Internal Revenue Service

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Department of the Treasury
Washington, DC 20224

Third Party Communication: None
Date of Communication: Not Applicable

Person To Contact:
, ID No.

Telephone Number:

Refer Reply To:
CC:PSI:B06
PLR-127590-20

Date:
July 29, 2021

LEGEND:

Taxpayer =

Date 1 =

Date 2 =

Date 3 =

Tax Year =

a =

b =

c =

Dear :

This letter responds to a letter dated Date 1, and supplemental correspondence dated Date 2, submitted by Taxpayer, requesting a ruling under § 1.59-1(c) of the Income Tax Regulations permitting Taxpayer to revoke its timely filed election made under § 59(e) of the Internal Revenue Code for Tax Year.

FACTS

A. Taxpayer and its Original Return for Tax Year

Taxpayer, a consolidated group of corporations, files its federal income tax return on a calendar year basis. Taxpayer is

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Taxpayer electronically filed its original income tax return for Tax Year on Date 3. On the return, Taxpayer reported taxable income of $a, resulting in $b of income tax before credits. Taxpayer used $b of foreign tax credits and general business credits resulting in no tax due for Tax Year.

Taxpayer properly elected to capitalize under § 59(e) $c of the total eligible research or experimental (R&E) expenditures it incurred during Tax Year. By making this election, Taxpayer avoided a net operating loss (NOL) and was able to take a deduction under § 250 to offset, and claim foreign tax credits against the tax due on, its Global Intangible Low-Taxed Income (GILTI) inclusion under § 951A for Tax Year.

B. GILTI High-Tax Exclusion

On June 21, 2019, the Department of the Treasury (Treasury Department) and the Internal Revenue Service (IRS) published in the Federal Register a notice of proposed rulemaking containing proposed regulations under the GILTI provisions in § 951A regarding gross income that is subject to a high rate of foreign tax (GILTI HTE Proposed Regulations).[1] The GILTI HTE Proposed Regulations were proposed to apply to tax years of foreign corporations beginning on or after the date the regulations were finalized.

The notice of proposed rulemaking requested comments on all aspects of the regulations, which were due on September 19, 2019 (a date before Date 3). The Treasury Department and the IRS received 24 comment letters that asked that taxpayers be allowed to apply the regulations for tax years beginning after December 31, 2017. All written comments received in response to the proposed regulations were (and still are) available at www.regulations.gov.

The Treasury Department and the IRS published in the Federal Register on July 23, 2020 final regulations for the GILTI provisions in § 951A regarding the treatment of income that is subject to a high rate of foreign tax (GILTI HTE Final Regulations).[2] In response to the comments received, the GILTI HTE Final Regulations generally allow taxpayers to choose to apply the GILTI HTE Final Regulations for tax years beginning after December 31, 2017 on an amended return, if certain requirements are satisfied.

[1] REG-101828-19 (84 FR 29114, as corrected at 84 FR 37807).
[2] T.D. 9902 (85 FR 44620, as corrected at 85 FR 79853).

C. CARES Act

On March 27, 2020, subsequent to the filing of Taxpayer's income tax return for Tax Year, the Coronavirus Aid, Relief, and Economic Security Act, Pub. L. 116-136, 134 Stat 281, (CARES Act) was enacted. Section 2303(b) of the CARES Act modified § 172(b)(1) to allow taxpayers to carry back NOLs arising in tax years beginning in 2018 through 2020 to the 5 tax years preceding the year of the loss.

D. Taxpayer's Request to Revoke its Election under § 59(e)

Taxpayer had originally determined that the law in effect at the time it filed its Tax Year return did not permit it to either carry back NOLs to offset taxable income in prior tax years or apply the GILTI HTE Proposed Regulations for Tax Year. Following the enactment of the CARES Act and the issuance of the GILTI HTE Final Regulations, Taxpayer requested permission to revoke its § 59(e) election for Tax Year. Taxpayer represents that the CARES Act allows Taxpayer to carry back any NOLs to tax years preceding Tax Year to offset taxable income in those years and that it can apply the GILTI HTE Final Regulations to Tax Year on an amended return. By applying the GILTI HTE Final Regulations, Taxpayer would reduce its inclusion under the GILTI provisions in § 951A and increase its NOL for Tax Year. Taxpayer intends to carry back NOLs to tax years prior to Tax Year to generate refunds.[3]

RULING REQUESTED

Taxpayer requests permission to revoke its § 59(e) election for Tax Year so that it may deduct R&E expenditures in accordance with § 174.

