*This Month in M&A / Issue 1 / January 2014*



# M&A tax recent guidance

This month features:

- IRS issues ruling excluding deferred intercompany gain from gross income under discretionary rule (PLR 201352007)
- Eleventh Circuit interprets tax sharing agreement between members of consolidated group to determine ownership of tax refund (*In re Netbank, Inc.*, 729 F.3d 1344)
- Proposed regulations to foreclose attempts to accelerate deductions for unamortized organizational expenses and start-up expenditures (REG-126285-12)
- Proposed regulations provide guidance on determining partner's share of recourse liabilities in certain contexts (REG-136984-12)
- Revenue Procedure provides safe harbor for partnership allocations of Section 47 rehabilitation credits (Rev. Proc. 2014-12)
- Exchange of pre-existing Distributing debt for Controlled stock in monetized spin-off transaction qualifies as tax-free (PLR 201349006)
- Segregation rules apply to loss corporation in pro rata spin-off, causing creation of new public group (PLR 201350006)

## *Did you know...?*

The IRS issued only its third ruling excluding deferred intercompany gain apparently triggered with respect to stock of a consolidated group member from gross income under the Commissioner's Discretionary Rule (CDR) in Reg. sec. 1.1502-13(c)(6)(ii)(D). Deferred intercompany gains on member stock can be a trap for the unwary, and even seemingly tax-free transactions can result in the acceleration of the deferred gain. In PLR 201352007, the CDR was applied in the context of a downstream merger preceding a Section 355 distribution.

### *Background*

#### *The CDR*

In general, when stock of a consolidated group member has a deferred intercompany gain associated with it, and the stock basis in such group member is eliminated (even, for example, in a tax-free liquidation under Section 332), such deferred gain is accelerated into income.

Reg. sec. 1.1502-13(c)(6)(ii)(C)(1)(i)-(v) provides an exception to this general rule and states that "intercompany gain with respect to a member's stock that was created by reason of an intercompany transfer of the stock, and that would not otherwise be taken into account upon a subsequent elimination of the stock's basis but for the transfer, is redetermined to be excluded from gross income if[:]

- [The buying member (B)] or S becomes a successor...to the other party (either B or S), or a third member becomes a successor to both B and S [Factor 1];
- Immediately before the intercompany gain would be taken into account, the successor member holds the member's stock with respect to which the intercompany gain was realized [Factor 2];
- The successor member's basis in the member's stock that reflects the intercompany gain that is taken into account is eliminated without the recognition of gain or loss (and such eliminated basis is not further reflected in the basis of any successor asset) [Factor 3];
- The effects of the intercompany transaction have not previously been reflected, directly or indirectly, on the group's consolidated return [Factor 4]; and
- The group has not derived, and no taxpayer will derive, any Federal income tax benefit from the intercompany transaction that gave rise to the intercompany gain or the redetermination of the intercompany gain (including any adjustment to basis in member stock under [Treas. Reg. sec. 1.1502-32). For this purpose, the redetermination of the intercompany gain is not itself considered a Federal income tax benefit." [Factor 5]

Further, the CDR provides that in the case of items of intercompany gain "[t]he Commissioner may determine that treating S's intercompany item as excluded from gross income is consistent with the purposes of [Reg. sec. 1.1502-13] and other applicable provisions of the Internal Revenue Code, regulations, and published guidance, if...the conditions described in [Factor 4 and Factor 5] are satisfied."

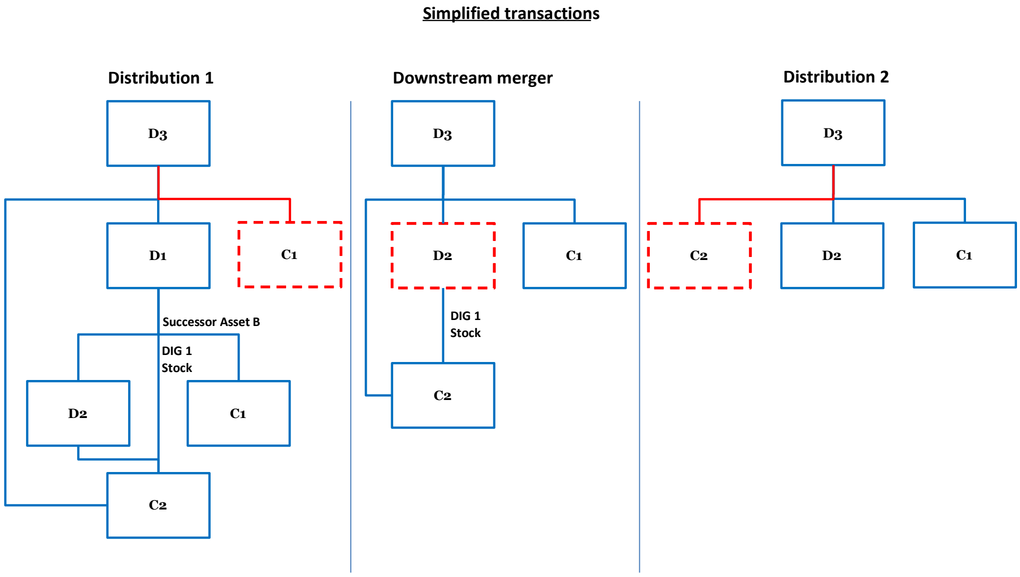
#### *Simplified relevant transaction steps from PLR 201352007*

