively as "Taxpayer" throughout this memorandum.

2. If Issue 1 is resolved in favor of Taxpayer, whether the Service should allow Taxpayer to replace the market segment-based groupings rejected in Conclusion 3 of TAM 200705028 with certain product-based groupings already accepted as valid by the Service for later taxable years.

CONCLUSIONS:

1. No. The Service denies Taxpayer's request for relief under section 7805(b)(8) to apply Conclusions 1 and 2 of TAM 200705028 without retroactive effect.

2. Because Issue 1 is not resolved in Taxpayer's favor, the Service cannot allow untimely grouping redeterminations with respect to the taxable years at issue.

FACTS:

This memorandum incorporates by reference the facts provided in TAM 200705028. In TAM 200705028, the National Office concluded with respect to Taxpayer that:

(1) the time limits for changing a grouping basis ("grouping deadlines") set forth in section 1.925(a)-1(c)(8)(i) apply to groupings for purposes of determining the overall profit percentage ("OPP groupings") under section 1.925(b)-1T(b)(3)(ii);

(2) Taxpayer's changes to its OPP groupings for Taxable Years 1, 2, and 3 were not timely under the grouping deadlines – in particular, the notification deadline set forth in the seventh sentence of section 1.925(a)-1(c)(8)(i); and

(3) section 1.925(a)-1T(c)(8)(ii) does not permit Taxpayer to elect OPP groupings on the basis of the market segments defined by Taxpayer.

After the National Office issued TAM 200705028, Taxpayer submitted a second technical advice memorandum ("TAM") request,[2] this time requesting relief under section 7805(b)(8) with respect to Conclusions 1 and 2 of TAM 200705028 so that those determinations would not apply retroactively. The request also provided that if the National Office granted the requested relief under section 7805(b)(8), Taxpayer would agree to use valid product groupings already accepted by Examination for later taxable years instead of the market segment-based groups rejected by the National Office. After Taxpayer submitted the request for relief under section 7805(b)(8), it submitted a letter dated March 6, 2007, in which Taxpayer proposed an alternative position to

[2] Taxpayer's submission primarily requested a TAM but also requested a pre-submission conference with respect to such potential TAM. We held a pre-submission conference with Taxpayer and its representatives on February 20, 2007, after which Taxpayer explicitly requested that we proceed with the TAM process with the full understanding that Taxpayer could not, from that point on, unilaterally stop the TAM process.

resolve the issues involving its OPP grouping redeterminations. We are treating that letter as a supplement to the second TAM request.

Taxpayer's second TAM request sets forth numerous arguments for section 7805(b)(8) relief. Many of those arguments are identical to arguments that Taxpayer raised in its first TAM request to challenge the correctness of Examination's position and that the National Office carefully considered and rejected in TAM 200705028. We will not re-analyze the correctness of those arguments (our position has not changed during the roughly eleven months since we issued the first TAM), but we will analyze whether such arguments – if hypothetically determined to be correct – would support a request for relief under section 7805(b)(8). The rest of the arguments presented by Taxpayer in the second TAM request are arguments that Taxpayer did not raise in connection with TAM 200705028, so we will consider them as a matter of first impression.

LAW AND ANALYSIS:

I. FSC Provisions

The foreign sales corporation ("FSC") provisions relevant to the FSC issues that are the subject of this memorandum are set forth in detail in TAM 200705028.

II. Section 7805(b)(8)

Section 7805(b)(8) provides:

> The Secretary may prescribe the extent, if any, to which any ruling (including any judicial decision or any administrative determination other than by regulation) relating to the internal revenue laws shall be applied without retroactive effect.

Section 301.7805-1(b) provides, in relevant part:

> The Commissioner may prescribe the extent, if any, to which any ruling relating to the internal revenue laws, issued by or pursuant to authorization from him, shall be applied without retroactive effect.

Section 7805(b)(8) is materially similar to its predecessor, section 506 of the Internal Revenue Act of 1934 (ch. 277, 48 Stat. 680, 757 (1934)), which provided:

> The Secretary, or the Commissioner with the approval of the Secretary, may prescribe the extent, if any, to which any ruling, regulation, or

> Treasury Decision, relating to the internal revenue laws, shall be applied without retroactive effect.

The legislative history to that section provides the following explanation of its purpose:

> [I]n some cases the application of regulations, Treasury Decisions, and rulings to past transactions which have been closed by taxpayers in reliance upon existing practice, will work such inequitable results that it is believed desirable to lodge in the Treasury Department the power to avoid these results by applying certain regulations, Treasury Decisions, and rulings with prospective effect only.

H.R. Rep. No. 704, 73d Cong., 2d Sess. 38 (1934).

Section 13.01 of Rev. Proc. 2007-2, 2007-1 I.R.B. 88, provides:

> The holdings in a TAM are applied retroactively, whether they are initial holdings or they are later holdings that modify or revoke holdings in a prior TAM. The Associate Chief Counsel with jurisdiction over the TAM, however, may exercise the discretionary authority under § 7805(b) to limit the retroactive effect of any holding. This authority is exercised in rare and unusual circumstances.

Section 13.02 of Rev. Proc. 2007-2 provides, in part:

> Generally, a TAM revoking or modifying a letter ruling or an earlier TAM will not be applied retroactively if: (1) the applicable law has not changed; (2) the taxpayer directly involved in the letter ruling or earlier TAM relied in good faith on it; and (3) revoking or modifying the letter ruling or earlier TAM would be detrimental to the taxpayer.

Section 14.01 of Rev. Proc. 2007-2 provides, in part:

> A taxpayer for whom a TAM was issued or for whom a TAM request is pending may request that the appropriate Associate Chief Counsel limit the retroactive effect of any holding in the TAM or of any subsequent modification or revocation of the TAM.

Thus, to address Taxpayer's request for relief under section 7805(b)(8), we must: (1) identify the arguments that Taxpayer advances in favor of granting it relief;

(2) determine whether the arguments are correct; and (3) determine whether the arguments, if correct, satisfy the requirements for relief under section 7805(b)(8).

III. Summary of Taxpayer's Arguments under Issue 1 of the Second TAM Request

The first step is to identify Taxpayer's arguments. Some of the arguments offered by Taxpayer apply only to Conclusion 1 of TAM 200705028. Other arguments apply only to Conclusion 2 of TAM 200705028. Still other arguments apply to both Conclusions 1 and 2. We summarize the arguments accordingly below.

A. Conclusion 1 Only

Taxpayer makes the following arguments in support of its claim that it is entitled to section 7805(b)(8) relief for Conclusion 1 of TAM 200705028:

#1. Section 1.925(b)-1T(b)(3)(ii), which provides rules for OPP groupings, does not contain a deadline for filing an election to make an OPP grouping redetermination.

#2. Taxpayer relied on statements made by Service personnel (as well as on non-statements of Service personnel and on published guidance and forms) that the grouping deadlines do not apply to OPP groupings.

