INTERNAL REVENUE SERVICE
NATIONAL OFFICE TECHNICAL ADVICE MEMORANDUM

Number: **201006030**
Release Date: 2/12/2010

September 30, 2009

Third Party Communication: None
Date of Communication: Not Applicable

Index (UIL) No.: 832.12-00
CASE-MIS No.: TAM-115459-09

Taxpayer's Name:

Taxpayer's Address:

Taxpayer's Identification No
Year Involved:
Date of Conference:

LEGEND:

Taxpayer =

State A =

State A Statutes =

Individual A =

C	=
D	=
x	=
y	=
z	=
xx	=
yy	=
zz	=
X	=
Y	=
Z	=
Month E	=
Date a	=
Date b	=
Year 1	=
Year 2	=
Year 8	=
Year 9	=
Year 10	=
Year 11	=
Year 12	=

Year 13 =

Year 14 =

Year 15 =

ISSUE:

Whether the "general declaration" of Taxpayer's surplus made in Month E of Year 14 constitutes a deductible policyholder dividend within the meaning § 811(c)(11) of the Internal Code for the Year 14 tax year?

CONCLUSION:

The "general declaration" made in Month E of Year 14 of Taxpayer's surplus does not constitute a policyholder dividend within the meaning of § 811(c)(11) deductible in the Year 14 tax year.

FACTS:

Taxpayer is a workers' compensation self insurance trust formed in Year 1 pursuant to a State A statute. For Federal income tax purposes it files a Form 1120-PC, U.S. Property and Casualty Insurance Company Income Tax Return. Taxpayer has a number of employer members, each with a positive net worth, associated with the C industry which are allowed under the State A Statute to pool their liabilities and form a self insurance fund. Each member of the group becomes jointly and severally liable for the workers' compensation liabilities of each other member of the group.[1] Taxpayer's tax year is a calendar year.

The group of employer/members are required by State A Statute to meet certain financial and investment requirements. For example, the group must have at least $1x of net worth. Taxpayer, in turn, is restricted to certain investments such as United States Treasury Securities, deposits that are insured by the Federal Deposit Insurance Corporation and corporate bonds having a minimum rating of "A" by the X, Y or Z rating agencies.

While the workers' compensation self-insurance funds operating in State A are not considered to be insurance companies for state regulatory purposes, under a separate State A Statute the State A Department of Insurance (the Department) has certain authority over the funds. Further, if a fund's operating expenses are kept low in

[1] If such a self insurance fund is properly organized and implemented, participation in such insurance fund satisfies a member/employer's responsibility under State A's workers' compensation law.

relation to the fund's premium and investment income, such funds often provide for policyholder dividends.

To assist in keeping track of a fund's items of income and expense, the Department requires the funds to account for these items on a "Fund Year" basis. All policies have a common anniversary date which coincides with the Fund Year concept. A Fund Year will typically remain open and reflect activity until all claims are closed and paid with no remaining reserve liabilities, all expenses are paid and any remaining funds are returned to members. This means that premium income from a given year is matched against expenses for that year, although, expenses may actually be paid in later years. Taxpayer has a history of distributing policyholder dividends to its members over the years of its existence.

For Year 14, the State A Statute is silent as to whether Taxpayer has any need to notify the Department of its intent to declare a dividend. The State A Statute is also silent as to what particular time when a distribution of dividends must be made. A portion of the State A Statute provides that:

> any monies for a fund year in excess of the amount necessary to fund all obligations of the fund may be declared as refundable to the members of the fund by the board of trustees. The board of trustees shall be authorized to distribute the refund at their discretion, in accordance with the agreement establishing the fund and the following limitations:
>
> (a) The amount of the distribution shall not exceed the surplus funds available in the fund year as indicated by the most recently completed audited financial statements of the fund.
>
> (b) The board of trustees shall notify the Department in writing of their intent to make a refund to the membership, the fund year to which the distributions apply, and the amount of the distribution for each fund year, thirty days prior to distribution.
>
> (c) No distributions shall be paid if an open fund year has a deficit.[2]

As set forth in paragraph (b) above, Taxpayer was required to notify the Department in writing of its intent to distribute policyholder dividends from excess proceeds, thirty days prior to distribution. According to Individual A, an official of the

[2] For Year 14, the State A Statute provided that if a deficit exists in a fund year, the fund shall eliminate the deficit or submit a plan for elimination of the deficit pursuant to regulations promulgated by the Department.