LAW

For amounts paid or incurred in taxable years beginning prior to 2022, § 174(a)(1) provides that, in general, a taxpayer may treat R&E expenditures which are paid or incurred by the taxpayer during the taxable year in connection with its trade or business as expenses which are not chargeable to capital account and that such expenditures shall be allowed as a deduction.

Section 59(e)(1) allows a taxpayer, in general, to deduct ratably over the 10-year period any qualified expenditure to which an election under § 59(e)(1) applies, beginning with the taxable year in which such expenditure was made.

Section 59(e)(2)(B) includes in the definition of "qualified expenditure" any amount which, but for an election under § 59(e), would have been allowable as a

[3] Taxpayer represented that it has already filed an amended return to make the GILTI HTE election and intends to (or already has) filed amended returns to claim refunds based on Tax Year NOL carrybacks. An attachment to Taxpayer's ruling request provides an illustration of Taxpayer's estimated refunds from Tax Year NOL carrybacks.

deduction for the taxable year in which paid or incurred under § 174(a) (relating to R&E expenditures).

Section 59(e)(4)(A) provides that an election under § 59(e)(1) may be made with respect to any portion of any qualified expenditure. Section 59(e)(4)(B) provides that an election under § 59(e) may be revoked only with the consent of the Secretary.

Section 1.59-1(b)(1) provides, in part, that an election under § 59(e) shall only be made by attaching a statement to the taxpayer's income tax return (or amended return) for the taxable year in which the amortization of the qualified expenditures subject to the § 59(e) election begins. The taxpayer must file the statement no later than the date prescribed by law for filing the taxpayer's original income tax return (including any extensions of time) for the taxable year in which the amortization of the qualified expenditures subject to the § 59(e) election begins.

Section 1.59-1(b)(2) provides, in part, that a taxpayer may make an election under § 59(e) with respect to any portion of any qualified expenditure paid or incurred by the taxpayer in the taxable year to which the election applies. An election under § 59(e) must be for a specific dollar amount and the amount subject to an election under § 59(e) may not be made by reference to a formula.

Section 1.59-1(c)(1) provides that an election under § 59(e) may be revoked only with the consent of the Commissioner and that such consent will only be granted in rare and unusual circumstances. The revocation, if granted, will be effective in the first taxable year in which the § 59(e) election was applicable. However, if the period of limitations for the taxable year the § 59(e) election was applicable has expired, the revocation, if granted, will be effective in the earliest taxable year for which the period of limitations has not expired.

Section 1.59-1(c)(2) provides, in part, that a taxpayer requesting consent to revoke a § 59(e) election must submit the request prior to the end of the taxable year the applicable amortization period described in § 59(e)(1) ends.

Section 1.59-1(c)(3) provides that a request to revoke a § 59(e) election must contain all of the information necessary to demonstrate the rare and unusual circumstances that would justify granting revocation.

PRIOR PLR ON SECTION 59(e) REVOCATION

In support of its request, Taxpayer points to a private letter ruling (PLR) that the IRS released on May 7, 2010, PLR 201018001 (2010 PLR), permitting another taxpayer to revoke a § 59(e) election under the standard of § 1.59-1(c)(1).[4] The facts of the 2010

[4] The 2010 PLR explicitly provides that pursuant to § 6110(k)(3) it may not be used or cited as precedent. We discuss it here only to provide some background for purposes of addressing Taxpayer's argument.