Prior to an external spin-off transaction, the members of a consolidated group undertook several internal restructuring transactions. As relevant to the application of the CDR, (i) Distributing 1 distributed all the stock of Controlled 1 to Distributing 3 in a tax-free Section 355 transaction (Distribution 1), (ii) Distributing 1 merged into its subsidiary, Distributing 2, with Distributing 2 surviving in a tax-free Section 368(a)(1)(A) reorganization (the Downstream Merger), and Distributing 2 distributed all the common stock of Controlled 2 to Distributing 3 in a tax-free Section 355 transaction (Distribution 2).

There was a deferred intercompany gain associated with both the Controlled 1 and Controlled 2 stock. More specifically, as a result of prior internal transactions, the Controlled 1 stock held by Distributing 1 prior to Distribution 1 was a successor asset

(Successor Asset B) to a portion of Controlled 2 common stock (DIG 1 Stock) distributed by Distributing 2 to Distributing 1 in a taxable distribution that resulted in a deferred intercompany gain (DIG 1).

At issue in the PLR was whether the spin-off would result in the acceleration of the deferred gain associated with the Controlled 1 stock.




## *Application of the CDR*

Distribution 1, as an intercompany Section 355 transaction, is a stock basis elimination transaction with respect to Successor Asset B (*see* Reg. sec. 1.1502-13(c)(7)(ii), Ex. 17) because the basis in the Controlled 1 stock as a result of DIG 1 is no longer reflected in the Controlled 1 stock. If the Downstream Merger had occurred prior to Distribution 1 (and per the taxpayer's representations as to the satisfaction of Factors 4 and 5), it appears that Factors 1-5 would have been satisfied because Distributing 2 (S in the DIG 1 Stock distribution) would be the successor to Distributing 1 (B in the DIG 1 Stock distribution) at the time of the tax-free basis elimination transaction. However, because the Downstream Merger did not occur until after Distribution 1, it appears that the taxpayer could not meet Factors 1 and 2 literally because Distributing 2 is not the successor to Distributing 1, and thus does not hold the DIG 1 Stock, until after Distribution 1.

In the PLR, the taxpayer received approval under the CDR to exclude from the gross income of Distributing 1 the portion of DIG 1 reflected in Successor Asset B. While not clear from the PLR, it appears that a separate non-US federal income tax business reason existed for undertaking the Downstream Merger after Distribution 1. This can generally be inferred in the first instance from the ordering of the transactions and the taxpayer's awareness to request application of the CDR.

The existence of a separate business purpose for the Downstream Merger (apart from the Section 355 transactions) may be further inferred because the IRS respected the Downstream Merger as a separate transaction preceding Distribution 2, notwithstanding that the Downstream Merger was at least in part necessary for Distributing 2 to acquire Section 368(c) control of Controlled 2, in light of the IRS's holding in Rev. Rul. 70-18. In Rev. Rul. 70-18, which is not specifically referenced in the PLR, the IRS respected a brother-sister merger providing the resulting distributing corporation with the requisite control to spin off its controlled corporation because "business reasons existed to establish the validity of the merger as having a substantial business purpose other than to gain the control required to effect the spin-off."

*For additional information, please contact Tim Lohnes or Rich McManus.*

# Court watch

## *In re Netbank, Inc., 729 F.3d 1344*

When the parent of a consolidated group receives a federal tax refund on behalf of the group, does it own the money received? What if the refund amount is related only to tax attributes, such as net operating loss (NOL) carrybacks, generated by a consolidated subsidiary? Can the consolidated subsidiary claim ownership of the refund if its parent has filed for bankruptcy? If ownership of a refund is disputed, what weight does a court assign to documents such as tax allocation agreements that purport to govern the issue?