Department, the notification is for actuarial purposes, so that the Department's actuaries can verify that a fund has excess funds from which to pay the dividends. A fund does not need the Department's approval to make the distribution. However, the purpose of the notification is to give the Department an opportunity to evaluate a fund's ability to pay the dividends. Until the Department agrees that the fund has the ability to pay, no distribution is made. Furthermore, if the Department objects in whole or in part, then no distribution objected to by the Department is made.[3]

Taxpayer's trust agreement with respect to policyholder dividends provides as follows:

> The Trustees are authorized to set aside from premiums collected a reasonable sum for the operating expenses and/or administrative expenses of the Trust. All remaining funds coming into their hands during any one year of the Trust shall be set aside and shall be used for purposes such as:
>
> Payments of medical, surgical, hospital, and nursing home expenses and payments of employees covered by this Agreement, including settlements, awards, judgments, legal fees, and costs in all contested cases.
>
> Payments of lawful assessments as required by State A.
>
> Reimbursement legally required pursuant to the terms of any bond, excess insurance policy or similar agreement entered into by the Trust.
>
> Distribute dividends to members in such manner as the Board shall deem to be equitable, including, but not limited to, limiting distribution to members with a loss ratio not in excess of a level designated by the Board. Any member who has participated in the Trust for any particular fund year may share in pro-rata distributions of dividends attributable to that fund year, regardless of when such dividends might actually be paid if (a) said member participated in the Trust for the year for which such distribution is being made, and (b) said member is a member in good standing of the Trust and the B organization as of the date specified by the Trustees at the time the dividend declaration was made.
>
> Notwithstanding anything herein to the contrary, it is the intention of the Trust Agreement that ultimately all net gains from all sources of income received by the Trust will be returned to all eligible members.

---

[3] With regard to the impact of the Department's impact of Taxpayer's practice of paying policyholder dividends, at the National Office conference held in this case, Taxpayer's representative provided an illustration of the Department's regulatory oversight. That is, Taxpayer proposed paying a dividend with respect to a certain number of Fund Years and sent a letter to that effect to the Department. The Department wrote back that Taxpayer had a deficit for an earlier fund year. Taxpayer then responded to the Department that it proposed to take surplus from another fund year to extinguish any deficit in the earlier fund year and that action resolved the concern the Department had raised.

Annually, usually in Month E of a year, Taxpayer's Board of Trustees (Board) holds a meeting that among other items will typically involve the general declaration of dividends to policyholders with respect to the current fund year. This same annual Board meeting will also usually involve specific dividend declarations with respect to open past fund years. The amount of the specific dividend declaration for past open Fund Years depends primarily on favorable loss development (of claims) of those past Fund Years and the actual payment to eligible members will follow the specific dividend declaration within a matter of several months. Immediately prior to Year 14, Taxpayer had Fund Years 2 through 13 which were both open and had tentative balances due the members of Taxpayer for those years provided that there was favorable loss development with respect to these individual Fund Years.

In Month E of Year 14, the Board made a general declaration with respect to policyholder dividends, which provides, in part, as follows:

> Be it resolved that all taxable revenues less deductible expenses of [Taxpayer] Fund for the calendar [Year 14] is hereby declared as a dividend returnable to eligible members as soon as it is reasonable prudent to so. It is further resolved that all accounting net income for the [Year 14] calendar year is hereby declared as a dividend returnable to eligible members as soon as it is reasonably prudent to do so. It is the intent of this resolution to return all income, taxable or accounting, to eligible members as quickly as is reasonable under the circumstances.

At the same meeting, the Board also made a specific declaration with respect to fund Years 8, 9, 10, 11, and 12, which amounts were actually paid to eligible members within a short time frame after the specific dividend declaration.

In Year 15, when Taxpayer prepared its Form 1120-PC for Year 14, it considered the information available with respect to the Fund Year information for Year 14 and claimed a policyholder dividend deduction of $y. In that $y amount for the anticipated Year 14 Fund Year surplus there was included a z% D dividend which eligible members of Taxpayer would receive if they attended certain training classes. However, the historic practice with respect to the D dividend was (unlike the rest of the amount of the claimed policyholder dividend of $y based on the general declaration for Year 14, which was not ascertained and when ascertained not paid out for several years) that the D dividend would actually be paid out before September 15 of the year following the year of the general declaration of policyholder dividends.