PLR provide that the IRS modified its interpretation of a statue that affected whether environmental remediation costs could be carried back as NOLs. As provided in that PLR, following the issuance of Revenue Ruling 2004-18, 2004-1 C.B. 509, the taxpayer concluded that because its environmental remediation costs had to be capitalized and included as part of cost of goods sold, such costs were not allowable as a deduction and, therefore, could not qualify for the 10-year carryback as part of a specified liability loss under § 172(f). Revenue Ruling 2004-18 provides that environmental remediation costs are subject to capitalization under § 263A of the Code and that certain manufacturing remediation costs must be recovered as inventory costs but does not directly address the treatment of such costs as specified liability losses. However, the IRS's position had been that costs recovered through cost of goods sold are not deductions and therefore are not specified liability losses eligible for a 10-year carryback, which the IRS confirmed in a 2007 Field Directive, LMSB-04-0207-009 (Directive). That Directive provided that "Revenue Rulings 2004-18 and 2005-42 make clear that certain manufacturer's remediation costs are not deductible and thus, are not specified liability losses under IRC § 172(f)." Subsequently in a generic legal advice memorandum published on December 19, 2008, AM2008-012 (GLAM), the IRS modified its view, concluding instead that environmental remediation costs that are allocated to inventory under § 263A and recovered through cost of goods sold constitute specified liability losses to the extent that they are taken into account in computing an NOL for the taxable year. Because the IRS modified its position regarding existing law, which the taxpayer had no way to know the IRS was considering, the IRS granted the taxpayer permission to revoke its election.

Taxpayer asserts that the 2010 PLR creates a standard for "rare and unusual" under § 1.59-1(c)(1) such that § 59(e) revocations should be permitted following events that taxpayers "could not reasonably have anticipated." Taxpayer also argues that its facts are not meaningfully distinguishable from the facts in the 2010 PLR and, therefore, we should allow Taxpayer to revoke its election. For the reasons discussed below, we disagree with Taxpayer and do not provide consent to revoke the election.

ANALYSIS

The IRS has a strong administrative need for elections to be final. Allowing taxpayers to revoke elections without restriction places an undue administrative burden on the IRS's enforcement of the tax law, particularly when revoking an election requires a recalculation of tax liability for several taxable years. Revoking an election can provide the taxpayer with the benefit of hindsight in choosing the most advantageous method of reporting based on later events and may undercut the equity and fairness of the tax system by treating similarly situated taxpayers differently. This need for finalization in elections is reflected in § 1.59-1(c)(1), where the Commissioner is authorized by the Secretary to permit a taxpayer to revoke a § 59(e) election only in rare

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The IRS released the 2010 PLR pursuant to § 6110(a). All references to the 2010 PLR are to the publicly-available version.

and unusual circumstances. Although the term “rare and unusual” is not specifically defined in the regulations, based on the plain meaning of the term, it is only satisfied when the facts and circumstances present an infrequent or uncommon occurrence.

Contrary to Taxpayer’s assertion, the 2010 PLR did not set a standard that § 59(e) revocations should be permitted following events that taxpayers “could not reasonably have anticipated.” PLRs cannot set a legal standard. PLRs, including the 2010 PLR, explicitly provide that under § 6110(k)(3) they may not be used or cited as precedent. Rather, the sole test for revocation of a § 59(e) election is provided in § 1.59-1(c)(1), and the 2010 PLR is limited to its facts and the taxpayer to whom it was addressed. In particular, § 59(e) revocation PLRs are inherently factual and, based on the “rare and unusual circumstances” standard under which they are to be administered, are unlikely to present the same fact pattern twice in which a favorable ruling would be granted. Moreover, the standard as contemplated by Taxpayer, that taxpayers should be permitted to revoke a § 59(e) election for unanticipated changes, is far too broad and belies the regulatory mandate that the Commissioner should grant revocations only in rare and unusual circumstances. Unpredictable changes in facts and circumstances frequently occur; those changes may make an election less favorable to a taxpayer, but they are neither rare nor unusual.

Here, Taxpayer proposes to revoke its § 59(e) election to take advantage of changes to the NOL carryback rules in the CARES Act and changes from the GILTI HTE Proposed Regulation to the GILTI HTE Final Regulations. But Taxpayer has not demonstrated that its request is based on a rare and unusual circumstance. Statutory changes, such as the change to § 172(b)(1), are not rare or unusual. There are frequent statutory changes, including retroactive changes, for which a taxpayer may subsequently wish that it had not made a § 59(e) election. Taxpayer should not be permitted to revoke its § 59(e) election merely because the law, and therefore its facts and circumstances, changed following its election. Such § 59(e) election revocations do not appear to be contemplated by § 1.59-1(c)(1) or the CARES Act.

