the consolidated section 53(c) limitation under this paragraph (h)(4)(iii). However, if a consolidated group chooses to apply the optional effective date rule, the consolidated group shall not take into account a consolidated taxable year beginning before January 1, 1997 in determining a member's (or subgroup's) contributions to the consolidated section 53(c) limitation under this paragraph (h)(4)(iii).

(*ii*) *Special subgroup rule*. In the event that the principles of § 1.1502–21(g)(1) do not apply to a particular credit carryover in the current group, then solely for purposes of applying this paragraph (h)(4)(iii) to determine the limitation with respect to that carryover and with respect to which the SRLY register (the aggregate of the member's or subgroup's contribution to consolidated section 53(c) limitation reduced by the aggregate of the member's or subgroup's minimum tax credits arising and absorbed in all consolidated return years) began in a taxable year for which the due date of the return is on or before May 25, 2000, the principles of § 1.1502–21(c)(2) shall be applied without regard to the phrase "or for a carryover that was subject to the overlap rule described in paragraph (g) of this section or § 1.1502–15(g) with respect to another group (the former group)."

(*2*) *Overlap rule*. Paragraph (h)(4)(iii)(B)(*5*) of this section (relating to overlap with section 383) applies to taxable years for which the due date (without extensions) of the consolidated return is after May 25, 2000. For purposes of paragraph (h)(4)(iii)(B)(*5*) of this section, only an ownership change to which section 383, as amended by the Tax Reform Act of 1986 (100 Stat. 2095), applies and which results in a section 383 credit limitation shall constitute a section 383 event. The optional effective date rule of § 1.1502–3(d)(4) (generally making this paragraph (h)(4)(iii) also applicable to a consolidated return year beginning on or after January 1, 1997, if the due date of the income tax return (without extensions) was on or before March 13, 1998) does not apply with respect to paragraph (h)(4)(iii)(B)(*5*) of this section (relating to the overlap rule).

[T.D. 8884, 65 FR 33759, May 25, 2000]

ADMINISTRATIVE PROVISIONS AND OTHER RULES

§ 1.1502–75 Filing of consolidated returns.

(a) *Privilege of filing consolidated returns*—(1) *Exercise of privilege for first consolidated return year*. 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. If a group wishes to exercise its privilege of filing a consolidated return, such consolidated return must be filed not later than the last day prescribed by law (including extensions of time) for the filing of the common parent's return. Such consolidated return may not be withdrawn after such last day (but the group may change the basis of its return at any time prior to such last day).

(2) *Continued filing requirement*. A group which filed (or was required to file) a consolidated return for the immediately preceding taxable year is required to file a consolidated return for the taxable year unless it has an election to discontinue filing consolidated returns under paragraph (c) of this section.

(b) *How consent for first consolidated year exercised*—(1) *General rule*. The consent of a corporation referred to in paragraph (a)(1) of this section shall be made by such corporation joining in the making of the consolidated return for such year. A corporation shall be deemed to have joined in the making of such return for such year if it files a Form 1122 in the manner specified in paragraph (h)(2) of this section.

(2) *Consent under facts and circumstances*. 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 taxable 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 paragraph (h)(2) of this section.

(3) *Failure to consent due to mistake.* 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.

(c) *Election to discontinue filing consolidated returns*—(1) *Good cause*—(i) *In general.* Notwithstanding that a consolidated return is required for a taxable year, the Commissioner, upon application by the common parent, may for good cause shown grant permission to a group to discontinue filing consolidated returns. Any such application shall be made to the Commissioner of Internal Revenue, Washington, DC 20224, and shall be made not later than the 90th day before the due date for the filing of the consolidated return (including extensions of time). In addition, if an amendment of the Code, or other law affecting the computation of tax liability, is enacted and the enactment is effective for a taxable year ending before or within 90 days after the date of enactment, then application for such a taxable year may be made not later than the 180th day after the date of enactment, and if the application is approved the permission to discontinue filing consolidated returns will apply to such taxable year notwithstanding that a consolidated return has already been filed for such year.

(ii) *Substantial adverse change in law affecting tax liability.* Ordinarily, the Commissioner will grant a group permission to discontinue filing consolidated returns if the net result of all amendments to the Code or regulations with effective dates commencing within the taxable year has a substantial adverse effect on the consolidated tax liability of the group for such year relative to what the aggregate tax liability would be if the members of the group filed separate returns for such year. Thus, for example, assume P and S filed a consolidated return for the calendar year 1966 and that the provisions of the Code have been amended by a bill which was enacted by Congress in 1966, but which is first effective for taxable years beginning on or after January 1, 1967. Assume further that P makes a timely application to discontinue filing consolidated returns. In order to determine whether the amendments have a substantial adverse effect on the consolidated tax liability for 1967, relative to what the aggregate tax liability would be if the members of the group filed separate returns for 1967, the difference between the tax liability of the group computed on a consolidated basis and taking into account the changes in the law effective for 1967 and the aggregate tax liability of the members of the group computed as if each such member filed separate returns for such year (also taking into account such changes) shall be compared with the difference between the tax liability of such group for 1967 computed on a consolidated basis without regard to the changes in the law effective in such year and the aggregate tax liability of the members of the group computed as if separate returns had been filed by such members for such year without regard to the changes in the law effective in such year.

(iii) *Other factors.* In addition, the Commissioner will take into account other factors in determining whether good cause exists for granting permission to discontinue filing consolidated returns beginning with the taxable year, including:

(*a*) Changes in law or circumstances, including changes which do not affect Federal income tax liability,

(*b*) Changes in law which are first effective in the taxable year and which result in a substantial reduction in the consolidated net operating loss (or consolidated unused investment credit) for such year relative to what the aggregate net operating losses (or investment credits) would be if the members of the group filed separate returns for such year, and

(*c*) Changes in the Code or regulations which are effective prior to the taxable year but which first have a substantial adverse effect on the filing of a consolidated return relative to the filing of separate returns by members of the group in such year.

(2) *Discretion of Commissioner to grant blanket permission*—(i) *Permission to all groups.* The Commissioner, in his discretion, may grant all groups permission to discontinue filing consolidated returns if any provision of the Code or regulations has been amended and such amendment is of the type which could have a substantial adverse effect on the filing of consolidated returns by substantially all groups, relative to the filing of separate returns. Ordinarily, the permission to discontinue shall apply with respect to the taxable year of each group which includes the effective date of such an amendment.

(ii) *Permission to a class of groups.* The Commissioner, in his discretion, may grant a particular class of groups permission to discontinue filing consolidated returns if any provision of the Code or regulations has been amended and such amendment is of the type which could have a substantial adverse effect on the filing of consolidated returns by substantially all such groups relative to the filing of separate returns. Ordinarily, the permission to discontinue shall apply with respect to the taxable year of each group within the class which includes the effective date of such an amendment.

(3) *Time and manner for exercising election.* If, under subparagraph (1) or (2) of this paragraph, a group has an election to discontinue filing consolidated returns for any taxable year and such group wishes to exercise such election, then the common parent must file a separate return for such year on or before the last day prescribed by law (including extensions of time) for the filing of the consolidated return for such year. See section 6081 (relating to extensions of time for filing returns).

(d) *When a group remains in existence*—(1) *General rule.* A group remains in existence for a tax year if the common parent remains as the common parent and at least one subsidiary that was affiliated with it at the end of the prior year remains affiliated with it at the beginning of the year, whether or not one or more corporations have ceased to be subsidiaries at any time after the group was formed. Thus, for example, assume that corporation P acquires the sole outstanding share of stock of S on January 1, year 1, and that P and S file a consolidated return for the year 1 calendar year. On May 1, year 2, P acquires the sole outstanding share of stock of S1 and, on July 1, year 2, P sells the S share. The group (consisting originally of P and S) remains in existence in year 2 because P remained the common parent and, S, a subsidiary that was affiliated with P at the end of year 1, remained affiliated with P at the beginning of year 2.

(2) *Common parent no longer in existence*—(i) *Mere change in identity.* For purposes of this paragraph, the common parent corporation shall remain as the common parent irrespective of a mere change in identity, form, or place of organization of such common parent corporation (see section 368(a)(1)(F)).

(ii) *Transfer of assets to subsidiary.* The group shall be considered as remaining in existence notwithstanding that the common parent is no longer in existence if the members of the affiliated group succeed to and become the owners of substantially all of the assets of such former parent and there remains one or more chains of includible corporations connected through stock ownership with a common parent corporation which is an includible corporation and which was a member of the group prior to the date such former parent ceases to exist. For purposes of applying paragraph (f)(2)(i) of §1.1502–1 to separate return years ending on or before the date on which the former parent ceases to exist, such former parent, and not the new common parent, shall be considered to be the corporation described in such paragraph.

(iii) *Taxable years.* If a transfer of assets described in subdivision (ii) of this subparagraph is an acquisition to which section 381(a) applies and if the group files a consolidated return for the taxable year in which the acquisition occurs, then for purposes of section 381:

(*a*) The former common parent shall not close its taxable year merely because of the acquisition, and all taxable years of such former parent ending on or before the date of acquisition shall be treated as taxable years of the acquiring corporation, and

(*b*) The corporation acquiring the assets shall close its taxable year as of the date of acquisition, and all taxable years of such corporation ending on or before the date of acquisition shall be treated as taxable years of the transferor corporation.

(iv) *Exception.* With respect to acquisitions occurring before January 1, 1971, subdivision (iii) of this subparagraph shall not apply if the group, in its income tax return, treats the taxable year of the former common parent as having closed as of the date of acquisition.

(3) *Reverse acquisitions*—(i) *In general.* If a corporation (hereinafter referred to as the ''first corporation'') or any member of a group of which the first corporation is the common parent acquires after October 1, 1965:

(*a*) Stock of another corporation (hereinafter referred to as the second corporation), and as a result the second corporation becomes (or would become but for the application of this subparagraph) a member of a group of which the first corporation is the common parent, or

(*b*) Substantially all the assets of the second corporation,

in exchange (in whole or in part) for stock of the first corporation, and the stockholders (immediately before the acquisition) of the second corporation, as a result of owning stock of the second corporation, own (immediately after the acquisition) more than 50 percent of the fair market value of the outstanding stock of the first corporation, then any group of which the first corporation was the common parent immediately before the acquisition shall cease to exist as of the date of acquisition, and any group of which the second corporation was the common parent immediately before the acquisition shall be treated as remaining in existence (with the first corporation becoming the common parent of the group). Thus, assume that corporations P and S comprised group PS (P being the common parent), that P was merged into corporation T (the common parent of a group composed of T and corporation U), and that the shareholders of P immediately before the merger, as a result of owning stock in P, own 90 percent of the fair market value of T's stock immediately after the merger. The group of which P was the common parent is treated as continuing in existence with T and U being added as members of the group, and T taking the place of P as the common parent.

For purposes of determining under (*a*) of this subdivision whether the second corporation becomes (or would become) a member of the group of which the first corporation is the common parent, and for purposes of determining whether the former stockholders of the second corporation own more than 50 percent of the outstanding stock of the first corporation, there shall be taken into account any acquisitions or redemptions of the stock of either corporation which are pursuant to a plan of acquisition described in (*a*) or (*b*) of this subdivision.

(ii) *Prior ownership of stock.* For purposes of subdivision (i) of this subparagraph, if the first corporation, and any members of a group of which the first corporation is the common parent, have continuously owned for a period of at least 5 years ending on the date of the acquisition an aggregate of at least 25 percent of the fair market value of the outstanding stock of the second corporation, then the first corporation (and any subsidiary which owns stock of the second corporation immediately before the acquisition) shall, as a result of owning such stock, be treated as owning (immediately after the acquisition) a percentage of the fair market value of the first corporation's outstanding stock which bears the same ratio to (*a*) the percentage of the fair market value of all the stock of the second corporation owned immediately before the acquisition by the first corporation and its subsidiaries as (*b*) the fair market value of the total outstanding stock of the second corporation immediately before the acquisition bears to (*c*) the sum of (*1*) the fair market value, immediately before the acquisition, of the total outstanding stock of the first corporation, and (*2*) the fair market value, immediately before the acquisition, of the total outstanding stock of the second corporation (other than any such stock owned by the first corporation and any of its subsidiaries). For example, assume that corporation P owns stock in corporation T having a fair market value of $100,000, that P acquires the remaining stock of T from individuals in exchange for stock of P, that immediately before the acquisition the total outstanding stock of T had a fair market value of $150,000, and that immediately before the acquisition the total outstanding stock of P had a fair market value of $200,000. Assuming P owned at least 25 percent of the fair market value of T's stock for 5 years, then for purposes of this subparagraph, P is treated as owning (immediately after the acquisition) 40 percent of the fair market value of its own outstanding stock, determined as follows:

[$150,000/($200,000+$50,000)]×662/3%=40%.

Thus, if the former individual stockholders of T own, immediately after the acquisition more than 10 percent of the fair market value of the outstanding stock of P as a result of owning stock of T, the group of which T was the common parent is treated as continuing in existence with P as the common parent, and the group of which P was the common parent before the acquisition ceases to exist.

(iii) *Election.* The provisions of subdivision (ii) of this subparagraph shall not apply to any acquisition occurring in a taxable year ending after October 7, 1969, unless the first corporation elects to have such subdivision apply. The election shall be made by means of a statement, signed by any officer who is duly authorized to act on behalf of the first corporation, stating that the corporation elects to have the provisions of §1.1502–75(d)(3)(ii) apply and identifying the acquisition to which such provisions will apply. The statement shall be filed, on or before the due date (including extensions of time) of the return for the group's first consolidated return year ending after the date of the acquisition, with the internal revenue officer with whom such return is required to be filed.

(iv) *Transfer of assets to subsidiary.* This subparagraph shall not apply to a transaction to which subparagraph (2)(ii) of this paragraph applies.

(v) *Taxable years.* If, in a transaction described in subdivision (i) of this subparagraph, the first corporation files a consolidated return for the first taxable year ending after the date of acquisition, then:

(*a*) The first corporation, and each corporation which, immediately before the acquisition, is a member of the group of which the first corporation is the common parent, shall close its taxable year as of the date of acquisition, and each such corporation shall, immediately after the acquisition, change to the taxable year of the second corporation, and

(*b*) If the acquisition is a transaction described in section 381(a)(2), then for purposes of section 381:

(*1*) All taxable years ending on or before the date of acquisition, of the first corporation and each corporation which, immediately before the acquisition, is a member of the group of which the first corporation is the common parent, shall be treated as taxable years of the transferor corporation, and

(*2*) The second corporation shall not close its taxable year merely because of such acquisition, and all taxable years ending on or before the date of acquisition, of the second corporation and each corporation which, immediately before the acquisition, is a member of any group of which the second corporation is the common parent, shall be treated as taxable years of the acquiring corporation.

(vi) *Exception.* With respect to acquisitions occurring before April 17, 1968, subdivision (v) of this subparagraph shall not apply if the parties to the transaction, in their income tax returns, treat subdivision (i) as not affecting the closing of taxable years or the operation of section 381.

(4) [Reserved]

(5) *Coordination with section 833*—(i) *Election to continue old group.* If, solely by reason of the enactment of section 833 (relating to certain Blue Cross or Blue Shield organizations and certain other health insurers), an organization to which section 833 applies (a ''section 833 organization'') became the new common parent of an old group on January 1, 1987, the old group may elect to continue in existence with that section 833 organization as its new common parent, provided all the old groups having the same section 833 organization as their new common parent elect to continue in existence. To revoke this election, see paragraph (d)(5)(x) of this section. To file as a new group, see paragraph (d)(5)(v) of this section.

(ii) *Old group.* For purposes of this paragraph (d)(5), an old group is a group which, for its last taxable year ending in 1986, either filed a consolidated return or was eligible to (but did not) file a consolidated return.

(iii) *Manner of electing to continue*—(A) *Deemed election.* If all the members of all the old groups having the same section 833 organization as their new common parent are included for the first taxable year beginning after December 31, 1986, on the same consolidated (or amended consolidated) return and a Form 1122 was not filed, the old groups are deemed to have elected under paragraph (d)(5)(i) of this section to continue in existence.

(B) *Delayed election.* If a deemed election to continue in existence was not made under paragraph (d)(5)(iii)(A) of this section, all the members of all the old groups having the same section 833 organization as their new common parent may make a delayed election under paragraph (d)(5)(i) of this section to continue in existence by:

(*1*) Filing an appropriate consolidated (or amended consolidated) return or returns for each taxable year beginning after December 31, 1986, (notwithstanding §1.1502–75(a)(1)) on or before January 3, 1991, and

(*2*) On the top of any such return prominently affixing a statement containing the following declaration: ''THIS RETURN'' (or, if applicable, ''AMENDED RETURN'') ''REFLECTS A DELAYED ELECTION TO CONTINUE UNDER §1.1502–75T(d)(5)(iii)(B)''. A delayed election to continue in existence automatically revokes a deemed election to file as a new group which was made under paragraph (d)(5)(vi) of this section.

(iv) *Effects of election to continue in existence.* If an old group or groups elect to continue in existence under paragraph (d)(5)(i) of this section, the following rules apply:

(A) *Taxable years.* Each member that filed returns other than on a calendar year basis shall close its taxable year on December 31, 1986, and change to a calendar year beginning on January 1, 1987. See section 843 and §1.1502–76(a)(1).

(B) *Carryovers from separate return limitation years.* For purposes of applying the separate return limitation year rules to carryovers from taxable years beginning before 1987 to taxable years beginning after 1986, the following rules apply:

(*1*) Any taxable year beginning before 1987 of a corporation that was not a member of an old group (including a section 833 organization) will be treated as a separate return limitation year;

(*2*) Any taxable year beginning before 1987 of a corporation that was a member of an old group that, without regard to this section and the enactment of section 833, was a separate return limitation year will continue to be treated as a separate return limitation year;

(*3*) Any taxable year beginning before 1987 of a member of an old group (other than a separate return limitation year described in paragraph (d)(5)(iv)(B)(*2*) of this section) will not be treated as a separate return limitation year with respect to any corporation that was a member of such group for each day of that taxable year; and

(*4*) Any taxable year beginning before 1987 of a member of an old group will be treated as a separate return limitation year with respect to any corporation that was not a member of such group for each day of that taxable year (e.g., a corporation that was not a member of an old group, including a section 833 organization, or a corporation that was a member of another old group).

(C) *Five-year rules for life-nonlife groups.* Any life-nonlife election under section 1504(c)(2) in effect for an old group remains in effect. Any old group which was eligible to make a life-nonlife election will remain eligible to make the election. For purposes of section 1503(c), a nonlife member is treated as ineligible under §1.1502–47(d)(13) with respect to a life member, unless both were members of the same affiliated group (determined without regard to the exclusions in section 1504(b) (1) and (2)) for five taxable years immediately preceding the taxable year in which the loss arose. See paragraph (d)(5)(ix) of this section for a tacking rule.

(v) *Election to file as a new group.* If, solely by reason of the enactment of section 833, a section 833 organization became the new common parent of an old group on January 1, 1987, the application of the five-year prohibition on reconsolidation in section 1504(a)(3)(A) to the old group is waived and the old group together with the new section 833 organization common parent may elect to file as a new group provided that all includible corporations elect to file a consolidated (or amended consolidated) return as a new group for the first taxable year beginning after December 31, 1986. To revoke this election, see paragraph (d)(5)(x) of this section.

(vi) *Manner of electing to file as a new group*—(A) *Deemed election.* The old group or groups and the section 833 organization are deemed to have elected under paragraph (d)(5)(v) of this section to file as a new group by filing, for the first taxable year beginning after December 31, 1986, a Form 1122 and a consolidated (or amended consolidated) tax return.

(B) *Delayed election.* If a deemed election to file as a new group was not made pursuant to paragraph (d)(5)(vi)(A) of this section, the old group or groups and the section 833 organization may make a delayed election under paragraph (d)(5)(v) of this section to file as a new group by

(*1*) Filing an appropriate consolidated (or amended consolidated) return or returns for each taxable year beginning after December 31, 1986 (notwithstanding §1.1502–75(a)(1)) on or before January 3, 1991, and

(*2*) On the top of any such return prominently affixing a statement containing the following declaration: "THIS RETURN" (or, if applicable, "AMENDED RETURN") "REFLECTS A DELAYED ELECTION TO FILE AS A NEW GROUP UNDER §1.1502–75T (d)(5)(vi)(B)". A delayed election to file as a new group automatically revokes any deemed election to continue in existence which was made under paragraph (d)(5)(iii) of this section.

(vii) *Effects of election to file as a new group.* If an old group or groups elect to file as a new group under paragraph (d)(5)(v) of this section, the following rules apply:

(A) *Termination.* Each old group is treated as if it terminated on January 1, 1987, and the termination is not treated as resulting from the acquisition by a nonmember of all of the stock of the common parent.

(B) *Taxable years.* Each member that filed returns other than on a calendar year basis shall close its taxable year on December 31, 1986, and change to a calendar year beginning on January 1, 1987. See section 843 and §1.1502–76(a)(1).

(C) *Separate return limitation year and life-nonlife groups.* For purposes of §1.1502–1(f), sections 1503(c) and 1504(c), and §1.1502–47, the group is treated as coming into existence as a new group on January 1, 1987. Thus, for example, paragraphs (d)(5)(iv) (B) and (C) of this section do not apply.

(viii) *Earnings and profits.* All distributions after January 1, 1987 by a corporation, whether or not such corporation was a member of an old group, to an existing Blue Cross or Blue Shield organization (as defined in section 833(c)(2)) out of earnings and profits accumulated before 1987 are deemed made out of earnings and profits accumulated in pre-affiliation years. See §1.1502–32(h)(5).

(ix) *Five-year tacking rules for certain life-nonlife groups*. For purposes of applying §1.1502–47(d) (5) and (12) to any taxable year ending after 1986 to a corporation, whether or not the corporation was a member of an old group,

(A) The determination of whether the corporation was in existence and a member or tentatively treated as a member of a group, for taxable years ending before 1987, is made without regard to the exclusions under section 1504(b) (1) and (2) of any section 833 organization or life insurance company (as the case may be) and

(B) A section 833 organization is not treated as having a change in tax character solely by reason of the loss of its tax-exempt status due to the enactment of section 833.

This paragraph (d)(5)(ix) does not apply if an election to file as a new group under paragraph (d)(5)(v) of this section is made.

(x) *Time to revoke elections made before September 5, 1990*. An election by an old group to continue in existence or to file as a new group that was made (or deemed made) before September 5, 1990, may be revoked by filing an appropriate return (or returns) on or before January 3, 1991. For purposes of this paragraph (d)(5)(x), appropriate returns include separate returns filed by each member of the group or consolidated returns filed in accordance with a delayed election either under paragraph (d)(5)(iii)(B) or (vi)(B) of this section.

(xi) *Examples*. The following examples illustrate this paragraph (d)(5). In these examples, each corporation uses the calendar year as its taxable year.

Example 1. B is a section 833 organization. For several years, B has owned all of the outstanding stock of X, Y, and Z. X has owned all the outstanding stock of X_1 throughout X_1's existence and Y has owned all of the outstanding stock of Y_1 throughout Y_1's existence. For 1986 X and X_1 filed a consolidated federal income tax return but Y and Y_1 filed separate returns. Under paragraph (d)(5)(ii) of this section, X and X_1 and Y and Y_1 each constitute an old group because they either filed a consolidated return or were eligible to file a consolidated return for 1986. The X and Y groups may elect under paragraph (d)(5)(i) of this section to continue in existence. If they elect to continue, under paragraph (d)(5)(iv)(B) of this section, the separate return limitation year rules apply as follows: any taxable year of B or Z beginning before 1987 is treated as a separate return limitation year with respect to each other and to all other members of the group; any taxable year of X or X_1 beginning before 1987 is treated as a separate return limitation year with respect to B, Z, Y and Y_1, but not with respect to each other; and any taxable year of Y or Y_1 beginning before 1987 is treated as a separate return limitation year with respect to B, Z, X and X_1, but not with respect to each other.

Example 2. The facts are the same as in Example 1 except that B is owned by C, another section 833 organization. If the X and Y groups elect to continue, the results are the same as in Example 1, except that, under paragraph (d)(5)(iv)(B)(*1*) of this section, for purposes of applying the separate return limitation year rules, any taxable year of C beginning before 1987 is also treated as a separate return limitation year with respect to all other members of the group.

Example 3. The facts are the same as in Example 1 except that Y purchased Y_1 on January 1, 1985. If the X and Y groups elect to continue, the results are the same as in Example 1, except that, under paragraph (d)(5)(iv)(B)(*2*) of this section, for purposes of applying the separate return limitation year rules, any taxable year of Y_1 beginning before 1985 is treated as a separate return limitation year with respect to Y as well as with respect to all other members of the group.

Example 4. B, a section 833 organization, has owned all the stock of X since November 1984. X has owned all the stock of L, a life insurance company, throughout L's existence. In 1986, X and L properly filed a life-nonlife consolidated return. Under paragraph (d)(5)(i) of this section, the X group elects to continue in existence. Under paragraph (d)(5)(iv)(C) of this section, the life-nonlife election will remain in effect. However, losses of B which arise before 1990 cannot be used to offset the income of L. See section 1503(c)(2) and §1.1502–47(d)(13) and paragraph (d)(5)(iv)(C) of this section. Under paragraph (d)(5)(iv)(B) of this section, the separate return limitation year rules apply as follows: any taxable year of B beginning before 1987 is treated as a separate return limitation year with respect to all other members of the group; and any taxable year of X or L beginning before 1987 is treated as a separate return limitation year with respect to B, but not with respect to each other.

Example 5. The facts are the same as Example 4 except that, on January 1, 1984, B formed L_1, a life insurance company. Under paragraph (d)(5)(ix) of this section and section 1504(c), the first year L_1 is eligible to join in B's life-nonlife election is 1989.

Example 6. The facts are the same as in Example 4 except that B and the X group elect under paragraph (d)(5)(v) of this section to file as a new group. The X group will be considered to have terminated under §1.1502–

75(d)(1) on December 31, 1986. X and L are each separately subject to the separate return limitation year rules of §1.1502–1(f). The first year L and L_1 are eligible to join the new group in a life-nonlife election is 1992 (five years after the new group is formed). See section 1504(c)(2) and paragraphs (d)(5)(vii)(C) and (ix) of this section.

