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:

Telephone:

Refer Reply To:
LB&I Eastern Compliance

Date:
September 6, 2023

Dear [redacted]

This letter responds to the letter, received [redacted], submitted on behalf of [redacted] ("Holdco") and [redacted] ("Intermediate") (together, the "affiliated group" for purposes of this letter and to the extent these entities meet the definition provided by Section 1504(a) of the Internal Revenue Code), requesting that the Commissioner make a determination regarding the failure of Holdco's wholly-owned subsidiary, Intermediate, to have consented to the filing of a consolidated return with Holdco pursuant to, and in the manner provided by, Treasury Regulation sections 1.1502-75(a)(1), 1.1502-75(b)(1) and 1.1502-75(h)(2) for the taxable year ended [redacted].

The determination contained in this letter is based upon facts and representations submitted by the taxpayers and accompanied by a penalties of perjury statement executed by an appropriate party.

Summary of Facts

Holdco and Intermediate were both formed under [redacted] law on [redacted], with the purpose of acquiring [redacted] ("Asset"). The Purchase Agreement provided that Intermediate would purchase all the membership interests of Holdco, the then and current owner of Asset. Holdco is a holding company with no operations or assets other than its investment in Intermediate. Holdco has maintained sole control and been the sole shareholder for the entire term of Intermediate's existence.

Holdco hired [redacted] ("Accounting Firm") as its certified public accountants to prepare and file its federal income tax returns after the closing of the acquisition of Asset. Asset utilized Accounting Firm prior to the transaction and decided to continue the relationship post-acquisition. According to Holdco's POA ("the POA"), Holdco provided

Accounting Firm with all the information necessary to prepare its federal income tax return, including the Purchase Agreement and certain contribution agreements between members of the affiliated group.

Per the POA, Holdco believed that review of the transaction documents by Accounting Firm would have provided adequate detail to determine Holdco's post-acquisition legal organizational structure and federal income tax filing requirements.

If Holdco had intended to file a consolidated return with Intermediate, Holdco should have included Form 1122, signed by a representative of Intermediate granting consent to join in a consolidated group with Holdco, an indication of a consolidated filing on Page 1 of the Form 1120, and a Form 851, Affiliations Schedule. However, this was not done, nor, per the information provided by the POA, was the need for this brought to the attention of Holdco.

For the initial short tax period ending [redacted], and all subsequent calendar years Holdco filed a standalone Form 1120, U.S. Corporation Income Tax Return, that reported the operations of Intermediate and its subsidiaries. Intermediate did not file a separate return for the period ending [redacted], or for any subsequent tax years. The amount of U.S. income taxes reported as owing on Holdco's U.S. income tax return for its tax period ending [redacted], and for all its subsequent tax years was never less than what the total U.S. income tax liability of Holdco and Intermediate would have been had each of them filed separate U.S. income tax returns.

The CFO, who served in the role for both Holdco and Intermediate, did not have in-depth knowledge of consolidated filing regulations. The CFO signed the returns without fully understanding the procedural irregularity of the filing, in part because the return contained all the activities of Intermediate, and Holdco was solely a holding company.

At the request of Holdco's majority shareholder, [redacted] ("Analyst') was engaged to analyze and provide due diligence services to Holdco and its subsidiaries. Analyst was not involved in the formation of Holdco and its subsidiaries or the preparation of its returns. Analyst discovered the missed election while performing its due diligence procedures.

During the due diligence process, Analyst reviewed the Purchase Agreement and discovered that Intermediate, which was still in existence, had not properly filed consolidated income tax returns as the direct or indirect owner of the operating disregarded entities. Analyst recognized that Intermediate's existence impacted Holdco's tax returns. Once the missed filing of a consolidated group's return was discovered, Analyst advised Holdco to file this request for a determination letter under Treas. Reg. §§ 1.1502-75(b)(2) or 1.1502-75(b)(3) regarding Holdco's missed consolidated group's election and the subsidiary's consent in joining consolidated Forms 1120 filing for tax years 2017 and all subsequent years.

To support this request for relief, the affiliated group attached declarations from:

(1) [redacted], in his dual capacity as Chief Financial Officer for both Holdco and Intermediate, and

(2) [redacted], Partner, Analyst.

Determination Requested

Based on the above facts, Holdco requested that the Commissioner determine under §1.1502-75(b)(2) or §1.1502-75(b)(3) of the Treasury Regulations that Intermediate has joined in the filing of Holdco's consolidated income tax returns for the period ending on [redacted], and for all tax years ending thereafter. Holdco and Intermediate will conform with any additional or amended filings that might be required as a condition for the requested determination.