#3. Denying Taxpayer's request for relief under section 7805(b)(8) will result in unfair discrimination against Taxpayer. In support of this position, Taxpayer claims that:

(a) the Service's position prior to the issuance of TAM 200705028 was that section 1.925(a)-1(c)(8)(i) did not apply to OPP groupings;

(b) the Service has allowed taxpayers that did not elect OPP groupings on their original returns to elect OPP groupings on amended returns after the grouping deadlines expired; and

(c) failure to permit prospective application of Conclusion 1 to Taxpayer constitutes an abuse of discretion. See United States v. Kaiser, 363 U.S. 299 (1960); Oshkosh Truck Corp. v. United States, 123 F.3d 1477 (Fed. Cir. 1997); International Business Machines Corp. v. United States, 343 F.2d 914 (Ct. Cl. 1965); and Computer Sciences Corp. v. United States, 50 Fed. Cl. 388 (2001).

#4. The grouping deadlines do not apply to OPP groupings because the Service's position relies on cross-references involving section 1.925(a)-1T(c)(8), a provision that sunset pursuant to section 7805(e)(2).[3] Moreover, the absence of grouping time limits

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[3] This summary of Taxpayer's argument #4 reflects our best effort to articulate the argument set forth at pages 14 and 15 of Taxpayer's submission. We note that, during the pre-submission conference, we

(as a result of the sunsetting) prevents the Service from limiting Taxpayer's right to redetermine its OPP groupings with grouping time limits. See First Chicago Corp. v. Commissioner, 842 F.2d 180 (7th Cir. 1988).

B. Conclusion 2 Only

Taxpayer makes the following arguments in support of its claim that it is entitled to section 7805(b)(8) relief for Conclusion 2 of TAM 200705028:

#5. The date of the notice of audit of a FSC is the date that the notification deadline starts. USCorp filed its claims for refund resulting from the grouping redetermination within one year after the day the Service sent USCorp-FSC a letter notifying it of an audit.

#6. The preamble to section 1.925(a)-1(c)(8)(i) states that the Service and taxpayers should plan and conduct examinations of grouping redeterminations made during the notification deadline period in a manner that facilitates efficient and fair administration of the FSC grouping rules for transfer pricing. Taxpayer acted in good faith by presenting its OPP grouping redeterminations in a manner that did not impose a significant audit burden on the Service.

C. Both Conclusions 1 and 2

Taxpayer makes the following arguments in support of its claims that it is entitled to section 7805(b)(8) relief for both Conclusions 1 and 2 of TAM 200705028.

#7. Section 1.925(a)-1(c)(8)(i) is invalid because the grouping deadlines conflict with section 6511.

#8. The Service cannot impose, through regulations, restrictions that are not explicitly authorized in sections 925 and 927. In particular, section 927(d)(2)(B), which authorizes the Treasury Department to issue regulations that provide rules for grouping transactions, does not authorize the Treasury Department to impose time limitations on taxpayers for purposes of grouping transactions. Therefore, the grouping deadlines provided in section 1.925(a)-1(c)(8)(i) are invalid because the Treasury Department and the Service went beyond the statutory authority when they issued T.D. 8944, 2001-1 C.B. 1067. See Rite Aid Corp. v. United States, 255 F.3d 1357 (Fed. Cir. 2001); Estate of Boeshore v. Commissioner, 78 T.C. 523 (1982). The Service must accept Taxpayer's OPP grouping redeterminations whenever made because the regulations providing the grouping deadlines are invalid and because Taxpayer's OPP grouping

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specifically asked Taxpayer if it intended to argue that the entire set of regulations contained in section 1.925(a)-1T(c)(8) is expired, and Taxpayer confirmed that intent.

redeterminations are reasonable and meet the standards provided in sections 925 and 927 of the Code.[4]

#9. The grouping deadlines conflict with section 1.925(a)-1T(e)(4), which provides that a FSC and its related supplier may redetermine the FSC commission if certain statutes of limitations for the FSC and related supplier are open.

#10. In addition to Taxpayer's request for relief under section 7805(b)(8), Taxpayer proposed an alternative position in a letter dated March 6, 2007, to resolve the issues involving its OPP grouping redeterminations. Under its proposal,[5] Taxpayer is willing to use OPP groupings that have been accepted by Examination as valid for later taxable years. Taxpayer claims that these alternative proposed groupings reflect two-, three-, and four-digit Standard Industrial Classification ("SIC") codes as did Taxpayer's original valid OPP groupings (in contrast to the groupings rejected in Conclusion 3 of TAM 200705028, which were based on market segments). Thus, Taxpayer argues that, because both the original groupings and the newly-proposed groupings involve the same SIC code families, they do not constitute grouping redeterminations within the meaning of section 1.925(a)-1(c)(8)(i), are not subject to the grouping deadlines and, therefore, are timely as long as they are submitted within the time limits provided in section 1.925(a)-1T(e)(4) and the statutes of limitations.

IV. Taxpayer's Arguments under Issue 1 Are Incorrect

Taxpayer offers approximately ten[6] arguments in support of its request for relief under section 7805(b)(8). We already addressed some of these arguments in TAM 200705028. Taxpayer raises other arguments here for the first time. As explained below, we believe that every argument set forth by Taxpayer is incorrect on the merits.

A. Arguments Rejected in TAM 200705028

In TAM 200705028, the Service generally addressed Taxpayer's arguments ##1, 2, 5, and 6. Because we have addressed these arguments in TAM 200705028 with respect to this very case and have not changed our position, we need not repeat that analysis in this TAM. However, we include additional discussion on Taxpayer's arguments #1 and #2.

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[4] Based on the organization of Taxpayer's TAM request, we believe that Taxpayer may consider its reasoning based on Rite Aid and its reasoning based on Boeshore as two separate arguments. We address Taxpayer's reasoning under the two cases as a single argument.

[5] This proposal is distinct from (but bears similarities to) Taxpayer's request reflected in Issue 2.

[6] We have a made a good faith effort to identify and address Taxpayer's arguments. Where two or more lines of Taxpayer's reasoning arguably could constitute two separate arguments but also appear to be logically related or otherwise intertwined, we generally treat those as two or more facets or elements of a single argument (for example, as explained in note 4, above).

i. *Argument #1*

One aspect of Argument #1 is new in comparison with the version of the argument first rejected in TAM 200705028. Taxpayer's submission states on page 11:

> In the Temporary Treasury Regulations issued in 2002, IRS deleted the cross reference in OPP grouping Temporary Treasury Regulations §1.925(b)-1T(b)(3) to the one year deadline contained in the Final Treasury Regulations §1.925(a)-1(c)(8) regarding grouping for determining combined taxable income.