The provisions contained in this Treasury decision are needed to immediately amend the consolidated return regulations in response to changes made by section 1012 of the Tax Reform Act of 1986. It is therefore found impracticable and contrary to the public interest to issue this Treasury decision with notice and public procedure under section 553(b) of title 5 of the United States Code or subject to the effective date limitations of section 553(d) of title 5, United States Code.

(e) *Failure to include subsidiary*. If a consolidated return is required for the taxable year under the provisions of paragraph (a)(2) of this section, the tax liability of all members of the group for such year shall be computed on a consolidated basis even though:

(1) Separate returns are filed by one or more members of the group, or

(2) There has been a failure to include in the consolidated return the income of any member of the group.

If subparagraph (1) of this paragraph applies, the amounts assessed or paid upon the basis of separate returns shall be considered as having been assessed or paid upon the basis of a consolidated return.

(f) *Inclusion of one or more corporations not members of the group*—(1) *Method of determining tax liability*. If a consolidated return includes the income of a corporation which was not a member of the group at any time during the consolidated return year, the tax liability of such corporation will be determined upon the basis of a separate return (or a consolidated return of another group, if paragraph (a)(2) or (b)(3) of this section applies), and the consolidated return will be considered as including only the income of the corporations which were members of the group during that taxable year. If a consolidated return includes the income of two or more corporations which were not members of the group but which constitute another group, the tax liability of such corporations will be computed in the same manner as if separate returns had been made by such corporations unless the Commissioner upon application approves the making of a consolidated return for the other group or unless under paragraph (a)(2) of this section a consolidated return is required for the other group.

(2) *Allocation of tax liability*. In any case in which amounts have been assessed and paid upon the basis of a consolidated return and the tax liability of one or more of the corporations included in the consolidated return is to be computed in the manner described in subparagraph (1) of this paragraph, the amounts so paid shall be allocated between the group composed of the corporations properly included in the consolidated return and each of the corporations the tax liability of which is to be computed on a separate basis (or on the basis of a consolidated return of another group) in such manner as the corporations which were included in the consolidated return may, subject to the approval of the Commissioner, agree upon or in the absence of an agreement upon the method used in allocating the tax liability of the members of the group under the provisions of section 1552(a).

(g) *Computing periods of limitation*—(1) *Income incorrectly included in consolidated return*. If:

(i) A consolidated return is filed by a group for the taxable year, and

(ii) The tax liability of a corporation whose income is included in such return must be computed on the basis of a separate return (or on the basis of a consolidated return with another group), then for the purpose of computing any period of limitation with respect to such separate return (or such other consolidated return), the filing of such consolidated return by the group shall be considered as the making of a return by such corporation.

(2) *Income incorrectly included in separate returns*. If a consolidated return is required for the taxable year under the provisions of paragraph (a)(2) of this section, the filing of separate returns by the members of the group for such year shall not be considered as the making of a return for the purpose of computing any period of limitation

with respect to such consolidated return unless there is attached to each such separate return a statement setting forth:

(i) The most recent taxable year of the member for which its income was included in a consolidated return, and

(ii) The reasons for the group's belief that a consolidated return is not required for the taxable year.

(h) *Method of filing return and forms*—(1) *Consolidated return made by common parent corporation.* The consolidated return shall be made on Form 1120 for the group by the common parent corporation. The consolidated return, with Form 851 (affiliations schedule) attached, shall be filed with the district director with whom the common parent would have filed a separate return.

(2) *Filing of Form 1122 for first year.* 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 before January 1, 2003, the executed Forms 1122 must be attached to the consolidated return for the taxable year. 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. If the group submits unsigned Forms 1122 with its return, it must retain the signed originals in its records in the manner required by §1.6001–1(e). 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.

(3) *Persons qualified to execute returns and forms.* Each return or form required to be made or prepared by a corporation must be executed by the person authorized under section 6062 to execute returns of separate corporations.

(i) [Reserved]

(j) *Statements and schedules for subsidiaries.* The statement of gross income and deductions and the schedules required by the instructions on the return shall be prepared and filed in columnar form so that the details of the items of gross income, deductions, and credits for each member may be readily audited. Such statements and schedules shall include in columnar form a reconciliation of surplus for each corporation, and a reconciliation of consolidated surplus. Consolidated balance sheets as of the beginning and close of the taxable year of the group, taken from the books of the members, shall accompany the consolidated return and shall be prepared in a form similar to that required for reconciliation of surplus.

(k) *Cross-reference.* See §1.338(h)(10)–1(d)(7) for special rules regarding filing consolidated returns when a section 338(h)(10) election is made for a target acquired from a selling consolidated group.

(l) *Effective/applicability dates.* Paragraph (d)(1) of this section applies to taxable years for which the due date of the original return (without regard to extensions) is on or after September 17, 2008.

[T.D. 6894, 31 FR 11794, Sept. 8, 1966]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting §1.1502–75, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and at *www.fdsys.gov.*

§ 1.1502–76 Taxable year of members of group.

(a) *Taxable year of members of group.* The consolidated return of a group must be filed on the basis of the common parent's taxable year, and each subsidiary must adopt the common parent's annual accounting period for the first consolidated return year for which the subsidiary's income is includible in the consolidated return. If any member is on a 52–53-week taxable year, the rule of the preceding sentence shall, with the advance consent of the Commissioner, be deemed satisfied if the taxable years of all members of the group end within the same 7-day period. Any request for such consent shall be filed with the Commissioner of Internal Revenue, Washington, DC 20224, not later than the 30th day before the due date (not including extensions of time) for the filing of the consolidated return.

(b) *Items included in the consolidated return*—(1) *General rules*—(i) *In general.*

A consolidated return must include the common parent's items of income, gain, deduction, loss, and credit for the entire consolidated return year, and each subsidiary's items for the portion of the year for which it is a member. If the consolidated return includes the items of a corporation for only a portion of its tax year determined without taking this section into account, items for the portion of the year not included in the consolidated return must be included in a separate return (including the consolidated return of another group). The rules of this paragraph (b) must be applied to prevent the duplication or elimination of the corporation's items.

(ii) *The day a corporation becomes or ceases to be a member*—(A) *End of the day rule*. (*1*) *In general*. If a corporation (S), other than one described in paragraph (b)(1)(ii)(A)(*2*) of this section, becomes or ceases to be a member during a consolidated return year, it becomes or ceases to be a member at the end of the day on which its status as a member changes, and its tax year ends for all Federal income tax purposes at the end of that day. Appropriate adjustments must be made if another provision of the Internal Revenue Code or the regulations thereunder contemplates the event occurring before or after S's change in status. For example, S's items restored under §1.1502–13 immediately before it becomes a nonmember are taken into account in determining the basis of S's stock under §1.1502–32. On the other hand, if a section 338(g) election is made in connection with S becoming a member, the deemed asset sale under that section takes place before S becomes a member. See §1.338–10(a)(5) (deemed sale excluded from purchasing corporation's consolidated return.)

(*2*) *Special rule for former S corporations*. If S becomes a member in a transaction other than in a qualified stock purchase for which an election under section 338(g) is made, and immediately before becoming a member an election under section 1362(a) was in effect, then S will become a member at the beginning of the day the termination of its S corporation election is effective. S's tax year ends for all Federal income tax purposes at the end of the preceding day. This paragraph (b)(1)(ii)(A)(*2*) applies to transactions occurring after November 10, 1999.

(B) *Next day rule*. If, on the day of S's change in status as a member, a transaction occurs that is properly allocable to the portion of S's day after the event resulting in the change, S and all persons related to S under section 267(b) immediately after the event must treat the transaction for all Federal income tax purposes as occurring at the beginning of the following day. A determination as to whether a transaction is properly allocable to the portion of S's day after the event will be respected if it is reasonable and consistently applied by all affected persons. In determining whether an allocation is reasonable, the following factors are among those to be considered—

(*1*) Whether income, gain, deduction, loss, and credit are allocated inconsistently (e.g., to maximize a seller's stock basis adjustments under §1.1502–32);

(*2*) If the item is from a transaction with respect to S stock, whether it reflects ownership of the stock before or after the event (e.g., if a member transfers encumbered land to nonmember S in exchange for additional S stock in a transaction to which section 351 applies and the exchange results in S becoming a member of the consolidated group, the applicability of section 357(c) to the exchange must be determined under §1.1502–80(d) by treating the exchange as occurring after the event; on the other hand, if S is a member but has a minority shareholder and becomes a nonmember as a result of its redemption of stock with appreciated property, S's gain under section 311 is treated as from a transaction occurring before the event);

(*3*) Whether the allocation is inconsistent with other requirements under the Internal Revenue Code and regulations promulgated thereunder (e.g., if a section 338(g) election is made in connection with a group's acquisition of S, the deemed asset sale must take place before S becomes a member and S's gain or loss with respect to its assets must be taken into account by S as a nonmember (but see §1.338–1(d)), or if S realizes discharge of indebtedness income that is excluded from gross income under section 108(a) on the day it becomes a nonmember, the discharge of indebtedness income must be treated as realized by S as a member (see §1.1502–28(b)(11))); and

(*4*) Whether other facts exist, such as a prearranged transaction or multiple changes in S's status, indicating that the transaction is not properly allocable to the portion of S's day after the event resulting in S's change.

(C) *Successor corporations.* For purposes of this paragraph (b)(1)(ii), any reference to a corporation includes a reference to a successor or predecessor as the context may require. A corporation is a successor if the basis of its assets is determined, directly or indirectly, in whole or in part, by reference to the basis of the assets of another corporation (the predecessor). For example, if a member forms S, S is treated as a member from the beginning of its existence.

(iii) *Group structure changes.* If the common parent ceases to be the common parent but the group remains in existence, adjustments must be made in accordance with the principles of §1.1502–75(d)(2) and (3).

(2) *Determination of items included in separate and consolidated returns*—(i) *In general.* The returns for the years that end and begin with S becoming (or ceasing to be) a member are separate tax years for all Federal income tax purposes. The returns are subject to the rules of the Internal Revenue Code applicable to short periods, as if S ceased to exist on becoming a member (or first existed on becoming a nonmember). For example, cost recovery deductions under section 168 must be allocated for short periods. On the other hand, annualization under section 443 is not required of S solely because it has a short year as a result of becoming a member. (Similarly, section 443 applies with respect to a consolidated return only to the extent that the group's return is for a short period and section 443 applies without taking this paragraph (b) into account.)

(ii) *Ratable allocation of a year's items*—(A) *Application.* Although the periods ending and beginning with S's change in status are different tax years, items (other than extraordinary items) may be ratably allocated between the periods if—

(*1*) S is not required to change its annual accounting period or its method of accounting as a result of its change in status (e.g., because its stock is sold between consolidated groups that have the same annual accounting periods); and

(*2*) An irrevocable ratable allocation election is made under paragraph (b)(2)(ii)(D) of this section.

(B) *General rule*—(*1*) *Allocation within original year.* Under a ratable allocation election, paragraph (b)(2) of this section applies by allocating to each day of S's original year (S's tax year determined without taking this section into account) an equal portion of S's items taken into account in the original year, except that extraordinary items must be allocated to the day that they are taken into account. All persons affected by the election must take into account S's extraordinary items and the ratable allocation of S's remaining items in a manner consistent with the election.

(*2*) *Items to be allocated.* Under ratable allocation, the items to be allocated and their timing, location, character, and source are generally determined by treating the original year as a single tax year, and the items are not subject to the rules of the Internal Revenue Code applicable to short periods (unless the original year is a short period). However, the years ending and beginning with S's change in status are treated as different tax years (and as short periods) with respect to any item carried to or from these years (e.g., a net operating loss carried under section 172) and with respect to the application of section 481.

(*3*) *Multiple applications.* If this paragraph (b) applies more than once with respect to an original year, adjustments must be made in accordance with the principles of this paragraph (b). For example, if S becomes a member of two different consolidated groups during the same original year and ratable allocation is elected with respect to both groups, ratable allocation is generally determined for both groups by treating the original year as a single tax year; however, if ratable allocation is elected only with respect to the first group, the ratable allocation is determined by treating the original year as a short period that does not include the period that S is a member of the second group. Ratable allocation is not a method of accounting, and ratable allocation with respect to one application of this paragraph (b) to S does not require ratable allocation to be subsequently applied with respect to S.

(C) *Extraordinary items.* An extraordinary item is—

(*1*) Any item from the disposition or abandonment of a capital asset as defined in section 1221 (determined without the application of any other rules of law);

(*2*) Any item from the disposition or abandonment of property used in a trade or business as defined in section 1231(b) (determined without the application of any holding period requirement);

(*3*) Any item from the disposition or abandonment of an asset described in section 1221(1), (3), (4), or (5), if substantially all the assets in the same category from the same trade or business are disposed of or abandoned in one transaction (or series of related transactions);

(*4*) Any item from assets disposed of in an applicable asset acquisition under section 1060(c);

(*5*) Any item carried to or from any portion of the original year (e.g., a net operating loss carried under section 172), and any section 481(a) adjustment;

(*6*) The effects of any change in accounting method initiated by the filing of the appropriate form after S's change in status;

(*7*) Any item from the discharge or retirement of indebtedness (e.g., cancellation of indebtedness income or a deduction for retirement at a premium);

(*8*) Any item from the settlement of a tort or similar third-party liability;

(*9*) Any compensation-related deduction in connection with S's change in status (including, for example, deductions from bonus, severance, and option cancellation payments made in connection with S's change in status);

(*10*) Any dividend income from a nonmember that S controls within the meaning of section 304 at the time the dividend is taken into account;

(*11*) Any deemed income inclusion from a foreign corporation, or any deferred tax amount on an excess distribution from a passive foreign investment company under section 1291;

(*12*) Any interest expense allocable under section 172(h) to a corporate equity reduction transaction causing this paragraph (b) to apply;

(*13*) Any credit, to the extent it arises from activities or items that are not ratably allocated (e.g., the rehabilitation credit under section 47, which is based on placement in service); and

(*14*) Any item which, in the opinion of the Commissioner, would, if ratably allocated, result in a substantial distortion of income in any consolidated return or separate return in which the item is included.

(D) *Election*—(*1*) *Statement.* The election to ratably allocate items under this paragraph (b)(2)(ii) must be made in a separate statement entitled, ''THIS IS AN ELECTION UNDER §1.1502–76(b)(2)(ii) TO RATABLY ALLOCATE THE YEAR'S ITEMS OF [INSERT NAME AND EMPLOYER IDENTIFICATION NUMBER OF THE MEMBER].'' The election must be filed by including a statement on or with the returns including the items for the years ending and beginning with S's change in status. If two or more members of the same consolidated group, as a consequence of the same plan or arrangement, cease to be members of that group and remain affiliated as members of another consolidated group, an election under this paragraph (b)(2)(ii)(D)(*1*) may be made only if it is made by each such member. Each statement must also indicate that an agreement, as described in paragraph (b)(2)(ii)(D)(*2*) of this section, has been entered into. Each party signing the agreement must retain either the original or a copy of the agreement as part of its records. See §1.6001–1(e).

(*2*) *Agreement.* For each election under this paragraph (b)(2)(ii), the member and the common parent of each affected group must sign and date an agreement. The agreement must—

(*i*) Identify the extraordinary items, their amounts, and the separate or consolidated returns in which they are included;

(*ii*) Identify the aggregate amount to be ratably allocated, and the portion of the amount included in the separate and consolidated returns; and

(*iii*) Include the name and employer identification number of the common parent (if any) of each group that must take the items into account.

(iii) *Ratable allocation of a month's items.* If ratable allocation under paragraph (b)(2)(ii) of this section is not elected (e.g., because S is required to change its annual accounting period), this paragraph (b)(2)(iii) may be applied to ratably allocate only S's items taken into account in the month of its change in status, but only if the allocation is consistently applied by all affected persons. The ratable allocation is made by applying the principles of paragraph (b)(2)(ii) of this section under any reasonable method. For example, S may close its books both at the end of the preceding month and at the end of the month of the change, and allocate only its items (other than extraordinary items) from the month of the change. See paragraph (b)(1)(ii)(B) of this section for factors to be considered in determining whether the method is reasonable.

(iv) *Taxes.* To the extent properly taken into account during the member's tax year (determined without the application of this paragraph (b)), Federal, state, local, and foreign taxes are allocated under paragraph (b)(2) of this section on the basis of the items or activities to which the taxes relate. Thus, income tax is allocated based on the inclusion of the income (determined under the principles of this paragraph (b)) to which the tax relates. For example, if a calendar-year domestic corporation has $100 of foreign source dividend income (determined in accordance with United States tax accounting principles but without taking this paragraph (b) into account) that is passive income for purposes of section 904, and $60 of the income is allocated under this paragraph (b) to the period of the calendar year after it becomes a member of a consolidated group, then 60% of the corporation's deemed paid foreign tax credit associated with its dividend income for the calendar year is taken into account in computing the group's passive basket consolidated foreign tax credit. Similarly, property taxes relate to the ownership of property and are allocated over the period that the property is owned. This paragraph (b)(2)(iv) applies without regard to any determination or allocation by another taxing jurisdiction.

(v) *Acquisition of S corporation.* If a corporation is acquired in a transaction to which paragraph (b)(1)(ii)(A)(*2*) of this section applies, then paragraphs (b)(2)(ii) and (iii) of this section do not apply and items of income, gain, loss, deduction, and credit are assigned to each short taxable year on the basis of the corporation's normal method of accounting as determined under section 446. This paragraph (b)(2)(v) applies to transactions occurring after November 10, 1999.

(vi) *Passthrough entities*—(A) *In general.* If S is a partner in a partnership or an owner of a similar interest with respect to which items of the entity are taken into account by S, S is treated, solely for purposes of determining the year to which the entity's items are allocated under paragraph (b)(2) of this section, as selling or exchanging its entire interest in the entity immediately before S's change in status.

(B) *Treatment as a conduit.* For purposes of this paragraph (b)(2), if a member (together with other members) would be treated under section 318(a)(2) as owning an aggregate of at least 50% of any stock owned by the passthrough entity, the method that is used to determine the inclusion of the entity's items in the consolidated or separate return must be the same method that is used to determine the inclusion of the member's items in the consolidated or separate return.

(C) *Exception for certain foreign entities.* This paragraph (b)(2)(v) does not apply to any foreign corporation generating the deemed inclusion of income, or to any passive foreign investment company generating a deferred tax amount on an excess distribution under section 1291.

(3) *Anti-avoidance rule.* If any person acts with a principal purpose contrary to the purposes of this paragraph (b),

to substantially reduce the Federal income tax liability of any person, adjustments must be made as necessary to carry out the purposes of this section.

(4) *Determination of due date for separate return.* Paragraph (c) of this section contains rules for the filing of the separate return referred to in this paragraph (b). In applying paragraph (c) of this section, the due date for the filing of S's separate return shall also be determined without regard to the ending of the tax year under paragraph (b)(1)(ii) of this section or the deemed cessation of its existence under paragraph (b)(2)(i) of this section.

(5) *Examples.* For purposes of the examples in this paragraph (b), unless otherwise stated, P and X are common parents of calendar-year consolidated groups, P owns all of the only class of T's stock, T owns no stock of lower-tier members, all persons use the accrual method of accounting, the facts set forth the only corporate activity, all transactions are between unrelated persons, tax liabilities are disregarded, and any election required under paragraph (b)(2) of this section is properly made. The principles of this paragraph (b) are illustrated by the following examples.

Example 1. Items allocated between consolidated and separate returns. (a) *Facts.* P and S are the only members of the P group. P sells all of S's stock to individual A on June 30, and therefore S becomes a nonmember on July 1 of Year 2.

(b) *Analysis.* Under paragraph (b)(1) of this section, the P group's consolidated return for Year 2 includes P's income for the entire tax year and S's income for the period from January 1 to June 30, and S must file a separate return for the period from July 1 to December 31.

(c) *Acquisition of another subsidiary before end of tax year.* The facts are the same as in paragraph (a) of this *Example 1,* except that on July 31 P acquires all the stock of T (which filed a separate return for its year ending on November 30 of Year 1) and T therefore becomes a member on August 1 of Year 2. Under §1.1502–75(d) and paragraph (b)(1) of this section, the P group's consolidated return for Year 2 includes P's income for the entire year, S's income from January 1 to June 30, and T's income from August 1 to December 31. S must file a separate return that includes its income from July 1 to December 31, and T must file a separate return that includes its income from December 1 of Year 1 to July 31 of Year 2. (If P had acquired T after December 31, the P group that included S is a different group from the P group that includes T, and, for example, the P group that includes T must make a separate election under section 1501 and §1.1502–75 if consolidated returns are to be filed.)

Example 2. Group structure change. (a) *Facts.* P owns all of the stock of S and T. Shortly after the beginning of Year 1, P merges into T in a reorganization described in section 368(a)(1)(A) (and in section 368(a)(1)(D)), and P's shareholders receive T's stock in exchange for all of P's stock. The P group is treated under §1.1502–75(d)(2)(ii) as remaining in existence with T as its common parent.

(b) *Analysis.* Under paragraph (b)(1) of this section, the P group's return must include the common parent's items for the entire consolidated return year and, if the common parent ceases to be the common parent but the group remains in existence, appropriate adjustments must be made. Consequently, although P did not exist for all of Year 1, P's items for the portion of Year 1 ending with the merger are treated as the items of the common parent that must be included in the P group's return for Year 1.

(c) *Reverse acquisition.* Assume instead that X acquires all of P's assets in exchange for more than 50% of X's stock in a reorganization described in section 368(a)(1)(D). The reorganization constitutes a reverse acquisition under §1.1502–75(d)(3), with the X group terminating and the P group surviving with X as its common parent. Consequently, P's items for the portion of Year 1 ending with the acquisition are treated as the items of the common parent that must be included in the P group's return for Year 1, and X's items are treated for purposes of paragraph (b)(1) of this section as the items of a subsidiary included in the P group's return for the portion of Year 1 for which X is a member.

Example 3. Ratable allocation. (a) *Facts.* P sells all of T's stock to X, and T becomes a nonmember on July 1 of Year 1. T engages in the production and sale of merchandise throughout Year 1 and is required to use inventories. The sale is treated as causing T's tax year to end on June 30, and the periods beginning and ending with the sale are treated as two tax years for Federal income tax purposes.

(b) *Analysis.* If ratable allocation under paragraph (b)(2)(ii) of this section is not elected, T must perform an inventory valuation as of the acquisition and also as of the end of Year 1. If ratable allocation is elected, T must perform an inventory valuation only as of the close of Year 1, and T's income from inventory is ratably allocated, along with T's other items that are not extraordinary items, between the P and X consolidated returns.

(c) *Merger into nonmember.* Assume instead that T merges into a wholly owned subsidiary of X in a reorganization described in section 368(a)(2)(D), and P receives 10% of X's stock in exchange for all of T's stock. Under paragraph (b)(2)(ii)(B) of this section, because T's tax year ends on June 30 under section 381(b)(1), T's original year determined without taking paragraph (b) of this section into account also ends on June 30. Consequently, a ratable allocation under paragraph (b)(2)(ii) of this section is the same as an allocation based on closing the books.

Example 4. Net operating loss. P sells all of T's stock to X, T becomes a nonmember on June 30 of Year 1, and ratable allocation under paragraph (b)(2)(ii) of this section is elected. Under ratable allocation, the X group has a $100 consolidated net operating loss for Year 1, all of which is attributable to T. However, because of extraordinary items, T has $100 of income for the portion of Year 1 that T is a member of the P group. Under paragraph (b)(2)(ii)(B)(*2*) of this section, T's loss may be carried back from the X group to the portion of Year 1 that T was a member of the P group. See also section 172 and §1.1502–21(b). Under paragraph (b)(2)(ii)(C)(*5*) of this section, any item carried to or from any portion of the original year is an extraordinary item, and the loss therefore is not taken into account again in determining the ratable allocation under paragraph (b)(2)(ii) of this section.

Example 5. Employee benefit plans. (a) *Facts.* P sells all of T's stock to X, and T becomes a nonmember on June 30 of Year 1. On March 15 of Year 2, T contributes $100 to its retirement plan, which is a qualified plan under section 401(a). T is not required to make quarterly contributions to the plan for Year 1 under section 412(m). The contribution is made on account of T's taxable period beginning on July 1 of Year 1, and is deemed in accordance with section 404(a)(6) to have been made on the last day of T's taxable period beginning on July 1 of Year 1. Ratable allocation under paragraph (b)(2)(ii) of this section is not elected.

(b) *Analysis.* Under paragraph (b) of this section, the sale is treated as causing T's tax year to end on June 30, and the period beginning on July 1 is treated as a separate annual accounting period for all Federal income tax purposes. T's income from January 1 to June 30 is included in the P group's Year 1 return, and T's income from July 1 to December 31 is included in the X group's Year 1 return. Thus, the $100 contribution is deductible by T for the period of Year 1 that it is a member of the X group, subject to the applicable limitations of section 404, if a contribution on the last day of that period would otherwise be deductible.

(c) The facts are the same as in paragraph (a) of this *Example 5*, except that, in accordance with section 404(a)(6), $40 of the $100 contribution is made on account of T's taxable period beginning on January 1 of Year 1 and is deemed to be made on the last day of T's taxable period beginning on January 1 of Year 1. The remaining $60 is made on account of T's taxable period beginning on July 1 of Year 1 and is deemed to be made on the last day of T's taxable period beginning on July 1 of Year 1. As in paragraph (b) of this *Example 5*, under paragraph (b) of this section, the sale is treated as causing T's tax year to end on June 30, and the period beginning on July 1 is treated as a separate annual accounting period for all Federal income tax purposes. The $40 portion of the contribution is deductible by T for the period of Year 1 that it is a member of the P group, subject to the applicable limitations of section 404 and provided that a $40 contribution on the last day of that period would otherwise be deductible for that period, and the $60 portion is deductible by T for the period of Year 1 that it is a member of the X group, subject to the same conditions.