Law

The Internal Revenue Code ("I.R.C.") § 1501 provides (in part) that "An affiliated group of corporations shall ... have the privilege of making a consolidated return with respect to the income tax imposed by chapter 1 for the taxable year in lieu of separate returns. The making of a consolidated return shall be upon the condition that all corporations which at any time during the taxable year have been members of the affiliated group consent to all the consolidated return regulations prescribed under I.R.C. § 1502 prior to the last day prescribed by law for the filing of such return. The making of a consolidated return shall be considered as such consent."

I.R.C. § 1504(a) defines the term "affiliated group" as follows:

> (a) Affiliated group defined
> For purposes of this subtitle –
> (1) In general
> The term "affiliated group" means –
> (A) 1 or more chains of includible corporations connected through stock ownership with a common parent corporation which is an includible corporation, but only if –
> (B) (i) the common parent owns directly stock meeting the requirements of paragraph (2) in at least 1 of the other includible corporations, and
> (ii) stock meeting the requirements of paragraphs (2) in each of the includible corporations (except the common parent) is owned directly by 1 or more of the other includible corporations.
>
> (2) 80-percent voting and value test
> The ownership of stock of any corporation meets the requirements of this paragraph if it –
> (A) possesses at least 80 percent of the total voting power of the stock of such corporation, and
> (B) has a value equal to at least 80 percent of the total value of the stock of such corporation.

Treas. Reg. § 1.1502-75(a)(1) provides (in part) that "A group which did not file a consolidated return for the immediately preceding taxable year may file a consolidated return in lieu of separate returns for the taxable year, provided that each corporation which has been a member during any part of the taxable year for which the consolidated return is to be filed consents (in the manner provided in paragraph (b) of this section) to the regulations under section 1502."

Treas. Reg. § 1.1502-75(b)(1) provides that "The consent of a corporation referred to in paragraph (a)(1) of this section shall be made by the corporation joining in the making of the consolidated return for such year. A corporation shall be deemed to have joined in the making of a consolidated return if it files a Form 1122 in the manner specified in paragraph (h)(2) of this section."

Treas. Reg. § 1.1502-75(b)(2) provides that "If a member of the group fails to file Form 1122, the Commissioner may under the facts and circumstances determine that such member has joined in the making of a consolidated return by such group. The following circumstances, among others, will be taken into account in making this determination:

(i) Whether or not the income and deductions of the member were included in the consolidated return;

(ii) Whether or not a separate return was filed by the member for that tax year; and

(iii) Whether or not the member was included in the affiliations schedule, Form 851."

If the Commissioner determines that the member has joined in the making of the consolidated return, such member shall be treated as if it had filed a Form 1122 for such year for purposes of Treas. Reg. § 1502-75(h)(2).

Treas. Reg. § 1.1502-75(b)(3) provides that "If any member has failed to join in the making of a consolidated return under either subparagraph (1) or (2) of this paragraph, then the tax liability of each member of the group shall be determined on the basis of separate returns unless the common parent corporation establishes to the satisfaction of the Commissioner that the failure of such member to join in the making of the consolidated return was due to a mistake of law or fact, or to inadvertence. In such case, such member shall be treated as if it had filed a Form 1122 for such year for purposes of paragraph (h)(2) of this section, and thus joined in the making of the consolidated return for such year."

Treas. Reg. § 1.1502-75(h)(2) provides that "If, under the provisions of paragraph (a)(1) of this section, a group wishes to file a consolidated return for a taxable year, then a Form 1122 ("Authorization and Consent of Subsidiary Corporation to Be Included in a Consolidated Income Tax Return") must be executed by each subsidiary... For taxable years beginning after December 31, 2002, the group must attach either executed Forms 1122 or unsigned copies of the completed

Forms 1122 to the consolidated return...Form 1122 is not required for a taxable year if a consolidated return was filed (or was required to be filed) by the group for the immediately preceding taxable year."

Rev. Proc. 2014-24 allows an affiliated group that satisfies certain requirements to obtain an automatic determination to treat a subsidiary member of the affiliated group as if it filed a Form 1122, even though it failed to do so. Rev. Proc. 2014-24, Section 1.03 provides that if an affiliated group cannot satisfy such requirements, a determination by the Commissioner under Treas. Reg. § 1.1502-75(b) is available only pursuant to a determination letter issued by a Director.

Analysis

Holdco and its wholly owned subsidiary, Intermediate, were eligible to file consolidated federal income tax returns for the tax period ending on [redacted], and every tax year thereafter. The income and deductions of Intermediate were included in the timely-filed federal income tax returns of Holdco for the tax period ending on [redacted], and all subsequent tax years. However, Form 1122 and related entries were not filed with Holdco's initial Form 1120 for lax year ending [redacted]. The failure of Intermediate to join Holdco's consolidated return appears to be inadvertent and lacks an obvious tax planning purpose.