These were among the questions faced by the Eleventh Circuit in *In re Netbank, Inc.,* in which (1) the consolidated subsidiary that had generated the NOLs in question was a bank (Bank), and (2) Bank had been placed in receivership. As a result, the FDIC was asserting ownership of the refund on Bank's behalf. The case involved the Eleventh Circuit reviewing a district court decision granting ownership of the refund to the liquidator of the parent (Netbank) based on the provisions of the consolidated tax-sharing agreement (TSA) in place.

The Eleventh Circuit's decision turned on whether, under the terms of the TSA, Netbank received the refund as the debtor of Bank or as its agent. On a review of the TSA, the Eleventh Circuit identified certain provisions in it appearing to create a debtor-creditor relationship between the parties and others appearing to create an agency relationship.

Faced with this ambiguity in the TSA, the Eleventh Circuit took notice of a federal policy statement referenced approvingly in the TSA. The federal policy statement itself counselled against a consolidated parent entering into a tax allocation agreement granting the parent ownership of refunds attributable to its subsidiaries. Interpreting the TSA in light of the federal policy statement, the Eleventh Circuit concluded that Netbank had acted as Bank's agent with respect to the tax refund at issue. Accordingly, the Eleventh Circuit reversed the district court decision found in favor of the FDIC.

### *Observations*

Reg. sec. 1.1502-78(b) generally requires the IRS to pay refunds for consolidated loss or credit carrybacks to the consolidated parent and discharges the IRS of liability for the refund upon payment. As may be expected following the financial downturn, the *In re Netbank, Inc.*, decision is but a recent example of case law highlighting the uncertainty that can result once the IRS has fulfilled its refund payment obligation (other recent cases include *In re IndyMac Bancorp Inc.,* 2012 WL 1951474 (C.D. Cal. May 30, 2012); *In re BankUnited Financial Corp*, 727 F.3d 1100 (11th Cir. 2013); and *In re Imperial Capital Bancorp, Inc.,* 492 B.R. 25 (S.D. Cal. 2013). In CCA 201310039 (March 8, 2013), the IRS also recently concluded outside the litigation context that under the relevant agreements a previously sold consolidated subsidiary owned refunds related to the carryback of its post-sale NOLs by the seller's group.

While implementing a TSA is best practice, *In re Netbank, Inc.,* is a reminder to taxpayers with a TSA in place to review the agreement in light of recent decisions and ensure that it still accomplishes the intended results. In reviewing the adequacy of an existing TSA, taxpayers may find it helpful to consider factors such as changes in law, relevant business developments, and whether the TSA provides a framework for resolving situations outside the normal course of business.

*For additional information, please contact David Friedel.*

# *Proposed Treasury regulations*

## *IRS proposes to foreclose attempts to accelerate deductions for unamortized organizational expenses and start-up expenditures (REG 126285-12)*

Partnerships generally are required to capitalize and, unless electing otherwise, amortize over 15 years organizational expenses (within the meaning of Section 709(b)(3)) and start-up expenditures (within the meaning of Section 195(c)(1)). If a partnership is liquidated before the end of the 15-year period, any unamortized portion generally is allowable as a deduction under Section 165 (Sections 195(b)(2) and 709(b)(2)). Some taxpayers have been attempting to accelerate the deduction of organizational expenses and start-up expenditures by intentionally triggering a technical termination of a partnership under Section 708(b)(1)(B). Specifically, as a result of a technical termination, the 'old' partnership is deemed to contribute all of its assets in to a 'new' partnership in exchange for an interest in the new partnership. Immediately thereafter, the old partnership distributes interests in the new partnership to partners and terminates for tax purposes.

The IRS has issued proposed regulations under the authority of Section 708 providing that technical partnership terminations do not accelerate the deductions, which it views as contrary to the congressional intent underlying Sections 195, 708, and 709. The proposed regulations would require the 'new' partnership resulting from a technical termination under Section 708(b)(1)(B) to continue amortizing the organizational expenses and start-up expenditures using the same amortization period as the terminated partnership. The proposed regulations, if finalized, would be effective for technical terminations that occur on or after December 9, 2013.