(d) *Ratable allocation.* The facts are the same as in paragraph (a) of this *Example 5*, except that P, T, and X elect ratable allocation under paragraph (b)(2)(ii) of this section and T's deduction for the retirement plan contribution is not an extraordinary item. T's deduction may be ratably allocated, subject to the applicable limitations of section 404, and is allowable only if a contribution on the last day of Year 1 otherwise would be deductible for any period in the year. (The results would be the same if S were an unaffiliated corporation when acquired by X, and the due date of its last separate return (including extensions) were before the pension contribution was made on March 15 of Year 2.)

Example 6. Allocation of partnership items. (a) *Facts.* P sells all of T's stock to X, and T becomes a nonmember on June 30 of Year 1. T has a 10% interest in the capital and profits of a calendar-year partnership.

(b) *Analysis.* Under paragraph (b)(2)(vi)(A) of this section, T is treated, solely for purposes of determining T's tax year in which the partnership's items are included, as selling or exchanging its entire interest in the partnership as of P's sale of T's stock. Thus, the deemed disposition is not taken into account under section 708, it does not result in gain or loss being recognized by T, and T's holding period is unaffected. However, under section 706(a), in determining T's income, T is required to include its distributive share of partnership items for the partnership's year ending within or with T's tax year. Under section 706(c)(2), the partnership's tax year is treated as closing with respect to T for this purpose as of P's sale of T's stock. The allocation of T's distributive share of partnership items must be made under §1.706–1(c)(2)(ii).

(c) *Controlled partnership.* The facts are the same as in paragraph (a) of this *Example 6*, except that T has a 75% interest in the capital and profits of the partnership. Under paragraph (b)(2)(vi)(B) of this section, T's distributive share of the partnership items is treated as T's items for purposes of paragraph (b)(2) of this section. Thus, if ratable allocation under paragraph (b)(2)(ii) of this section is not elected, T's distributive share of the partnership's items must be determined under §1.706–1(c)(2)(ii) by an interim closing of the partnership's books. Similarly, if ratable allocation is elected for T's items that are not extraordinary items, T's distributive share of the partnership's non-extraordinary items must also be ratably allocated under §1.706–1(c)(2)(ii).

Example 7. Acquisition of S corporation. (a) *Facts.* Z is a small business corporation for which an election under section 1362(a) was in effect at all times since Year 1. At all times, Z had only 100 shares of stock outstanding, all of which were owned by individual A. On July 1 of Year 3, P acquired all of the Z stock. P does not make an election under section 338(g) with respect to its purchase of the Z stock.

(b) *Analysis.* As a result of P's acquisition of the Z stock, Z's election under section 1362(a) terminates. See sections 1361(b)(1)(B) and 1362(d)(2). Z is required to join in the filing of the P consolidated return. See §1.1502–75. Z's tax year ends for all Federal income tax purposes on June 30 of Year 3. If no extension of time is sought, Z must file a separate return for the period from January 1 through June 30 of Year 3 on or before March 15 of Year 4. See paragraph (b)(4) of this section. Z will become a member of the P consolidated group as of July 1 of Year 3. See paragraph (b)(1)(ii)(A)(*2*) of this section. P group's Year 3 consolidated return will include Z's items from July 1 to December 31 of Year 3.

(6) *Effective date*—(i) *General rule.* Except as provided in paragraphs (b)(1)(ii)(A)(2) and (b)(2)(v) of this section, this paragraph (b) applies to corporations becoming or ceasing to be members of consolidated groups on or after January 1, 1995.

(ii) *Prior law.* For prior transactions, see prior regulations under section 1502 as in effect with respect to the transaction. See, e.g., §1.1502–76(b) and (d) as contained in the 26 CFR part 1 edition revised as of April 1, 1994. However, §1.1502–76(b)(5) and (6) as contained in the 26 CFR part 1 edition revised as of April 1, 1994 do not apply with respect to corporations becoming or ceasing to be members of consolidated groups on or after January 1, 1995. If both this paragraph (b) and prior law may apply to determine the inclusion of any amount in a return, appropriate adjustments must be made to prevent the omission or duplication of the amount.

(c) *Time for making separate returns for periods not included in consolidated return*—(1) *Consolidated return filed by due date for separate return.* If the group has filed a consolidated return on or before the due date for the filing of a subsidiary's separate return (including extensions of time and determined without regard to any change of its taxable year required under paragraph (a) of this section), then the separate return for any portion of the subsidiary's taxable year for which its income is not included in the consolidated return of the group must be filed no later than the due date of such consolidated return (including extensions of time).

(2) *Consolidated return not filed by due date for separate return.* If the group has not filed a consolidated return on or before the due date for the filing of a subsidiary corporation's separate return (including extensions of time and determined without regard to any change of its taxable year required under paragraph (a) of this section), then on or before such due date such subsidiary shall file a separate return either for the portion of its taxable year for which its income would not be included in a consolidated return if such a return were filed, or for its complete taxable year. However, if a separate return is filed for such portion of its taxable year and the group subsequently does not file a consolidated return, such subsidiary corporation shall file a substituted return for its complete taxable year not later than the due date (including extensions of time) prescribed for the filing of the common parent's return. On the other hand, if the return is filed for the subsidiary's complete taxable year and the group later files a consolidated return, such subsidiary must file an amended return not later than the due date (including extensions of time) for the filing of the consolidated return of the group. Such amended return shall be for that portion of such subsidiary's taxable year which is not included in the consolidated return. If, under this subparagraph, a substituted return must be

filed, then the return previously filed shall not be considered a return within the meaning of section 6011. If, under this subparagraph, a substituted or amended return must be filed, then, for purposes of sections 6513(a) and 6601(a), the last date prescribed for payment of tax shall be the due date (not including extensions of time) for the filing of the subsidiary's separate return (determined without regard to this subparagraph and without regard to any change of its taxable year required under paragraph (a) of this section).

(3) *Examples.* The provisions of this paragraph may be illustrated by the following examples:

Example 1. Corporation P, which filed a separate return for the calendar year 1966, acquires all of the stock of corporation S as of the close of December 31, 1966. Corporation S reports its income on the basis of a fiscal year ending March 31. On June 15, 1967, the due date for the filing of a separate return by S (assuming no extensions of time), a consolidated return has not been filed for the group (P and S). On such date S may either file a return for the period April 1, 1966, through December 31, 1966, or it may file a return for the complete fiscal year ending March 31, 1967. If S files a return for the short period ending December 31, 1966, and if the group elects not to file a consolidated return for the calendar year 1967, S, on or before March 15, 1968 (the due date of P's return, assuming no extensions of time), must file a substituted return for the complete fiscal year ending March 31, 1967, in lieu of the return previously filed for the short period. Interest is computed from June 15, 1967. If, however, S files a return for the complete fiscal year ending March 31, 1967, and the group elects to file a consolidated return for the calendar year 1967, then S must file an amended return covering the period from April 1, 1966, through December 31, 1966, in lieu of the return previously filed for the complete fiscal year. Interest is computed from June 15, 1967.

Example 2. Assume the same facts as in example (1) except that corporation P acquires all of the stock of corporation S at the close of September 30, 1967, and that P files a consolidated return for the group for 1967 on March 15, 1968 (not having obtained any extensions of time). Since a consolidated return has been filed on or before the due date (June 15, 1968) for the filing of the separate return for the taxable year ending March 31, 1968, the return of S for the short taxable year beginning April 1, 1967, and ending September 30, 1967, should be filed no later than March 15, 1968.

(d) *Effective/applicability date*—(1) *Taxable years of members of group effective date.* (i) *In general.* Paragraph (a) of this section applies to any original consolidated Federal income tax return due (without extensions) after July 20, 2007.

(ii) *Prior law.* For original consolidated Federal income tax returns due (without extensions) after April 25, 2006, and on or before July 20, 2007, see §1.1502–76T as contained in 26 CFR part 1 in effect on April 1, 2007. For original consolidated Federal income tax returns due (without extensions) on or before April 25, 2006, see §1.1502–76 as contained in 26 CFR part 1 in effect on April 1, 2006.

(2) *Election to ratably allocate items effective date*—(i) *In general.* Paragraph (b)(2)(ii)(D) of this section applies to any original consolidated Federal income tax return due (without extensions) after July 20, 2007.

(ii) *Prior law.* For original consolidated Federal income tax returns due (without extensions) after May 30, 2006, and on or before July 20, 2007, see §1.1502–76T as contained in 26 CFR part 1 in effect on April 1, 2007. For original consolidated Federal income tax returns due (without extensions) on or before May 30, 2006, see §1.1502–76 as contained in 26 CFR part 1 in effect on April 1, 2006.

[T.D. 6894, 31 FR 11794, Sept. 8, 1966]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting §1.1502–76, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and at *www.fdsys.gov.*

§ 1.1502–77 Agent for the group.

(a) *Agent for the group*—(1) *Sole agent.* Except as provided in paragraphs (e) and (f)(2) of this section, one entity (the agent) is the sole agent that is authorized to act in its own name regarding all matters relating to the federal income tax liability for the consolidated return year for each member of the group and any successor or transferee of a member (and any subsequent successors and transferees thereof). The identity of that agent is determined under the rules of paragraph (c) of this section.

(2) *Agent for each consolidated return year*. Agency for the group is established for each consolidated return year and is not affected by the status or membership of the group in later years. Thus, subject to the rules of paragraph (c) of this section, the agent will generally remain agent for that consolidated return year regardless of whether one or more subsidiaries later cease to be members of the group, whether the group files a consolidated return for any subsequent year, whether the agent ceases to be the agent or a member of the group in any subsequent year, or whether the group continues pursuant to §1.1502–75(d) with a new common parent in any subsequent year.

(3) *Communications under this section*. Any designation, notification, objection, request, or other communication made to or by the Commissioner pursuant to paragraphs (c) and (f)(2) of this section must be made in accordance with procedures prescribed by the Commissioner in the Internal Revenue Bulletin (see §601.601(d)(2)(ii) of this chapter), forms, instructions, or other appropriate guidance.

(b) *Definitions*. The following definitions apply for purposes of this section only—

(1) *Successor*. A *successor* is an individual or entity (including a disregarded entity as defined in paragraph (b)(3) of this section) that is primarily liable, pursuant to applicable law (including, for example, by operation of a state or federal merger statute), for the tax liability of a corporation that was a member of the group but is no longer in existence under applicable law. The determination of tax liability is made without regard to §1.1502–1(f)(4) or §1.1502–6(a). (For inclusion of a successor in references to a subsidiary or member, see paragraph (b)(5)(iii) of this section.)

(2) *Entity*. The term *entity* includes any corporation, limited liability company, or partnership formed under any state, federal, or foreign jurisdiction. The term entity includes a disregarded entity (as defined in paragraph (b)(3) of this section). The term entity does not include an entity that has terminated even if it is in a winding up period under the law under which it is organized.

(3) *Disregarded entity*. The term *disregarded entity* includes any of the following types of entities that are disregarded as separate from their owners—

(i) Qualified real estate investment trust subsidiaries (within the meaning of section 856(i)(2));

(ii) Qualified subchapter S subsidiaries (within the meaning of section 1361(b)(3)(B)); and

(iii) Eligible entities with a single owner (within the meaning of §301.7701–3 of this chapter).

(4) *Default successor*. A successor to the agent is the *default successor* if it is an entity (whether domestic or foreign) that is the sole successor to the agent. A partnership is treated as a sole successor with primary liability notwithstanding that one or more partners may also be primarily liable by virtue of being partners.

(5) *Member or subsidiary*. All references to a member or subsidiary for a consolidated return year include—

(i) Each corporation that was a member of the group during any part of such year (except that any reference to a subsidiary does not include the common parent);

(ii) Each corporation whose income was included in the consolidated return for such year, notwithstanding that the tax liability of such corporation should have been computed on the basis of a separate return, or as a member of another consolidated group, under the provisions of §1.1502–75; and

(iii) Except as indicated otherwise, a successor of any of the foregoing corporations.

(6) *Completed year*. A *completed year* is a consolidated return year that has ended, or will end at the time of the referenced event.

(7) *Current year*. A *current year* is a consolidated return year that is not a completed year.

(c) *Identity of the agent*—(1) *In general*. Except as otherwise provided in this section, the agent for a current year is the common parent and the agent for a completed year is the common parent at the close of the completed year or its default successor, if any. Except as specifically provided otherwise in this paragraph (c), any entity that is an agent pursuant to paragraph (c)(3) of this section (agent following group structure change), paragraph (c)(5) of this section (agent designated by agent terminating without default successor), paragraph (c)(6) of this section (agent designated by Commissioner), or paragraph (c)(7) of this section (agent designated by resigning agent) of this section (and any entity that subsequently serves as agent) acts as an agent for and under the same terms and conditions that apply to a common parent. For example, such an agent would generally be able to designate an agent if it terminates without a default successor; however, an entity that became agent pursuant to a designation by the Commissioner under paragraphs (c)(6)(i)(A)(*2*), (*3*), or (*4*) of this section is not permitted to designate an agent if it terminates without a default successor. Other special rules described in this paragraph (c) apply.

(2) *Purported agent.* If any entity files a consolidated return, or takes any other action related to the tax liability for the consolidated return year, purporting to be the agent but is subsequently determined not to have been the agent with respect to the claimed group, that entity is treated, to the extent necessary to avoid prejudice to the Commissioner, as if it were the agent.

(3) *New common parent after a group structure change.* If the group continues in existence after a group structure change (as described in §1.1502–33(f)(1)), the former common parent is the agent until the group structure change, and the new common parent becomes the agent after the group structure change. Following the group structure change, the new common parent is the agent with respect to the entire current year (including the period before the group structure change) and the former common parent is no longer the agent for that year. However, actions taken by the former common parent as the agent before the group structure change are not nullified when the new common parent becomes the agent with respect to the entire consolidated return year. Following the group structure change, the new common parent continues as the agent for succeeding years subject to the rules of this section.

(4) *Notification by default successor*—(i) *In general.* Failure to provide notice to the Commissioner pursuant to this paragraph (c)(4)(i) does not invalidate an entity's status as the default successor. However, until the Commissioner receives notification in writing that an entity is the default successor—

(A) Any notice of deficiency or other communication mailed to the predecessor agent, even if no longer in existence, is considered as having been properly mailed to the agent; and

(B) The Commissioner is not required to act on any communication (including, for example, a claim for refund) submitted on behalf of the group by any person (including the default successor) other than the predecessor agent.

(ii) *Conversions and continuances.* For purposes of the notice requirements under paragraph (c)(4)(i) of this section, any entity that results from the agent's conversion or continuance by operation of state law and that qualifies as a default successor under paragraph (b)(4) of this section is treated as a default successor for purposes of the notice provisions of paragraph (c)(4)(i) of this section, even if applicable state or local law may treat the converted or continued entity as not ceasing to exist.

(5) *Designation by terminating agent*—(i) *In general.* Prior to the termination of its existence without a default successor, an agent may designate an entity described in paragraph (c)(5)(ii) of this section to act as agent for any completed year. This designation is effective upon the termination of the designating agent's existence. However, this paragraph (c)(5) does not apply to, and no designation can be made by, an agent that was designated by the Commissioner under paragraphs (c)(6)(i)(A)(*2*), (*3*), or (*4*) of this section, or any successor of such an agent; in such a case, the terminating agent should request that the Commissioner designate an agent pursuant to paragraph (c)(6)(i)(B) of this section.

(ii) *Permissible agents*—(A) The terminating agent may designate as agent a member of the group during any part of the completed year, or an entity (whether domestic or foreign) that is a successor of such a member, including an entity that will become a successor at the time the agent's existence terminates.

(B) The terminating agent may not designate as agent any entity that was previously replaced as agent by the Commissioner pursuant to paragraphs (c)(6)(i)(A)(*2*), (*3*), or (*4*) of this section, or any successor of such an agent. However, the terminating agent may submit a request pursuant to paragraph (c)(6)(i)(B) of this section that the Commissioner designate such an entity as agent.

(iii) *Notification of designation.* The terminating agent must notify the Commissioner in writing of its designation of an entity as agent pursuant to paragraph (c)(5)(i) of this section and provide a statement executed by the designated entity acknowledging that it will serve as the agent for each specified completed year for which it is designated as the agent. If the designated entity was not itself a member of the group during any specified year (because it is a successor of a member), the notification must include a statement acknowledging that the designated entity is or will be primarily liable for the tax liability for the specified completed year as a successor of a member.

(iv) *Failure to designate an agent.* If the agent terminates without a default successor, and no agent is designated pursuant to this paragraph (c)(5)—

(A) Any notice of deficiency or other communication mailed to the agent, even if no longer in existence, is considered as having been properly mailed to the agent; and

(B) The Commissioner is not required to act on any communication (including, for example, a claim for refund) submitted on behalf of the group by any person.

(6) *Designation by the Commissioner*—(i) *In general.* The Commissioner has the authority to designate an entity to act as the agent under the circumstances prescribed in this paragraph (c)(6)(i). The designated agent for a completed year must be an entity described in paragraph (c)(5)(ii)(A) of this section when the designation becomes effective. The designated agent for a current year must be a member of the group when the designation becomes effective. If, pursuant to this paragraph (c)(6), the Commissioner replaces the common parent or another entity as the agent, the common parent or other entity, or any successor thereof, may not later act as the agent unless so designated by the Commissioner.

(A) *On Commissioner's own accord.* With or without a request from any member of the group, the Commissioner may designate an entity to act as the agent if—

(*1*) The agent's existence terminates, other than in a group structure change, without there being a default successor and without any designation made under paragraph (c)(5)(i) of this section;

(*2*) An agent previously designated by the Commissioner is no longer a member of the group in the current year and does not have a default successor that is a member of the group;

(*3*) The Commissioner believes that the agent or its default successor exists but such entity has either not timely responded to the Commissioner's notices (sent to the last known address on file for the entity or left at the usual place of business for such entity) or has failed to perform its obligations as agent as prescribed by the Internal Revenue Code (Code) or regulations promulgated thereunder; or

(*4*) The agent is or becomes a foreign entity as a result of any action or transaction (including, for example, a continuance into a foreign jurisdiction or certain inversion transactions subject to section 7874 in which a foreign parent is treated as a domestic corporation).

(B) *Written request from any member.* At the request of any member, in a circumstance not described in paragraph (c)(6)(i)(A) of this section, the Commissioner may, but is not required to, replace an agent previously designated under this paragraph (c)(6).

(ii) *Notification by Commissioner.* The Commissioner will notify the designated entity in writing of the Commissioner's designation of the entity as agent pursuant to paragraph (c)(6)(i) of this section, and the designation will be effective as prescribed by the Commissioner. The designated entity should give notice of the designation by the Commissioner pursuant to paragraph (c)(6)(i) of this section to each member of the group during any part of the consolidated return year. However, a failure by the designated entity to notify any such member of the group does not invalidate the designation by the Commissioner.

(iii) *Term and effect of designation.* Unless otherwise provided by the Commissioner in the designation, any agent designated by the Commissioner pursuant to paragraph (c)(6)(i) of this section (new agent) is the agent with respect to the entire consolidated return year for which it is designated and successive years, subject to the rules of this section. An agent immediately preceding a new agent (former agent) ceases to be the agent for a particular consolidated return year once the new agent has been designated for that year, but the designation of the new agent does not nullify actions taken on behalf of the group by the former agent while it was agent. If there is more than one new agent designated by the Commissioner for a consolidated return year, the new agent that is designated last in time by the Commissioner is the agent with respect to the entire consolidated return year. A designation pursuant to this paragraph (c)(6) is effective as prescribed by the Commissioner in such designation or the Internal Revenue Bulletin (see §601.601(d)(2)(ii) of this chapter), forms, instructions, or other appropriate guidance.

(iv) *Request by member of the group where agent previously designated by the Commissioner is no longer a member.* If an agent at any time after it is designated as agent by the Commissioner pursuant to paragraph (c)(6)(i) of this section is no longer a member of the group for any current year, and its default successor, if any, is not a member of the group at that time, a member of the group, including the agent that will cease to be a member, should request, in writing, that the Commissioner designate a member of the group to be the new agent pursuant to paragraph (c)(6)(i)(A)(*2*) of this section. Until such a request is made—

(A) Any notice of deficiency or other communication mailed to the agent, even if no longer a member, is considered as having been properly mailed to the agent; and

(B) The Commissioner is not required to act on any communication (including, for example, a claim for refund) submitted on behalf of the group by any person.

(7) *Agent resigns*—(i) *In general.* The agent may resign for a completed year if—

(A) It provides written notice to the Commissioner that it no longer intends to be the agent for that completed year;

(B) An entity described in paragraph (c)(5)(ii)(A) of this section consents, in writing, to be the agent with respect to that completed year;

(C) Immediately after its resignation takes effect, the resigning agent will not be the agent for the current year; and

(D) The Commissioner does not object to the agent's resignation.

(ii) *Notification by agent that replaces agent that resigns.* If the Commissioner does not object to the agent's resignation, the agent that replaces the agent that resigns should give written notice that it is the new agent to each member of the group for any part of the completed year for which it is designated the agent.

(8) *Transactions under the Code.* Notwithstanding section 338(a)(2), a target corporation for which an election is made under section 338 is not deemed to terminate for purposes of this section.

(d) *Examples of matters subject to agency.* With respect to any consolidated return year for which it is the agent—

(1) The agent makes any election (or similar choice of a permissible option) that is available to a subsidiary in the computation of its separate taxable income, and any change in an election (or similar choice of a permissible option) previously made by or for a subsidiary, including, for example, a request to change a subsidiary's method or period of accounting;

(2) All correspondence concerning the income tax liability for the consolidated return year is carried on directly with the agent;

(3) The agent files for all extensions of time, including extensions of time for payment of tax under section 6164, and any extension so filed is considered as having been filed by each member;

(4) The agent gives waivers, gives bonds, and executes closing agreements, offers in compromise, and all other documents, and any waiver or bond so given, or agreement, offer in compromise, or any other document so executed, is considered as having also been given or executed by each member;

(5) The agent files claims for refund, and any refund is made directly to and in the name of the agent and discharges any liability of the Government to any member with respect to such refund;

(6) The agent takes any action on behalf of a member of the group with respect to a foreign corporation including, for example, elections by, and changes to the method of accounting of, a controlled foreign corporation in accordance with § 1.964–1(c)(3);

(7) Notices of claim disallowance are mailed only to the agent, and the mailing to the agent is considered as a mailing to each member;

(8) Notices of deficiencies are mailed only to the agent (except as provided in paragraph (f)(3) of this section), and the mailing to the agent is considered as a mailing to each member;

(9) Notices of final partnership administrative adjustment under section 6223 with respect to any partnership in which a member of the group is a partner may be mailed to the agent, and, if so, the mailing to the agent is considered as a mailing to each member that is a partner entitled to receive such notice (for other rules regarding partnership proceedings, see paragraph (f)(2)(iii) of this section);

(10) The agent files petitions and conducts proceedings before the United States Tax Court, and any such petition is considered as also having been filed by each member;

(11) Any assessment of tax may be made in the name of the agent, and an assessment naming the agent is considered as an assessment with respect to each member; and

(12) Notice and demand for payment of taxes is given only to the agent, and such notice and demand is considered as a notice and demand to each member.

(e) *Matters reserved to subsidiaries.* Except as provided in this paragraph (e) and paragraph (f)(2) of this section, no subsidiary (unless it is or becomes an agent pursuant to paragraph (c) of this section) has authority to act for or to represent itself in any matter related to the tax liability for the consolidated return year. The following matters, however, are reserved exclusively to each subsidiary—

(1) The making of the consent required by § 1.1502–75(a)(1);

(2) Any action with respect to the subsidiary's liability for a federal tax other than the income tax imposed by chapter 1 of the Code (including, for example, employment taxes under chapters 21 through 25 of the Code, and miscellaneous excise taxes under chapters 31 through 47 of the Code); and

(3) The making of an election to be treated as a Domestic International Sales Corporation under § 1.992–2.

(f) *Dealings with members*—(1) *Identifying members in notice of a lien.* Notwithstanding any other provisions of this section, any notice of a lien, any levy, or any other proceeding to collect the amount of any assessment, after the assessment has been made, must name the entity from which such collection is to be made.

(2) *Direct dealing with a member*—(i) *Several liability.* The Commissioner may, upon issuing to the agent written notice that expressly invokes the authority of this provision, deal directly with any member of the group with respect to its liability under § 1.1502–6 for the consolidated tax of the group, in which event such member has sole authority to act for itself with respect to that liability. However, if the Commissioner believes or has reason to believe that the existence of the agent has terminated without an agent being identified under this section, the Commissioner may, if the Commissioner deems it advisable, deal directly with any member with respect to that member's liability under § 1.1502–6 without issuing notice to any other entity.

(ii) *Information requests.* The Commissioner may, upon issuing to the agent written notice, request information relevant to the consolidated tax liability from any member of the group. However, if the Commissioner believes or has reason to believe that the existence of the agent has terminated without an agent being identified under this section, the Commissioner may request such information from any member of the group without issuing notice to any other entity.

(iii) *Members as partners in partnerships subject to the provisions of the Code.* Except as otherwise provided in this paragraph (f)(2)(iii), the general rule of paragraph (a)(1) of this section applies so that the agent is the agent for any subsidiary member that for any part of the consolidated return year is a partner in a partnership subject to the provisions of sections 6221 through 6234 of the Code (as originally enacted by the Tax Equity and Fiscal Responsibility Act of 1982 and subsequently amended) and the accompanying regulations (TEFRA partnership). However—

(A) Any subsidiary or any disregarded entity owned by a subsidiary that is designated as tax matters partner of a TEFRA partnership will act in its own name and perform its responsibilities under sections 6221 through 6234 and the accompanying regulations without requiring any action by the agent (but see paragraph (d)(9) of this section regarding the mailing of a final partnership administrative adjustment to the agent); and

(B) The Commissioner may at any time communicate directly with a subsidiary or a disregarded entity owned by a subsidiary that is a partner in a TEFRA partnership, without having to deal with each member separately pursuant to paragraph (f)(2)(i) of this section, whenever the Commissioner determines that such direct communication will facilitate the conduct of an examination, appeal, or settlement with respect to the partnership.