Changes to proposed regulations in final regulations are also not rare and unusual (including changes that affect tax years preceding the date of publication). On the contrary, they are common and usual in the rulemaking process. The Treasury Department and the IRS, in executing their responsibilities, consider all relevant, timely, public comments received, and make changes to proposed regulations in response to those comments, as appropriate. In addition, neither a modification to a proposed applicability date nor the permissive application of a rule before its applicability date is rare or unusual. It is not uncommon for the final version of a regulation, including regulations with an applicability date prior to issuance of the final version, to include changes in response to comments, and it is typical that taxpayers would not know of such changes until the regulation is finalized. Therefore, changes from a proposed regulation to a final regulation do not give rise to rare and unusual circumstances, and Taxpayer cannot be allowed to revoke a § 59(e) election for such reason.

Even if § 6110(k)(3) did not explicitly prohibit Taxpayer's use or citation of the 2010 PLR, the 2010 PLR still would provide no support for Taxpayer's position as the facts of the 2010 PLR are altogether distinguishable from those presented by Taxpayer in this case. Under the facts of the 2010 PLR, the IRS, in response to unsolicited comments, changed its position regarding specified liability losses and issued a GLAM blindsiding the taxpayer because there was no reason to expect that the IRS's position may change. Further, the change in the IRS's position was not subject to the rulemaking process, and the taxpayer could not participate in that process. The facts of the 2010 PLR suggest that it presented unique equitable considerations at the time because the IRS changed its view regarding existing law in a way that was not transparent to taxpayers.

Conversely, the elective applicability of the GILTI HTE Final Regulations came in response to public comments received as part of the rulemaking process. The comments, received and publicly available for review prior to Date 3, requested that the GILTI HTE Final Regulations apply retroactively to tax years beginning after December 31, 2017. The GILTI HTE Final Regulations did not change the proposed applicability date, but did allow taxpayers to choose to apply the GILTI HTE Final Regulations to tax years that begin after December 31, 2017 and before July 23, 2020, the applicability date of such regulations, subject to certain requirements.

Although Taxpayer could not have known what the GILTI HTE Final Regulations would provide, Taxpayer could have read the publicly available comments on this matter and inferred that the Treasury Department and the IRS would consider the issue and respond to those comments in the GILTI HTE Final Regulations. Further, Taxpayer could have participated in the process by submitting its own comment letter or by requesting to speak at a public hearing.

In sum, Taxpayer, like all taxpayers, had to take a position on its return regarding whether to make a § 59(e) election when the return was due based on the information available to it at the time. Taxpayer is not permitted to revisit that position merely because a subsequent change in the law or the regulations makes the election less favorable. The IRS is not permitted to allow § 59(e) revocations following such changes in Taxpayer's facts and circumstances because they are neither rare nor unusual.

Based solely on the information submitted and representations made, we conclude that the facts presented do not constitute rare and unusual circumstances permitting consent to revoke a § 59(e) election under § 1.59-1(c)(1). Therefore, Taxpayer may not revoke its § 59(e) election for Tax Year.

Except as specifically set forth above, we express or imply no opinion concerning the federal tax consequences of the facts described above under any other provisions of the Code and the regulations thereunder.

This letter ruling is directed only to the taxpayer that requested it. Section 6110(k)(3) provides that it may not be used or cited as precedent.

The ruling contained in this letter is based upon information submitted and representations made by Taxpayer and Taxpayer's representatives and accompanied by a penalty of perjury statement executed by an appropriate party. Although this office has not verified any of the material submitted in support of the request for a ruling, it is subject to verification on examination.

In accordance with the power of attorney on file with this office, we are sending a copy of this letter ruling to Taxpayer's authorized representatives. We are also sending a copy of this letter ruling to the LB&I Policy Office.

Sincerely,

Jennifer A. Records
Senior Technician Reviewer, Branch 6
Office of the Associate Chief Counsel
(Passthroughs and Special Industries)

Enclosures (2)
Copy of this letter
Copy for § 6110 purposes

cc: