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From: [redacted]
Sent: Monday, February 24, 2020 9:50:22 AM
To: [redacted]
Cc: [redacted]
Bcc: [redacted]
Subject: [redacted]

[redacted],

I have found something very important and I am now sure that we should challenge deduction of the entire interest payment on the consolidated group's tax liability for the tax year ended June 30, . may show that it is entitled to take some portion of the interest deduction but it doesn't seem likely that it can take the entire amount of the interest deduction on what I confirmed this morning in my research.

I will explain what happened: was of course correct that the consolidated regulations that require allocation of tax liability are for specific purposes of allocating E&P and basis. But, I think that may not be familiar with a requirement to allocate tax liability to determine the correct portion of interest that is deductible on an income tax deficiency for a former member that pays in a subsequent separate return year because it is not explicitly found in the consolidated regulations and I think it is an unusual or unique fact pattern. The law is based on case law and general tax law principles.

While I was revising the memo for you, I was reading Federal Income Taxation of Corporations Filing Consolidated Returns (also known as Dubroff) and I found that there is a requirement under general tax law principles (as I've been reading in other sources) to determine quote:

"Each member's deductible portion of interest paid on an income tax deficiency for a prior consolidated return year, if the deficiency is paid in a subsequent separate return year." Federal Income Taxation of Corporations Filing Consolidated Returns, section 54.01 fn. 6 citing

Koppers Co. v. Comm'r, 8 T.C. 886 (1947), supplemental opinion 11 T.C. 894 (1948). (page from Dubroff is attached).

I had found the Koppers supplemental opinion but I did not see the original case until this morning. Koppers Co. v. Comm'r 8 T.C. 886 (1947). In this case, Koppers was part of the consolidated group in 1930. It left the group in 1934. In 1940, the Service assessed a tax deficiency for the consolidated group of $545,898 in tax and 316,631 in interest. Koppers, an accrual method taxpayer paid most of the liability and interest: $501,136 in tax and $290,659 in interest and deducted that interest. The Tax Court held that Koppers was entitled only to deduct the portion of interest payment that was allocable to it based on its share of the adjusted net income in 1930. The Tax Court gave Koppers leave to show that it was entitled to take the interest deduction based on its share of adjusted consolidated net taxable income. As it turned out, Koppers was able to show that the portion of the tax liability it paid was its fair and equitable share in the supplemental opinion and it was entitled to the entire interest deduction. I think our case is different than Koppers because I do not think can show that the entire interest payment was allocable to it based on its share of the net consolidated income in because it was not even a member of the group for most of the year. [redacted]

[redacted]

Some important excerpts from the Koppers case (8 T.C. 886):

"Petitioner paid the major portion of the deficiency and interest. Although respondent has determined that none of the interest is deductible, it would seem that **petitioner is entitled to an interest deduction in some amount, at least to the extent it paid interest on its part of the tax.** Respondent concedes this on brief, but rightfully places upon petitioner the burden of proving the exact amount. Since there really is no dispute on this

point, we need not discuss the question further, and hold that petitioner is entitled to deduct the interest paid on that portion of the deficiency properly assignable to it upon the basis of its share of the adjusted consolidated net income.

Although petitioner and the other affiliates were thus severally liable to the Government for the full deficiency and interest, as between themselves, each affiliate was mutually obligated under principles of general law to pay only its fair share of the common burden. See Phillips-Jones Corporation v. Parmley, 302 U.S. 233

We think that respondent is correct in claiming that if petitioner paid more than its proportionate share of the deficiency and interest of the companies not in existence in 1940 a right of contribution did accrue to it from the other affiliates. The right of contribution is not founded upon contract and arises as a matter of general law whenever one pays on a common obligation in excess of the share proper as between himself and others similarly liable. Restatement Restitution, secs. 81 and 82; a Williston on Contracts, Rev. Ed., sec. 345. *892 To us, however, the existence of a right of contribution has a significance different from the one claimed for it by respondent. A taxpayer can deduct interest qua interest only in so far as the interest is paid on the taxpayer's own obligation. William H. Simon, supra; Colston v. Burnet, 59 Fed.(2d) 867. Mere legal liability or obligation to the creditor is not enough, for, as was said in Eskimo Pie Corporation, 4 T.C. 669; affd., 153 Fed.(2d) 301:

* * * The statutory deduction for interest is confined to amounts chargeable against the taxpayer on his own indebtedness, and he may not deduct interest on the indebtedness of another, even though he has by legal contract agreed to pay such interest. William H. Simon, 36 B.T.A. 184;