(3) *Copy of notice of deficiency to entity that has ceased to be a member of the group.* A subsidiary that ceases to be a member of the group during or after a consolidated return year may file a written notice of that fact with the Commissioner and request a copy of any notice of deficiency with respect to the tax for a consolidated return year during which it was a member, or a copy of any notice and demand for payment of such deficiency, or both. Such filing does not limit the scope of the agency of the agent provided for in this section. Any failure by the Commissioner to comply with such request does not limit the subsidiary's tax liability under §1.1502–6.

(g) *Examples.* Unless otherwise indicated, all entities are domestic and have a calendar year taxable year, and each of P, S, S–1, S–2, S–3, T, V, W, W–1, Y, Z, and Z–1 is a corporation. For none of the consolidated return years at issue does the Commissioner exercise the authority under paragraph (f)(2) of this section to deal with any member separately. Any surviving entity in a merger is either a successor as described in paragraph (b)(1) of this section, or a default successor as described in paragraph (b)(4) of this section, as the case may be. Except as otherwise indicated, no agent will be replaced under paragraph (c)(6) of this section or will resign under paragraph (c)(7) of this section, and all communications to and from the Commissioner are made in accordance with procedures prescribed by the Commissioner.

Example 1. Disposition of all group members where the agent remains the agent. (i) *Facts.* As of January 1 of Year 1, P is the common parent and agent for the P consolidated group, consisting of P and its two subsidiaries, S and S–1. P files consolidated returns for the P group in Years 1 and 2. On December 31 of Year 1, P sells all the stock of S–1 to X. On December 31 of Year 2, P distributes all the stock of S to P's shareholders. P files a separate return for Year 3.

(ii) *Analysis.* Although the consolidated group terminates after Year 2 under §1.1502–75(d)(1) and P is no longer the common parent nor the agent for years after Year 2, P remains the agent for the P group for Years 1 and 2 under paragraph (a)(2) of this section. Accordingly, for as long as P remains in existence, P is the agent for the P group under paragraphs (a)(1) and (2) and (c)(1) of this section for Years 1 and 2.

Example 2. Acquisition of the agent by another group where the agent remains the agent. (i) *Facts.* The facts are the same as in *Example 1*, except on January 1 of Year 3, all of the outstanding stock of P is acquired by Y, which is the common parent and agent of the Y consolidated group. P thereafter joins in the Y group's consolidated return as a member of the Y group.

(ii) *Analysis.* Although P is a member of the Y group in Year 3 and succeeding years, P remains the agent for the P group for Years 1 and 2 under paragraph (a)(2) of this section. Accordingly, for as long as P remains in existence, P is the agent for the P group under paragraphs (a)(1) and (2) and (c)(1) of this section for Years 1 and 2.

Example 3. Reverse triangular merger of the agent where the agent remains the agent. (i) *Facts.* As of January 1 of Year 1, P is the common parent and agent for the P consolidated group consisting of P and its two subsidiaries, S and S–1. P files consolidated returns for the P group in Years 1 and 2. On March 1 of Year 3, W–1, a subsidiary of W, merges into P in a reverse triangular merger qualifying as a reorganization under section 368(a)(1)(A) and (a)(2)(E). P survives the merger with W–1. The transaction constitutes a reverse acquisition under §1.1502–75(d)(3)(i) because P's shareholders receive more than 50 percent of W's stock in exchange for all of P's stock. The transaction is therefore a group structure change as described in paragraph (c)(3) of this section.

(ii) *Analysis.* Because the transaction constitutes a reverse acquisition that results in a group structure change, the P group is treated as remaining in existence with W as its common parent and agent. Under paragraphs (a)(1) and (2) and (c)(1) of this section, P remains the agent for the P group for Years 1 and 2 for as long as P remains in existence, even though the P group continues with W as its new common parent pursuant to §1.1502–75(d)(3)(i). Until the merger of W–1 and P on March 1 of Year 3, P is the agent for the P group for Year 3. From the time of that merger, W, as common parent of the P group, becomes the agent for the P group with respect to all of Year 3 (including the period through March 1) and succeeding consolidated return years. The actions taken by P before the merger as agent for the P group for Year 3 are not nullified by the fact that W becomes the agent for all of Year 3.

Example 4. Reverse triangular merger of the agent—subsequent distribution of agent where the agent remains the agent. (i) *Facts.* The facts are the same as in *Example 3*, except that on April 1 of Year 4, in a transaction unrelated to the March 1, Year 3 reverse acquisition, P distributes the stock of its subsidiaries S and S–1 to W, and W then distributes the stock of P to the W shareholders.

(ii) *Analysis.* Although P is no longer a member of the P group after the Year 4 distribution, P remains the agent for the P group under paragraphs (a)(1) and (2) and (c)(1) of this section for Years 1 and 2 for as long as P remains in existence.

Example 5. Agent Resigns. (i) *Facts.* The facts are the same as in *Example 4*, except that on August 1 of Year 4, P provides written notice to the Commissioner that it resigns as the agent for Years 1 and 2. Included with the written notice is a statement executed by either S or S–1 consenting to be the agent for the P group for Years 1 and 2.

(ii) *Analysis.* Pursuant to paragraph (c)(7) of this section, because P is not the agent in Year 4, the current year, it will not be the agent immediately after its resignation takes effect. Accordingly, if the Commissioner does not object to P's resignation, P may resign with respect to Years 1 and 2, both of which are completed years, and either S or S–1, each an entity described in paragraph (c)(5)(ii)(A) of this section, can be the agent for the P group for Years 1 and 2 if it consents in writing. W cannot be the agent for the P group for Years 1 and 2 because it is not an entity described in paragraph (c)(5)(ii)(A) of this section with respect to the P group for Years 1 and 2.

Example 6. Qualified stock purchase and section 338 election where the agent remains the agent. (i) *Facts.* As of January 1 of Year 1, P is the common parent and agent for the P consolidated group consisting of P and its two subsidiaries, S and S–1. P files consolidated returns for the P group in Years 1 and 2. On March 31 of Year 2, V purchases the stock of P in a qualified stock purchase (within the meaning of section 338(d)(3)), and V makes a timely election pursuant to section 338(g) with respect to P.

(ii) *Analysis.* Although section 338(a)(2) provides that P is treated as a new corporation as of the beginning of the day after the acquisition date for purposes of subtitle A, paragraph (c)(8) of this section provides that P's existence is not deemed to terminate for purposes of this section notwithstanding the general rule of section 338(a)(2). Accordingly, new P is the agent for the P group for Year 1 and the period ending March 31 of Year 2 regardless of the election under section 338(g).

Example 7. Change in the agent's federal income tax classification to a partnership and the resulting partnership continues as the agent. (i) *Facts.* P, a State M limited liability partnership with two partners that is formed on January 1 of Year 1, elects pursuant to §301.7701–3(c) of this chapter to be an association taxable as a corporation for federal income tax purposes effective on the date of formation. P is the common parent and agent for the P consolidated group consisting of P and its two subsidiaries, S and S–1. P files consolidated returns for the P group in Years 1 through 6. On January 1 of Year 7, P elects pursuant to §301.7701–3(c) of this chapter to be treated as a partnership. P remains in existence under applicable law.

(ii) *Analysis.* The P group terminates and P is no longer the common parent of a consolidated group after its election to be treated as a partnership for federal income tax purposes. Because P remains in existence under applicable law, P is the agent for the P group under paragraphs (a)(1) and (2) and (c)(1) of this section for Years 1 through 6. If P merged into a foreign partnership instead of converting to a partnership, the foreign partnership would be P's default successor and agent for the P group for Years 1 through 6. See paragraphs (b)(4) and (c)(1) of this section.

Example 8. Forward triangular merger of agent—successor as default successor. (i) *Facts.* As of January 1 of Year 1, P is the common parent and agent for the P consolidated group consisting of P and its two subsidiaries, S and S–1. P files a consolidated return for the P group for Year 1. On January 1 of Year 3, P merges with and into Z–1, a subsidiary of Z, in a forward triangular merger qualifying as a reorganization under section 368(a)(1)(A) and (a)(2)(D). The transaction constitutes a reverse acquisition under §1.1502–75(d)(3)(i) resulting in a group structure change as described in paragraph (c)(3) of this section because P's shareholders receive more than 50 percent of Z's stock in exchange for all of P's stock. Z–1, the corporation that survives the merger and the successor of P, is the default successor for the P group for Years 1 and 2.

(ii) *Analysis.* Although Z is the new common parent for the P group (which continues pursuant to §1.1502–75(d)(3)(i)) for consolidated return years after the merger, and, as a consequence, Z is the new agent as a result of this group structure change, P may not designate an agent for Years 1 or 2 because Z–1 is P's default successor and the agent for the P group for Years 1 and 2. Z–1 must file the P group's consolidated return for Year 2. See paragraphs (b)(4) and (c)(1) of this section.

Example 9. Merger of the agent into a disregarded entity in exchange for stock of owner in a transaction qualifying as a reorganization under the Code where successor is the default successor. (i) *Facts.* As of January 1 of Year 1, P is the common parent and agent for the P consolidated group consisting of P and its two subsidiaries, S and S–1. P files a consolidated return for the P group in Year 1. On January 1 of Year 2, the shareholders of P form Y, a State M corporation. On the same date, Y forms Y–1, a State M limited liability company that is a disregarded entity (as defined in paragraph (b)(3) of this section) for federal income tax purposes, and P merges into Y–1 under State M law. In the merger, the P shareholders receive all of the Y stock. Y (through Y–1) is treated as acquiring the assets of P in a transaction qualifying as a reorganization of P into Y under section 368(a)(1)(F), and the P group continues under §1.1502–75(d)(2) with Y as the common parent and, as a consequence, the transaction is treated as a group structure change as described in paragraph (c)(3) with Y as the P group's agent for Year 2. In Year 4, the Commissioner seeks to extend the period of limitations on assessment with respect to Year 1 of the P group. In Year 5, the Commissioner seeks to extend the period of limitations on assessment with respect to Year 2 of the Y group (formerly the P group).

(ii) *Analysis.* (A) *Year 1 extension.* As a result of the January 1, Year 2 merger, Y–1 is the default successor of P, and the agent for the P group for Year 1. See paragraphs (b)(4) and (c)(1) of this section. Therefore, Y–1 is the only party that can sign the extension with respect to the P group for Year 1.

(B) *Year 2 extension.* Because the January 1, Year 2 merger qualified as a reorganization under section 368(a)(1)(F), the P group remains in existence with Y as the common parent. Therefore, Y, the common parent of the P group after the merger, is the P group's agent for all of Year 2 (see paragraph (c)(3) of this section) and is the only party that can sign the extension with respect to the P group for that year and in succeeding years. See paragraphs (a)(1) and (2) and (c)(1) of this section.

Example 10. Designation of agent where there is no default successor. (i) *Facts.* P is incorporated under the laws of State X. Fifty percent of its stock is owned at all times by A, an individual, and 50 percent by BCD, a partnership. On January 1 of Year 1, P forms two subsidiaries, S and T, and becomes the common parent of the P group. P files consolidated returns for the P group beginning in Year 1 and is the agent for the P consolidated group beginning on January 1 of Year 1. On November 30 of Year 3, P dissolves under X law. Under X law, A and BCD are primarily liable for the federal income tax liability of dissolved corporation P. State X law allows the officers of a dissolved corporation to perform certain actions incident to the winding up of its affairs after its dissolution, including the filing of tax returns.

(ii) *Analysis.* Upon P's dissolution, there is no default successor to P, pursuant to paragraph (b)(4) of this section, because there are two successors. Prior to its dissolution on November 30 of Year 3, pursuant to paragraph (c)(5)(i) of this section, P may designate an agent for the P group for Years 1 and 2 and the short taxable year ending on November 30 of Year 3, to be effective upon P's dissolution. P may designate S or T, pursuant to paragraph (c)(5)(ii)(A) of this section (because they are members of the former group), or BCD (because it is an entity that is a successor to P pursuant to paragraph (b)(1) of this section). P cannot designate A pursuant to paragraph (c)(5)(ii) of this section, because A is not an entity. Under paragraph (b)(2) of this section, the officers of P cannot designate an agent for the P group after P dissolves on November 30 of Year 3, notwithstanding the winding up provisions of State X law. Accordingly, P should designate an agent prior to its dissolution to ensure that there is an agent authorized to file the short Year 3 consolidated return. If P does not designate an agent prior to dissolution under paragraph (c)(5)(i) of this section, the Commissioner may designate an agent under paragraph (c)(6)(i)(A)(*1*) of this section from among S, T, or BCD, upon their request or otherwise. If any of S, T, A, or BCD realizes that P has dissolved without designating an agent, it should request, in writing, a designation of an agent by the Commissioner as soon as possible.

Example 11. Commissioner designates a new agent. (i) *Agent fails to fulfill its obligations.* (A) *Facts.* P is the common parent and agent for the P consolidated group consisting of P and its two subsidiaries, S–1 and S–2, each a State Y corporation. P files a consolidated return for the P group in Year 1. In Year 2, S–3, also a State Y corporation, joins the P group. The P group continues as a consolidated group in Years 2, 3, and 4. As of Year 4, P has failed to file the P group consolidated returns for Years 2 and 3.

(B) *Analysis.* (*1*) *Scope of designation.* Because P failed to perform its obligations as agent as prescribed by federal tax law, the Commissioner may, under the authority of paragraph (c)(6)(i)(A)(*3*) of this section, on his own accord, with or without a written request from a member, designate another entity described in paragraph (c)(6)(i) of this section to act as the agent for not just Years 2 and 3, but any of Years 1 through 4.

(*2*) *Year 1 designation.* The Commissioner may designate either S–1 or S–2, both of which are entities described in paragraphs (c)(6)(i) and (c)(5)(ii)(A) of this section, to act as the agent for the P group for Year 1. Because S–3 was not a member of the group in Year 1, it is not an entity described in paragraphs (c)(6)(i) and (c)(5)(ii)(A) of this section for Year 1 and therefore cannot be the agent for Year 1. Unless otherwise provided in the designation, the designation of either S–1 or S–2 will also be effective for Years 2, 3, and 4 and all succeeding consolidated return years of the group.

(*3*) *Year 2 designation.* The Commissioner may designate either S–1, S–2, or S–3, all of which are entities described in paragraph (c)(5)(ii)(A) of this section, to act as the agent for the P group for Year 2. Unless otherwise provided in the designation, the designation of either S–1, S–2, or S–3 will also be effective for Years 3 and 4 and all succeeding consolidated return years of the group.

(*4*) *Year 3 designation.* The Commissioner may designate any of S–1, S–2, or S–3 as the agent for Year 3. Unless otherwise provided in the designation, the designation of either S–1, S–2, or S–3 will also be effective for Year 4 and all succeeding consolidated return years of the group.

(*5*) *Year 4 designation.* The Commissioner may designate any of S–1, S–2, or S–3 as the agent for Year 4. Unless otherwise provided in the designation, the designation of either S–1, S–2, or S–3 will also be effective for all succeeding consolidated return years of the group.

(ii) *Member requests replacement of designated agent.* (A) *Facts.* The facts are the same as in paragraph (i)(A) of this *Example 11,* except that in Year 4 the Commissioner designates S–1 as agent for Years 1 and succeeding years to replace P for P's failure to fulfill its obligations. After receiving notification that S–1 has been designated, S–3 submits a request in Year 4, pursuant to paragraph (c)(6)(i)(B) of this section, that the Commissioner designate S–2 as the agent because S–1 does not have ready access to the group's books and records, which are located in another state and are in the possession of S–2.

(B) *Analysis.* In light of S–3's request, the Commissioner may, under the authority of paragraph (c)(6)(i)(B) of this section, designate either S–2 (for all or any years) or S–3 (for any year or years other than Year 1) as agent in lieu of the previously designated agent, S–1. However, notwithstanding S–3's request, the Commissioner is not required to replace S–1 as agent for any of the consolidated return years for which S–1 was designated.

Example 12. Designated agent ceases to be a member of the group. (i) *Facts.* The facts are the same as in paragraph (ii)(A) of *Example 11,* except that in Year 4 no member requests that the Commissioner replace S–1, which accordingly continues to be the agent for the P group in Year 5 pursuant to paragraph (c)(6)(iii) of this section. On May 2 of Year 5, S–1 converts under State Y law into S–1 LLC, a limited liability company that is an entity that is treated as a disregarded entity (as defined in paragraph (b)(3) of this section) and, as a consequence, is no longer a member of the P group after the conversion.

(ii) *Analysis for completed years.* S–1 LLC, the disregarded entity resulting from the conversion, becomes S–1's default successor. As such, S–1 LLC is the agent for Years 1–4.

(iii) *Analysis for current and succeeding years.* S–1 is an agent designated by the Commissioner pursuant to paragraph (c)(6)(i)(A)(*3*) of this section. Because S–1 is no longer a member of the P group after May 2 of Year 5, S–1 is the agent for the P group for Year 5 only while it remains a member (see paragraphs (c)(6)(i) and (iii) of this section). According to paragraph (c)(6)(i) of this section, although S–1 LLC is S–1's default successor, it is not a member of the group for the current year and therefore cannot be its agent. Furthermore, S–1 cannot designate an agent for Year 5 under paragraph (c)(5)(i) of this section because that paragraph pertains only to designations for completed years for which there is no default successor. In addition, S–1 cannot designate an agent for Year 5 under paragraph (c)(5)(i) of this section because S–1 was previously designated by the

Commissioner under paragraph (c)(6)(i)(A)(*3*) of this section.

(iv) *Member's notice to Commissioner for Commissioner to designate a member of the group for a current year.* A member of the group in Year 5 should request that the Commissioner designate, pursuant to paragraphs (c)(6)(i)(A)(*2*) and (c)(6)(iv) of this section, another member of the P group to be the agent of the group for Year 5. The Commissioner may then, pursuant to paragraph (c)(6)(i)(A)(*2*) of this section, designate either S–2, S–3, or P to be the agent for the P group and, once so designated, that member will be, effective on May 3 of Year 5, the agent for all of Year 5 and for succeeding years (subject to the rules of this section) pursuant to paragraph (c)(6)(iii) of this section. No actions taken by S–1 on behalf of the P group through May 2, Year 5, are nullified by the Commissioner's designation of another agent even though the agent so designated will be the agent for all of Year 5.

Example 13. Fraudulent conveyance of assets. (i) *Facts.* As of January 1 of Year 1, P is the common parent and agent for the P consolidated group consisting of P and its two subsidiaries, S and S–1. On March 15 of Year 2, P files a consolidated return that includes the income of S and S–1 for Year 1. On December 1 of Year 2, S–1 transfers assets having a fair market value of $100x to U in exchange for $10x. This transfer of assets for less than fair market value constitutes a fraudulent conveyance under applicable state law. On March 1 of Year 5, P executes a waiver extending to December 31 of Year 6 the period of limitations on assessment with respect to the P group's Year 1 consolidated return. On February 1 of Year 6, the Commissioner issues a notice of deficiency to P asserting a deficiency of $30x for the P group's Year 1 consolidated tax liability. P does not file a petition for redetermination in the Tax Court, and the Commissioner makes a timely assessment against the P group. P, S, and S–1 are all insolvent and are unable to pay the deficiency. On February 1 of Year 8, the Commissioner sends a notice of transferee liability to U, which does not file a petition in the Tax Court. On August 1 of Year 8, the Commissioner assesses the amount of the P group's deficiency against U. Under section 6901(c), the Commissioner may assess U's transferee liability within one year after the expiration of the period of limitations against the transferor, S–1. By operation of section 6213(a) and 6503(a), the issuance of the notice of deficiency to P and the expiration of the 90-day period for filing a petition in the Tax Court have the effect of further extending by 150 days the P group's limitations period on assessment from the previously extended date of December 31 of Year 6 to May 30 of Year 7.

(ii) *Analysis.* Pursuant to paragraph (a)(1) of this section, the waiver executed by P on March 1 of Year 5 to extend the period of limitations on assessment to December 31 of Year 6 and the further extension of the P group's limitations period to May 30 of Year 7 (by operation of sections 6213(a) and 6503(a)) have the derivative effect of extending the period of limitations on assessment of U's transferee liability to May 30 of Year 8. By operation of section 6901(f), the issuance of the notice of transferee liability to U and the expiration of the 90-day period for filing a petition in the Tax Court have the effect of further extending the limitations period on assessment of U's liability as a transferee by 150 days, from May 30 of Year 8 to October 27 of Year 8. Accordingly, the Commissioner may send a notice of transferee liability to U at any time on or before May 30 of Year 8 and assess the unpaid liability against U at any time on or before October 27 of Year 8. The result would be the same even if S–1 ceased to exist before March 1 of Year 5, the date P executed the waiver.

Example 14. Consent to extend the statute of limitations for a partnership where a member of the consolidated group is a partner of such partnership subject to the provisions of the Code and the tax matters partner is not a member of the group. (i) *Facts.* P is the common parent and agent for the P consolidated group consisting of P and its two subsidiaries, S and S–1. The P group has a November 30 fiscal year end and P files consolidated returns for the P group for the years ending November 30, Year 1 and November 30, Year 2. S–1 is a partner in the PRS partnership, which is subject to the provisions of sections 6221 through 6234. PRS has a calendar year end and A, an individual, is the tax matters partner of the PRS partnership. PRS files a partnership return for the year ending December 31, Year 1. On January 10, Year 5, A, as the tax matters partner for the PRS partnership, executes a consent to extend the period for assessment of partnership items of PRS for all partners, and the Commissioner co-executes the consent on the same day for the year ending December 31, Year 1.

(ii) *Analysis.* A's consent to extend the statute of limitations for the partnership items of PRS partnership for the year ending December 31, Year 1, extends the statute of limitations with respect to the partnership items for all members of the P group, including P, S, and S–1 for the consolidated return year ending November 30, Year 2. This is because S–1 is a partner in the PRS partnership for which A, the tax matters partner for the PRS partnership, consents, pursuant to section 6229(b)(1)(B), to extend the statute of limitations for the year ending December 31, Year 1. However, under paragraph (f)(2)(iii) of this section, such agreement with respect to the statute of limitations for the PRS partnership for the year ending December 31, Year 1 does not obviate the need to obtain a consent from P, the agent for the P consolidated group, to extend the statute of limitations for the P consolidated group for the P group's consolidated return years ending November 30, Year 1 and November 30, Year 2 regarding any items other than partnership items or affected items of the PRS partnership.

Example 15. Contacting subsidiary member in order to facilitate the conduct of an examination, appeal, or settlement where a member of the consolidated group is a partner of a partnership subject to the provisions of the Code. (i) *Facts.* P is the common parent and agent for the P consolidated group consisting of P and its two subsidiaries, S and S–1. The P group has a November 30 fiscal year end, and P files consolidated returns for the P group for the years ending November 30, Year 1 and November 30, Year 2. S–1 is a partner in the PRS partnership, which is subject to the provisions of sections 6221 through 6234. PRS has a calendar year end and A, an individual, is the tax matters partner of the PRS partnership. PRS files a partnership return for the year ending December 31, Year 1. The Commissioner, on January 10, Year 4, in the course of an examination of the PRS partnership for the year ending December 31, Year 1, seeks to obtain information in the course of that examination to resolve the audit.

(ii) *Analysis.* Because the direct contact with a subsidiary member of a consolidated group that is a partner in a partnership subject to the provisions under sections 6221 through 6234 may facilitate the conduct of an examination, appeal, or settlement, the Commissioner, under paragraph (f)(2)(iii) of this section, may communicate directly with either S–1, P, or A regarding the PRS partnership without breaking agency pursuant to paragraph (f)(2)(i) of this section. However, if the Commissioner were instead seeking to execute a settlement agreement with respect to S–1 as a partner with respect to its liability as a partner in PRS partnership, P would need to execute such settlement agreement for all members of the group including the partner subsidiary.

(h) *Cross-reference.* For further rules applicable to groups that include insolvent financial institutions, see §301.6402–7 of this chapter.

(i) [Reserved]

(j) *Effective/applicability date*—(1) *In general.* The rules of this section apply to consolidated return years beginning on or after April 1, 2015. For prior years beginning before June 28, 2002, see §1.1502–77A. For prior years beginning on or after June 28, 2002, and before April 1, 2015, see §1.1502–77B.

(2) *Application of this section to prior years.* Notwithstanding paragraph (j)(1) of this section, an agent may apply the rules of paragraph (c)(7) of this section to resign as agent for a completed year that began before April 1, 2015.

[T.D. 9715, 80 FR 17318, Apr. 1, 2015]

§ 1.1502–78 Tentative carryback adjustments.

(a) *General rule.* If a group has a consolidated net operating loss, a consolidated net capital loss, or a consolidated unused business credit for any taxable year, then any application under section 6411 for a tentative carryback adjustment of the taxes for a consolidated return year or years preceding such year shall be made by the common parent corporation for the carryback year (or the agent determined under §1.1502–77(c) or §1.1502–77B(d) for the carryback year) to the extent such loss or unused business credit is not apportioned to a corporation for a separate return year pursuant to §1.1502–21(b), 1.1502–22(b), or 1.1502–79(c). In the case of the portion of a consolidated net operating loss or consolidated net capital loss or consolidated unused business credit to which the preceding sentence does not apply and that is to be carried back to a corporation that was not a member of a consolidated group in the carryback year, the corporation to which such loss or credit is attributable shall make any application under section 6411. In the case of a net capital loss or net operating loss or unused business credit arising in a separate return year that may be carried back to a consolidated return year, after taking into account the application of §1.1502–21(b)(3)(ii)(B) with respect to any net operating loss arising in another consolidated group, the common parent for the carryback year (or the agent determined under §1.1502–77(c) or §1.1502–77B(d) for the carryback year) shall make any application under section 6411.

(b) *Special rules*—(1) *Payment of refund.* Any refund allowable under an application referred to in paragraph (a) of this section shall be made directly to and in the name of the corporation filing the application, except that in all cases where a loss is deducted from the consolidated taxable income or a credit is allowed in computing the consolidated tax liability for a consolidated return year, any refund shall be made directly to and in the name of the common parent corporation for the carryback year (or the agent determined under §1.1502–77(c) or §1.1502–77B(d) for the carryback year). The payment of any such refund shall discharge any liability of the Government with respect to such refund.