It was Holdco's and Intermediate's intention to have their incomes reported and federal income tax liabilities satisfied on a combined basis, and even though they did not file the proper documentation, it was essentially what occurred. Holdco included all items of Intermediate's income, gain, loss, deduction, and credit on its income tax returns and paid all federal income taxes on such income. Thus, Holdco and Intermediate had filed what virtually amounted to a consolidated federal tax return for the tax period ending [redacted] and all subsequent tax years.

Thus, while neither the Holdco nor Intermediate complied with Treas. Reg. § 1.1502-75(b)(1), it would be consistent with the regulation for the Commissioner to determine, pursuant to subsection (b)(2) or subsection (b)(3), that Intermediate has consented to join in the making of the consolidated return based on the facts and circumstances of the case.

Per Treas. Reg. § 1.1502-75(b)(2), the making a facts and circumstances determination regarding the consent of a member, the Commissioner will generally take into account (1) whether or not the income and deductions of the member were included in the consolidated return; (2) whether or not a separate return was filed by the member for that taxable year; and (3) whether or not the member was included in the affiliations schedule, Form 851. None of the factors here weigh against granting the determination.

Treas. Reg. § 1.1502-75(b)(3) permits the Commissioner to find that a Form 1122 was filed if the common parent corporation establishes that the failure of the affiliated group to join in the consolidated return was due to a mistake of fact or to inadvertence. Here, due to inadvertence, Accounting Firm failed to properly include Intermediate in the consolidated filing. Even though Holdco did not formally file Form 1122, its inclusion of Intermediate's income and deductions on its tax returns constructively amounted to a consolidated return. Therefore, if the

representation of the POA is accurate, the improper filing of the consolidated return paperwork appears to be inadvertent.

DETERMINATION

Based on the information submitted and the representations made in the letter received [redacted] we have determined that Treas. Reg. § 1.1502-75(b)(2) can be applied in this case.

In this case, Holdco and Intermediate failed to file Form 1122. It is our opinion that Treas. Reg. § 1.1502-75(b)(2) applies in this case because of the following circumstances: (i) The income and deductions of Holdco and Intermediate were included in Holdco's [redacted] return, and (ii) Intermediate did not file a separate return for the [redacted] tax year.

Intermediate was not included on a Form 851 affiliation schedule, because no Form 851 was filed with the Holdco affiliated group return. However, the Service has granted relief under Treas. Reg. § 1.1502-75(b)(2) in similar previous situations where a subsidiary was not included on Form 851.

Accordingly, based solely on facts and representations submitted in the letter received [redacted], the Service shall treat Subsidiary as if it had filed a Form 1122 for the taxable years ended [redacted], and subsequent years for purposes of Treas. Reg. § 1.1502-75(h)(2) and thus joined in the making of a consolidated return by the affiliate group, notwithstanding that it failed to actually file Form 1122.

In the alternative, relief could be granted under Treas. Reg. § 1.1502-75(b)(3), which allows for relief in the case of inadvertence or mistake. As the failure to properly file paperwork for consolidated returns was likely inadvertent, relief could be granted under Treas. Reg. § 1.1502-75(b)(3). In this case, since a determination is being made under Treas. Reg. § 1.1502-75(b)(2) there is no need to make a determination under Treas. Reg. § 1.1502-75(b)(3); however, the Service agrees that the facts also support a conclusion that the failure of the subsidiaries to join in the making of the consolidated return was due to a mistake of law or fact, or to inadvertence as the taxpayers representative stated in their determination letter request, "the failure was due to a mistake of fact or to inadvertence."

CAVEATS

Except as expressly provided herein, no opinion is expressed or implied concerning the U.S. income tax consequences of any aspect of any transaction or item discussed or referenced in this letter or about the tax treatment of any condition existing at the time of, or effects resulting from, any transaction or item that is not specifically covered by the above determination. The determination contained in this letter is based upon information and representations submitted by

the taxpayers and accompanied by a penalty of perjury declaration executed by an appropriate party.

PROCEDURAL MATTERS

This determination is directed only to the taxpayers who requested it. I.R.C. § 6110(k)(3) provides that it may not be used or cited as precedent.

This office will associate a copy of this determination letter with Holdco's U.S. income tax returns. A copy of this determination letter should be kept by Holdco in its permanent records.

A copy of this determination letter must be attached to any income tax return to which it is relevant. Alternatively, taxpayers filing their returns electronically may satisfy this requirement by attaching a statement to their returns that provides the date and control number of the determination letter.

Sincerely,

By:

Khin M Chow

Title: Director, Field Operations North Central

Section 6110(k)(3) of the Internal Revenue Code

This document may not be used or cited as precedent.