As written, this statement is incorrect in several respects. First, the Service did not issue FSC regulations in 2002. Second, the Service did not issue regulations that deleted a "cross reference in OPP grouping" FSC regulations. Third, we are not sure what Taxpayer means by "the one year deadline" in final regulations. If Taxpayer means any of the grouping deadlines, then Taxpayer's assertion is incorrect again.

We surmise that Taxpayer intended to argue as follows:

> The Service amended section 1.925(b)-1T(b)(3)(i) in 2001 to remove a cross-reference to the notification deadline.

If this is what Taxpayer intended to say, Taxpayer's claim is incorrect. First, the cross-reference in question was a cross-reference to the no longer existing grouping rules under temporary regulations, not final regulations. Second, because the cross-referenced regulation did not contain the notification deadline, Taxpayer is incorrect to claim that the Service removed a cross-reference to such deadline. Third, the cross-reference was not within the OPP grouping rules as Taxpayer claims. The cross-reference was contained in section 1.925(b)-1T(b)(3)(i) whereas the OPP grouping rules are contained in section 1.925(b)-1T(b)(3)(ii).

ii. *Argument #2*

With respect to argument #2, Taxpayer claims that: (a) at a tax conference on March 24, 1998, one of Taxpayer's representatives heard a Service employee state that the grouping deadlines do not affect OPP groupings; and (b) at the public hearing for T.D. 8764, 1998-1 C.B. 844, a Service employee did not explicitly state that the Service had identified an administrability problem with respect to OPP groupings.

Assuming arguendo the Service employee made the statement as Taxpayer claims, that statement was a personal opinion and is not binding on the Service because personal opinions expressed by Service employees are irrelevant in construing or determining the validity of regulations. Otherwise, any public misstatement or statement of opinion by any Service employee would prevent the Service from correctly interpreting and administering the tax laws with a single voice. This ground is well-trod. See Sidell v. Commissioner, 225 F.3d 103, 111 (1st Cir. 2000) (internal IRS memoranda are not relevant to interpreting regulations because “internal memoranda represent the personal views of the authors, not the official position of the agency” and “the IRS must speak with a single voice, that is, through formal statements of policy such as regulations and revenue rulings”); Connecticut General Life Ins. Co. v. Commissioner, 177 F.3d 136, 145 (3d Cir. 1999), cert. denied, 528 U.S. 1003 (1999) (affidavits of several former Treasury officials describing remembered details of a regulation drafting process have little weight, especially where the officials “lacked the ultimate authority to issue any proposed regulation”); Armco Inc. v. Commissioner, 87 T.C. 865, 867-869 (1986) (post hoc views of the primary drafter of a regulation are not evidence but rather are personal opinions that were not formally reviewed or approved for public consumption as a statement of institutional intent); Vons Companies, Inc. v. United States, 51 Fed. Cl. 1, 21 (2001) (the court should “be extraordinarily hesitant to attribute to the IRS or the Treasury Department interpretations of a revenue ruling made by individual IRS employees that represent their personal views, rather than the official position of the agency”); Schwalbach v. Commissioner, 111 T.C. 212, 228 n.4 (1998) (Tax Court gave alleged public statements by agents of the Commissioner “no weight” regardless of whether actually made).

Moreover, the alleged statement regarded temporary regulations that are not the regulations at issue here. Thus, at best, it is an opinion regarding a regulation that was replaced by the regulations now at issue. In short, Taxpayer hangs its hat on an alleged personal opinion of a single Service employee with respect to a regulation that was revoked and does not apply to the case at issue.

In connection with Taxpayer’s second claim, Taxpayer does not cite any authority, and we are unaware of any authority, that supports Taxpayer’s position that a non-statement by a Service employee during a public hearing is evidence of the intent behind a provision in a regulation. In any event, the case law we cited above for the proposition that personal opinions expressed by Service employees are irrelevant in construing or determining the validity of regulations is equally applicable here and, therefore, any non-statement of a Service employee is similarly not binding on the Service.

B. Arguments not Addressed in TAM 200705028

For the reasons explained below, Taxpayer’s arguments ##3, 4, and 7 through 10 are incorrect.

i. *Argument #3*

Taxpayer claims that TAM 200705028 represents a change in the Service position with regard to the grouping deadlines and their applicability to OPP groupings. This is incorrect. TAM 200705028 was the first statement of the Service's interpretation of the grouping deadlines. TAM 200705028 cannot reflect a change in position because it was the only statement of our position prior to issuing this TAM (albeit a position that may not be used or cited as precedent pursuant to section 6110(k)(3)).

Taxpayer also claims that the Service has allowed one other taxpayer to make OPP groupings after the grouping deadlines expired. Taxpayer brought to our attention one audit in which a taxpayer that did not make an OPP grouping on its original return was permitted to make an OPP grouping on its amended return, after the grouping deadline. The agent's misapplication of the regulations in that audit does not amount to discrimination against Taxpayer. On the contrary, the agent's mistake in that audit merely put the other taxpayer on an equal footing with Taxpayer by allowing the other taxpayer to elect OPP groupings and benefit from the marginal costing rules. In this case, Taxpayer already validly elected OPP groupings on its original return and benefited from the marginal costing rules. In short, the single instance cited by Taxpayer does not constitute discrimination.

Nonetheless, Taxpayer cites Kaiser, Oshkosh, IBM, and Computer Sciences for the proposition that the Service must provide relief under section 7805(b)(8) lest Conclusions 1 and 2 in TAM 200705028 discriminate against Taxpayer.

In Kaiser, the Supreme Court considered whether the Service was required to treat certain payments in the same manner as it treated certain other payments in published rulings in order to treat all taxpayers fairly. The case involved two lines of rulings; one line of rulings determined that certain payments are non-taxable under the principle of gift and compensation for loss, and the other line of rulings determined that certain other payments are taxable. 363 U.S. 299, 312-313. While the majority opinion reached its decision on grounds other than applying a rational basis approach for treating similarly-situated taxpayers differently, as did Justice Frankfurter in his concurring opinion in which Justice Clark joined, Justice Frankfurter expressed the principle that "[t]he Commissioner cannot tax one and not tax another without some rational basis for the difference." Id. at 308.

In Oshkosh, the Federal Circuit Court of Appeals applied the similarly-situated taxpayer principle discussed in Kaiser to temporary regulations that exempted certain categories of income from imposition of an excise tax. The taxpayer argued that the same justification for exemption that underlay the regulatory exemption for certain income was equally applicable to taxpayers in the taxpayer's position. The Court found that limiting the regulatory exemption to a category of taxpayers that did not include the taxpayer at issue constituted an abuse of discretion because the taxpayer's situation was materially indistinguishable from situations that the regulations exempted. 123 F.3d 1477, 1481.