(2) *Several liability.* If a group filed a consolidated return for a taxable year for which there was an adjustment by reason of an application under section 6411, and if a deficiency is assessed against such group under section 6213(b)(3), then each member of such group shall be severally liable for such deficiency including any interest or penalty assessed in connection with such deficiency.

(3) *Groups that include insolvent financial institutions.* For further rules applicable to groups that include insolvent financial institutions, see §301.6402–7 of this chapter.

(c) *Examples.* The provisions of paragraphs (a) and (b) of this section may be illustrated by the following examples:

Example 1. Corporations P, S, and S–1 filed a consolidated return for the calendar year 2003. P, S, and S–1 also filed a consolidated return for the calendar year 2006. The group incurred a consolidated net operating loss in 2006 attributable to S–1 which may be carried back to 2003 as a consolidated net operating loss carryback. If a tentative carryback adjustment is desired, P, the common parent for the carryback year, must file an application under section 6411 and any refund will be made to P.

Example 2. Assume the same facts as in example (1) except that P, S, and S–1 filed separate returns for the calendar year 2006, even though they were members of the same group for such year. P incurred a net operating loss in 1969 which may be carried back to 2003. If a tentative carryback adjustment is desired, P must file an application under section 6411 and any refund from such application will be made to P.

Example 3. Corporations X, Y, and Z filed a consolidated return for the calendar year 2003. Z ceased to be a member of the group in 2004. Z filed a separate return for 2005 while X and Y filed a consolidated return for such year. The group incurred a consolidated net operating loss in 2005 attributable to Y, which may be carried back to 2003. Z also incurred a net operating loss for 2005 which may be carried back to 2003. If a tentative carryback adjustment is claimed with respect to the consolidated net operating loss, X, the common parent, must file an application under section 6411. If a tentative carryback adjustment is desired with respect to Z's loss, X must file an application. Any refunds attributable to either application will be made to X. If an assessment is made under section 6213(b)(3) to recover an excessive tentative allowance made with respect to calendar year 2003, X, Y, and Z are severally liable for such assessment.

Example 4. Corporations L and M filed a consolidated return for the calendar year 2003. Corporation N filed a separate return for such year. Later, N became a member of the group and filed a consolidated return with the group for the calendar year 2005. The group incurred a consolidated net operating loss in 2005 attributable to N which may be carried back to N's separate return for 2003. If a tentative carryback adjustment is desired, N must file an application under section 6411 and any refund will be made directly to N.

(d) *Adjustments of overpayments of estimated income tax.* If a group paid its estimated income tax on a consolidated basis, then any application under section 6425 for an adjustment of overpayment of estimated income tax shall be made by the common parent corporation. If the members of a group paid estimated income taxes on a separate basis, then any application under section 6425 shall be made by the member of the group which claims an overpayment on a separate basis. Any refund allowable under an application under section 6425 shall be made directly to and in the name of the corporation filing the application.

(e) *Time for filing application*—(1) *General rule.* The provisions of section 6411(a) apply to the filing of an application for a tentative carryback adjustment by a consolidated group.

(2) *Special rule for new members*—(i) *New member.* A new member is a corporation that, in the preceding taxable year, did not qualify as a member, as defined in §1.1502–1(b), of the consolidated group that it now joins.

(ii) *End of taxable year.* Solely for the purpose of complying with the twelve-month requirement for making an application for a tentative carryback adjustment under section 6411(a), the separate return year of a qualified new member shall be treated as ending on the same date as the end of the current taxable year of the consolidated group that the qualified new member joins.

(iii) *Qualified new member.* A new member of a consolidated group qualifies for purposes of the provisions of this paragraph (e)(2) if, immediately prior to becoming a new member, either—

(A) It was the common parent of a consolidated group; or

(B) It was not required to join in the filing of a consolidated return.

(iv) *Examples.* The provisions of this paragraph (e)(2) may be illustrated by the following examples:

Example 1. Individual A owns 100 percent of the stock of X, a corporation that is not a member of a consolidated group and files separate tax returns on a calendar year basis. On January 31 of year 1, X becomes a member of the Y consolidated group, which also files returns on a calendar year basis. X is a qualified new member as defined in paragraph (e)(2)(iii)(B) of this section because, immediately prior to becoming a new member of the Y consolidated group, X was not required to join in the filing of a consolidated return. As a result of its becoming a new member of Group Y, X's separate return for the short taxable year (January 1 of year 1 through January 31 of year 1) is due September 15 of year 2 (with extensions). See §1.1502–76(c). Group Y's consolidated return is also due September 15 of year 2 (with extensions). See §1.1502–76(c). Solely for the purpose of complying with the twelve-month requirement for making an application for a tentative carryback adjustment under section 6411(a), X's taxable year for the separate return year is treated as ending on December 31 of year 1. X's application for a tentative carryback adjustment is therefore due on or before December 31 of year 2.

Example 2. Assume the same facts as in *Example 1* except that immediately prior to becoming a new member of Group Y, X was a member of the Z consolidated group. Because X was required to join in the filing of the consolidated return for Group Z, X is not a qualified new member as defined in paragraph (e)(2)(iii) of this section. X's items for the one-month period will be included in the consolidated return for Group Z. Group Z's application for a tentative carryback adjustment, if any, continues to be due within 12 months of the end of its taxable year, which is not affected by X's change in status as a new member of Group Y.

(f) *Effective date*—(1) *In general.* This section applies to taxable years to which a loss or credit may be carried back and for which the due date (without extensions) of the original return is after June 28, 2002, except that the provisions of paragraph (e)(2) apply for applications by new members of consolidated groups for tentative carryback adjustments resulting from net operating losses, net capital losses, or unused business credits arising in separate return years of new members that begin on or after January 1, 2001.

(2) *Prior law.* For taxable years to which a loss or credit may be carried back and for which the due date (without extensions) of the original return is on or before June 28, 2002, *see* §1.1502–78 in effect prior to June 28, 2002, as contained in 26 CFR part 1 revised April 1, 2002.

[T.D. 6894, 31 FR 11794, Sept. 3, 1966, as amended by T.D. 7059, 35 FR 14546, Sept. 17, 1970; T.D. 7246, 38 FR 767, Jan. 4, 1973; T.D. 8387, 56 FR 67489, Dec. 31, 1991; T.D. 8446, 57 FR 53034, Nov. 6, 1992; T.D. 8677, 61 FR 33324, June 27, 1996; T.D. 8823, 64 FR 36100, July 2, 1999; T.D. 8950, 66 FR 33463, June 22, 2001; T.D. 9002, 67 FR 43544, June 28, 2002; 67 FR 77678, Dec. 19, 2002; T.D. 9715, 80 FR 17324, Apr. 1, 2015]

§ 1.1502–79 Separate return years.

(a) *Carryover and carryback of consolidated net operating losses to separate return years.* For losses arising in consolidated return years beginning before January 1, 1997, see §1.1502–79A(a). For later years, see §1.1502–21(b).

(b) *Carryover and carryback of consolidated net capital loss to separate return years.* For losses arising in consolidated return years beginning before January 1, 1997, see §1.1502–79A(b). For later years, see §1.1502–22(b).

(c) *Carryover and carryback of consolidated unused investment credit to separate return years*—(1) *In general.* If a consolidated unused investment credit can be carried under the principles of section 46(b) and paragraph (b) of §1.1502–3 to a separate return year of a corporation (or could have been so carried if such corporation were in existence) which was a member of the group in the year in which such unused credit arose, then the portion of such consolidated unused credit attributable to such corporation (as determined under subparagraph (2) of this paragraph) shall be apportioned to such corporation (and any successor to such corporation in a transaction to which section 381(a) applies) under the principles of §1.1502–21(b) (or §§1.1502–79A(a)(1) and (2), as appropriate) and shall be an investment credit carryover or carryback to such separate return year.

(2) *Portion of consolidated unused investment credit attributable to a member*—(i) *Investment credit carryback.* In the case of a consolidated unused credit which is an investment credit carryback, the portion of such consolidated unused credit attributable to a member of the group is an amount equal to such consolidated unused credit multiplied by a fraction, the numerator of which is the credit earned of such member for the consolidated unused credit year, and the denominator of which is the consolidated credit earned for such unused credit year.

(ii) *Investment credit carryover.* In the case of a consolidated unused credit which is an investment credit carryover, the portion of such consolidated unused credit attributable to a member of the group is an amount equal to such consolidated unused credit multiplied by a fraction, the numerator of which is the credit earned with respect to any section 38 property placed in service in the consolidated unused credit year and owned by such member (whether or not placed in service by such member) at the close of the last day as of which the taxable income of such member is included in a consolidated return filed by the group, and the denominator of which is the consolidated credit earned for such unused credit year.

(d) *Carryover and carryback of consolidated unused foreign tax*—(1) *In general.* If a consolidated unused foreign tax can be carried under the principles of section 904(d) and paragraph (e) of §1.1502–4 to a separate return year of a corporation (or could have been so carried if such corporation were in existence) which was a member of the group in the year in which such unused foreign tax arose, then the portion of such consolidated unused foreign tax attributable to such corporation (as determined under subparagraph (2) of this paragraph) shall be apportioned to such corporation (and any successor to such corporation in a transaction to which section 381(a) applies) under the principles of §1.1502–21(b) (or §§1.1502–79A(a)(1) and (2), as appropriate) and shall be deemed paid or accrued in such separate return year to the extent provided in section 904(d).

(2) *Portion of consolidated unused foreign tax attributable to a member.* The portion of a consolidated unused foreign tax for any year attributable to a member of a group is an amount equal to such consolidated unused foreign tax multipled by a fraction, the numerator of which is the foreign taxes paid or accrued for such year (including those taxes deemed paid or accrued, other than by reason of section 904(d)) to each foreign country or possession (or to all foreign countries or possessions if the overall limitation is effective) by such member, and the denominator of which is the aggregate of all such taxes paid or accrued for such year (including those taxes deemed paid or accrued, other than by reason of section 904(d)) to each such foreign country or possession (or to all foreign countries or possessions if the overall limitation is effective) by all the members of the group.

(e) *Carryover of consolidated excess charitable contributions to separate return years*—(1) *In general.* If the consolidated excess charitable contributions for any taxable year can be carried under the principles of section 170(b)(2) and paragraph (b) of §1.1502–24 to a separate return year of a corporation (or could have been so carried if such corporation were in existence) which was a member of the group in the year in which such excess contributions arose, then the portion of such consolidated excess charitable contributions attributable to such corporation (as determined under subparagraph (2) of this paragraph) shall be apportioned to such corporation (and any successor to such corporation in a transaction to which section 381(a) applies) under the principles of §1.1502–21(b) (or §§1.1502–79A(a)(1) and (2), as appropriate) and shall be a charitable contribution carryover to such separate return year.

(2) *Portion of consolidated excess charitable contributions attributable to a member.* The portion of the consolidated excess charitable contributions attributable to a member of a group is an amount equal to such consolidated excess contributions multiplied by a fraction, the numerator of which is the charitable contributions paid by such member for the taxable year, and the denominator of which is the aggregate of all such charitable contributions paid for such year by all the members of the group.

[T.D. 6894, 31 FR 11794, Sept. 8, 1966, as amended by T.D. 7728, 45 FR 72650, Nov. 3, 1980; T.D. 8294, 55 FR 9438, Mar. 14, 1990; T.D. 8319, 55 FR 49038, Nov. 26, 1990; T.D. 8364, 56 FR 47402, Sept. 19, 1991; T.D. 8597, 60 FR 36710, July 18, 1995; T.D. 8677, 61 FR 33324, 33325, 33334, June 27, 1996; T.D. 8823, 64 FR 36100, July 2, 1999]

§ 1.1502–80 Applicability of other provisions of law.

(a) *In general*—(1) *Application of other provisions.* The Internal Revenue Code (Code), or other law, shall be applicable to the group to the extent the regulations do not exclude its application. To the extent not excluded, other rules operate in addition to, and may be modified by, these regulations. Thus, for example, in a transaction to which section 381(a) applies, the acquiring corporation will succeed to the tax attributes described in section 381(c). Furthermore, sections 269 and 482 apply for any consolidated return year. However, in a recognition transaction otherwise subject to section 1001, for example, the rules of section 1001 continue to apply, but may be modified by the intercompany transaction regulations under § 1.1502–13.

(2) *No duplicative adjustments.* Nothing in these regulations shall be interpreted or applied to require an adjustment, inclusion, or other item to the extent it would have the effect of duplicating any other adjustment, inclusion, or other item required under the Code or other rule of law, including other provisions of these regulations.

(3) *Application of single-entity principles.* If two or more adjustments, inclusions, or other items are subject to paragraph (a)(2) of this section, the determination of which adjustment, inclusion, or other item is treated as applied or taken into account is made by taking into account the purposes of the provisions and applying single-entity principles as appropriate.

(4) *Effective/applicability dates.* This paragraph (a) is applicable with respect to transactions and determinations on or after September 17, 2008.

(b) *Non-applicability of section 304.* Section 304 does not apply to any acquisition of stock of a corporation in an intercompany transaction or to any intercompany item from such transaction occurring on or after July 24, 1991.

(c) *Deferral of section 165*—(1) *General rule.* Subsidiary stock is not treated as worthless under section 165 until immediately before the earlier of the time—

(i) The stock is worthless within the meaning of § 1.1502–19(c)(1)(iii); or

(ii) The subsidiary for any reason ceases to be a member of the group.

(2) *Cross reference.* See § 1.1502–36 for additional rules relating to worthlessness of subsidiary stock on or after September 17, 2008.

(3) *Effective/applicability date.* This paragraph (c) applies to taxable years for which the original consolidated Federal income tax return is due (without extensions) after July 18, 2007. However, taxpayers may apply this paragraph (c) to taxable years beginning on or after January 1, 1995.

(d) *Non-applicability of section 357(c)*—(1) *In general.* Section 357(c) does not apply to any transaction to which § 1.1502–13, § 1.1502–13T, § 1.1502–14, or § 1.1502–14T applies, if it occurs in a consolidated return year beginning on or after January 1, 1995. For example, P, S, and T are members of a consolidated group, P owns all of the stock of S and T with bases of $30 and $20, respectively, S has a $30 basis in its assets and $40 of liabilities, and S merges into T in a transaction described in section 368(a)(1)(A) (and in section 368(a)(1)(D)); section 357(c) does not apply to the merger, P's basis in T's stock increases to $50 ($30 plus $20), and T succeeds to S's $30 basis in the assets transferred subject to the $40 liability. Similarly, if S instead transferred its assets and liabilities to a newly formed subsidiary in a transaction to which section 351 applies, section 357(c) does not apply and S's basis in the subsidiary's stock is a $10 excess loss account. This paragraph (d) does not apply to a transaction if the transferor or transferee becomes a nonmember as part of the same plan or arrangement. The transferor (or transferee) is treated as becoming a nonmember once it is no longer a member of a consolidated group that includes the transferee (or transferor). For purposes of this paragraph (d), any reference to a transferor or transferee includes, as the context may require, a reference to a successor or predecessor.

(2) *Prior period transactions.* If, in a tax year beginning before January 1, 1995, a member's stock with an excess loss account is transferred in a transaction to which §1.1502–13, §1.1502–13T, §1.1502–14, or §1.1502–14T applies, paragraph (d)(1) of this section applies to the stock transfer to the extent that the income, gain, deduction, or loss (if any) is not taken into account in a tax year beginning before January 1, 1995. For example, if P, S, and T, are members of a consolidated group, T's stock has an excess loss account, and P transfers the T stock to S in 1993 in a transaction to which section 351 and §1.1502–13 apply, section 357(c) applies to the transfer only to the extent P's gain is taken into account in tax years beginning before January 1, 1995.

(e) *Non-applicability of section 163(e)(5).* Section 163(e)(5) does not apply to any intercompany obligation (within the meaning of §1.1502–13(g)) issued in a consolidated return year beginning on or after July 12, 1995.

(f) *Non-applicability of section 1031.* Section 1031 does not apply to any intercompany transaction occurring in consolidated return years beginning on or after July 12, 1995.

(g) *Special rules for liquidations to which section 332 applies.* Notwithstanding the general rule of section 381, if multiple members (distributee members) acquire assets of a corporation in a liquidation to which section 332 applies (regardless of whether any single member owns stock in the liquidating corporation meeting the requirements of section 1504(a)(2)), such members succeed to and take into account the items of the liquidating corporation (including items described in section 381(c), but excluding intercompany items under §1.1502–13) as provided in this paragraph (g) to the extent not otherwise prohibited by any applicable provision of law. This paragraph (g) does not apply to the intercompany items of the liquidating corporation. See §1.1502–13(j)(2)(ii).

(1) *Income offset items and deferred income.* Except as otherwise provided in this paragraph (g)(1), each distributee member succeeds to and takes into account the items of the liquidating corporation that could be used to offset the income of the group or any member (including deferred deductions, net operating loss carryovers, and capital loss carryovers) (income offset items) to the extent that such items would have been reflected in investment adjustments to the stock of the liquidating corporation owned by such distributee member under §1.1502–32(c) if, immediately prior to the liquidation, any stock of the liquidating corporation owned by nonmembers had been redeemed and then such items had been taken into account. However, each distributee member succeeds to the full amount of any deferred deduction or deferred income item attributable to the particular property or business operations distributed to such distributee in the liquidation to the extent that such item is not taken into account in the determination of the income or loss of the liquidating corporation with regard to the liquidation under chapter 1 of the Internal Revenue Code (Code). If the liquidating corporation is not a member of the group at the time of the liquidation, the rules of this paragraph (g)(1) are applied as if the liquidating corporation had been a member of the group.

(2) *Accounting for deferred income items.* Solely for the purpose of determining whether deferred income items of a liquidating corporation are taken into account under applicable principles of law as a result of a liquidation to which section 332 applies, the transfer of property to, and the assumption of liabilities by, a distributee member that does not own stock in the liquidating corporation meeting the requirements of section 1504(a)(2) without regard to the application of §1.1502–34 immediately prior to the liquidation is

not treated as part of a transaction to which section 381(a) applies. In addition, section 332(a) does not apply in determining the recognition or nonrecognition of any income realized by the distributee member under applicable principles of law on account of consideration received (or deemed received) on the assumption of the liquidating corporation's obligation or liability attributable to any deferred income item.

(3) *Credits and earnings and profits.* Each distributee member succeeds to and takes into account a percentage of each credit of the liquidating corporation equal to the value of the stock of the liquidating corporation owned by such distributee at the time of the liquidation divided by the total value of all the stock of the liquidating corporation owned by members of the group at the time of the liquidation. Except to the extent that the distributee member's earnings and profits already reflect the liquidating corporation's earnings and profits, each distributee member succeeds to and takes into account under the principles of §1.1502–32(c) the earnings and profits, or deficit in earnings and profits, of the liquidating corporation (determined after taking into account the amount of earnings and profits properly applicable to distributions to non-member shareholders under §1.381(c)(2)–1(c)(2)). If the liquidating corporation is not a member of the group at the time of the liquidation, the rules of this paragraph (g)(3) are applied as if the liquidating corporation had been a member of the group.

(4) *Other items.* With regard to items to which neither paragraph (g)(1) nor (g)(3) of this section applies, a distributee member that, immediately prior to the liquidation, owns stock in the liquidating corporation meeting the requirements of section 1504(a)(2) without regard to the application of §1.1502–34 succeeds to the items of the liquidating corporation in accordance with section 381 and other applicable principles. A distributee member that, immediately prior to the liquidation, does not own stock in the liquidating corporation meeting the requirements of section 1504(a)(2) without regard to the application of §1.1502–34 succeeds to the items of the liquidating corporation to the extent that it would have succeeded to those items if it had purchased, in a taxable transaction, the assets or businesses of the liquidating corporation that it received in the liquidation and had assumed the liabilities that it assumed in the liquidation.

(5) *Determination of the items of a liquidating subsidiary.* For purposes of this section, the items of a liquidating subsidiary include the amount of any consolidated tax attribute attributable to the liquidating subsidiary that is determined pursuant to the principles of §1.1502–21(b)(2)(iv). In addition, if the liquidating subsidiary is a member of a separate return limitation year subgroup, the amount of a tax attribute that arose in a separate return limitation year that is attributable to that member shall also be determined pursuant to the principles of §1.1502–21(b)(2)(iv).

(6) *Examples.* The following examples illustrate the application of this paragraph (g):

Example 1. Liquidation—80 percent distributee. (i) *Facts.* X has only common stock outstanding. On January 1 of year 1, X acquired equipment with a 10-year recovery period and elected to depreciate the equipment using the straight-line method of depreciation. On January 1 of year 7, M1 and M2 own 80 percent and 20 percent, respectively, of X's stock. X is a domestic corporation but is not a member of the group that includes M1 and M2. On that date, X distributes all of its assets to M1 and M2 in complete liquidation. The equipment is distributed to M1. Under section 334(b), M1's basis in the equipment is the same as it would be in X's hands. After computing its tax liability for the taxable year that includes the liquidation, X has net operating losses of $100, business credits of $40, and earnings and profits of $80.

(ii) *Succession to items described in section 381(c).* (A) *Losses.* Under paragraph (g)(1) of this section, each distributee member succeeds to X's items that could be used to offset the income of the group or any member to the extent that such items would have been reflected in investment adjustments to the stock of X it owned under §1.1502–32(c) if, immediately prior to the liquidation, such items had been taken into account. Accordingly, M1 and M2 succeed to $80 and $20, respectively, of X's net operating loss.

(B) *Credits and earnings and profits.* Under paragraph (g)(3) of this section, because, immediately prior to the liquidation, M1 and M2 hold 80 percent and 20 percent, respectively, of the value of the stock of X, M1 and

M2 succeed to $32 and $8, respectively, of X's $40 of business credits. In addition, because M1's and M2's earnings and profits do not reflect X's earnings and profits, X's earnings and profits are allocated to M1 and M2 under the principles of §1.1502–32(c). Therefore, M1 and M2 succeed to $64 and $16, respectively, of X's earnings and profits.

(C) *Depreciation of equipment's basis.* Under paragraph (g)(4) of this section, because M1 owns stock in X meeting the requirements of section 1504(a)(2) without regard to the application of §1.1502–34, M1 is required to continue to depreciate the equipment using the straight-line method of depreciation over the remaining recovery period of 4.5 years (assuming X used a half-year convention).

Example 2. Liquidation-no 80 percent distributee. (i) *Facts.* The facts are the same as in *Example 1* except that M1 and M2 own 60 percent and 40 percent, respectively, of X's stock. In addition, on January 1 of year 6, X entered into a long-term contract with Y, an unrelated party. The total contract price is $1000, and X estimates the total allocable contract costs to be $500. At the time of the liquidation, X had received $250 in progress payments under the contract and incurred costs of $125. X accounted for the contract under the percentage of completion method described in section 460(b). In the liquidation, M1 assumes X's contract obligations and rights.

(ii) *Succession to items described in section 381(c).* (A) *Losses.* Under paragraph (g)(1) of this section, each distributee member succeeds to X's items that could be used to offset the income of the group or any member to the extent that such items would have been reflected in investment adjustments to the stock of X it owned under §1.1502–32(c) if, immediately prior to the liquidation, such items had been taken into account. Accordingly, M1 and M2 succeed to $60 and $40, respectively, of X's net operating loss.

(B) *Credits and earnings and profits.* Under paragraph (g)(3) of this section, because, immediately prior to the liquidation, M1 and M2 hold 60 percent and 40 percent, respectively, of the value of the stock of X, M1 and M2 succeed to $24 and $16, respectively, of X's $40 of business credits. In addition, because M1's and M2's earnings and profits do not reflect X's earnings and profits, X's earnings and profits are allocated to M1 and M2 under the principles of §1.1502–32(c). Therefore, M1 and M2 succeed to $48 and $32, respectively, of X's earnings and profits.

(C) *Depreciation of equipment's basis.* Under section 334(a), M1's basis in the equipment is its fair market value at the time of the distribution. Pursuant to section 168(i)(7), to the extent that M1's basis in the equipment does not exceed X's adjusted basis in the equipment at the time of the transfer, M1 is required to continue to depreciate the equipment using the straight-line method of depreciation over the remaining recovery period of 4.5 years (assuming X used a half-year convention). Any portion of M1's basis in the equipment that exceeds X's adjusted basis in the equipment at the time of the transfer is treated as being placed in service by M1 in the year of the transfer. Thus, M1 may choose any applicable depreciation method, recovery period, and convention under section 168 for such excess basis.

(D) *Method of accounting for long-term contract.* Under paragraph (g)(4) of this section, M1 does not succeed to X's method of accounting for the contract. Rather, under §1.460–4(k)(2), M1 is treated as having entered into a new contract on the date of the liquidation. Under §1.460–4(k)(2)(iii), M1 must evaluate whether the new contract should be classified as a long-term contract within the meaning of §1.460–1(b) and account for the contract under a permissible method of accounting.

Example 3. Liquidation—deferred items. (i) *Facts.* X has only common stock outstanding, and M1 and M2 (who are members of the same group) own 80 percent and 20 percent, respectively, of X's stock. X operates two divisions, each of which defers prepaid subscription income pursuant to an election under section 455. X distributes all of its assets in complete liquidation. M1 receives all of the assets of Division 1, including prepaid subscription income, and assumes X's liability to furnish or deliver the newspaper, magazine, or other periodical to which the prepaid subscription income received by M1 relates. M2 receives all of the assets of Division 2, including prepaid subscription income, and assumes X's liability to furnish or deliver the newspaper, magazine, or other periodical to which the prepaid subscription income received by M2 relates.

(ii) *Acceleration of deferred income items and succession to other deferred items.* Under paragraph (g)(1) of this section, M1 succeeds to the full amount of the deferred prepaid subscription income of X attributable to Division 1. Under applicable law, X does not recognize the deferred prepaid subscription income attributable to Division 1 because X's liability to furnish or deliver the newspaper, magazine, or other periodical ends as a result of a transaction to which section 381(a) applies. Under paragraph (g)(2) of this section, solely for purposes of determining whether the deferred income items of X attributable to Division 2 are taken into account as a result of the liquidation, the distribution of property to M2 is not treated as a transaction to which section 381(a) applies. Therefore, under applicable law, X's deferred prepaid subscription income attributable to Division 2 is taken into account in the determination of X's income or loss with regard to the liquidation. Further, under paragraph (g)(2) of this section, section 332(a) does not apply in determining the recognition or nonrecognition of any income that M2 realizes on account of consideration received (or deemed received) on its assumption of X's liability to furnish or deliver the newspaper, magazine, or other periodical to which the prepaid subscription income relates.

