INTERNAL REVENUE SERVICE
NATIONAL OFFICE TECHNICAL ADVICE MEMORANDUM

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CASE MIS No.: TAM-105593-00/CC:DOM:CORP:B3

Chief, Appeals Office
Dallas Appeals Office

Taxpayer's Name:
Taxpayer's Address:

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

LEGEND:

Taxpayer =
Target =

ISSUE:

Whether the limitation on the utilization of net operating loss carryovers in § 381(c)(1)(B) of the Internal Revenue Code for certain corporate acquisitions applies to the computation of an alternative tax net operating loss carryover deduction.

FACTS:

Taxpayer is a domestic corporation that filed a consolidated tax return for the taxable year ending August 31, 1992. Effective July 14, 1992, Taxpayer acquired Target in a transaction intended to qualify as a tax free reorganization under §§ 368(a)(1)(D), 354 and 356. Taxpayer utilized Target's net operating loss (NOL) carryovers and alternative tax NOL carryovers in the return for the taxable year 1992. The Taxpayer applied § 381(c)(1)(B) to the net operating loss deduction but did not apply it to the alternative tax NOL deduction.

LAW AND ANALYSIS:

Section 55(a) imposes a tax equal to the excess (if any) of the tentative minimum tax for the taxable year over the regular tax for the year. According to § 55(b)(1)(B) the tentative minimum tax of a corporate taxpayer is (i) 20 percent of so much of the

alternative minimum taxable income (AMTI) for the taxable year as exceeds the exemption amount, reduced by (ii) the alternative minimum tax foreign tax credit for the taxable year. Section 55(b)(2) provides, in part, that a corporate taxpayer's AMTI means the taxable income for the year determined with the adjustments provided in §§ 56 and 58, and increased by items of tax preference of § 57. Under § 56(a)(4), the alternative tax NOL deduction shall be allowed in lieu of the NOL deduction allowed under § 172.

In addition, § 56(d)(1) defines the alternative tax NOL deduction as the NOL deduction allowable for the taxable year under § 172, except that – (A) the amount of such deduction shall not exceed 90 percent of AMTI determined without regard to such deduction, and (B) in determining the amount of such deduction – (i) the NOL (within the meaning of § 172(c)) for any loss year shall be adjusted as provided in paragraph (2), and (ii) appropriate adjustments in the application of § 172(b)(2) shall be made to take into account the limitation of subparagraph (A).

Section 381 provides that in certain corporate acquisitions, including a transfer to which § 361 applies that is in connection with a reorganization described in subparagraph (D) of § 368(a)(1), the acquiring corporation shall succeed to and take into account, among other things, the NOL carryovers of the distributor or transferor corporation.

However, § 381(c)(1) applies to the NOL carryovers as first determined under § 172. The NOL deduction allowed for the year includes the NOL carryovers determined under § 172 as limited by the formula in § 381(c)(1)(B) (as well as other limitations not relevant here). Section 381(c)(1)(B) states that the portion of such deduction attributable to the NOL carryovers of the distributor or transferor corporation to the first taxable year of the acquiring corporation ending after the date of distribution or transfer is limited to an amount which bears the same ratio to the taxable income (determined without regard to a NOL deduction) of the acquiring corporation in such taxable year as the number of days in the taxable year after the date of distribution or transfer bears to the total number of days in the taxable year.

Section 381(c)(1)(B) does not explicitly provide rules to apply its limitation to corporations which are engaged in transactions described in § 381(a)(2) and are also subject to AMT. Nor does § 56 make any reference to corporate acquisitions and the utilization of distributor or transferor NOLs. However, the Conference Report to the 1986 Act provides important guidance:

> It is clarified that, in light of the parallel nature of the regular and minimum tax systems, any limitations applying for regular tax purposes to the use by a consolidated group of NOLs or current year losses (e.g., section 1503) apply for minimum tax purposes as well.