LAW:

Section 461(a) provides that the amount of any deduction or credit allowed by this subtitle shall be taken for the taxable year which is the proper taxable year under the method of accounting used in computing taxable income.

Section 1.461-1(a)(2)(i) of the Income Tax Regulations provides, in part, that under an accrual method of accounting, a liability (as defined in § 1.446-1(c)(1)(ii)(B)) is incurred, and generally is taken into account for Federal income tax purposes, in the taxable year in which all the events have occurred that established the fact of the liability, the amount of the liability can be determined with reasonable accuracy, and economic performance has occurred with respect to the liability. (See paragraph (a)(2)(iii)(A) of this section for examples of liabilities that may not be taken into account until a taxable year subsequent to the taxable year incurred, and see §§ 1.461-4 through 1.461-6 for rules relating to economic performance.)

Section 461(h)(1) provides that for purposes of this title, in determining whether an amount has been incurred with respect to any item during any taxable year, the all events test shall not be treated as met any earlier than when economic performance with respect to such item occurs.

Section 1.461-4(g)(3) provides, in part, that in the case of rebates or refunds, economic performance occurs when payment is made.

Section 461(h)(3) provides, in part, that notwithstanding paragraph (1) an item shall be treated as incurred during any taxable year if (i) the all events test with respect to such item is met during such taxable year (determined without regard to paragraph (1)), economic performance with respect to such item occurs within the shorter of a reasonable period after the close of such taxable year, or 8 ½ months after the close of such taxable year.

Section 461(h)(5) provides that section 461(h) shall not apply to any item for which a deduction is allowable under a provision of this title which specifically provides for a deduction for estimated expenses.

Section 832(c)(11) provides for a deduction for dividends and similar distributions paid or declared to policyholders in their capacity as such, except in the case of a mutual fire insurance company described in § 832(b)(1)(C). For purposes of the preceding sentence, the term “dividends and other similar distributions” includes amounts returned or credited to policyholders on cancellation or expiration of policies described in § 832(b)(1)(D). For purposes of this paragraph, the term “paid or declared” shall be construed according to the method of accounting regularly employed in keeping the books of the insurance company.

Section 834(e)(2) provides that the term “dividends to policyholders” means dividends and similar distributions paid or declared to policyholders. For purposes of the preceding sentence, the term “paid or declared” shall be construed according to the method regularly employed in keeping the books of the insurance company.

Section 1.822-12(b) provides, in part, as follows: if, on the other hand, the method of accounting so employed is the accrual method, the deduction, or a reasonably accurate estimate thereof, for dividends and similar distributions declared to policyholders for any taxable year will, in general, be computed by adding the amount of dividends and similar distributions declared but unpaid at the end of the taxable year to dividends and similar distributions paid during the taxable year and deducting dividends and similar distributions declared but unpaid at the beginning of the taxable year. If an insurance company using the accrual method does not compute the deduction for dividends and similar distributions declared to policyholders in the manner stated, it must submit with its return a full and complete explanation of the manner in which the deduction is computed.

In Rev. Rul. 57-134, 1957-1 C.B. 210, the insurance company on November 15th of the taxable year declared a dividend to policyholders of all company profits in excess of $2,500x dollars for such taxable year payable after the close of the year. The dividend was paid on January 20th of the following year. Rev. Rul. 57-134 stated that the declaration cannot create a debt at the time the resolution therefor is adopted by the board of directors because losses may occur during the remainder of the year which would more than offset the corporation’s prior earnings for such year. Accordingly, under such resolution, no debt between the corporation and the policyholders can be created until the taxable year has closed, since only then would it be clear whether there would be earnings available for the purposes of the dividend declaration. At the end of the taxable year during which the dividend is declared, pursuant to a resolution of the board of directors, however, all events will have occurred which fix the company’s liability for the dividend and such liability cannot be affected by anything transpiring after that time.

ANALYSIS

In summary, the Service believes the amount declared as a policyholder dividend for Year I is not deductible under § 832(c)(11) because (1) the fact of liability under the accrual method of accounting is contingent, and (2) the economic performance requirement of § 461(h) has not been met.