(7) *Effective/applicability date.* This paragraph (g) applies to transactions occurring after April 14, 2008.

(h) *Non-applicability of section 362(e)(2)*—(1) *General rule.* Section 362(e)(2) does not apply to any intercompany transaction occurring on or after September 17, 2008. Taxpayers may apply this paragraph (h) to intercompany transactions occurring on or after October 22, 2004, and in such case, any election made under section 362(e)(2)(C) will have no effect. The purpose of this paragraph (h) is to facilitate the application of the consolidated return provisions addressing the duplication of loss between members of a consolidated group.

(2) *Anti-abuse rule*—(i) *General rule.* If a taxpayer engages in a transaction to which section 362(e)(2) would apply but for the application of paragraph (h)(1) of this section, and acts with a view to prevent the consolidated return provisions from properly addressing loss duplication, appropriate adjustments will be made to clearly reflect the income of the group.

(ii) *Example.* The following example illustrates the principle of the anti-abuse rule in this paragraph (h)(2).

Example. (A) *Facts.* P, the common parent of a consolidated group, owns the four outstanding shares of S stock (Share 1 through Share 4) with an aggregate basis of $0 and value of $80. S owns Asset 1 with a basis of $0 and a value of $80. With a view to prevent the consolidated return provisions from addressing the duplication of loss, P transfers Asset 2 with a basis of $100 and a value of $20 to S in exchange for an additional share of S stock (Share 5) in a transaction to which section 351 applies. P later sells Share 5 to X, an unrelated person, for $20 at a time when S's basis in Asset 2 was still $100. The sale is a transfer of a loss share and therefore subject to § 1.1502–36.

(B) *Analysis.* Although the sale would be subject to § 1.1502–36, that section would not prevent the stock loss or reduce S's attributes (to prevent duplication of the stock loss) because neither § 1.1502–36(b) nor § 1.1502–36(c) would adjust the basis of the transferred share (because there are no investment adjustments) and § 1.1502–36(d) would not reduce S's attributes (because S's aggregate inside loss is $0). However, because P acted with a view to prevent the consolidated return provisions from addressing the duplication of the loss on Asset 2, P's transfer of Asset 2 to S is subject to the anti-abuse rule in this paragraph (h)(2). Accordingly, effective immediately before the transfer of Share 5 to X, either P's basis in Share 5 or S's basis in Asset 2 must be adjusted to reflect what it would have been had section 362(e)(2) been applied at the time P transferred Asset 2 to S (taking into account the interim facts and circumstances). Accordingly, S must either reduce its basis in Asset 2 by $80 to $20 (eliminating the duplicated loss) or P must reduce its basis in Share 5 by $80 to $20 (eliminating the duplicated loss).

(C) *Transfer of all S shares.* Assume the same facts as those in paragraph (A) of this *Example,* except that P sells all five S shares to X. Although P's transfer of Asset 2 to S results in the duplication of an $80 loss, because all the shares are transferred, the transaction does not prevent the consolidated return provisions from properly addressing loss duplication. P's $80 duplicated loss is offset by an $80 duplicated gain, and the group recognizes the offsetting stock gain and loss. Accordingly, this paragraph (h)(2) does not apply to P's transfer of Asset 2 to S.

[T.D. 8402, 57 FR 9385, Mar. 18, 1992]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting § 1.1502–80, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and at *www.fdsys.gov.*

§ 1.1502–81T Alaska Native Corporations.

(a) *General Rule.* The application of section 60(b)(5) of the Tax Reform Act of 1984 and section 1804(e)(4) of the Tax Reform Act of 1986 (relating to Native Corporations established under the Alaska Native Claims Settlement Act (43 U.S.C. 1601 *et seq.*)) is limited to the use on a consolidated return of losses and credits of a Native Corporation, and of a corporation all of whose stock is owned directly by a Native Corporation, during any taxable year (beginning after the effective date of such sections and before 1992), or any part thereof, against the income and tax liability of a corporation affiliated with the Native Corporation. Thus, no other tax saving, tax benefit, or tax loss is intended to result from the application of section 60(b)(5) of the Tax Reform Act of 1984 and section 1804(e)(4) of the

Tax Reform Act of 1986 to any person (whether or not such person is a member of an affiliated group of which a Native Corporation is the common parent). In particular, except as approved by the Secretary, no positive adjustment under §1.1502–32(b) will be made with respect to the basis of stock of a corporation that is affiliated with a Native Corporation through application of section 60(b)(5) of the Tax Reform Act of 1984 and section 1804(e)(4) of the Tax Reform Act of 1986.

(b) *Effective Dates.* This section applies to taxable years beginning after December 31, 1984.

[T.D. 8130, 52 FR 8448, Mar. 18, 1987, as amended by T.D. 8560, 59 FR 41675, Aug. 15, 1994]

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The following list contains the major headings in §§1.1502-91 through 1.1502–99:

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§ 1.1502–93 Consolidated section 382 limitation (or subgroup section 382 limitation).

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§ 1.1502–94 Coordination with section 382 and the regulations thereunder when a corporation becomes a member of a consolidated group.

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(3) Coordination in the case of a loss subgroup.
(4) End of separate tracking of certain losses.
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§ 1.1502–96 Miscellaneous rules.

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(2) Effect of end of separate tracking.
(i) Net operating loss carryovers.

[T.D. 8824, 64 FR 36128, July 2, 1999, as amended by T.D. 9304, 71 FR 76907, Dec. 22, 2006; T.D. 9329, 72 FR 32805, June 14, 2007; T.D. 9424, 73 FR 53986, Sept. 17, 2008]

§ 1.1502–91 Application of section 382 with respect to a consolidated group.

(a) *Determination and effect of an ownership change*—(1) *In general.* This section and §§1.1502–92 and 1.1502–93 set forth the rules for determining an ownership change under section 382 for members of consolidated groups and the section 382 limitations with respect to attributes described in paragraphs (e) and (f) of this section. These rules generally provide that an ownership change and the section 382 limitation are determined with respect to these attributes for the group (or loss subgroup) on a single entity basis and not for its members separately. Following an ownership change of a loss group (or a loss subgroup) under §1.1502–92, the amount of consolidated taxable income for any post-change year which may be offset by pre-change consolidated attributes (or pre-change subgroup attributes) shall not exceed the consolidated section 382 limitation (or subgroup section 382 limitation) for such year as determined under §1.1502–93.

(2) *Special rule for post-change year that includes the change date.* If the post-change year includes the change date, section 382(b)(3)(A) is applied so that the consolidated section 382 limitation (or subgroup section 382 limitation) does not apply to the portion of consolidated taxable income that is allocable to the period in the year on or before the change date. See generally §1.382–6 (relating to the allocation of income and loss). The allocation of consolidated taxable income for the post-change year that includes the change date must be made before taking into account any consolidated net operating loss deduction (as defined in §1.1502–21(a)).

(3) *Cross-reference.* See §§1.1502–94 and 1.1502–95 for rules that apply section 382

to a corporation that becomes or ceases to be a member of a group or loss subgroup.

(b) *Definitions and nomenclature.* For purposes of this section and §§ 1.1502–92 through 1.1502–99, unless otherwise stated:

(1) The definitions and nomenclature contained in section 382 and the regulations thereunder (including the nomenclature and assumptions relating to the examples in § 1.382–2T(b)) and this section and §§ 1.1502–92 through 1.1502–99 apply.

(2) In all examples, all groups file consolidated returns, all corporations file their income tax returns on a calendar year basis, the only 5-percent shareholder of a corporation is a public group, the facts set forth the only owner shifts during the testing period, no election is made under paragraph (d)(4) of this section, and each asset of a corporation has a value equal to its adjusted basis.

(3) As the context requires, references to §§ 1.1502–91 through 1.1502–96 include references to corresponding provisions of §§ 1.1502–A through 1.1502–96A. For example, a reference to an ownership change under § 1.1502–92 in § 1.1502–95(b) can include a reference to an ownership change under § 1.1502–92A.

(c) *Loss group*—(1) *Defined.* A loss group is a consolidated group that—

(i) Is entitled to use a net operating loss carryover to the taxable year that did not arise (and is not treated under § 1.1502–21(c) as arising) in a SRLY;

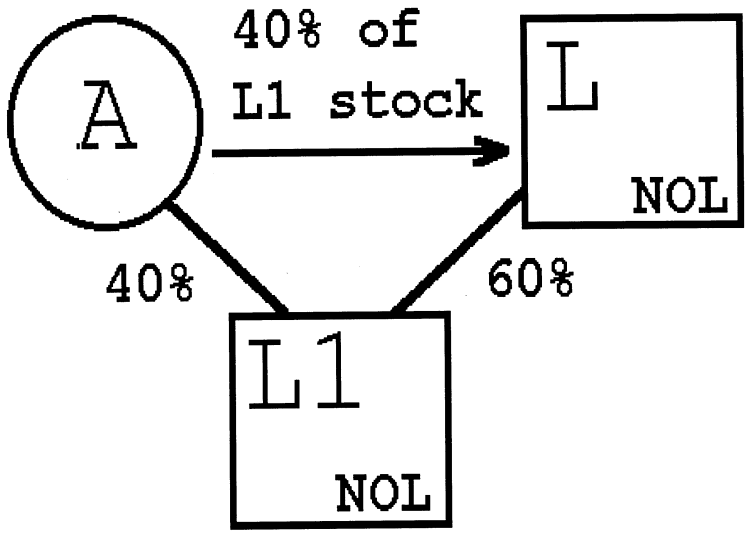
(ii) Has a consolidated net operating loss for the taxable year in which a testing date of the common parent occurs (determined by treating the common parent as a loss corporation); or

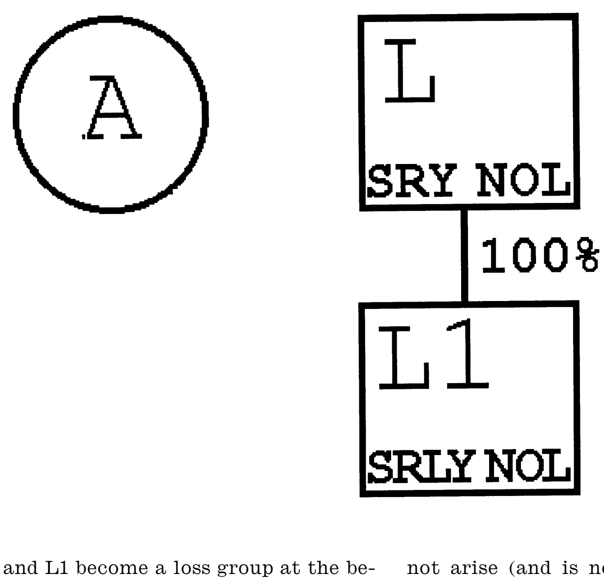
(iii) Has a net unrealized built-in loss (determined under paragraph (g) of this section by treating the date on which the determination is made as though it were a change date).

(2) *Coordination with rule that ends separate tracking.* A consolidated group may be a loss group because a member's losses that arose in (or are treated as arising in) a SRLY are treated as described in paragraph (c)(1)(i) of this section. See § 1.1502–96(a).

(3) *Example.* The following example illustrates the principles of this paragraph (c):

Example. Loss group. (i) L and L1 file separate returns and each has a net operating loss carryover arising in Year 1 that is carried over to Year 2. A owns 40 shares and L owns 60 shares of the 100 outstanding shares of L1 stock. At the close of Year 1, L buys the 40 shares of L1 stock from A. For Year 2, L and L1 file a consolidated return. The following is a graphic illustration of these facts:





(ii) L and L1 become a loss group at the beginning of Year 2 because the group is entitled to use the Year 1 net operating loss carryover of L, the common parent, which did not arise (and is not treated under §1.1502–21(c) as arising) in a SRLY. See §1.1502–94 for rules relating to the application of section 382 with respect to L1's net operating loss carryover from Year 1 which did arise in a SRLY.

(d) *Loss subgroup*—(1) *Net operating loss carryovers*. Two or more corporations that become members of a consolidated group (the current group) compose a loss subgroup if—

(i) They were affiliated with each other in another group (the former group), whether or not the group was a consolidated group;

(ii) They bear the relationship described in section 1504(a)(1) to each other through a loss subgroup parent immediately after they become members of the current group (or are deemed to bear that relationship as a result of an election described in paragraph (d)(4) of this section); and

(iii) At least one of the members carries over a net operating loss that did not arise (and is not treated under §1.1502–21(c) as arising) in a SRLY with respect to the former group.

(2) *Net unrealized built-in loss*. Two or more corporations that become members of a consolidated group compose a loss subgroup if they—

(i) Have been continuously affiliated with each other for the 5 consecutive year period ending immediately before they become members of the group;

(ii) Bear the relationship described in section 1504(a)(1) to each other through a loss subgroup parent immediately after they become members of the current group (or are deemed to bear that relationship as a result of an election described in paragraph (d)(4) of this section); and

(iii) Have a net unrealized built-in loss (determined under paragraph (g) of this section on the day they become members of the group by treating that day as though it were a change date).

(3) *Loss subgroup parent*. A loss subgroup parent is the corporation that bears the same relationship to the other members of the loss subgroup as a common parent bears to the members of a group.

(4) *Election to treat loss subgroup parent requirement as satisfied*—(i) *In general*. Solely for purposes of paragraphs (d)(1)(i) and (2)(ii) of this section, two or more corporations that become members of a consolidated group at the same time and that were affiliated with each other immediately before becoming members of the group are deemed to bear a section 1504(a)(1) relationship to each other immediately after they become members of the group if the common parent of that group makes an election under this paragraph (d)(4) with respect to those members. See §1.1502–96(e) for the time and manner of making the election.

(ii) *Members included*. An election under this paragraph (d)(4) includes all corporations that become members of the current group at the same time and that were affiliated with each other immediately before they become members of the current group.

(iii) *Each member included treated as loss subgroup parent*. If the members to which this election applies are a loss subgroup described in paragraph (d)(1) or (2) of this section, then each member is treated as a loss subgroup parent. See §1.1502–92(b)(1)(iii) for special rules relating to an ownership change of a loss subgroup if the election under this paragraph (d)(4) is made.

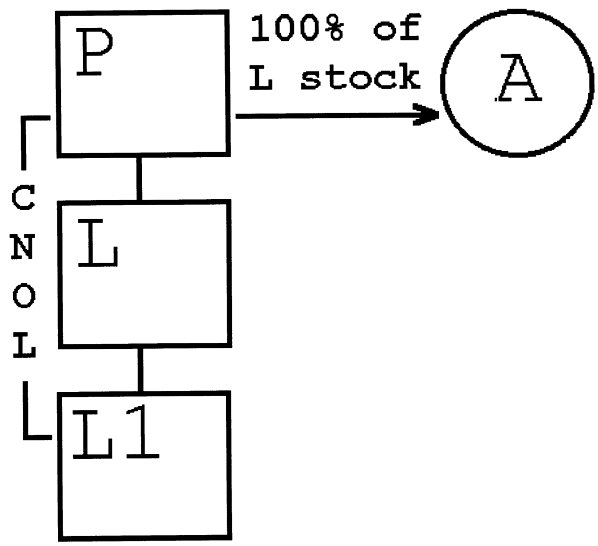
(5) *Principal purpose of avoiding a limitation*. The corporations described in paragraphs (d)(1) or (2) of this section do not compose a loss subgroup if any one of them is formed, acquired, or availed of with a principal purpose of avoiding the application of, or increasing any limitation under, section 382. Instead, §1.1502–94 applies with respect to the attributes of each such corporation. Any member excluded from a loss subgroup, if excluded with a principal purpose of so avoiding or increasing any section 382 limitation, is treated as included in the loss subgroup. This paragraph (d)(5) does not apply solely because, in connection with becoming members of the group, the members of a group (or loss subgroup) are rearranged (or, in the case of the preceding sentence, are not rearranged) to bear a relationship to the other members described in section 1504(a)(1).

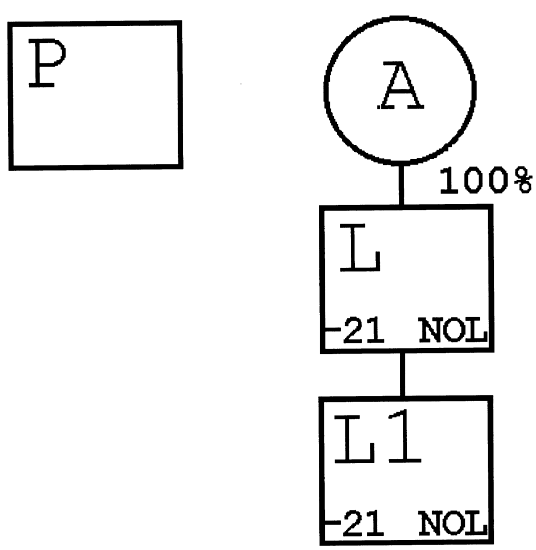
(6) *Special rules*. See §1.1502–95(d) for rules concerning when a corporation ceases to be a member of a loss subgroup, and for certain exceptions that may apply if a member does not continue to satisfy the loss subgroup parent requirement within the current group. See also §1.1502–96(a) for a special rule regarding the end of separate tracking of SRLY losses of a member

that has an ownership change or that has been a member of a group for at least 5 consecutive years.

(7) *Examples*. The following examples illustrate the principles of this paragraph (d):

Example 1. Loss subgroup. (i) P owns all the L stock and L owns all the L1 stock. The P group has a consolidated net operating loss arising in Year 1 that is carried to Year 2. On May 2, Year 2, P sells all the stock of L to A, and L and L1 thereafter file consolidated returns. A portion of the Year 1 consolidated net operating loss is apportioned under §1.1502–21(b) to each of L and L1, which they carry over to Year 2. The following is a graphic illustration of these facts:





(ii) (a) L and L1 compose a loss subgroup within the meaning of paragraph (d)(1) of this section because—

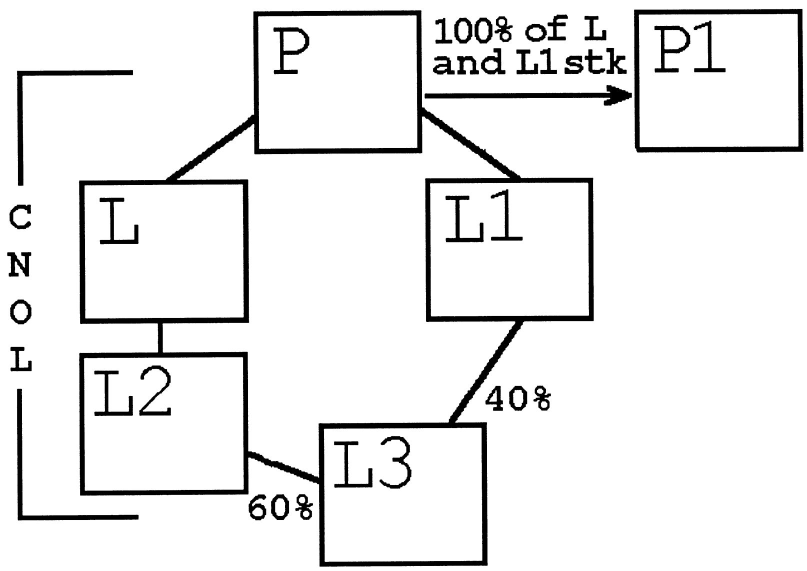
(A) They were affiliated with each other in the P group (the former group);

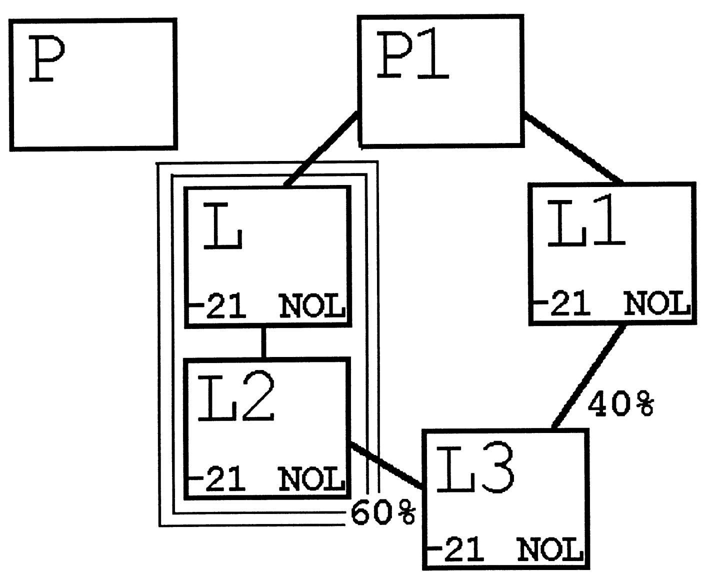
(B) They bear a relationship described in section 1504(a)(1) to each other through a loss subgroup parent (L) immediately after they became members of the L group; and

(C) At least one of the members (here, both L and L1) carries over a net operating loss to the L group (the current group) that did not arise in a SRLY with respect to the P group.

(b) Under paragraph (d)(3) of this section, L is the loss subgroup parent of the L loss subgroup.

Example 2. Loss subgroup—section 1504(a)(1) relationship. (i) P owns all the stock of L and L1. L owns all the stock of L2. L1 and L2 own 40 percent and 60 percent of the stock of L3, respectively. The P group has a consolidated net operating loss arising in Year 1 that is carried over to Year 2. On May 22, Year 2, P sells all the stock of L and L1 to P1, the common parent of another consolidated group. The Year 1 consolidated net operating loss is apportioned under §1.1502–21(b), and each of L, L1, L2, and L3 carries over a portion of such loss to the first consolidated return year of the P1 group ending after the acquisition. The following is a graphic illustration of these facts:





(ii) L and L2 compose a loss subgroup within the meaning of paragraph (d)(1) of this section. Neither L1 nor L3 is included in a loss subgroup because neither bears a relationship described in section 1504(a)(1) through a loss subgroup parent to any other member of the former group immediately after becoming members of the P1 group.

Example 3. Loss subgroup—section 1504(a)(1) relationship. The facts are the same as in *Example 2*, except that the stock of L1 is transferred to L in connection with the sale of the L stock to P1. L, L1, L2, and L3 compose a loss subgroup within the meaning of paragraph (d)(1) of this section because—

(i) They were affiliated with each other in the P group (the former group);

(ii) They bear a relationship described in section 1504(a)(1) to each other through a loss subgroup parent (L) immediately after they become members of the P1 group; and

(iii) At least one of the members (here, each of L, L1, L2, and L3) carries over a net operating loss to the P1 group (the current group).

Example 4. Loss subgroup—elective section 1504(a)(1) relationship. The facts are the same as in *Example 2*, except that P1 makes the election under paragraph (d)(4) of this section. The election includes L, L1, L2, and L3 (even though L and L2 would compose a loss subgroup without regard to the election) because they become members of the current group (the P1 group) at the same time and were affiliated with each other in the P group immediately before they became members of the P1 group. As a result of the election, L, L1, L2, and L3 are treated as satisfying the requirement that they bear the relationship described in section 1504(a)(1) to each other through a loss subgroup parent immediately after they become members of the P1 group. L, L1, L2, and L3 compose a loss subgroup within the meaning of paragraph (d)(1) of this section.

(e) *Pre-change consolidated attribute*—(1) *Defined.* A pre-change consolidated attribute of a loss group is—

(i) Any loss described in paragraph (c)(1)(i) or (ii) of this section (relating to the definition of loss group) that is allocable to the period ending on or before the change date; and

(ii) Any recognized built-in loss of the loss group.

(2) *Example.* The following example illustrates the principle of this paragraph (e):

Example. Pre-change consolidated attribute. (i) The L group has a consolidated net operating loss arising in Year 1 that is carried over to Year 2. The L loss group has an ownership change at the beginning of Year 2.

(ii) The net operating loss carryover of the L loss group from Year 1 is a pre-change consolidated attribute because the L group was entitled to use the loss in Year 2 and therefore the loss was described in paragraph (c)(1)(i) of this section. Under paragraph (a)(2)(i) of this section, the amount of consolidated taxable income of the L group for Year 2 that may be offset by this loss carryover may not exceed the consolidated section 382 limitation of the L group for that year. See §1.1502–93 for rules relating to the computation of the consolidated section 382 limitation.

(f) *Pre-change subgroup attribute*—(1) *Defined.* A pre-change subgroup attribute of a loss subgroup is—

(i) Any net operating loss carryover described in paragraph (d)(1)(iii) of this section (relating to the definition of loss subgroup); and

(ii) Any recognized built-in loss of the loss subgroup.

(2) *Example.* The following example illustrates the principle of this paragraph (f):

Pre-change subgroup attribute. (i) P is the common parent of a consolidated group. P owns all the stock of L, and L owns all the stock of L1. L2 is not a member of an affiliated group, and has a net operating loss arising in Year 1 that is carried over to Year 2. On December 11, Year 2, L1 acquires all the stock of L2, causing an ownership change of L2. During Year 2, the P group has a consolidated net operating loss that is carried over to Year 3. On November 2, Year 3, M acquires all the L stock from P. M, L, L1, and L2 thereafter file consolidated returns. All of the P group Year 2 consolidated net operating loss is apportioned under §1.1502–21(b) to L and L2, which they carry over to the M group.

(ii)(a) L, L1, and L2 compose a loss subgroup because—

(1) They were affiliated with each other in the P group (the former group);

(2) They bear a relationship described in section 1504(a)(1) to each other through a loss subgroup parent (L) immediately after they became members of the L group; and

(3) At least one of the members (here, both L and L2) carries over a net operating loss to the M group (the current group) that is described in paragraph (d)(1)(iii) of this section.

(b) For this purpose, L2's loss from Year 1 that was a SRLY loss with respect to the P group (the former group) is described in paragraph (d)(1)(iii) of this section because L2 had an ownership change on becoming a member of the P group (see §1.1502–96(a)) on December 11, Year 2. Starting on December 12, Year 2, the P group no longer separately tracked owner shifts of the stock of L1 with respect to the Year 1 loss. M's acquisition results in an ownership change of L, and therefore the L loss subgroup under §1.1502–92(a)(2). See §1.1502–93 for rules governing the computation of the subgroup section 382 limitation.