*For additional information, please contact Todd McArthur, Dianna Miosi, or Matthew Arndt.*

## *IRS issues proposed guidance on the determination of a partner's share of recourse liabilities in certain contexts (REG-136984-12)*

The IRS issued proposed regulations under Section 752 providing guidance on the determination of a partner's share of recourse liabilities in situations involving: (1) overlapping economic risk of loss, (2) tiered partnerships, and (3) related parties. The regulations are proposed to be applicable to liabilities incurred or assumed by a partnership on or after the date the proposed regulations become final, other than liabilities incurred or assumed by a partnership pursuant to a written binding contract in effect prior to that date.

Under current regulations, there is uncertainty as to how partners should share a partnership liability where multiple partners bear the economic risk of loss with respect to the same partnership liability. For example, two partners both may guarantee 100% of the same partnership liability.

The proposed regulations provide, when multiple partners bear the economic risk of loss with respect to the same liability, that the economic risk of loss borne by each partner with respect to such liability shall equal the amount determined by multiplying the amount of such liability by the fraction obtained by dividing (i) the amount of economic risk of loss that such partner is determined to bear with respect to that liability by (ii) the sum of such amounts for all partners. This brings back a rule from the prior temporary regulations.

Under current regulations, there is no guidance as to how a lower-tier partnership liability should be shared when a partner of an upper-tier partnership also is a partner in the lower-tier partnership, and that partner bears the economic risk of loss with respect to the liability of the lower-tier partnership.

The proposed regulations provide that under this fact pattern, to the extent the upper-tier partnership does not have a payment obligation or is not the lender with respect to the lower-tier partnership liability, the lower-tier partnership liability shall be allocated to the partner of the lower-tier partnership who bears the economic risk of loss and no part of the liability is allocated to the upper-tier partnership.

*Constructive ownership of stock:* Under current regulations, when a partnership owns stock in a corporation that is a lender to the partnership or has a payment obligation with respect to a liability of the partnership, a partner may be treated as related to the corporation through its ownership in the partnership for purposes of determining the partner's economic risk of loss with respect to the partnership liability.

The proposed regulations eliminate the constructive ownership of stock attribution from a partnership to its partners when the corporation is owned by the partnership and is a lender or has a payment obligation with respect to the partnership liability. The modification is intended to prevent a partnership from allocating such liability to a partner who is treated as related to the corporation as a result of the partner's ownership in the partnership.

*Related-party exception:* Under current regulations, persons owning interest directly or indirectly in the same partnership are not treated as related persons for purposes of determining the economic risk of loss borne by each of them with respect to the liabilities of the partnership. Thus, for example, when A bears the economic risk of loss with respect to a liability of a partnership owned by A and its related partner B who does not bear economic risk of loss, A's relationship to B is disregarded.

The proposed regulations modify this rule by limiting its application to the portion of the partnership liability when a person owning a direct or indirect interest in a partnership has a payment obligation or is the lender with respect to such liability. The regulations also clarify that an indirect interest in a partnership means an indirect interest through one or more partnerships.

*Person related to more than one partner:* Under current regulations, if a person is related to more than one partner in a partnership and the partners related to such person have the same percentage of related ownership with no other partner having a greater percentage, the partnership liability to which the person bears the economics risk of loss is allocated equally among the partners having equal percentage of related ownership. On the other hand, if the partners do not have the same percentage of related ownership, the person is treated as related only to the partner with the highest percentage of related ownership in determining the economic risk of loss borne by such partners with respect to the partnership liability.

The proposed regulations eliminate the 'greatest percentage rule' and provide that if a person is a lender or has a payment obligation with respect to a partnership liability and is related to more than one partner, those partners share the liability equally regardless of percentage of related ownership.

## *Observations*

The proposed regulations address some longstanding ambiguities with respect to partnership debt allocations. The proposed regulations are not the fundamental changes to Section 752 and 707 that we anticipate are substantially underway and nearing completion as part of a guidance project. The anticipated proposed regulations could have a significant impact on leveraged partnership transactions in the future as well as more traditional debt assumptions. For example, we expect the guidance project to address bottom-dollar guarantees and net worth requirements in a manner that can alter the allocation of partnership liabilities when a partner contributes low-basis property subject to debt.

*For additional information, please contact Karen Lohnes, Todd McArthur, or John Schmalz.*

# *Revenue procedures*

## *Rev. Proc. 2014-12*

The IRS recently issued a safe-harbor revenue procedure (Rev. Proc. 2014-12) eagerly anticipated by participants in the historic rehabilitation tax credit market. Activity in that market has been chilled following the decision of the U.S. Court of Appeals for the Third Circuit in *Historic Boardwalk Hall, LLC v. Commissioner*, 694 F.3d 425 (3d Cir. 2012).