IBM involved the Service's issuance of inconsistent rulings to direct competitors on an identical issue. The Court of Claims applied the similarly-situated taxpayer principle and found that the Service abused its discretion by failing to apply a ruling only prospectively. 343 F.2d 914, 920-921. In other words, by applying the adverse ruling (i.e., a change in position) only prospectively, the Service would put the taxpayer on an equal footing with its direct competitor, which already availed itself of a prior contrary and beneficial ruling.

Computer Sciences involved the application of an arbitrary factor standard, as opposed to the rational basis standard articulated by Justice Frankfurter in Kaiser and applied in Oshkosh and IBM, to address whether the Service abused its discretion by imposing an arbitrary effective date for a revenue ruling that limited deductions for contributions to an employee benefits plan. The Claims Court held that the Service abused its discretion by allowing some taxpayers to deduct the contributions at issue and disallowing other taxpayers the same deduction based solely on an arbitrary factor – i.e., whether returns were filed by the effective date of the revenue ruling that disallowed the deductions. 50 Fed. Cl. 388, 396. The court held that the effective date unfairly discriminated among similarly-situated taxpayers because it provided different tax treatment based solely on an arbitrary effective date chosen solely for purposes of administrability. Id. at 398.

The key elements that were present in Kaiser, Oshkosh, IBM, and Computer Sciences are not present in Taxpayer's case.[7] The similarly-situated taxpayer principle may apply where two different rules or lines of rulings yield different tax consequences to two categories of taxpayers that ought to be treated the same. In other words, these cases stand for a fundamental rule of fairness. So the threshold question is whether the grouping deadlines issue involves two different rules or lines of rulings. The answer to that threshold question is "no." The grouping deadlines apply to all taxpayers. Every taxpayer has at least until one year after the extended due date of its income tax return to make grouping redeterminations. In addition, if a taxpayer is subject to an examination, it may qualify for an additional year to make grouping redeterminations. Both of these deadlines applied to Taxpayer, which complied with neither of them with respect to its amended return. So the evil addressed by the similarly-situated taxpayer principle – different rules for different taxpayers that should be treated similarly – is absent from the present case. On the contrary, the grouping deadlines are specifically designed to achieve both administrability and fairness; in particular, the notification deadline reflects the Service's acknowledgement that the situations of certain taxpayers may warrant additional opportunities to make grouping redeterminations.

[7] We do not concur with all of the reasons assigned by the Court for its conclusions in Oshkosh. Oshkosh Truck Corp. v. United States, AOD 1999-04 (Mar. 15, 1999).

The dissimilarities between Kaiser and its progeny, on the one hand, and the present case, on the other hand, are further amplified in the IBM context. IBM involved a taxpayer that sought prospective application of an adverse ruling so that it would not be placed at a tax disadvantage in comparison with a direct competitor that earlier received a beneficial ruling on the same issue. As noted last year by the Claims Court, IBM does not apply unless

> "(i) two or more taxpayers in direct economic competition have each applied for a ruling and only one has received a favorable ruling; and (ii) the taxpayer denied the favorable ruling is arguing that the Commissioner abused his discretion under section 7805(b) by failing to apply a new legal position only prospectively."

USA Choice Internet Service, LLC v. United States, 73 Fed. Cl. 780, 797, n.29 (2006) (citing Vons, 51 Fed. Cl. 1, 10). In addition to the fact that the present case does not involve two different rulings, IBM further does not apply to the present situation because this case does not involve direct competitors or a change in position (whether hypothetical or actually reflected in inconsistent rulings). In fact, none of Taxpayer's competitors (or any other taxpayers for that matter), benefit from a different rule or ruling than applies to Taxpayer.

Like IBM, Computer Sciences involves significant differences from the present case in addition to the threshold issue of two different rules or rulings. For example, Computer Sciences involved a situation where taxpayers were treated differently by an arbitrary effective date that had no reason for distinguishing between taxpayers other than ease of administrability for the Service. The present case is easily distinguished from that situation. The grouping deadlines do not treat taxpayers differently based on past actions of the taxpayers. Taxpayers are aware of the grouping deadlines before they file their income tax returns and for the duration of the period during which the grouping deadlines permit grouping redeterminations. Neither the grouping deadlines themselves nor their effective date denied Taxpayer the opportunity to file grouping redeterminations.

In addition, unlike Computer Sciences, this case does not involve a rule that distinguishes among taxpayers solely for purposes of administrability. It is well-documented that the impetus for the grouping deadlines was basic concern regarding the administrability of the FSC administrative pricing rules. The evolution of the grouping deadlines – from the original "embargo" on grouping redeterminations provided in T.D. 8764 to the less rigid time limits provided in Notice 99-24, 1999-1 C.B. 1069, to the even less restrictive final grouping deadlines set forth in section 1.925(a)-1(c)(8)(i) – indicates that the grouping deadlines reflect a balancing of administrative and compliance concerns on one hand, and fairness concerns, on the other hand. For instance, the notification deadline, which is the specific grouping deadline at issue in this case, was included to give taxpayers an additional opportunity to make grouping redeterminations in limited cases. But Taxpayer characterizes this granting of an additional opportunity to make grouping redeterminations as discriminatory and purely administrative. That characterization is directly contradicted by the regulations themselves and by the well-documented evolution of the rules. A rule intended to benefit taxpayers cannot fairly be characterized as an arbitrary rule designed solely for administrability.

In addition, Taxpayer cites Computer Sciences for the proposition that, without specific Congressional authorization in a statute, any regulation or published guidance that the Service issues that provides for a deadline for purposes of administrative convenience is invalid. Taxpayer's claim is unfounded. Nowhere in Computer Sciences does the court suggest that explicit Congressional authorization in a statute is a prerequisite for a regulatory time limit. Indeed, the Tax Court's holding in Union Carbide Corp. v. Commissioner, 110 T.C. 375, 388 (1998) contradicts Taxpayer's assertion. In Union Carbide, the Tax Court held that section 1.925(a)-1T(e)(4) – which provides that a taxpayer-initiated redetermination resulting in a refund for the related supplier is permitted only if, among other requirements, the section 6511 refund statute of the corresponding FSC is open – is valid. In other words, the Tax Court has already upheld a deadline for FSC redeterminations that is not specifically mandated by statute. Moreover, the section 1.925(a)-1T(e)(4) time limit at issue in Union Carbide applies to grouping redeterminations. See Treas. Reg. § 1.925(a)-1(c)(8)(i) (8^{th} sentence) (regarding the present case) and T.D. 8126, 1987-1 C.B. 184, 206 (regarding Union Carbide).

Like IBM, Oshkosh, and Kaiser, Computer Sciences is inapposite to the present case and, thus, the similarly-situated taxpayer principle (in its various permutations as reflected in those cases) is not relevant here. This case involves neither separate sets of rules nor unfair treatment of one taxpayer in comparison to others.

ii. *Argument #4*

Taxpayer seems to claim that section 1.925(a)-1T(c)(8) sunset in its entirety pursuant to section 7805(e)(2) but provides no explanation or rationale to support this claim. Taxpayer does not indicate the date (or dates) on which the sunset occurred. Moreover, Taxpayer does not explain why it apparently believes that, although section 1.925(a)-1T(c)(8) sunset, the rest of section 1.925(a)-1T remains in effect. Taxpayer also cites First Chicago for the proposition that, in the absence of grouping regulations, Taxpayer may elect any OPP groupings it likes, whenever it likes.