Accrual Accounting-contingency

Section 832(c)(11) provides a deduction for policyholder dividends "paid or declared." The statute states that the term "paid or declared" shall be construed according to the method of accounting regularly employed in keeping the books of the insurance company. Under the accrual method of accounting, a liability is incurred in the taxable year in which (1) all the events have occurred that establish the fact of the liability, and (2) the amount of the liability can be determined with reasonable accuracy. § 1.461-1(a)(2)(i). Although expenses may be deductible before they have become due and payable, liability must first be established. United States v. General Dynamics Corp, 481 U.S. 239, 243 (1987). If all the events necessary to establish the fact of liability have not occurred, the liability is "contingent" upon the prior occurrence of a particular event (a condition precedent) and may not be accrued for purposes of deduction. ABKCO Industries, Inc. v. Comm'r, 56 T.C. 1083 (1971), aff'd, 482 F.2d 150 (3d Cir. 1973); Field Enterprises, Inc. v. United States, 172 Ct. Cl. 77, 348 F.2d 485 (1965), cert. denied, 382 U.S. 1009 (1966). In our view the required "fact of liability" has not been established by the "general declaration" for Year 14. Such a liability is at that point contingent on the existence of Taxpayer's profits which in turn is dependent on the future claims loss development. If the loss reserve set up for Year 14 proves inadequate in future years, profits will be reduced to pay claims and in turn reduce Taxpayer's liability to pay the Year 14 declared dividends.

In American Bemberg Corp. v. United States, 253 F.2d 691 (3rd Cir. 1958), aff'g. 150 F. Supp. 355 (D. Del. 1957), cert. denied, 358 U.S. 827 (1958), the Court considered a corporation's contingent obligation to repay its two major shareholders for providing advances to the corporation which were used to pay dividends on preferred stock to other shareholders. The agreement between the parties provided for their reimbursement conditioned upon (1) the declaration of the semi-annual current dividend on the preferred stock and (2) the existence of profits. These conditions were required to be met before the corporation's liability to pay principal and interest to the two major shareholders became absolute. The Court held that only after the regular dividend for the current semi-annual period was declared on outstanding preferred stock, liability to repay the interest on advances accrued when profits, excluding consideration of dividends accumulated but not paid, was sufficient to enable taxpayer to repay with interest the advances made by the majority shareholders.

The facts of the present case bear certain similarities to the situation in American Bemberg in that there are certain conditions precedents or benchmarks that must occur before the fact of liability exists. As to the members of a particular fund year there has be a profit in that particular fund year. This is the basic contingency problem, i.e., the amounts subject to the general declarations but held for long periods of time by Taxpayer without being actually paid out to the participants are subject to being paid to claimants because of unfavorable loss development which could cause initially anticipated profits to not come to fruition.

In practice, there are also other benchmarks that are important in moving from contingent to non-contingent liability status. For example, the setting aside of amounts in the more specific declarations relative to amounts to be paid with respect to other fund years. Associated with this action is the involvement of the Department in providing feedback to the funds with respect to actuarial and financial matters and that might have a bearing on their ability to actually pay the amount of the dividends they propose.[4]

Whether a business expense has been "incurred" as to permit an accrual basis taxpayer to deduct it under § 162 is governed by the "all events" test that originated in Anderson, supra. That test is contained in § 1.461-1(a)(2) which provides that "[u]nder an accrual method of accounting, an expense is deductible for the taxable year in which all the events have occurred which determine that fact of the liability and the amount thereof can be determined with reasonable accuracy." In United States v. General Dynamics Corp, supra, the Court held that where filing is a condition precedent to liability, an accrual basis taxpayer providing medical benefits to its employees cannot deduct at the close of the taxable year an estimate of its obligation to pay for medical care obtained by employees or their qualified dependents during the final quarter of the year, claims for which have not been reported to the employer.

> It is fundamental to the "all events" test that, although expenses may be deductible before they have become due and payable, liability must first be firmly established. This is consistent with our prior holdings that a taxpayer may not deduct a liability that is contingent, see Lucas v. American Code Co., 280 U.S. 445, 452 (1980), or contested, see Security Flour Mills Co. v. Commissioner of Internal Revenue, 321 U.S. 281, 284 (1944). Nor may a taxpayer deduct an estimate of an anticipated expense, no matter how statistically certain, if it is based on events that have not occurred by the close of the taxable year. Brown v. Helvering, 291 U.S. 193, 201 (1934), cf. American Automobile Assn. v. United States, 367 U.S. 687, 693 (1961).

United States v. General Dynamics Corp., id. at 243.