The revenue procedure provides that the IRS will not challenge partnership allocations of Section 47 rehabilitation tax credits if certain requirements are met. Rev. Proc. 2014-12 was issued on December 30, 2013, revised on January 8, 2014, and is effective for allocations of Section 47 rehabilitation credits made by a partnership to its partners on or after December 30, 2013.

### *Background: Historic Boardwalk Hall, LLC v. Commissioner*

In 2012, the Third Circuit reversed a taxpayer-friendly Tax Court decision by holding that an investor was not entitled to Section 47 historic rehabilitation tax credits claimed through a partnership. The Third Circuit reasoned that the investor was not a partner for tax purposes and rejected a state governmental instrumentality's attempt to transfer historic rehabilitation tax credits through the partnership. The Third Circuit found that the investor lacked a meaningful stake in either the success or failure of the partnership. According to the Third Circuit, the investor's interest in the partnership provided no meaningful risk or potential upside. For more in-depth coverage of *Historic Boardwalk Hall, LLC v. Commissioner, see This Month in M&A* – September 2012.

### *Safe harbor requirements*

To fit within the scope of Rev. Proc. 2014-12, a number of requirements must be satisfied. The requirements generally focus on whether a partner has a meaningful stake in the success and failure of the partnership. The requirements include:

- The Principal must have a minimum one percent interest in each material item of partnership income, gain, loss, deduction, and credit at all times during the existence of the partnership.
- The Investor must have a minimum interest in each material item of partnership income, gain, loss, deduction, and credit equal to at least five percent of the investor’s percentage interest in each such item for the tax year for which the investor’s percentage share of that item is largest.
- The Investor’s interest must constitute a bona fide equity investment with a reasonably anticipated value commensurate with the investor’s overall percentage interest in the partnership.
- The Investor must contribute (and maintain) a minimum unconditional amount of at least 20% of the investor’s total expected capital contributions to the partnership before the date the building is placed in service.
- At least 75% of the Investor’s total expected capital contributions must be fixed in amount before the building is placed into service and the investor must reasonably expect to meet its funding obligations as they arise.
- Impermissible guarantees (generally defined in the Revenue Procedure as funded guarantees) between the persons involved in any part of the rehabilitation transaction are not permitted.
- Neither the Principal nor the partnership may have a call option or other contractual right or agreement to purchase or redeem the Investor’s interest at a future date (other than a contractual right or agreement for a present sale).
- The Investor may not have a contractual right or other agreement to require any person involved in any part of the rehabilitation transaction to purchase or liquidate the Investor’s interest in the partnership at a future date at a price

other than its fair market value determined at the time of exercise of the contractual right to sell.

- The Section 47 rehabilitation credit must be allocated in accordance with Reg. sec. 1.704-1(b)(4)(ii).

*Observations*

The scope of Rev. Proc. 2014-12 is intentionally narrow and limited. The IRS provided guidance only to the rehabilitation tax credit industry directly affected by the *Historic Boardwalk Hall* decision, declining requests to address other tax credits. Certain aspects of the safe harbor are similar to the safe harbor provided for the Section 45 wind energy production tax credit (*see* Rev. Proc. 2007-65, as amended by 2007-50 IRB 1175). Rev. Proc. 2014-12, however, cautions that its safe harbor does not provide substantive rules or even reflect views of the IRS and the Treasury Department on partner status. Participants in other tax credit industries and those participants in the rehabilitation tax credit industry falling outside the safe harbor will have to continue to weigh the impact of the *Historic Boardwalk Hall* decision and other authorities regarding partner status on a case-by-case basis.

*For additional information, please contact Todd McArthur, Gretchen Van Brackle, or Dianna Miosi.*

# Private letter rulings

## PLR 201349006

In this ruling, the IRS ruled favorably on a tax-free spin-off where a distributing corporation (Distributing) retained shares of stock of a controlled corporation (Controlled) following the distribution and subsequently exchanged such Controlled stock for pre-existing Distributing debt. The IRS ruled that Distributing would recognize no gain or loss upon the exchange under Section 361(c). The net result of the transaction is that Distributing has used stock of Controlled to pay off certain of its indebtedness without recognizing gain.