(iii) In the M group, L2's Year 1 loss continues to be subject to a section 382 limitation resulting from the ownership change that occurred on December 11, Year 2. See §1.1502–96(c).

(g) *Net unrealized built-in gain and loss*—(1) *In general*. The determination whether a consolidated group (or loss subgroup) has a net unrealized built-in gain or loss under section 382(h)(3) is based on the aggregate amount of the separately computed net unrealized built-in gains or losses of each member that is included in the group (or loss subgroup) under paragraph (g)(2) of this section, including items of built-in income and deduction described in section 382(h)(6). Thus, for example, amounts deferred under section 267, or under §1.1502–13 (other than amounts deferred with respect to the stock of a member (or an intercompany obligation) included in the group (or loss subgroup) under paragraph (g)(2) of this section) are built-in items. The threshold requirement under section 382(h)(3)(B) applies on an aggregate basis and not on a member-by-member basis. The separately computed amount of a member included in a group or loss subgroup does not include any unrealized built-in gain or loss on stock (including stock described in section 1504(a)(4) and §1.382–2T(f)(18)(ii) and (iii)) of another member included in the group or loss subgroup (or an intercompany obligation). However, a member of a group or loss subgroup includes in its separately computed amount the unrealized built-in gain or loss on stock (but not on an intercompany obligation) of another member not included in the group or loss subgroup. If a member is not included in the determination whether a group (or subgroup) has a net unrealized built-in loss under paragraph (g)(2)(ii) or (iv) of this section, that member is not included in the loss group or loss subgroup. See §1.1502–94(c) (relating to built-in gain or loss of a new loss member) and §1.1502–96(a) (relating to the end of separate tracking of certain losses).

(2) *Members included*—(i) *Consolidated group with a net operating loss*. The members included in the determination whether a consolidated group described in paragraph (c)(1)(i) or (ii) of this section (relating to loss groups with net operating losses) has a net unrealized built-in gain are all members of the consolidated group on the day that the determination is made.

(ii) *Determination whether a consolidated group has a net unrealized built-in loss*. The members included in the determination whether a consolidated group is a loss group described in paragraph (c)(1)(iii) of this section are—

(A) The common parent and all other members that have been affiliated with the common parent for the 5 consecutive year period ending on the day that the determination is made;

(B) Any other member that has a net unrealized built-in loss determined under paragraph (g)(1) of this section on the date that the determination is made, and that is neither a new loss member described in §1.1502–94(a)(1)(ii) nor a member of a loss subgroup described in paragraph (d)(2) of this section;

(C) Any new loss member described in §1.1502–94(a)(1)(ii) that has a net unrealized built-in gain determined under paragraph (g)(1) of this section on the day that the determination is made; and

(D) The members of a loss subgroup described in paragraph (d)(2) of this section if the members of the subgroup have, in the aggregate, a net unrealized built-in gain on the day that the determination is made.

(iii) *Loss subgroup with net operating loss carryovers*. The members included in the determination whether a loss subgroup described in paragraph (d)(1) of this section (relating to loss subgroups with net operating loss carryovers) has a net unrealized built-in gain are all members of the loss subgroup on the day that the determination is made.

(iv) *Determination whether subgroup has a net unrealized built-in loss*. The members included in the determination whether a subgroup has a net unrealized built-in loss are those members described in paragraphs (d)(2)(i) and (ii) of this section.

(v) *Separate determination of section 382 limitation for recognized built-in losses and net operating losses*. In determining whether a loss group described in paragraph (c)(1)(i) or (ii) of this section (relating to loss groups that have net operating loss carryovers) has a net unrealized built-in gain which, if recognized, increases the consolidated section 382 limitation, the group includes, under paragraph (g)(2)(i) of this section, all of its members on the day the determination is made. Under paragraph (g)(2)(ii) of this section, however, for purposes of determining whether a group has a net unrealized built-in loss described in paragraph (c)(1)(iii) of this section, not all members of the consolidated group may be included. Thus, a consolidated group may have recognized built-in gains that increase the amount of consolidated taxable income that may be offset by its pre-change net operating loss carryovers that did not arise (and are not treated as arising) in a SRLY, and also may have recognized built-in losses the absorption of which is limited. Similar results may obtain for loss subgroups under paragraphs (g)(2)(iii) and (iv) of this section. See §1.1502–93(c)(2) for rules prohibiting the use of recognized built-in gains to increase the amount of consolidated taxable income that can be offset by recognized built-in losses.

(3) *Coordination with rule that ends separate tracking.* See §1.1502–96(a) for special rules relating to members (or loss subgroups) that have an ownership change within six months before, on, or after becoming a member of the group.

(4) *Acquisitions of built-in gain or loss assets.* A member of a consolidated group (or loss subgroup) may not, in determining its separately computed net unrealized built-in gain or loss, include any gain or loss with respect to assets acquired with a principal purpose to affect the amount of its net unrealized built-in gain or loss. A group (or loss subgroup) may not, in determining its net unrealized built-in gain or loss, include any gain or loss of a member acquired with a principal purpose to affect the amount of its net unrealized built-in gain or loss.

(5) *Indirect ownership.* A member's separately computed net unrealized built-in gain or loss is adjusted to the extent necessary to prevent any duplication of unrealized gain or loss attributable to the member's indirect ownership interest in another member through a nonmember if the member has a 5-percent or greater ownership interest in the nonmember.

(6) *Common parent not common parent for five years.* If the common parent has become the common parent of an existing group within the previous 5 year period in a transaction described in §1.1502–75(d)(2)(ii) or (3), appropriate adjustments must be made in applying paragraph (g)(2)(ii)(A) of this section so that corporations that have not been members of the group for five years are not included. In such a case, references to the common parent in paragraph (g)(2)(ii)(A) of this section are to the former common parent. Thus, members of the group remaining in existence (including the new common parent) that have not been affiliated with the former common parent (or that have not been members of that group) for the five consecutive year period ending on the day that the determination is made are not included under paragraph (g)(2)(ii)(A) of this section. See, however, §1.1502–96(a)(2) for special rules relating to members (or loss subgroups) that have an ownership change within six months before, on, or after the time that the member becomes a member of the group.

(h) *Recognized built-in gain or loss*—(1) *In general.* [Reserved]

(2) *Disposition of stock or an intercompany obligation of a member.* Gain or loss recognized by a member on the disposition of stock (including stock described in section 1504(a)(4) and §1.382–2T(f)(18)(ii) and (iii)) of another member is treated as a recognized gain or loss for purposes of section 382(h)(2) (unless disallowed) even though gain or loss on such stock was not included in the determination of a net unrealized built-in gain or loss under paragraph (g)(1) of this section. Gain or loss recognized by a member with respect to an intercompany obligation is treated as recognized gain or loss only to the extent (if any) the transaction gives rise to aggregate income or loss within the consolidated group. The first sentence of this paragraph (h)(2) is applicable on or after September 17, 2008.

(3) *Intercompany transactions.* Gain or loss that is deferred under provisions such as section 267 and §1.1502–13 is

treated as recognized built-in gain or loss only to the extent taken into account by the group during the recognition period. See also § 1.1502–13(c)(7) *Example 10*.

(4) *Exchanged basis property*. If the adjusted basis of any asset is determined, directly or indirectly, in whole or in part, by reference to the adjusted basis of another asset held by the member at the beginning of the recognition period, the asset is treated, with appropriate adjustments, as held by the member at the beginning of the recognition period.

(i) [Reserved]

(j) *Predecessor and successor corporations*. A reference in this section and §§ 1.1502–92 through 1.1502–99 to a corporation, member, common parent, loss subgroup parent, or subsidiary includes, as the context may require, a reference to a predecessor or successor corporation as defined in § 1.1502–1(f)(4). For example, the determination whether a successor satisfies the continuous affiliation requirement of paragraph (d)(2)(i) or (g)(2)(ii) of this section is made by reference to its predecessor.

[T.D. 8824, 64 FR 36129, July 2, 1999, as amended by T.D. 9048, 68 FR 12291, Mar. 14, 2003; T.D. 9187, 70 FR 10326, Mar. 3, 2005; T.D. 9254, 71 FR 13018, Mar. 14, 2006; T.D. 9424, 73 FR 53984, Sept. 17, 2008]

§ 1.1502–92 Ownership change of a loss group or a loss subgroup.

(a) *Scope*. This section provides rules for determining if there is an ownership change for purposes of section 382 with respect to a loss group or a loss subgroup. See § 1.1502–94 for special rules for determining if there is an ownership change with respect to a new loss member and § 1.1502–96(b) for special rules for determining if there is an ownership change of a subsidiary.

(b) *Determination of an ownership change*—(1) *Parent change method*—(i) *Loss group*. A loss group has an ownership change if the loss group's common parent has an ownership change under section 382 and the regulations thereunder. Solely for purposes of determining whether the common parent has an ownership change—

(A) The losses described in § 1.1502–91(c) are treated as net operating losses (or a net unrealized built-in loss) of the common parent; and

(B) The common parent determines the earliest day that its testing period can begin by reference to only the attributes that make the group a loss group under § 1.1502–91(c).

(ii) *Loss subgroup*. A loss subgroup has an ownership change if the loss subgroup parent has an ownership change under section 382 and the regulations thereunder. The principles of § 1.1502–95(b) (relating to ceasing to be a member of a consolidated group) apply in determining whether the loss subgroup parent has an ownership change. Solely for purposes of determining whether the loss subgroup parent has an ownership change—

(A) The losses described in § 1.1502–91(d) are treated as net operating losses (or a net unrealized built-in loss) of the loss subgroup parent;

(B) The day that the members of the loss subgroup become members of the group (or a loss subgroup) is treated as a testing date within the meaning of § 1.382–2(a)(4); and

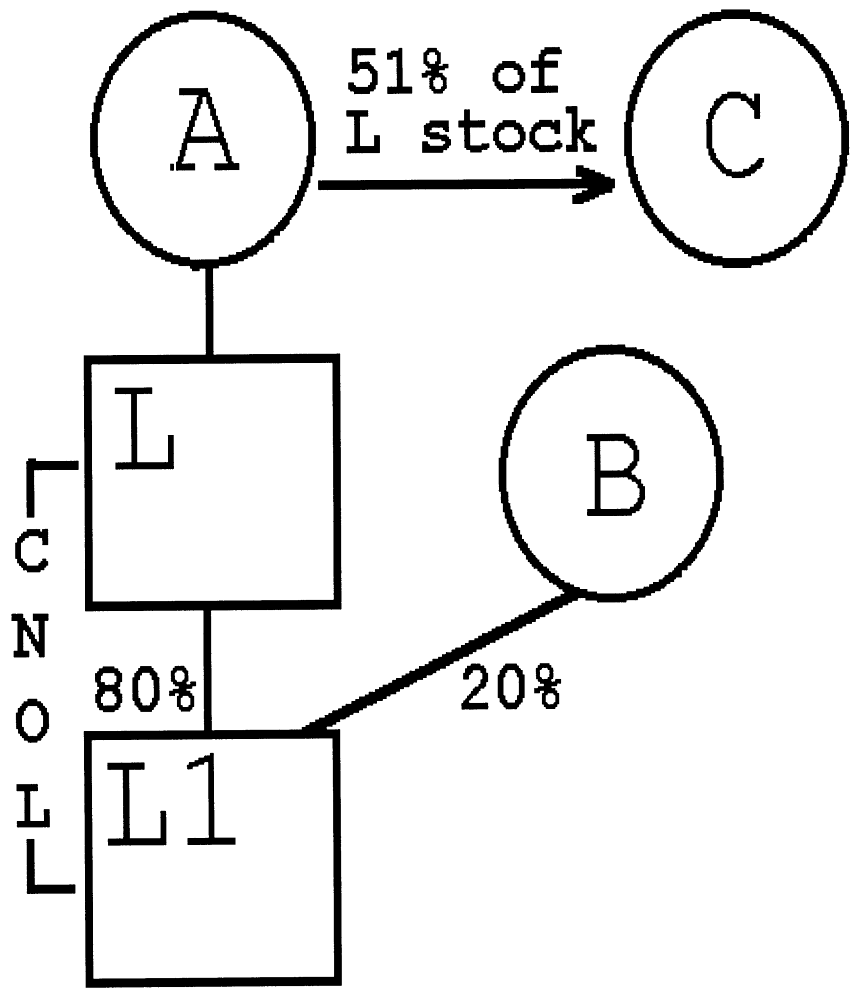
(C) The loss subgroup parent determines the earliest day that its testing period can begin under § 1.382–2T(d)(3) by reference to only the attributes that make the members a loss subgroup under § 1.1502–91(d).

(iii) *Special rule if election regarding section 1504(a)(1) relationship is made*—(A) *Ownership change of deemed loss subgroup parent is an ownership change of loss subgroup*. If the common parent makes an election under § 1.1502–91(d)(4), each of the members in the loss subgroup is treated as the loss subgroup parent for purposes of determining whether the loss subgroup has an ownership change under section 382 and the regulations thereunder on or after the day the members become members of the group.

(B) *Exception*. Paragraph (b)(1)(iii)(A) of this section does not apply to cause an ownership change of a loss subgroup if a deemed loss subgroup parent has an ownership change upon (or after) ceasing to be a member of the current group.

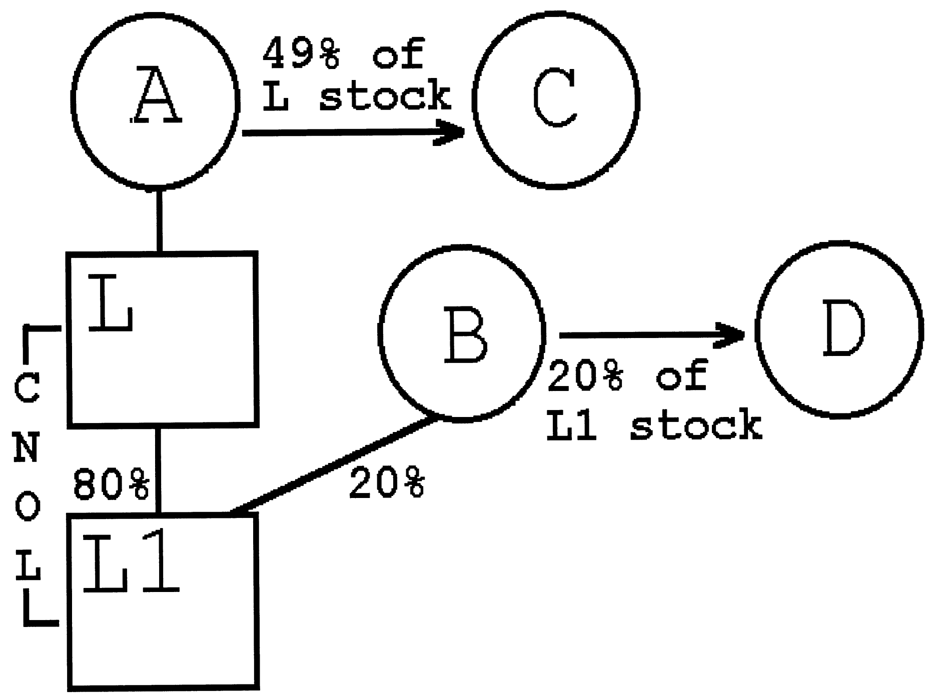
(2) *Examples*. The following examples illustrate the principles of this paragraph (b):

Example 1. Loss group—ownership change of the common parent. (i) A owns all the L stock. L owns 80 percent and B owns 20 percent of the L1 stock. For Year 1, the L group has a consolidated net operating loss that resulted from the operations of L1 and that is carried over to Year 2. The value of the L stock is $1000. The total value of the L1 stock is $600 and the value of the L1 stock held by B is $120. The L group is a loss group under §1.1502–91(c)(1) because it is entitled to use its net operating loss carryover from Year 1. On August 15, Year 2, A sells 51 percent of the L stock to C. The following is a graphic illustration of these facts:



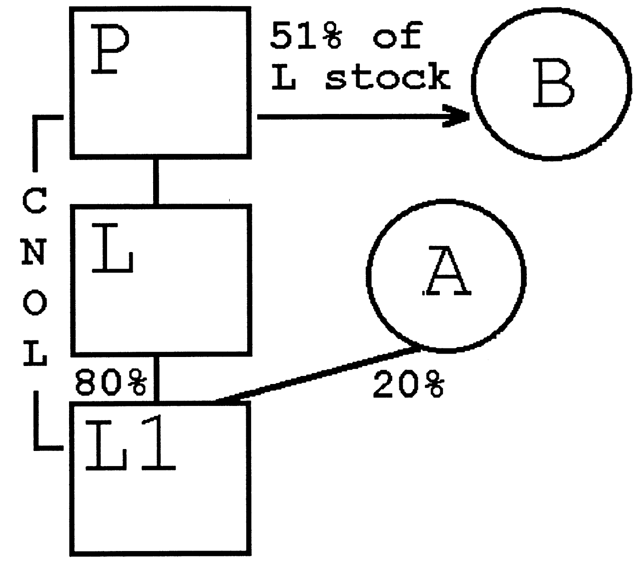
(ii) Under paragraph (b)(1)(i) of this section, section 382 and the regulations thereunder are applied to L to determine whether it (and therefore the L loss group) has an ownership change with respect to its net operating loss carryover from Year 1 attributable to L1 on August 15, Year 2. The sale of the L stock to C causes an ownership change of L under §1.382–2T and of the L loss group under paragraph (b)(1)(i) of this section. The amount of consolidated taxable income of the L loss group for any post-change taxable year that may be offset by its pre-change consolidated attributes (that is, the net operating loss carryover from Year 1 attributable to L1) may not exceed the consolidated section 382 limitation for the L loss group for the taxable year.

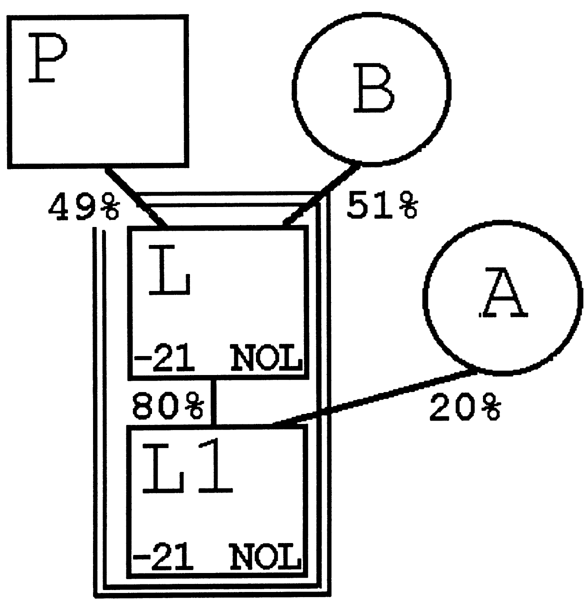
Example 2. Loss group—owner shifts of subsidiaries disregarded. (i) The facts are the same as in *Example 1,* except that on August 15, Year 2, A sells only 49 percent of the L stock to C and, on December 12, Year 3, in an unrelated transaction, B sells the 20 percent of the L1 stock to D. A's sale of the L stock to C does not cause an ownership change of L under §1.382-2T nor of the L loss group under paragraph (b)(1)(i) of this section. The following is a graphic illustration of these facts:



(ii) B's subsequent sale of L1 stock is not taken into account for purposes of determining whether the L loss group has an ownership change under paragraph (b)(1)(i) of this section, and, accordingly, there is no ownership change of the L loss group. See paragraph (c) of this section, however, for a supplemental ownership change method that would apply to cause an ownership change if the purchases by C and D were pursuant to a plan or arrangement and certain other conditions are satisfied.

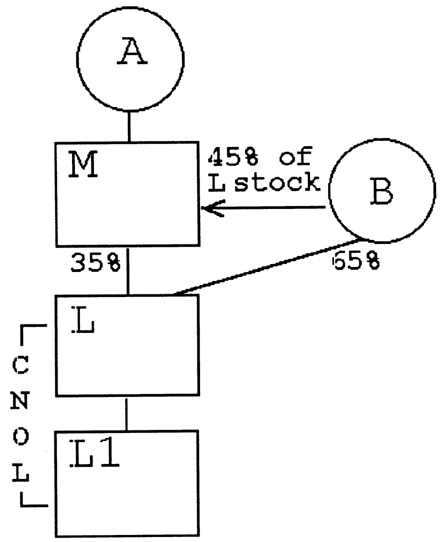
Example 3. Loss subgroup—ownership change of loss subgroup parent controls. (i) P owns all the L stock. L owns 80 percent and A owns 20 percent of the L1 stock. The P group has a consolidated net operating loss arising in Year 1 that is carried over to Year 2. On September 9, Year 2, P sells 51 percent of the L stock to B, and L1 is apportioned a portion of the Year 1 consolidated net operating loss under §1.1502–21(b), which it carries over to its next taxable year. L and L1 file a consolidated return for their first taxable year ending after the sale to B. The following is a graphic illustration of these facts:

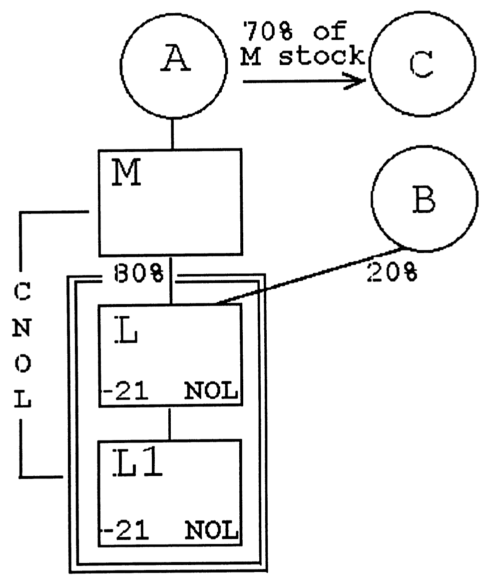




(ii) Under §1.1502–91(d)(1), L and L1 compose a loss subgroup on September 9, Year 2, the day that they become members of the L group. Under paragraph (b)(1)(ii) of this section, section 382 and the regulations thereunder are applied to L to determine whether it (and therefore the L loss subgroup) has an ownership change with respect to the portion of the Year 1 consolidated net operating loss that is apportioned to L1 on September 9, Year 2. L has an ownership change resulting from P's sale of 51 percent of the L stock to A. Therefore, the L loss subgroup has an ownership change with respect to that loss.

Example 4. Loss group and loss subgroup—contemporaneous ownership changes. (i) A owns all the stock of corporation M, M owns 35 percent and B owns 65 percent of the L stock, and L owns all the L1 stock. The L group has a consolidated net operating loss arising in Year 1 that is carried over to Year 2. On May 19, Year 2, B sells 45 percent of the L stock to M for cash. M, L, and L1 thereafter file consolidated returns. L and L1 are each apportioned a portion of the Year 1 consolidated net operating loss, which they carry over to the M group's Year 2 and Year 3 consolidated return years. The M group has a consolidated net operating loss arising in Year 2 that is carried over to Year 3. On June 9, Year 3, A sells 70 percent of the M stock to C. The following is a graphic illustration of these facts:





(ii) Under §1.1502–91(d)(1), L and L1 compose a loss subgroup on May 19, Year 2, the day they become members of the M group. Under paragraph (b)(1)(ii) of this section, section 382 and the regulations thereunder are applied to L to determine whether L (and therefore the L loss subgroup) has an ownership change with respect to the loss carryovers from Year 1 on May 19, Year 2, a testing date because of B's sale of L stock to M. The sale of L stock to M results in only a 45 percentage point increase in A's ownership of L stock. Thus, there is no ownership change of L (or the L loss subgroup) with respect to those loss carryovers under paragraph (b)(1)(ii) of this section on that day.

(iii) June 9, Year 3, is also a testing date with respect to the L loss subgroup because of A's sale of M stock to C. The sale results in a 56 percentage point increase in C's ownership of L stock, and L has an ownership change. Therefore, the L loss subgroup has an ownership change on that day with respect to the loss carryovers from Year 1.

(iv) Paragraph (b)(1)(i) of this section requires that section 382 and the regulations thereunder be applied to M to determine whether M (and therefore the M loss group) has an ownership change with respect to the net operating loss carryover from Year 2 on June 9, Year 3, a testing date because of A's sale of M stock to C. The sale results in a 70 percentage point increase in C's ownership of M stock, and M has an ownership change. Therefore, the M loss group has an ownership change on that day with respect to that loss carryover.

Example 5. Deemed subgroup parent. (i) P owns all the stock of L and L1 and 80 percent of the stock of T. A owns the remaining 20 percent of the stock of T. L1 owns all the stock of L2. P1, which owns 60 percent of the stock of P, acquires, at the beginning of Year 2, the T, L, and L1 stock owned by P, and T, L, L1, and L2 become members of the P1 group. The P group has a consolidated net operating loss arising in Year 1 that is carried over to Year 2. L, L1, and L2 are each apportioned a portion of the Year 1 consolidated net operating loss under §1.1502–21(b), which they carry over to the P1 group's Year 2 and Year 3 consolidated return years. P1 makes the election described in §1.1502–91(d)(4) to treat T, L, L1 and L2 as meeting the section 1504(a)(1) requirement of §1.1502–91(d)(1)(ii). As a result of the election, T, L, L1 and L2 compose a loss subgroup and T, L, L1, and L2 are each treated as the loss subgroup parent for purposes of this paragraph (b). Because of P1's indirect ownership of T, L, L1, and L2 prior to P1's acquisition of the T, L, and L1 stock, P1's acquisition does not cause an ownership change of the loss subgroup.

(ii) On February 2, Year 3, L1 sells all of the stock of L2 to B. Although L2 is treated as a loss subgroup parent, the determination whether the loss subgroup comprised of T, L, and L1 has an ownership change under this paragraph (b) is made without regard to the sale of L2 because L2's ownership change occurred upon ceasing to be a member of the P1 group. See §1.1502–95(b) to determine the application of section 382 to L2 when L2 ceases to be a member of the P1 group and the T, L, L1 and L2 loss subgroup.