If all the events necessary to establish the fact of liability have not occurred, the liability is "contingent" and may not be accrued for purposes of deduction. ABKCO Industries, Inc. v. Comm'r, supra; Field Enterprises, Inc. v. United States, supra. In these cases the Court held that the taxpayer's liability for the payments in question (in ABKCO Industries., royalties; and in Field Enterprises, Inc., "quality bonuses") was contingent upon the prior occurrence of a particular event (a condition precedent).

In this case Taxpayer's business is insuring workers' compensation risks and thus is liable for all appropriate claims under the insurance policies sold to its members. Taxpayer's excess surplus is returned to members as policyholder dividends but this excess surplus is net of all workers' compensation claims for a fund year. The condition precedent to Taxpayer's fact of liability for policyholder dividends is the satisfaction of all legal responsibility to pay claims for a particular fund year.

---

[4] An illustration of a financial issue that might be raised by the Department that could have an impact is its role in enforcing the statutory requirement that only "A" rated bonds are entitled to treatment as admitted assets for regulatory purposes.

In the year that Taxpayer declares a policyholder dividend it also sets up (and deducts for tax purposes) a loss reserve for workers' compensation claims (both case reserve and incurred but not reported, IBNR). Only a loss reserve that is "fair and reasonable" may be deducted. § 1.832-4. If that reserve proves to be inaccurate, then a taxpayer can take a tax deduction in a subsequent year either when it increases its reserve or pays a claim. Policyholder dividends are also deductible, in general, if paid. Thus, a taxpayer could offset its entire income by ordinary business expenses, workers' compensation claims, and policyholder dividends. The tax problem is one of timing because the current "fair and reasonable" estimate of losses is most likely inaccurate. Taxpayer keeps the declared dividend in order to pay for future unanticipated claims. Taxpayer's dividend declaration amount is a solvency reserve retained to pay those increased claims. Only when the claims activity of a particular fund year are settled or final, can the excess surplus, if any, of a fund year be accurately determined and actually paid out to members. "The prudent business man often sets up reserves to cover contingent liabilities. But they are not allowable as deductions." Lucas v. American Code Co. Inc., 280 U.S. 445, 452 (1930).

Taxpayer has addressed the legal issue of whether Taxpayer's declared dividends do not satisfy the all events test of the accrual method of accounting because they are subject to a contingency.

At the National Office conference, Taxpayer cited Rev. Rul. 57-134 as authority.

The Service disagrees that Rev. Rul. 57-134 is authority supporting Taxpayer. The ruling does not contain any facts regarding contingencies as to fact of liability as is present in this case. Indeed the taxpayer in the ruling paid the dividend in January of the year following the year in which the dividend declaration was made which would suggest that no contingency existed at the end of the year of declaration. Consequently, it is appropriate to ask Taxpayer why it keeps the declared dividend for so long before actually paying it out to members?

Taxpayer in its written submission of Date a offered various comments addressing the question of why the Trustees take so long to pay back projected fund year surplus.

Taxpayer states that actual payment of the declared dividend is usually deferred until it is prudent to return the funds to eligible members. Any actuary will tell you that it takes several years for a worker's compensation fund year claims portfolio to mature. Claim losses are based, in part, on estimate of future medical expenses and future lost wages depending on the nature of the claim. Some claims become worse than originally thought, others can be settled for less than the original estimate. The Trustees believe it is simply not prudent to return all projected excess revenues to members all at once and hope the estimate of unpaid incurred losses turns out to be correct. As the fund year matures, the Trustees pay to eligible members a portion of the estimated fund surplus for that fund year. Taxpayer submission of Date b at 4.

Because each member of Taxpayer is liable in solido for the claims made against Taxpayer, the trustees are very concerned about returning projected surplus too quickly to eligible members. The last thing in the world the trustees want to do is be in a position where they have paid out more than the projected surplus and must either transfer surplus from another fund year or make a special assessment against the members to cover any projected deficit. Taxpayer submission of Date a at 1.

The Trustees are also cognizant of their obligation to be fair to all members. Since its inception, Taxpayer has not returned dividends to members whose loss ratio for a fund year it greater the xx%. The reason for this rule is two-fold: it encourages the member to implement loss prevention procedures and rewards those members who have directly contributed to the surplus. In the early years following a fund year, case specific reserves are typically set conservatively to ensure that the claim will settle for less than the estimated amount. Because of this practice, a member's loss experience for a fund year might be initially in excess of xx%, but may eventually decline below xx%, thereby making the member eligible to receive a dividend from that fund year. If the trustees allow the claims experience to mature over a few years before returning the lion's share of projected surplus for a fund year, the trustees are able to more equitably distribute dividends to eligible members. Taxpayer submission of Date a at 1 and 2.

Taxpayer further states that the trustees believe that their approach is a sound and reasonable business practice which does not result in any loss of revenue to the government. There is no profit or gain which goes untaxed. The tax is merely deferred until the trustees determine that it is prudent and reasonable to return the surplus to the members, typically between years yy and following a fund year. Taxpayer submission of Date a at 2.

Taxpayer submits the following illustration. Assume the initial projected surplus for the 200 fund year is $3.6x, which is deducted as a policyholder dividend on the 200 tax return. Assume that in 200 it appears that the projected surplus for 200 is overstated by $1x due to an increase in estimated claim expense for that year. The Fund's reserve for dividends payable would be reduced during 200 to recognize the revision to the estimate of surplus for the 200 fund year. If the projected surplus for the year 200 , standing alone, is $2.5x, the dividend deduction for the year 200 would be $2.5x less the $1x adjustment to the reserve from the year 200 , or a net deduction of $1.5x for the year 200 . The formula in [§ 1.822-12 (b)] is being followed. Reserves at end of year ($5.1x million), less dividends paid from the reserve ($0), less reserve at beginning of the year ($3.6x) equals dividend deduction of $1.5x. Taxpayer submission of Date a at 2.

Taxpayer in summary concludes that Taxpayer was created as a liquidating trust. It must operate substantially at cost. It must return all underwriting gain and investment income to eligible members from each fund year. The trustees have no other choice. It is a contractually mandated obligation which is fixed at the end of each fund year. Taxpayer submission of Date a at 5.

The Service believes that the comments submitted by the Taxpayer and set out above are consistent with the Service's conclusion that the fact of liability has not occurred in the year that a fund year policyholder dividend is declared.

Economic performance-§ 461(h)

The Service believes that the economic performance provision of § 461(h) (enacted in 1984) literally applies to all accrual basis taxpayers and in this case would require the postponement of the claimed deduction until an actual cash payment of the dividend is made to members. As regard to the exceptions made available in § 461, the recurring item exception provide in § 461(h)(3) does not apply because the general declaration made by Taxpayer is not followed by payment within the time frames allowed by § 461(h)(3) and the exception provided by § 461(h)(5) does not apply because the § 832(c)(11) does not specifically provided for a deduction for estimated expenses.

Taxpayer makes several arguments regarding the applicability of the economic performance rule of § 461(h). One argument is that in 1986 the Congress changed that law to effectively deny a deduction for policyholder dividends until paid for life insurance companies. If Congress had intended to deny a deduction for dividends until paid for non-life insurance companies, it could have easily done so.

The Service disagrees. The argument that Congress has not specifically amended § 832(c)(11) by addressing self insurance funds by name does not answer the issue of whether § 461(h) is applicable to Taxpayer. The Service position is that § 832(c)(11) requires a taxpayer to follow its method of accounting which generally is the accrual method and under such method includes the all events test. Section 461(h) states that the all events test is not satisfied until economic performance occurs. Arguably, Congress has not amended § 832(c)(11) because it is satisfied with current accrual/economic performance conditions for allowing a policyholder dividend deduction.

Taxpayer cites the Conference Report to the Technical and Miscellaneous Revenue Act of 1988 (Pub. L. No. 100-647) (H. Conf. R. 100-1104 at 171 (1988) (Conf. Rep.)), regarding the definition of certain workers' compensation funds, as supporting its position. The Conference committee deleted § 345(b)(4) of the House bill which stated "that the group be bound by state law or regulation or by its governing documents to promptly return to its members all monies not needed to pay, or reserve against, claims under the State workers' disability compensation laws and expenses." Thus, the opportunity to apply economic performance requirements for the return of the excess of earnings and profits in the form of declared dividends was specifically deleted by Congress.

The Service disagrees. In addition to the various Service arguments made above, the Service would note that the application of § 461(h) would grant a taxpayer a long time period to pay the dividend that under the "promptly return" condition in the rejected legislation because of the recurring item exception in § 461(h).

CAVEAT:

A few years prior to Year 14, Taxpayer instituted a D dividend program. We have not developed additional facts in sufficient detail to make a determination whether that program has any impact on the analysis contained in this memorandum.

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

/S/