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Memorandum

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to:
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(Large & Mid-Size Business)

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subject: SRLY Cumulative Register

LEGEND:

Taxpayer =

Foreign Parent =

P =

T =

Purchaser =

Sub 1 =

Third Party =

Year 1 =

Year 2 =

Year 3 =

Year 4 =

Year 5 =

Year 6 =

Year 7 =

Year 8 =

Year 9 =

Year 10 =

Date 1 =

Date 2 =

Date 3 =

Date 4 =

Date 5 =

Date 6 =

Date 7 =

Date 8 =

a =

b =

c =

d =

e =

f =

g =

h =

i =

j =

k =

l =

m =

n =

o =

This memorandum responds to your request for Chief Counsel Advice regarding the subject taxpayer. This Chief Counsel Advice may not be used or cited as precedent.

ISSUE

What items of income, gain, deduction and loss are included in the cumulative register's computation of the amount of the separate return limitation year (SRLY) net operating loss to be included in the consolidated net operating loss (CNOL) deduction for Year 9 and Year 10 where the SRLY losses were generated by T, T became a member of the group at issue in Year 4, and T was treated as liquidated into common parent P pursuant to a § 332 transaction during Year 8?

CONCLUSION

The Taxpayer must compute the limitation on T's SRLY losses by including in the SRLY register (1) the pre-liquidation income of T and (2) the post-liquidation income of P. Taxpayer must exclude the pre-liquidation income of P. Because such computation results in a negative SRLY register for the tax years at issue, Taxpayer cannot include any portion of the SRLY losses at issue in its CNOL deduction for Year 9 and Year 10.

FACTS

P is a domestic corporation and the common parent of the P affiliated group (the "Taxpayer" or "P group"). For all years in question, the Taxpayer filed consolidated returns. At all relevant times, P has been wholly owned by Foreign Parent.

T is a domestic corporation that was formed on Date 1, by Foreign Parent and Third Party. Initially, Foreign Parent held a percent of the stock of T. On Date 2, Foreign Parent increased its ownership interest to b percent, and on Date 3, Foreign Parent increased its ownership interest further to c percent.

On examination of its Form 1120 for the tax year ending on Date 4 (which included Date 2 and Date 3), T represented that it had experienced no ownership change under § 382 and regulations there under. This conclusion was accepted by the Service.

Before Year 4, T was not a member of an affiliated group that filed consolidated returns.

On Date 5, Foreign Parent transferred the stock of T to Sub 1, a domestic corporation and wholly-owned subsidiary of P. For the tax years Year 4 through Year 8, T was a member of the P group and joined in the filing of consolidated returns.

On Date 6, the Taxpayer filed Form 1120X, Amended U.S. Corporate Income Tax Return, requesting a refund of $f for tax Year 5. Under the provisions of § 1.1502-21(c), the Taxpayer claimed a SRLY net operating loss deduction with respect to T in the amount of $g, thereby reducing the cumulative register of T to $h. Such deduction was allowed by the Service on examination.

For the tax year Year 6, Year 7 and Year 8, T continued to be included in Taxpayer's consolidated return. However, on a separate company basis, in these years T incurred net operating losses of $i, $j and $k, respectively. These losses were used to offset consolidated taxable income. As a result, the cumulative register of T was reduced to the amount of $l (a negative number) by the time of the deemed liquidation of T into P in Year 8.

T carried over SRLY net operating losses into Year 8 in the amounts of $m, $n and $o from Year 1, Year 2 and Year 3, respectively. In Year 8, the Taxpayer claimed no net operating loss deduction relating to the SRLY NOLs. Therefore, the SRLY net operating loss carryover of $m from Year 1 expired.

On Date 7, Sub 1 distributed the stock of T to P. Thereafter, as of the close of business on Date 8 (a date included in Year 8), P sold the stock of T to Purchaser. With respect to the stock sale, P and Purchaser elected the provisions of § 338(h)(10), resulting in a deemed sale by T of its assets, followed by a liquidation of T into P.

In Year 9, the Taxpayer claimed a net operating loss deduction in the amount of $d, relating to SRLY NOL carryovers from Year 2 and Year 3, which were held by P as successor to T. In Year 10, the Taxpayer claimed a net operating loss deduction in the amount of $e, relating to a SRLY NOL carryover from Year 3, which was held by P as successor to T.