*Observations*

This ruling is noteworthy because we are unlikely to see similar rulings on other forms of monetized spin-off transactions in the future in light of the recent changes to the IRS ruling practice. Monetized spin-off transactions most recently generally have been executed in some variation of the following. First, Distributing issues its own debt to a third-party lender for cash. Second, Distributing contributes assets to Controlled in exchange for Controlled stock and securities and distributes Controlled stock or securities to the Distributing debt holders in satisfaction of the recently issued Distributing debt. The exchange of Distributing debt for Controlled stock or securities is tax free under Section 361(c). Prior to the issuance of Rev. Proc. 2013-3, the IRS was generally willing to rule that such transactions qualified for tax-free treatment provided that, in general, (i) the Distributing debt was issued at least fourteen days prior to the exchange, and (ii) the agreement to exchange the Distributing debt for Controlled stock or securities was entered into at least five days after the issuance of the Distributing debt.

In Rev. Proc. 2013-3, however, the IRS announced that it would no longer rule on the treatment of the exchange of Distributing debt for Controlled stock or securities where the Distributing debt was issued in anticipation of the exchange. Notably, the IRS issued PLR 201349006 after the issuance of Rev. Proc. 2013-3. However, in the PLR, the Distributing debt was not issued in anticipation of the spin-off. Specifically, the taxpayer represented that the Distributing debt was incurred by Distributing in the ordinary course of business and was not incurred in connection with, or in contemplation of, the completed transaction. Therefore, the transaction did not fall within the scope of Rev. Proc. 2013-3.

In light of Rev. Proc. 2013-32, in which the IRS further narrowed the scope of letter rulings it will issue under Section 355, it is likely that few, if any, additional rulings will address the issue of newly issued Distributing debt. Nonetheless, this PLR indicates that the IRS is comfortable that an exchange of pre-existing Distributing debt for Controlled stock or securities can qualify for tax-free treatment.

*For additional information, please contact Bruce Decker.*

## PLR 201350006

The IRS ruled that the Section 382 segregation rules apply following a pro rata spin-off of a loss corporation, thus creating a new public group under Reg. sec. 1.382-2T. Parent was formed as an indirect, wholly owned subsidiary of Foreign Parent, a widely held, publicly traded corporation, for the purpose of facilitating a spin off. Foreign Parent then caused the Parent Business to be contributed to Parent, including the stock of Sub 1. Sub 1 was the parent of a group of affiliated corporations that had significant net operating loss (NOL) carryovers prior to the contribution of Sub 1's stock to Parent (Sub 1 loss subgroup). After Parent was distributed internally to Foreign Parent, Foreign Parent distributed all of the stock of Parent pro rata to its shareholders (Parent Spin-off).

The IRS ruled that the date of the Parent Spin-off constituted a testing date within the meaning of Reg. sec. 1.382-2(a)(4) with respect to the Sub 1 loss subgroup and, applied the segregation rules thus causing the creation of a new public group of Parent that consists of all shareholders of Parent that were not 5% shareholders following the Parent Spin-off. The IRS also ruled that for purposes of determining whether the Parent Spin-off resulted in a change of ownership of the Sub 1 loss subgroup, Parent may choose to apply the presumption of no cross-ownership under Reg. sec. 1.382-2T(j)(1)(iii) to determine the increase in ownership. Furthermore, Parent is not required to use actual knowledge with respect to the ownership of its stock by shareholders who were not 5% shareholders of Parent's stock at the time of the Parent Spin-off.

### Observations

This PLR illustrates that a Section 382 ownership change can occur in the context of a pro rata spin-off of a loss corporation by operation of the segregation rules. The facts of the PLR are similar to that of Example 2 under Reg. sec. 1.382-2T(j)(1)(vi). In the example, P distributed L pro rata to its shareholders. The example concludes that, although the members of one public group are presumed not to be members of any other public group, L had actual knowledge that all of its public shareholders immediately following the pro rata distribution had received stock of L pro rata with respect to outstanding P stock, establishing that there was no ownership increase that would constitute an owner shift.

If a taxpayer loss corporation relies on the presumption of no cross ownership after a pro rata spin-off, this may cause an ownership change to occur with respect to such corporation, in which case the corporation's ability to use its pre-change losses would be limited under Section 382. Importantly, there are some situations in which a taxpayer might wish to impose a Section 382 limitation. For example, a taxpayer concerned with the ability to utilize a separate return limitation year (SRLY) NOL might seek to trigger a Section 382 limitation in order to affirmatively use Reg. sec. 1.1502-21(g) to avoid application of the SRLY rules.

*For additional information, please contact Julie Allen, Pat Pellervo, or Rich McManus.*

## *Let's talk*

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