On March 3, 1987, the Service and Treasury Department issued T.D. 8126, which provided the first temporary regulations under section 925. On March 3, 1998, the Service and Treasury Department issued T.D. 8764, which provided temporary regulations that amended sections 1.925(a)-1T(c)(8)(i) and 1.925(b)-1T(b)(3)(i). On

March 6, 2001, the Service and Treasury Department issued T.D. 8944, which finalized the grouping deadlines in section 1.925(a)-1(c)(8)(i), reserved section 1.925(a)-1T(c)(8)(i), and amended section 1.925(b)-1T(b)(3)(i) by removing the language added by T.D. 8764. Therefore, T.D. 8944 finalized or removed all amendments made by T.D. 8764 and reserved section 1.925(a)-1T(c)(8)(i) because it was replaced by section 1.925(a)-1(c)(8)(i).

Section 7805(e)(2) provides: "Any temporary regulation shall expire within 3 years after the date of issuance of such regulation." Section 7805(e)(2) is effective only for regulations issued after November 20, 1988. See Technical and Miscellaneous Revenue Act of 1988, § 6232(b) (Pub. L. No. 100-647, 102 Stat. 3342, 3735 (1988)). The temporary regulations issued in T.D. 8126 in 1987 are not subject to section 7805(e)(2) because they were issued before November 21, 1988.[8] The temporary regulations issued in T.D. 8764 in 1998 are subject to section 7805(e)(2), which is why the Service and Treasury Department finalized, removed, or reserved the provisions in those temporary regulations in T.D. 8944.[9]

Because section 1.925(a)-1T(c)(8) did not sunset, Taxpayer's reliance on First Chicago is misplaced. First Chicago involved the proper application of a statute in the absence of legislatively mandated regulations. The present case involves the application of sections 1.925(a)-1(c)(8)(i) and 1.925(a)-1T(c)(8) both of which remain in effect; it does not involve a situation in which the Service and Treasury Department failed to issue regulations. Therefore, First Chicago is inapplicable to the present case.

iii. *Argument #7*

Taxpayer cites no case law or other authority to support argument #7. Taxpayer offers only a conclusory statement that the grouping deadlines in section 1.925(a)-1(c)(8)(i) conflict with the refund period of limitations provided in section 6511 and, therefore, the grouping deadlines are invalid. We are not aware of any authority that supports Taxpayer's position. On the contrary, case law and legislative history directly contradict Taxpayer's position.

[8] During the pre-submission conference, Taxpayer stated that it believed section 1.925(a)-1T(c)(8) sunset, not section 1.925(a)-1T(c)(8)(i). While we conclude that neither the larger nor the smaller portion of the regulation sunset, we are particularly surprised that Taxpayer claims that portions of a regulation that have remained unchanged since before the effective date of section 7805(e)(2) have sunset. Logically, under Taxpayer's theory, we would think that any post-section 7805(e)(2) effective date change to section 1.925(a)-1T, no matter how minor, would result in the sunsetting of entire section 1.925(a)-1T. But Taxpayer does not follow its own reasoning to the logical conclusion.

[9] Even if the situation were different such that section 7805(e)(2) did cause section 1.925(a)-1T(c)(8) to sunset, such sunset would not have occurred until March 6, 2004.

But first, we note that making a grouping redetermination is conceptually and legally distinct from filing a claim for refund under section 6511. Section 6511(a) provides in relevant part:

> Claim for credit or refund of an overpayment of any tax imposed by this title in respect of which tax the taxpayer is required to file a return shall be filed by the taxpayer within 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever of such periods expires the later. . . .

Thus, section 6511 provides a time limit for filing a claim for refund if a valid basis for a refund exists. In the general context of taxpayer-initiated FSC redeterminations, a valid basis for a refund exists only if the related supplier and FSC make a valid redetermination as permitted under the FSC provisions, including timing rules set forth in section 1.925(a)-1T(e)(4). But, in the specific case of FSC grouping redeterminations, the timing rules of section 1.925(a)-1T(e)(4) are supplemented by the grouping deadlines in section 1.925(a)-1(c)(8)(i). In other words, in the FSC context, the section 6511 deadline for claiming a refund is relevant only if a valid FSC redetermination has been made. For that purpose, section 1.925(a)-1(c)(8)(i) provides rules for determining whether a valid FSC grouping redetermination – and, therefore, a valid basis for a refund – exists in the first place. Therefore, section 6511 does not conflict with section 1.925(a)-1(c)(8)(i). If a taxpayer has made a valid (including timely) grouping redetermination under sections 1.925(a)-1(c)(8)(i) and 1.925(a)-1T(e)(4), and if that grouping redetermination supports a refund claim, then the taxpayer may claim a refund under section 6511, provided such refund would be timely and otherwise permissible under that statute.

In addition, as discussed above, Union Carbide confirmed that time limitations set forth in the FSC regulations can prevent a taxpayer from making a FSC redetermination that would result in a refund to the taxpayer even if the taxpayer's refund statute is open under section 6511. 110 T.C. 375. This directly contradicts Taxpayer's claim that the FSC grouping deadlines cannot prevent a redetermination if Taxpayer's statute for refund is open under section 6511.

Finally, the legislative history to the FSC Repeal and Extraterritorial Income Exclusion Act of 2000 (Pub. L. No. 106-519, 114 Stat. 2423 (2000)) supports the position that the regulations providing the rules for grouping transactions are consistent with Congressional intent and, therefore, are valid. The new legislation was considered and enacted while the original "embargo" on grouping redeterminations provided in T.D. 8764 was in effect. Those grouping redetermination rules provided that taxpayers could not make grouping redeterminations on untimely filed original returns or on amended returns. Thus, those rules were more restrictive than the grouping deadlines at issue here. The legislative history states:

> Under the bill, the Secretary of the Treasury is provided authority to prescribe rules for using marginal costing and for grouping transactions in determining qualifying foreign trade income. It is intended that similar principles under present-law regulations apply for these purposes.

S. Rep. No. 416, 106th Cong., 2d Sess. 18 (2000) (footnote omitted). A footnote to the above-quoted paragraph provides a "See, e.g.," reference to sections 1.925(a)-1T(c)(8) and 1.925(b)-1T. Congress' endorsement of the more restrictive grouping deadlines provided in T.D. 8764 with respect to section 943(b)(1)(B) (which is identical to section 927(d)(2)(B)) indicates that the less restrictive grouping deadlines in section 1.925(a)-1(c)(8)(i) are not inconsistent with Congressional intent or otherwise beyond the authority of Treasury and the Service.

iv. *Argument #8*

Section 927(d)(2)(B) provides:

> To the extent provided in regulations, any [FSC statute] which, but for this subparagraph, would be applied on a transaction-by-transaction basis may be applied by the taxpayer on the basis of groups of transactions based on product lines or recognized industry or trade usage. Such regulations may permit different groupings for different purposes.