Conf. Rep. No. 841, 99th Cong., 2d Sess. II-283. It is the position of the Internal Revenue Service that the above language means that the NOL carryover deduction limitation that applies to certain corporate acquisitions should be applied to the NOL carryover deduction of corporations engaging in those transactions whether or not the corporations are subject to AMT.

The Taxpayer argues that the § 381(c)(1)(B) limitation is not applicable to the alternative tax NOL deduction in part because § 381 does not alter the computation of an NOL deduction under § 172. Section 381(c) literally starts with the deduction under § 172 and applies its limitation to that. Section 56 provides first that the deduction in § 56 will be in lieu of the deduction under § 172, then computes the deduction starting with the § 172 deduction. The Taxpayer states that because § 381(c)(1)(B) only limits a taxpayer's use of the § 172 deduction, that § 381 does not apply to a taxpayer computing an NOL deduction under § 56.

However, the fact that both § 381 and § 56 start with a § 172 deduction and place independent limits on the amount of the deduction does not mean that either is exclusive. Section 381 is specific to corporations engaging in certain acquisitions and § 56 is specific to corporations subject to AMT; the Taxpayer is a corporation subject to AMT engaging in an acquisition covered by § 381 and therefore subject to both. Moreover, if the Taxpayer was not subject to § 381, it would not succeed to or take into account Target's NOL carryovers of any kind. The Taxpayer cannot use § 381(c)(1) to take Target's alternative tax NOLs into account, and at the same time ignore the § 381(c)(1)(B) limitation on them because the Taxpayer is subject to AMT.

The Taxpayer also argues that Congress did not intend the § 381(c)(1)(B) limitation to apply to AMT taxpayers because there is no explicit incorporation of the AMT provisions in § 381, as there is in § 382. Section 382(l)(7) provides that the Secretary can, by regulation, provide for the application of § 382 to the alternative tax NOL deduction under § 56(d). The Taxpayer argues that if Congress had intended the § 381(c)(1)(B) limitation to apply to the alternative tax NOL deduction it would have explicitly so provided in the statute. However, § 382(l)(7) is only a grant of regulatory authority. The fact that Congress did not grant similar regulatory authority for § 381 and § 382 does not prohibit the application of § 381 to § 56.

Further, the legislative history cited above is bolstered by the General Explanation of the Tax Reform Act of 1986, which states:

> In certain instances, the operation of the alternative minimum tax as a separate and independent tax system is set forth expressly in the Code. With respect to the passive loss provisions, for example, section 58 provides expressly that, applying the limitation for minimum tax purposes, all minimum tax adjustments to income and expenses are made and regular tax deductions that are items of tax preference are disregarded.

> In other instances, however, where no such express statement is made, Congress did not intend to imply that similar adjustments were not necessary. Thus, for example, for minimum tax purposes it was intended that section 1211 (limiting capital losses) be computed using minimum tax basis, that section 263A (requiring the capitalization of certain depreciation deductions to inventory) apply with regard to minimum tax depreciation deductions, and that section 265 (relating to expenses of earning tax-exempt income) apply with regard only to items excludible from alternative minimum taxable income.

Staff of the Joint Committee on Taxation, 99th Cong., General Explanation of the Tax Reform Act of 1986 (Comm. Print 1987).

Although the General Explanation does not rise to the level of legislative history because it is authored by the congressional staff and not by Congress, such explanations are entitled to great respect. Rivera v. Commissioner, 89 T.C. 343, 349 n.7 (1987). This is particularly true when the staff views are consistent with the other evidence of legislative intent that is present. Estate of Hutchinson v. Commissioner, 765 F.2d 665, 670 (7th Cir. 1985). The Conference Report, above, establishes that limitations found in the regular tax system apply to the minimum tax system whether or not Congress makes the application explicit in any given Code section. Therefore, the § 381(c)(1)(B) limitation will apply when computing the alternative tax NOL deduction.

CONCLUSION:

The limitation on the utilization of net operating loss carryovers in § 381(c)(1)(B) for certain corporate acquisitions applies to the computation of an alternative tax net operating loss carryover deduction.

CAVEAT:

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.