LAW

Section 381(a)(1) provides that, in the case of a liquidation to which § 332 applies, the acquiring corporation shall succeed to and take into account, as of the close of the day of distribution, the items of the distributor corporation described in § 381(c). Section 381(c)(1) provides that those items include the net operating loss carryovers of the distributor corporation, determined under § 172, subject to certain limitations. Section 381(c)(1)(A) provides that the taxable year of the acquiring corporation to which the net operating loss carryovers of the distributor corporation are first carried shall be the first taxable year ending after the date of the distribution.

Section 1.1502-1(e) provides that a "separate return year" is a taxable year of a corporation for which it files a separate return or for which it joins in the filing of a consolidated return by another group.

Section 1.1502-1(f)(1) defines a "separate return limitation year (or SRLY)" as any separate return year of a member or of a predecessor of a member, subject to exceptions that are not relevant to the issue presented herein.

Section 1.1502-1(f)(4) defines the term "predecessor" to include a transferor or distributor of assets to a member (the "successor") in a transaction to which § 381(a) applies.

Section 1.1502-21(a) provides that the consolidated net operating loss deduction (or NOL deduction) for any consolidated return year is the aggregate of the net operating loss carryovers and carrybacks to the year. It further provides that the net operating loss carryovers and carrybacks consist of (1) any CNOLs of the consolidated group, and (2) any net operating losses of the members arising in separate return years.

Section 1.1502-21(c)(1)(i) provides that the aggregate of the net operating loss carryovers and carrybacks of a member arising (or treated as arising) in SRLYs that are included in the CNOL deductions for all consolidated return years of the group under § 1.1502-21(a) may not exceed the aggregate consolidated taxable income ("CTI") for all consolidated return years of the group determined by reference to only the member's items of income, gain, deduction, and loss. This is commonly referred to as the cumulative register rule.

Section 1.1502-21(f)(1) provides that, for purposes of § 1.1502-21, any reference to a corporation, member, common parent, or subsidiary, includes, as the context may require, a reference to a successor or predecessor, as defined in § 1.1502-1(f)(4).

TAXPAYER'S POSITION

Taxpayer primarily argues that the cumulative register, which measures the P Group's ability to use T's Year 2 and Year 3 SRLY net operating losses, should include (1) T's income for the consolidated period prior to its liquidation, (2) P's income for the consolidated period following the liquidation of T, and (3) P's income for the consolidated period prior to the liquidation of T. [1]

In support of this argument, Taxpayer cites § 1.1502-21(c)(1)(i), which defines the cumulative register. This paragraph provides that the aggregate of the SRLY net operating loss carryovers and carrybacks of a member that are included in the CNOL deductions for all consolidated return years of the group may not exceed the aggregate CTI for all consolidated return years of the group determined by reference to only the member's items of income, gain, deduction, and loss. Taxpayer further relies on § 1.1502-21(f)(1), which provides that, for purposes of § 1.1502-21, "any reference to a corporation, member, common parent, or subsidiary includes, as the context may require, a reference to a successor or predecessor, as defined in § 1.1502-1(f)(4). Relying on these two provisions, Taxpayer concludes that, because P is a successor to T within the meaning of § 1.1502-1(f)(4), the pre-liquidation income of P should be included in the SRLY register. The Taxpayer argues:

> Applying the foregoing rules and assuming that the NOPA is correct in treating [T] as a predecessor to [P], then [P], by definition, must be the successor of [T]. Thus, applying the foregoing provisions, the SRLY Register of [T] includes the *aggregate* items of income and deduction of both [T] *for all consolidated return years* and also includes the aggregate items of its successor, [P], *for all consolidated return years*.

Taxpayer further argues that its application of the regulations is consistent with the Service's analysis of a different § 381 transaction in Rev. Rul. 75-223.

In the alternative, Taxpayer argues that the cumulative register should include only the taxable income of P generated after the liquidation and maintains that pre-liquidation income of both T and P should be excluded from the cumulative register. The Taxpayer argues:

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[1] T's pre-liquidation income is T's items of income, gain, deduction and loss computed under § 1.1502-21(c)(1)(i) from the date T became a member of the P consolidated group to the date of T's liquidation. Similarly P's post-liquidation income is P's items of income, gain, deduction and loss computed for the period after the liquidation.

> Although we believe the approach described above [i.e., Taxpayer's primary argument] is technically correct, we believe that an approach that excluded both the income history of the predecessor, [T], and that of its successor, [P], would be reasonable. This is because such treatment would treat a predecessor and a successor equally.

Under either argument, the Taxpayer would have sufficient income in the cumulative register to deduct in Year 9 and Year 10 the SRLY net operating losses generated by T in Year 2 and Year 3.

ANALYSIS

The Taxpayer and the Service agree that the amount of the SRLY NOLs at issue that can be included in the P Group's CNOL deduction is limited by the cumulative register, as defined in § 1.1502-21(c)(1)(i). The primary issue in this case is whether the cumulative register includes the items of income, gain, deduction and loss of P, as a successor to T, for the period prior to the deemed liquidation of T into P. Taxpayer concedes in its primary argument that the cumulative register should include the pre-liquidation income of T, as well as the post-liquidation income of P. The Service agrees with the inclusion of these two components. However, for the reasons discussed below, the pre-liquidation income of P may not be included in the SRLY register. We also discuss the reasons for rejecting Taxpayer's alternative argument that the SRLY register should include only the post-liquidation income of P.

1. Predecessors and Successors

Section 1.1502-21T(f)(1) provides that, for purposes of § 1.1502-21T, "any reference to a corporation, member, common parent, or subsidiary, includes, as the context may require, a reference to a successor or predecessor, as defined in § 1.1502-1(f)(4)." Section 1.1502-1(f)(4) provides general definitions of predecessor and successor for purposes of the consolidated return regulations. Section 1.1502-1(f)(4) provides that the definition of "predecessor" includes a distributor of assets to a member (the successor) in a transaction to which § 381(a) applies.

Pursuant to § 381(a)(1), P succeeded to T's separate company NOLs upon the deemed liquidation of T into P that resulted from the § 338(h)(10) election. Because the deemed liquidation constituted a transaction to which § 381(a) applied, P is treated as the successor to T under the general definition of predecessor and successors in § 1.1502-1(f)(4). However, all entities that satisfy the general predecessor/successor definition of § 1.1502-1(f)(4) are not automatically treated as extensions of group members for SRLY purposes. Rather, § 1.1502-21(f)(1) imposes a higher threshold for treatment of a predecessor as an extension of a member that is subject to the SRLY regulations. Under § 1.1502-21(f)(1), any reference to a member of a group includes, "as the context may require, a reference to a successor or predecessor, as defined in

§ 1.1502-1(f)(4)." (Emphasis added.) Therefore, for purposes of determining the proper inclusion (if any) of the income of P into the cumulative register corresponding to T's SRLY NOLs, it must be determined whether the context of the rules at issue requires such inclusion.

Thus, the controversy in this case concerns the meaning of the phrase, "as the context may require." In 1991, Treasury and the Service proposed the regulations that became the current SRLY regulations ("1991 regulations"). See CO-78-90, 1991-1 C.B. 757. This proposal included the predecessor and successor concepts herein at issue. Neither the 1991 regulations, nor the final version of the SRLY regulations, expounds on the meaning of the phrase "as the context may require." However, an examination of the pertinent sections of the 1991 regulations, the accompanying preamble, as well as the history and purpose of the SRLY regulations, provides a strong basis for interpretation of this language.

The preamble to the 1991 regulations provides only limited explanation of the "as the context may require" filter on the application of the predecessor and successor rule. However, the preamble strongly suggests that this language was intended, at least in part, to serve an anti-abuse function, to prevent inappropriate expansion of the SRLY limitation. The preamble states:

> To prevent one member's inappropriate use of the historic contribution to consolidated taxable income by another member, predecessors will be taken into account only as the context may require. In addition, a SRLY limitation may not be increased by a member transferring a portion of its assets in order to divide its contribution to consolidated taxable income between itself and other members of the group. [CO-78-90, 1991-1 C.B. at 759 (emphasis added).]

Although the 1991 preamble expressly discusses this concept only with regard to preventing inappropriate use by a successor of predecessor items, the text of the regulation clearly allows that both predecessor and successor status will be allowed only "as the context may require".

To determine whether an inclusion in the cumulative register of pre-liquidation income of P would be inappropriate, it is necessary to examine the purpose and function of the SRLY rules in general and of the cumulative register rules in particular. To the extent that such an inclusion is consonant with the operation of and intent behind those rules, the inclusion should be allowed; to the extent that such an inclusion is inconsistent with the operation and intent of those rules, it should be disallowed.[2]

2. History and Purpose of The SRLY Rules

[2] The question of the appropriate interpretation of the "as the context may require" provision has arisen in the past. In that case, the Service also required an examination of the intent and purpose of the SRLY rules generally and the cumulative register rules specifically in determining what successor/predecessor items could be included in a cumulative register. See TAM 200514019.

The SRLY rules have historically served to police the line between consolidated return years and separate return years. One of the most valuable features of consolidated filing is the right of a group to freely offset the losses of one member against the income and gain of other members. See § 1501; § 1.1502-11(a). However, it was established very early in the history of consolidated filing that the right to such unlimited offset extends only to losses incurred during years of affiliation. See Woolford Realty Co. v. Rose, 286 U.S. 319 , 330 (1932) (affirming the opinion of the 5th Circuit and stating that deduction of a separate year loss of one member against consolidated taxable income attributable to a different member "is unreasonable and cannot have been intended by the framers of the statute.") With regard to whether such a limitation impeded the proper functioning of the precursors to §§ 172 and 1502, the circuit court of appeals stated:

> The view we take gives full effect to them both. It does not permit affiliation to deprive the taxpayer of his net loss privilege or in any manner diminish it. It does not permit affiliation to enlarge or in any manner change it. [53 F.2d 821, 825 (5th Cir. 1931).]

The SRLY rules implement the principle established by Woolford Realty and limit a group's ability to offset separate return year losses of one member against the income of other members. As discussed above, SRLY losses are usable by a group only to the extent of the positive income contribution of the SRLY member. See § 1.1502-21(c)(1)(i)). Through this mechanism, the SRLY regulations replicate, to the extent possible, separate entity treatment of the SRLY member. In other words, the SRLY regulations were designed to produce an absorption result that varies as little as possible from the absorption that would have occurred, had the SRLY member not been acquired by the consolidated group.[3]

3. Cumulative Register

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[3] This understanding of the intent of the SRLY regulations is broadly accepted by commentators in the area. For example, a leading commentator in the area has explained:

> The SRLY rules represent an effort to reconcile the inconsistent single and separate-entity treatment of members, to avoid disrupting reasonable expectations (on the part of both taxpayers and the government). Reconciliation is achieved by preserving the separate return NOLs solely for purposes of offsetting the member's own income after it joins the group (but not the income of other members). The SRLY limitation has been applied in various forms since the 1920s to preserve a significant element of separate return treatment within a consolidated return.
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> * * * * * *
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> Where the SRLY limitation still applies, a member's ability to absorb its SRLY attributes is based essentially on the separate return rules.

2 Dubroff, et al., Federal Income Taxation of Corporations Filing Consolidated Returns, § 42.02[1][a] (Emphasis added; internal citations omitted.).

The regulations in effect for the years prior to the issuance of the current SRLY regulations ("pre-1991 regulations") provided for a clear separate entity-based rule regarding the use of SRLY losses. A consolidated group could use such losses to offset only the income generated by the member carrying over such losses, with that income measured on a year-by-year basis. That is, the amount of the SRLY loss that the group could use in a particular year was gauged by the amount of taxable income that the SRLY member produced in that same year. See § 1.1502-21A(c)(2). Unfortunately, these regulations created certain anomalous results, as discussed in the preamble to the 1991 regulations. For example, if the member carrying over the SRLY loss produced income in a consolidated return year, but the group had no positive CTI for that year, the member's SRLY losses could not be absorbed in that year. Further, because the pre-1991 regulations contained no mechanism to carry over the member's contribution to CTI to other years, the SRLY losses could not be absorbed in a different consolidated return year unless the member also contributed to CTI in that other year. See CO-78-90, 1991-1 C.B. 757, 758.

In an attempt to address the problems that resulted from application of the pre-1991 regulations, in 1991, the IRS and Treasury Department proposed new SRLY regulations. The 1991 regulations introduced to the SRLY regime the concept of the cumulative register now found at § 1.1502-21(c)(1). Under this provision, a member's contribution to CTI is measured cumulatively over the period during which the corporation is a member of the group. Thus, the cumulative register provides continuity, from one year to the next, and essentially maintains a "running tally" of a SRLY member's net positive (or negative) contribution to the group. As a result, a member's SRLY losses may be absorbed in a consolidated return year in which the member does not contribute to CTI to the extent of the member's cumulative net positive contribution to CTI over a course of years.

Because a consolidated group offsets consolidated year items of all members before applying § 172(a), it is impossible to replicate a perfect separate entity outcome regarding the use of SRLY attributes by a consolidated group.[4] Despite this inability to reach a perfect resolution, it is notable that the cumulative register tracks only the items of the member that carries over or back a SRLY attribute (or the items of the members of the subgroup that exists with respect to the tax attribute)[5] and departs from separate

[4] Under § 172, losses may be carried back only a limited number of years, and then must be carried forward. Because the cumulative register rule of § 1.1502-21(c)(1) constructs a running total beginning as early as 1991, it is possible for a taxpayer to have a much larger (or much smaller) usable carryback under the 1991 regulations than under the separate return application of § 172. See TAM 200514019.

[5] See § 1.1502-21(c)(1) and (2).

return outcomes only to the extent necessary to correct the anomalous outcomes produced under the pre-1991 regulations.[6]

4. Separate entity treatment of the SRLY losses

As discussed above, it is clear that the purpose and the effect of the SRLY regulations are to isolate the SRLY member and its SRLY losses. Thus, the losses are to be usable by the group to approximately the same extent that they would have been usable by the SRLY member, had it not been acquired by the group. Therefore, to determine the appropriateness of the inclusion of P's pre-liquidation income history in the cumulative register, an analysis of the separate entity treatment and absorption of those losses is required.

If T had not been included in a consolidated group, T would have been able to offset its NOLs against its own taxable income. Outside of consolidation, those NOLs could not have been used to offset the income of any other entity, including related parties. In Year 8, T was treated as liquidating into P. The issue now presented is, outside of consolidation, to what extent the NOLs at issue could have been used by P following the liquidation of T.

The deemed liquidation of T into P was a transaction to which § 381(a) applies, and, pursuant to § 381(a)(1) and (c)(1), P succeeded to T's separate company NOLs. In connection with the succession to such losses, § 381(c)(1)(A) requires that the losses be carried forward and not carried back.[7] Further, § 381(c)(1)(B) provides an additional limitation on the amount of the distributor's (T's) net operating loss carryover that can be deducted by an acquiring corporation (P) following a distribution. Under that provision, the acquirer may only use a pro-rated amount of T's net operating loss carry forward in its first taxable year ending after the date of the distribution based on a formula set forth in the statute and in the regulations.

As a result of the limitations imposed by § 381, outside of the consolidated context, P effectively would be able to offset T's NOLs only against P income earned

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[6] Although the parties agree that subgrouping is not at issue here, the principle of maintaining separate entity treatment of the SRLY member is further illustrated in the portion of the preamble to the 1991 regulations that discusses subgrouping. Specifically, the preamble indicates that the drafters attempted to limit the expansion of contributions to the SRLY register in order to maintain the separate entity principle of SRLY. The preamble provides that, to the extent that a subgroup exists, the drafters intended that the cumulative register would generally track only the subgroup that is initially established:

> Once a group becomes a subgroup within another group, it is generally not permitted to increase its membership. Permitting increases in the membership of subgroups would effectively eliminate the SRLY limitation. [CO-78-90, 1991-1 C.B. at 759.]

[7] Section 381(c)(1)(A) provides that"[t]he taxable year of the acquiring corporation to which the net operating loss carryovers of the distributor or transferor corporation are first carried shall be the first taxable year ending after the date of the distribution or transfer."

following the § 381 transaction. This result is diametrically opposed to the result urged by the Taxpayer. Under the Taxpayer's theory, following the liquidation, the pre-liquidation history of P (the acquirer) should be included in the cumulative register, and thus increase the amount of the SRLY NOLs that could be used by the P Group. This inclusion would result in the functional equivalent of allowing the NOLs to be carried back to P's pre-liquidation taxable periods. Section 381(c) clearly prohibits such a carryback.

Because the outcome that the Taxpayer advocates produces an answer that conflicts with the separate entity outcome that is required under the SRLY regulations, the Taxpayer's argument must fail. P's pre-liquidation income history must be excluded from the cumulative register.

RESPONSES TO THE TAXPAYER'S ARGUMENTS

Taxpayer argues that the SRLY register should include the P's historic contribution to consolidated taxable income for years prior to the liquidation in determining the amount of the SRLY limitation on T's SRLY net operating loss for taxable years after the liquidation. Alternatively, taxpayer argues that the pre-liquidation income of both T and P should be excluded from the SRLY register on grounds that to do so would allow a predecessor and a successor to be treated equally.

1. Failure to Implement the "as the context may require" Provision

In its primary argument, the taxpayer assumes that, as a result of the deemed liquidation, P will be treated as a successor to T for all purposes. However, Taxpayer fails to discuss the "as the context may require" criteria that is integral to the SRLY predecessor and successor regulation.

The taxpayer urges an interpretation of the SRLY rules that breaks from their historic function of ensuring that the use of tax attributes is not enlarged by reason of members carrying such tax attributes into a consolidated group. As discussed above, the well-established purpose of the SRLY rules is to prevent the offsetting of separate return year attributes of one member against income of different members. Taxpayer's interpretation of § 1.1502-21(f)(1) would change the function of the SRLY rules in a fundamental manner. Taxpayer's proposed result allows the functional equivalent of a carryback of T's separate return losses to income of P. A result that diverges so dramatically from the result that would have been reached in a separate entity setting is inappropriate, and, thus, the context of the SRLY regulations does not require including the pre-liquidation income history of P in the cumulative register.

2. Rev. Rul. 75-223

The subject of Rev. Rul. 75-223 was the determination of whether, under § 346(a), a genuine contraction of a corporate business occurred pursuant to a § 332

liquidation. In that context, the ruling states that the inheritance of net operating losses among other items highlights the similarities "between a corporation that distributes the assets of a division, or the proceeds of a sale of those assets, and a parent corporation that distributes assets of a subsidiary, or the proceeds of a sale of such assets, received from the subsidiary in a liquidation governed by sections 332 and 381." The revenue ruling states that "for most practical purposes, the parent corporation, after the liquidation of the subsidiary, is viewed as if it has always operated the business of the liquidated subsidiary."

The Taxpayer argues, based on the rationale of Rev. Rul. 75-223, that "the section 381 event causes an integration of the past results of the liquidated entity with the past results of the recipient corporation as if the liquidated entity and the recipient corporation always had operated as a single enterprise." On this basis, Taxpayer seeks to support its argument that the pre-liquidation income of P should be included in the cumulative register.

The Taxpayer misapplies the government's rationale in Rev. Rul. 75-223 to the situation at hand. Although the rationale of the ruling is appropriate for "most practical purposes", the specialized policy underlying and driving the SRLY regulations makes the single-entity rationale of the revenue ruling inapplicable. As discussed in detail above, the policy underlying the SRLY regulations is one of creating and maintaining a separation between the member bearing the SRLY loss and the remainder of the group. The SRLY regulations strive to impose separate entity treatment on the SRLY member. Therefore, application of the rationale of the revenue ruling essentially forcing single entity treatment of the two corporations would directly contravene the appropriate application of the SRLY rules.

3. Taxpayer's Alternative Argument

Taxpayer's alternative theory consists of including in the SRLY register only the post-liquidation income items of P, and excluding pre-liquidation items of both P and T. Taxpayer argues that the outcome of its secondary argument is acceptable because it would treat both P and T equally.

As discussed above, the cumulative register rule allows the consolidated group to use the separate return year attributes, but only to the extent of the cumulative contribution by the SRLY member to the group. Thus, the cumulative register provides continuity, from one year to the next, and essentially maintains a "running tally" of a SRLY member's net positive (or negative) contribution to the group. As a result, a member's SRLY losses may be absorbed in a consolidated return year in which the member does not contribute to CTI to the extent of the member's cumulative net positive contribution to CTI over a course of years.

Taxpayer's argument must fail. T generated the SRLY NOLs at issue and was a member of the P consolidated group prior to its liquidation. T generated items of

income, gain, deduction and loss during those years that are required to be tracked in the SRLY cumulative register. § 1.1502(c)(1). As discussed above, the cumulative register's tracking of these items allows for matching of income and losses of a particular corporation across taxable years, and protects against the anomalous outcomes that obtained under the pre-1991 regulations. Abandoning the cumulative register for the period during which T held the SRLY NOLs would constitute an unauthorized application of the pre-1991 regulations to the years at issue. There is no authority for disregarding these historic items of T as a result of a section 381(a) transaction.

Further, Taxpayer's assertion that its alternate theory treats T and P equally is not accurate. In fact, under Taxpayer's theory, the cumulative register would track the income history of P during the time that it held the SRLY attributes, but would disregard the income history of T for the period during which T held those attributes. This is hardly equivalent treatment. In contrast, the government's application of the regulation results in the cumulative register tracking the income history of the specific entity that holds the SRLY NOL for the period during which that entity holds the NOL. Thus, the government's interpretation of the regulation treats both the distributor (T) and the acquirer (P) equally.

PROCEDURAL MATTERS

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Please call Lola Johnson or Marie Milnes-Vasquez at (202) 622-7530 if you have any further questions.