Thus, the Service and Treasury Department issued section 1.925(a)-1(c)(8)(i) pursuant to authority provided by sections 927(d)(2)(B) and 7805(a) to provide rules for grouping transactions. See T.D. 8944, 2001-1 C.B. 1067, 1068; see also T.D. 8126, 1987-1 C.B. 184, 191 and T.D. 8764, 1998-1 C.B. 844, 845. Section 927(d)(2)(B) gives the Secretary broad authority to issue regulations to provide the rules that allow taxpayers to group transactions. Section 927(d)(2)(B) permits grouping of transactions only "to the extent" that the Service and Treasury issue regulations permitting groupings. The Supreme Court "has many times declared that Treasury regulations must be sustained unless unreasonable and plainly inconsistent with the revenue statutes. . . ." Commissioner v. South Texas Lumber Co., 333 U.S. 496, 501 (1948); see also Bingler v. Johnson, 394 U.S. 741, 750 (1969). Considering the broad authority Congress gave the Secretary to promulgate rules for grouping transactions, and considering that the grouping deadlines are neither unreasonable nor plainly inconsistent with section 927(d)(2)(B), the grouping deadlines are valid.

Taxpayer cites Rite Aid and Boeshore in support of its argument that the grouping deadlines are invalid because they go beyond the statutory authority provided in section 927(d)(2)(B). Rite Aid involved a consolidated return regulation that the

Federal Circuit held exceeded the scope of the Secretary's rulemaking authority under section 1502 because it achieved results different from those that would obtain in the separate return setting. 255 F.3d 1357, 1360. Boeshore involved a regulation that was inconsistent with Congressional intent regarding the underlying statute. 78 T.C. 523, 529.

The regulations and statutory contexts addressed by the Rite Aid and Boeshore courts are materially different from the present case. Here, the grouping deadlines provided in section 1.925(a)-1(c)(8)(i) do not conflict with any FSC provision of the Code, nor do they impose restrictions or requirements that are inconsistent with Congressional intent with such provisions. As discussed above, in the legislative history to the FSC Repeal and Extraterritorial Income Exclusion Act of 2000, Congress cited section 1.925(a)-1T(c)(8), which included the stricter predecessor of the grouping deadlines, as providing proper rules for purposes of grouping transactions. S. Rep. No. 416, 106th Cong., 2d Sess. 18. And as noted, the Union Carbide decision demonstrates that FSC regulations may impose time limits on redeterminations in addition to the statutory limitations under sections 6501 and 6511. In fact, the Tax Court stated with respect to the time limits set forth in the fourth sentence of section 1.925(a)-1T(e)(4):

> To deny the Secretary the ability to place time constraints on the benefits conferred by [section 1.925(a)-1T(e)(4)] would unduly circumscribe his authority under section 7805(a) to adopt 'ALL needful rules and regulations' for the enforcement of the revenue statutes.

110 T.C. 375, 389 (emphasis in original). The Tax Court's conclusion regarding the time limits and benefits under section 1.925(a)-1T(e)(4) is equally applicable to the time limit and benefits under section 1.925(a)-1(c)(8)(i). Taxpayer's claim – that the grouping deadlines are invalid as a result of lack of legal authority to promulgate such rules – is baseless.

The grouping deadlines do not exceed the scope of section 927(d)(2)(B) or any other FSC provision. On the contrary, the grouping deadlines are part of a regulatory framework that defines "the extent" to which groupings are permitted under section 927(d)(2)(B). Because the grouping deadlines do not exceed the scope of the underlying statutory basis, Rite Aid and the principle for which it is cited by Taxpayer are inapposite.[10] Moreover, the grouping deadlines do not contradict legislative intent. On

[10] In any event, Taxpayer's reliance on Rite Aid is misplaced in light of subsequent Congressional action which has significantly circumscribed the scope of that decision. Congress responded to Rite Aid in section 844(a) of the American Jobs Creation Act ("AJCA") (Pub. L. No. 108-357, 118 Stat. 1418 (2004)) by rejecting the Federal Circuit's interpretation of the scope of the Secretary's legislative rulemaking authority and amending section 1502 to reaffirm the breadth of such authority (by explicitly authorizing the Secretary to prescribe rules for consolidated taxpayers that are different from those applicable to taxpayers filing separate returns). Significantly, these changes to section 1502 were given retroactive effect. AJCA, § 844(c). In addition, in the legislative history to the AJCA, Congress further limited the

the contrary, the legislative history for the successor regime to the FSC provisions shows that Congress approved of an even more restrictive grouping time limit than the one applicable in this case. Consequently, Boeshore is inapposite as well.

v. *Argument #9*

We do not agree with Taxpayer that sections 1.925(a)-1(c)(8)(i) and 1.925(a)-1T(e)(4) conflict. Quite the opposite, section 1.925(a)-1(c)(8)(i) explicitly incorporates the rules of section 1.925(a)-1T(e)(4). Indeed, since the original promulgation of regulations under section 925 (other than the three year period when T.D. 8764 prohibited grouping elections on untimely and amended returns), grouping redeterminations under sections 1.925(a)-1T(c)(8)(i) and 1.925(a)-1(c)(8)(i) have been permitted only if, among other requirements, the redeterminations are also permissible under section 1.925(a)-1T(e)(4). The fourth sentence of original section 1.925(a)-1T(e)(4) provided:

> In addition, a redetermination may be made by the FSC and related supplier if their taxable years are still open under the statute of limitations for making claims for refund under section 6511 if they determine that a different transfer pricing method or grouping of transactions may be more beneficial.

T.D. 8126, 1987-1 C.B. 184, 206 (emphasis added). Section 1.925(a)-1T(e)(4) did not apply to grouping redeterminations during the period when T.D. 8764 was effective because section 1.925(a)-1T(c)(8)(i) did not allow grouping redeterminations during that period. The version of section 1.925(a)-1T(c)(8)(i) set forth in T.D. 8764 provided in part:

> No untimely or amended returns will be allowed to elect to group, to change a grouping basis, or to change from a grouping basis to a transaction-by-transaction basis. . . . For any taxable year beginning before January 1, 1998, for which a redetermination is otherwise permissible under [section 1.925(a)-1T(e)(4)] as in effect for taxable years beginning before January 1, 1998, a redetermination of grouping of transactions cannot be made later than the due date of the FSC's timely filed U.S. income tax return (including extensions thereof) for the FSC's first taxable year beginning after December 31, 1997.

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impact of Rite Aid by stating that the result in that case was to be restricted to its particular factual situation. See H.R. Conf. Rep. No. 755, 108th Cong., 2d Sess. 653 (2004).

1998-1 C.B. 844, 845. Effective since the issuance of T.D. 8944 in 2001, the eighth sentence of section 1.925(a)-1(c)(8)(i) provides:

> In addition, any grouping redeterminations made under this paragraph must meet the requirements under §1.925(a)-1T(e)(4) with respect to redeterminations other than grouping.

Thus, section 1.925(a)-1T(e)(4) provides time limits for all FSC redeterminations while section 1.925(a)-1(c)(8)(i) provides additional time limits for FSC grouping redeterminations only. This interaction between sections 1.925(a)-1T(e)(4) and 1.925(a)-1(c)(8)(i) is mandated by the eighth sentence of section 1.925(a)-1(c)(8)(i), which provides that grouping redeterminations must also meet the requirements under section 1.925(a)-1T(e)(4). Far from conflicting, the two rules work together (whether in seriatim or pari passu) to impose multiple time limits on grouping redeterminations.

vi. *Argument #10*

First, we note that the underlying premise of Taxpayer's argument #10 – i.e., that its OPP groupings correspond to SIC codes – conflicts with the facts. For purposes of TAM 200705028, Taxpayer stipulated that its original valid groupings were based on codes that were similar to, but not identical to, SIC codes. Therefore, Taxpayer's original groupings were based on recognized trade or industry usage ("RTIU"), not SIC codes. Similarly, the new groupings that Taxpayer now proposes to use to replace its market segment-based groupings are based on RTIU, not SIC codes. So, the foundation of Taxpayer's argument #10 – that Taxpayer proposes to change from broader SIC codes to narrower SIC codes – is untrue. In the event,Taxpayer intends its argument to also apply in the RTIU context (perhaps by analogy), we explain below that the rest of Taxpayer's argument is flawed as well.

Taxpayer focuses on the language of the fourth sentence of section 1.925(a)-1(c)(8)(i), which identifies the three types of grouping redeterminations as:

> to elect to group, to change a grouping basis, or to change from a grouping basis to a transaction-by-transaction basis. . . .

In other words, a grouping redetermination may be an original election to group ("elect to group"), an election to change from prior groupings to new groupings ("change a grouping basis"), or an election not to group transactions after a prior election to group ("change from a grouping basis to a transaction-by-transaction basis"). Taxpayer correctly observes that its newly proposed groupings election is of the "change a grouping basis" variety. But Taxpayer argues that its newly elected groupings would not actually constitute a change in grouping basis within the meaning of section 1.925(a)-

1(c)(8)(i) because the new groupings were subsumed within the broader groupings originally elected. Therefore, no grouping redetermination occurs and the grouping deadlines do not apply. Taxpayer cites no authority for this assertion (other than its attempt to parse the rules for SIC code groupings, which Taxpayer has not used), fails to explain how one can distinguish between a true change in grouping basis (according to Taxpayer, a grouping redetermination) and a mere change in groupings (according to Taxpayer, not a grouping redetermination), and disregards the plain language of the regulation. In short, Taxpayer asks us to interpret "grouping redetermination" as not including most, if not all, elections to change groupings, thereby rendering the grouping deadlines irrelevant.

The language of the grouping rules and the purpose underlying the grouping deadlines lead inexorably to the conclusion that all elections to change groupings are grouping redeterminations subject to the grouping deadlines.

The first four sentences of section 1.925(a)-1(c)(8)(i) provide:

> The determinations under this section are to be made on a transaction-by-transaction basis. However, at the annual choice made by the related supplier if the administrative pricing methods are used, some or all of these determinations may be made on the basis of groups consisting of products or product lines. The election to group transactions shall be evidenced on Schedule P of the FSC's U.S. income tax return for the taxable year. No untimely or amended returns filed later than one year after the due date of the FSC's timely filed (including extensions) U.S. income tax return will be allowed to elect to group, to change a grouping basis, or to change from a grouping basis to a transaction-by-transaction basis (collectively "grouping redeterminations").

Thus, section 1.925(a)-1(c)(8)(i) focuses on the distinction between determinations made on a transaction-by-transaction basis and those made on a grouping basis. If a taxpayer elects to group, it is choosing to make determinations on a grouping basis. If the taxpayer later elects to change its groups, it has made a change in grouping basis. Alternatively, if the taxpayer later decides not to group after all, the taxpayer has elected to change from a grouping basis to a transaction-by-transaction basis. Under any reasonable reading of section 1.925(a)-1(c)(8)(i), "change a grouping basis" must refer to electing to change from one set of groupings to another. The regulation contains no hint or suggestion that "change a grouping basis" refers only to some changes in groupings.

Moreover, section 1.925(a)-1T(c)(8)(ii), on which Taxpayer relies to support its position, does not even contain the word “basis” or the phrase “grouping basis.” So it cannot be argued that regulation stands for the proposition that some elections to change groupings do not in fact constitute changes in grouping basis and, therefore, grouping redeterminations.

We think Taxpayer may intend to argue that a change from broader groupings to narrower groupings subsumed within the original broader groupings should not be considered an election to change a grouping basis because the original grouping election included the election of the narrower. This view is incorrect. The original election of broader groupings includes only those broader groupings. By initially electing the broader groupings, Taxpayer chose not to elect the narrower groupings. Thus, the later decision to change to the narrower groupings constitutes a new election to group the narrower groupings while also choosing not to elect the broader groupings.

Taxpayer also claims that statements made by a Service employee at the public hearing for T.D. 8764 indicate that the grouping deadlines do not apply to increasing or decreasing the number and/or size of groupings, which is what Taxpayer is proposing to do here. In particular, Taxpayer quotes a Service employee as saying:

> I understand – and as you notice, <u>we did not expand this beyond the grouping</u> because we felt that the grouping was the issue. Taxpayers can still <u>go back and change methods</u>. Taxpayers can still <u>remove sales, add sales</u> – there are a <u>whole series of redeterminations that can be done</u>.

98 TNT 123-40, “Unofficial Transcript of IRS Hearing on FSCs,” ¶ 69 (June 26, 1998) (emphasis added). Taxpayer claims that the quoted reference to adding and removing sales means that increasing or decreasing the number and/or size of groupings should not be considered a grouping redetermination. Taxpayer fails to appreciate that, as a matter of simple logic, every change in groupings results in an increase or decrease to the number and/or size of groupings. Thus, if Taxpayer’s argument is followed to its logical conclusion, no change in groupings would ever constitute a grouping redetermination within the meaning of section 1.925(a)-1(c)(8)(i). That obviously cannot be the correct result.

The actual meaning of the quoted statement refers to redeterminations that have nothing at all to do with grouping. In particular, (1) “go back and change methods” refers to redeterminations that result when a taxpayer changes its transfer pricing method pursuant to the fourth sentence of section 1.925(a)-1T(e)(4); (2) “remove sales, add sales” refers to redeterminations of foreign trading gross receipts[11] pursuant to the

[11] The Service traditionally has referred (as reflected in published memoranda) to increasing or decreasing foreign trading gross receipts pursuant to section 1.925(a)-1T(e)(4) as adding and removing

fifth sentence of section 1.925(a)-1T(e)(4); and (3) "whole series of redeterminations that can be done" refers not only to the two aforementioned categories but also to redeterminations that flow from adjustments under sections 482 and 861 pursuant to the third sentence of section 1.925(a)-1T(e)(4) and from changes in costs and expenses pursuant to the fifth sentence of section 1.925(a)-1T(e)(4). In other words, the speaker distinguished redeterminations involving groupings ("we felt that grouping was the issue") from redeterminations not involving groupings ("a whole series of redeterminations can be done"). Rather than supporting Taxpayer's position, the quoted language demonstrates that the drafters intended the grouping deadlines to apply to redeterminations that arise from changes in groupings.

To summarize, although Taxpayer's position is somewhat unclear, it is clear that Taxpayer believes that changing from broader SIC code groupings to narrower SIC code groupings is not a grouping redetermination. It is also clear that Taxpayer did not use SIC code groupings originally and is not proposing to use SIC code groupings now. Taxpayer's position, in essence, is that changes in groupings do not constitute grouping redeterminations unless the changes meet some vague threshold of significance. Taxpayer provides no meaningful framework for that standard and no legal justification. The only reasonable interpretation of section 1.925(a)-1(c)(8)(i) is that any election to change groupings constitutes a change in grouping basis and is, therefore, a grouping redetermination subject to the grouping deadlines.

V. Taxpayer's Arguments Do Not Satisfy the Requirements of Section 7805(b)(8)

As explained above, we believe that all of the arguments set forth by Taxpayer in support of its request for relief under section 7805(b)(8) are incorrect or otherwise without merit. Furthermore, we believe that those arguments, even if determined to be correct, would not support Taxpayer's request for relief. Therefore, even if one or more of Taxpayer's arguments were found to be correct, such argument and determination would not provide a basis for granting relief under section 7805(b)(8).

Under section 7805(b)(8), the Service provides relief only in rare and unusual circumstances. Rev. Proc. 2007-2, § 13.01. Rev. Proc. 2007-2 provides a single example of a situation with respect to which the Service generally should consider providing relief from retroactivity. The situation arises where the Service issues a TAM that revokes or modifies a letter ruling or an earlier TAM where the applicable law has not changed, the taxpayer directly involved in the letter ruling or earlier TAM relied in good faith on the ruling or TAM, and such revocation or modification of the letter ruling or earlier TAM would be detrimental to the taxpayer. 2007-1 I.R.B. 88, §§ 13.01 and 13.02. In other words, relief under section 7805(b)(8) may be appropriate where the Service changes its position in a TAM involving a taxpayer, and the taxpayer has already relied on a prior inconsistent TAM or ruling on the same issue. Although section

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sales. Moreover, it is only the sales/foreign trading gross receipts that are added/treated under the FSC provisions that are available to be grouped in the first place.

13.01 of Rev. Proc. 2007-2 provides that the Service's discretionary authority is exercised in rare and unusual circumstances, Rev. Proc. 2007-2 does not specify when this authority can and cannot be used other than in the situation described in the example. Taxpayer's case bears no similarity to the situation described in section 13.02 of Rev. Proc. 2007-2. Therefore, Taxpayer's only possible claim for relief under section 7805(b)(8) is under some other justification under the rare and unusual circumstances standard of Rev. Proc. 2007-2.

The legislative history to the predecessor of section 7805(b)(8) provides some insight into the authority Congress granted to the Service. The legislative history indicates that the Service has the authority to grant relief from retroactive application in cases involving transactions that a taxpayer has closed in reliance upon existing practice when not granting relief from retroactive application would cause inequitable results for the taxpayer. H.R. Rep. No. 704, 73d Cong., 2d Sess. 38 (1934). Thus, at least two elements must be present for the Service to invoke section 7805(b)(8) to provide relief from retroactive effect. First, the taxpayer must have closed a transaction in reliance on prior Service practice (for example, based on regulations in effect at the time of the closing), but the transaction is now subject to different Service practice (for example, as a result of a new regulation). Second, failure to grant relief would cause inequitable results for the taxpayer.

Taxpayer has not shown that either element – detrimental reliance on prior Service practice and consequent inequitable results – is present. At all relevant times, the grouping deadlines and the Service's administration thereof have remained unchanged. Thus, there was no detrimental reliance by Taxpayer of the sort contemplated by section 7805(b)(8). Nor has Taxpayer demonstrated that it has suffered any inequitable results by being denied the ability to change its groupings after the time permitted by the grouping deadlines. Taxpayer knew or should have known that it would not be permitted to change its groupings after a certain point in time.

By requesting relief under section 7805(b)(8) where such relief is unjustified and inappropriate, Taxpayer is, in essence, attempting to avoid the Service's determinations set forth in TAM 200705028 under the guise of an equitable remedy. This is not the purpose that section 7805(b)(8) is intended to serve. Section 7805(b)(8) addresses situations where the Service's valid change in position could adversely and unfairly impact a taxpayer that properly relied on an earlier Service position, not situations where a taxpayer disagrees with the Service's unchanged position. The Service does not have authority to grant relief under section 7805(b)(8) for Conclusions 1 and 2 in TAM 200705028. In making this determination, we note the irony that, if we instead were to grant the relief requested by Taxpayer, that determination would discriminate against all other taxpayers because it would disregard the grouping deadlines for Taxpayer while the other taxpayers remain subject to the grouping deadlines.

This case is straightforward. Our interpretation of the grouping deadlines is adverse to Taxpayer's position, and Taxpayer would like a different result. Section 7805(b)(8) is not properly applied just because a taxpayer disagrees with the Service's position. Section 7805(b)(8) applies only in rare and unusual circumstances. There is nothing rare or unusual about this case: (1) the Service and Treasury Department issued deadlines for grouping elections; (2) Taxpayer originally elected a set of OPP groupings in a timely manner in compliance with those deadlines; and (3) Taxpayer later attempted to elect a different set of groupings after the grouping deadlines had passed. These circumstances do not merit prospective application of TAM 200705028.

Because Issue 1 is not resolved in Taxpayer's favor, Issue 2 is moot, and we do not address it other than to emphasize that the Service cannot accept untimely grouping redeterminations with respect to Taxable Years 1, 2, and 3.

CAVEAT(S):

A copy of this technical advice memorandum is to be given to the taxpayer(s). Section 6110(k)(3) of the Code provides that it may not be used or cited as precedent.