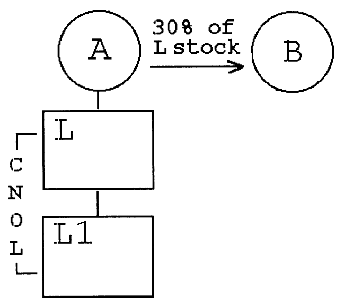
(iii) On March 26, Year 3, A sells her 20 percent minority stock interest in T to C . C's purchase, together with the 32 percentage point owner shift effected by P1's acquisition of the T stock at the beginning of Year 2, causes an ownership change of T, and therefore of the loss subgroup comprised of T, L, and L1.

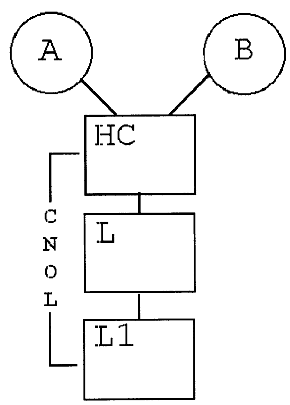
(3) *Special adjustments*—(i) *Common parent succeeded by a new common parent.* For purposes of determining if a loss group has an ownership change, if the common parent of a loss group is succeeded or acquired by a new common parent and the loss group remains in existence, the new common parent is treated as a continuation of the former common parent with appropriate adjustments to take into account shifts in ownership of the former common parent during the testing period (including shifts that occur incident to the common parent's becoming the former common parent). A new common parent may be a continuation of the former common parent even if, under §1.1502–91(g)(2)(ii), the new common parent is not included in determining whether the group has a net unrealized built-in loss.

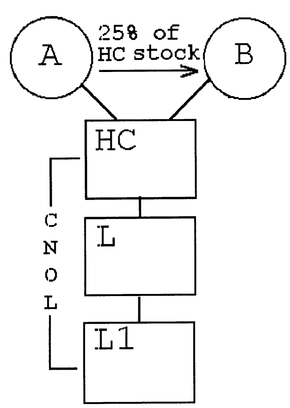
(ii) *Newly created loss subgroup parent.* For purposes of determining if a loss subgroup has an ownership change, if the member that is the loss subgroup parent has not been the loss subgroup parent for at least 3 years as of a testing date, appropriate adjustments must be made to take into account owner shifts of members of the loss subgroup so that the structure of the loss subgroup does not have the effect of avoiding an ownership change under section 382. (See paragraph (b)(3)(iii), *Example 3* of this section.)

(iii) *Examples.* The following examples illustrate the principles of this paragraph (b)(3):

Example 1. New common parent acquires old common parent. (i) A, who owns all the L stock, sells 30 percent of the L stock to B on August 26, Year 1. L owns all the L1 stock. The L group has a consolidated net operating loss arising in Year 1 that is carried over to Year 3. On July 16, Year 2, A and B transfer their L stock to a newly created holding company, HC, in exchange for 70 percent and 30 percent, respectively, of the HC stock. HC, L, and L1 thereafter file consolidated returns. Under the principles of §1.1502–75(d), the L loss group is treated as remaining in existence, with HC taking the place of L as the new common parent of the loss group. The following is a graphic illustration of these facts:

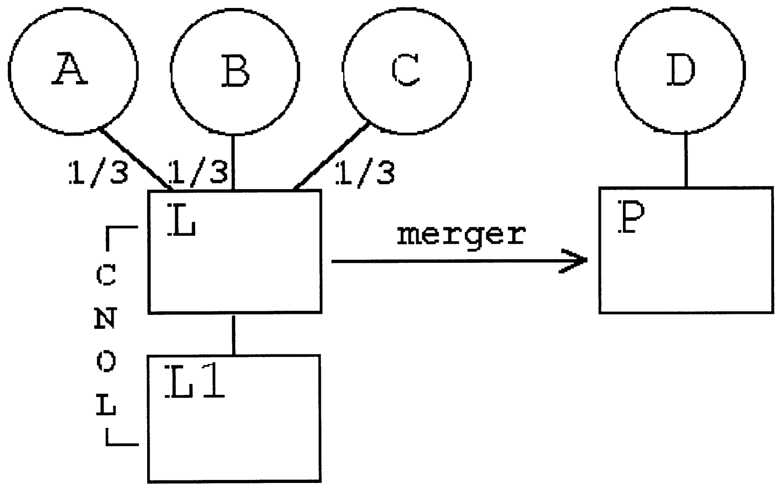


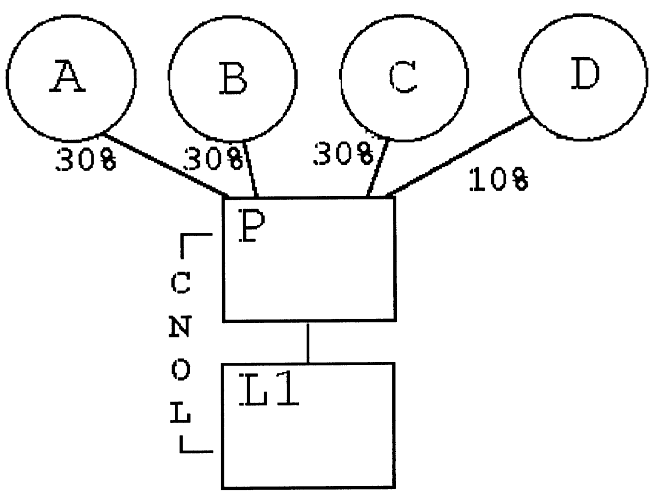




(ii) On November 11, Year 3, A sells 25 percent of the HC stock to B. For purposes of determining if the L loss group has an ownership change under paragraph (b)(1)(i) of this section on November 11, Year 3, HC is treated as a continuation of L under paragraph (b)(4)(i) of this section because it acquired L and became the common parent without terminating the L loss group. Accordingly, HC's testing period commences on January 1, Year 1, the first day of the taxable year of the L loss group in which the consolidated net operating loss that is carried over to Year 3 arose (see §1.382–2T(d)(3)(i)). Immediately after the close of November 11, Year 3, B's percentage ownership interest in the common parent of the loss group (HC) has increased by 55 percentage points over its lowest percentage ownership during the testing period (zero percent). Accordingly, HC and the L loss group have an ownership change on that day.

Example 2. New common parent in case in which common parent ceases to exist. (i) A, B, and C each own one-third of the L stock. L owns all the L1 stock. The L group has a consolidated net operating loss arising in Year 2 that is carried over to Year 3. On November 22, Year 3, L is merged into P, a corporation owned by D, and L1 thereafter files consolidated returns with P. A, B, and C, as a result of owning stock of L, own 90 percent of P's stock after the merger. D owns the remaining 10 percent of P's stock. The merger of L into P qualifies as a reverse acquisition of the L group under §1.1502–75(d)(3)(i), and the L loss group is treated as remaining in existence, with P taking the place of L as the new common parent of the L group. The following is a graphic illustration of these facts:





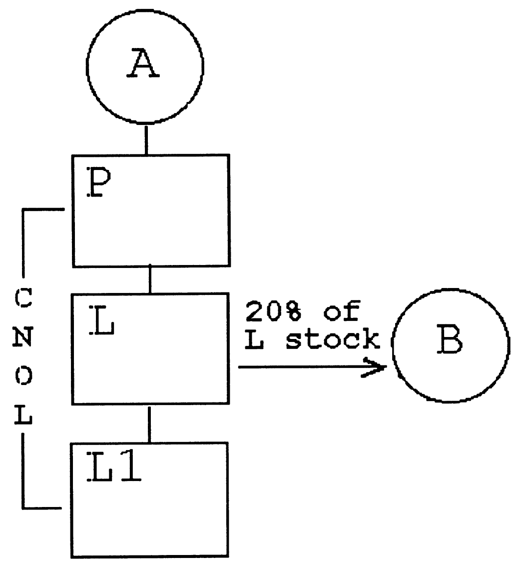
(ii) For purposes of determining if the L loss group has an ownership change on November 22, Year 3, the day of the merger, P is treated as a continuation of L so that the testing period for P begins on January 1, Year 2, the first day of the taxable year of the L loss group in which the consolidated net operating loss that is carried over to

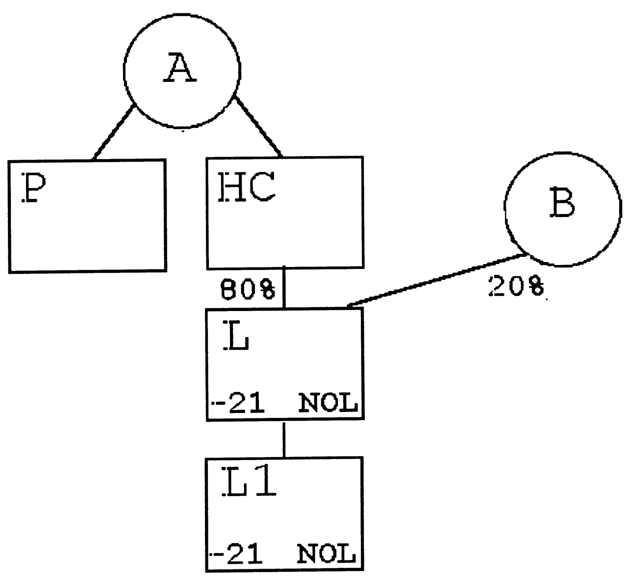
Year 3 arose. Immediately after the close of November 22, Year 3, D is the only 5-percent shareholder that has increased his ownership interest in P during the testing period (from zero to 10 percentage points).

(iii) The facts are the same as in paragraph (i) of this *Example 2,* except that A has held 23⅓ shares (23⅓ percent) of L's stock for five years, and A purchased an additional 10 shares of L stock from E two years before the merger. Immediately after the close of the day of the merger (a testing date), A's ownership interest in P, the common parent of the L loss group, has increased by 6⅔ percentage points over A's lowest percentage ownership during the testing period (23⅓ percent to 30 percent).

(iv) The facts are the same as in (i) of this *Example 2,* except that P has a net operating loss arising in Year 1 that is carried to the first consolidated return year ending after the day of the merger. Solely for purposes of determining whether the L loss group has an ownership change under paragraph (b)(1)(i) of this section, the testing period for P commences on January 1, Year 2. P does not determine the earliest day for its testing period by reference to its net operating loss carryover from Year 1, which §§1.1502–1(f)(3) and 1.1502–75(d)(3)(i) treat as arising in a SRLY. See §1.1502–94 to determine the application of section 382 with respect to P's net operating loss carryover.

Example 3. Newly acquired loss subgroup parent. (i) P owns all the L stock and L owns all the L1 stock. The P group has a consolidated net operating loss arising in Year 1 that is carried over to Year 3. On January 19, Year 2, L issues a 20 percent stock interest to B. On February 5, Year 3, P contributes its L stock to a newly formed subsidiary, HC, in exchange for all the HC stock, and distributes the HC stock to its sole shareholder A. HC, L, and L1 thereafter file consolidated returns. A portion of the P group's Year 1 consolidated net operating loss is apportioned to L and L1 under §1.1502–21(b) and is carried over to the HC group's year ending after February 5, Year 3. HC, L, and L1 compose a loss subgroup within the meaning of §1.1502–91(d) with respect to the net operating loss carryovers from Year 1. The following is a graphic illustration of these facts:





(ii) February 5, Year 3, is a testing date for HC as the loss subgroup parent with respect to the net operating loss carryovers of L and L1 from Year 1. See paragraph (b)(1)(ii)(B) of this section. For purposes of determining whether HC has an ownership change on the testing date, appropriate adjustments must be made with respect to the changes in the percentage ownership of the stock of HC because HC was not the loss subgroup parent for at least 3 years prior to the day on which it became a member of the HC loss subgroup (a testing date). The appropriate adjustments include adjustments so that HC succeeds to the owner shifts of other members of the former group. Thus, HC succeeds to the owner shift of L that resulted from the sale of the 20 percent interest to B in determining whether the HC loss subgroup has an ownership change on February 5, Year 3, and on any subsequent testing date that includes January 19, Year 2.

(4) *End of separate tracking of certain losses*. If §1.1502–96(a) (relating to the end of separate tracking of attributes) applies to a loss subgroup, then, while one or more members that were included in the loss subgroup remain members of the consolidated group, there is an ownership change with respect to their attributes described in §1.1502–96(a)(2) only if the consolidated group is a loss group and has an ownership change under paragraph (b)(1)(i) of this section (or such a member has an ownership change under §1.1502–96(b) (relating to ownership changes of subsidiaries)). If, however, the loss subgroup has had an ownership change before §1.1502–96(a) applies, see §1.1502–96(c) for the continuing application of the subgroup's section 382 limitation with respect to its pre-change subgroup attributes.

(c) *Supplemental rules for determining ownership change*—

(1) *Scope*. This paragraph (c) contains a supplemental rule for determining whether there is an ownership change of a loss group (or loss subgroup). It applies in addition to, and not instead of, the rules of paragraph (b) of this section. Thus, for example, if the common parent of the loss group has an ownership change under paragraph (b) of this section, the loss group has an ownership change even if, by applying this paragraph (c), the common parent would not have an ownership change. This paragraph (c) does not apply in determining an ownership change of a loss subgroup for which an election under §1.1502–91(d)(4) is made.

(2) *Cause for applying supplemental rule*. This paragraph (c) applies to a loss group (or loss subgroup) if—

(i) Any 5-percent shareholder of the common parent (or loss subgroup parent) increases its percentage ownership interest in the stock of both—

(A) A subsidiary of the loss group (or loss subgroup) other than by a direct or indirect acquisition of stock of the common parent (or loss subgroup parent); and

(B) The common parent (or loss subgroup parent);

(ii) Those increases occur within a 3 year period ending on any day of a consolidated return year or, if shorter, the period beginning on the first day following the most recent ownership change of the loss group (or loss subgroup); and

(iii) Either—

(A) The common parent (or loss subgroup parent) has actual knowledge of the increase in the 5-percent shareholder's ownership interest in the stock of the subsidiary (or has actual knowledge of the plan or arrangement described in paragraph (c)(3)(i) of this section) before the date that the group's income tax return is filed for the taxable year that includes the date of that increase; or

(B) At any time during the period described in paragraph (c)(2)(ii) of this section, the 5-percent shareholder of the common parent is also a 5-percent shareholder of the subsidiary (determined without regard to paragraph (c)(3)(i) of this section) whose percentage increase in the ownership of the stock of the subsidiary would be taken into account in determining if the subsidiary has an ownership change (determined as if the subsidiary was a loss corporation and applying the principles of §1.382–2T(k), including the principles relating to duty to inquire).

(3) *Operating rules*. Solely for purposes of this paragraph (c)—

(i) A 5-percent shareholder of the common parent (or loss subgroup parent) is treated as increasing its ownership interest in the stock of a subsidiary to the extent, if any, that another person or persons increases its percentage ownership interest in the stock of a subsidiary pursuant to a plan or arrangement under which the 5-percent shareholder increases its percentage ownership interest in the common parent (or loss subgroup parent);

(ii) The rules in section 382(l)(3) and §§1.382–2T(h) and 1.382–4(d) (relating to constructive ownership) apply with respect to the stock of the subsidiary by treating such stock as stock of a loss corporation; and

(iii) In the case of a loss subgroup, a subsidiary includes any member of the loss subgroup other than the loss subgroup parent. (A loss subgroup parent is, however, a subsidiary of the loss group of which it is a member.)

(4) *Supplemental ownership change rules.* The determination whether the common parent (or loss subgroup parent) has an ownership change is made by applying paragraph (b)(1) of this section as modified by the following additional rules:

(i) *Additional testing dates for the common parent (or loss subgroup parent).* A testing date for the common parent (or loss subgroup parent) also includes—

(A) Each day on which there is an increase in the percentage ownership of stock of a subsidiary as described in paragraph (c)(2) of this section; and

(B) The first day of the first consolidated return year for which the group is a loss group (or the members compose a loss subgroup).

(ii) *Treatment of subsidiary stock as stock of the common parent (or loss subgroup parent).* The common parent (or loss subgroup parent) is treated as though it had issued to the person acquiring (or deemed to acquire) the subsidiary stock an amount of its own stock (by value) that equals the value of the subsidiary stock represented by the percentage increase in that person's ownership of the subsidiary (determined on a separate entity basis). Similar principles apply if the increase in percentage ownership interest is effected by a redemption or similar transaction.

(iii) *Different testing periods.* Stock treated as issued under paragraph (c)(4)(ii) of this section on a testing date is not treated as so issued for purposes of applying the ownership change rules of this paragraph (c) and paragraph (b)(1) of this section in a testing period that does not include that testing date.

(iv) *Disaffiliation of a subsidiary.* If a deemed issuance of stock under paragraph (c)(4)(ii) of this section would not cause the loss group (or loss subgroup) to have an ownership change before the day (if any) on which the subsidiary ceases to be a member of the loss group (or subgroup), then paragraph (c)(4) of this section shall not apply.

(v) *Subsidiary stock acquired first.* If an increase of subsidiary stock described in paragraph (c)(2)(i)(A) of this section occurs before the date that the 5-percent shareholder increases its percentage ownership interest in the stock of the common parent (or loss subgroup parent), then the deemed issuance of stock is treated as occurring on that later date, but in an amount equal to the value of the subsidiary stock on the date it was acquired.

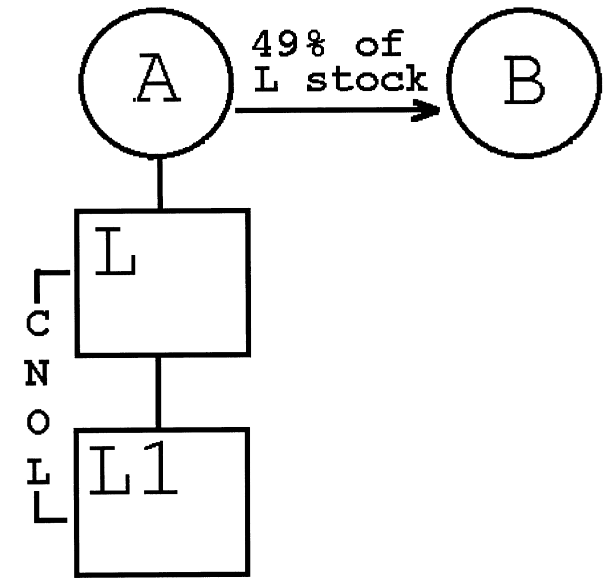
(vi) *Anti-duplication rule.* If two or more 5-percent shareholders are treated as increasing their percentage ownership interests pursuant to the same plan or arrangement described in paragraph (c)(3)(i) of this section, appropriate adjustments must be made so that the amount of stock treated as issued is not taken into account more than once.

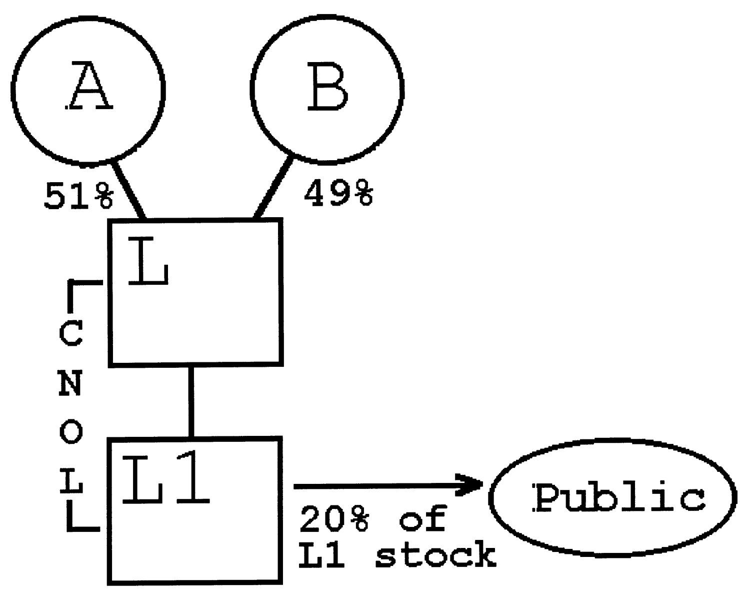
(5) *Examples.* The following examples illustrate the principles of this paragraph (c):

Example 1. Stock of the common parent under supplemental rules. (i) A owns all the L stock. L is not a member of an affiliated group and has a net operating loss carryover arising in Year 1 that is carried over to Year 6. On September 20, Year 6, L transfers all of its assets and liabilities to a newly created subsidiary, S, in exchange for S stock. L and S thereafter file consolidated returns. On November 23, Year 6, B contributes cash to L in exchange for a 45 percent ownership interest in L and contributes cash to S for a 20 percent ownership interest in S.

(ii) During the 3 year period ending on November 23, Year 6, B is a 5% shareholder of L and of S that increases its ownership interest in L and S during that period. Under paragraph (c)(4)(ii) of this section, the determination whether L (the common parent of a loss group) has an ownership change on November 23, Year 6 (or, subject to paragraph (c)(4)(iv) of this section, on any testing date in the testing period which includes November 23, Year 6), is made by applying paragraph (b)(1)(i) of this section and by treating the value of B's 20 percent ownership interest in S as if it were L stock issued to B. Because B is a 5% shareholder of both L and S during the 3 year period ending on November 23, Year 6, and B's increase in its percentage ownership in the stock of S would be taken into account in determining if S (if it were a loss corporation) had an ownership change, it is not relevant whether L has actual knowledge of B's acquisition of S stock.

Example 2. Plan or arrangement—public offering of subsidiary stock. (i) A owns all the stock of L and L owns all the stock of L1. The L group has a consolidated net operating loss arising in Year 1 that resulted from the operations of L1 and that is carried over to Year 2. On October 7, Year 2, A sells 49 percent of the L stock to B. As part of a plan that includes the sale of L stock, A causes a public offering of L1 stock on November 6, Year 2. L has actual knowledge of the plan. The following is a graphic illustration of these facts:





(ii) A's sale of the L stock to B does not cause an ownership change of the L loss group on October 7, Year 2, under the rules of §1.382–2T and paragraph (b)(1)(i) of this section.

(iii) Because the issuance of L1 stock to the public occurs as part of the same plan as

B's acquisition of L stock, and L has knowledge of the plan, paragraph (c)(4) of this section applies to determine whether the L loss group has an ownership change on November 6, Year 2 (or, subject to paragraph (c)(4)(iv) of this section, on any testing date for which the testing period includes November 6, Year 2).

(d) *Testing period following ownership change under this section.* If a loss group (or a loss subgroup) has had an ownership change under this section, the testing period for determining a subsequent ownership change with respect to pre-change consolidated attributes (or pre-change subgroup attributes) begins no earlier than the first day following the loss group's (or loss subgroup's) most recent change date.

(e) *Information statements*—(1) *Common parent of a loss group.* The common parent of a loss group must file the information statement required by §1.382–11(a) for a consolidated return year because of any owner shift, equity structure shift, or other transaction described in §1.382–2T(a)(2)(i)—

(i) With respect to the common parent and with respect to any subsidiary stock subject to paragraph (c) of this section; and

(ii) With respect to an ownership change described in §1.1502–96(b) (relating to ownership changes of subsidiaries).

(2) *Abbreviated statement with respect to loss subgroups.* The common parent of a consolidated group that has a loss subgroup during a consolidated return year must file the information statement required by §1.382–11(a) because of any owner shift, equity structure shift, or other transaction described in §1.382–2T(a)(2)(i) with respect to the loss subgroup parent and with respect to any subsidiary stock subject to paragraph (c) of this section. Instead of filing a separate statement for each loss subgroup parent, the common parent (which is treated as a loss corporation) may file the single statement described in paragraph (e)(1) of this section. In addition to the information concerning stock ownership of the common parent, the single statement must identify each loss subgroup parent and state which loss subgroups, if any, have had ownership changes during the consolidated return year. The loss subgroup parent is, however, still required to maintain the records necessary to determine if the loss subgroup has an ownership change. This paragraph (e)(2) applies with respect to the attributes of a loss subgroup until, under §1.1502–96(a), the attributes are no longer treated as described in §1.1502–91(d) (relating to the definition of loss subgroup). After that time, the information statement described in paragraph (e)(1) of this section must be filed with respect to those attributes.

[T.D. 8824, 64 FR 36137, July 2, 1999, as amended by T.D. 9264, 71 FR 30608, May 30, 2006; T.D. 9329, 72 FR 32807, June 14, 2007]

§ 1.1502–93 Consolidated section 382 limitation (or subgroup section 382 limitation).

(a) *Determination of the consolidated section 382 limitation (or subgroup section 382 limitation)*—(1) *In general.* Following an ownership change, the consolidated section 382 limitation (or subgroup section 382 limitation) for any post-change year is an amount equal to the value of the loss group (or loss subgroup), as defined in paragraph (b) of this section, multiplied by the long-term tax-exempt rate that applies with respect to the ownership change, and adjusted as required by section 382 and the regulations thereunder. See, for example, section 382(b)(2) (relating to the carryforward of unused section 382 limitation), section 382(b)(3)(B) (relating to the section 382 limitation for the post-change year that includes the change date), section 382(h) (relating to recognized built-in gains and section 338 gains), and section 382(m)(2) (relating to short taxable years). For special rules relating to the recognized built-in gains of a loss group (or loss subgroup), see paragraph (c)(2) of this section.

(2) *Coordination with apportionment rule.* For special rules relating to apportionment of a consolidated section 382 limitation (or a subgroup section 382 limitation) or net unrealized built-in gain when one or more corporations cease to be members of a loss group (or a loss subgroup) and to aggregation of amounts so apportioned, see §1.1502–95(c).

(b) *Value of the loss group (or loss subgroup)*—(1) *Stock value immediately before ownership change.* Subject to any adjustment under paragraph (b)(2) of this section, the value of the loss group (or loss subgroup) is the value, immediately before the ownership change, of the stock of each member, other than stock that is owned directly or indirectly by another member. For this purpose—

(i) Ownership is determined under § 1.382–2T;

(ii) A member is considered to indirectly own stock of another member through a nonmember only if the member has a 5-percent or greater ownership interest in the nonmember; and

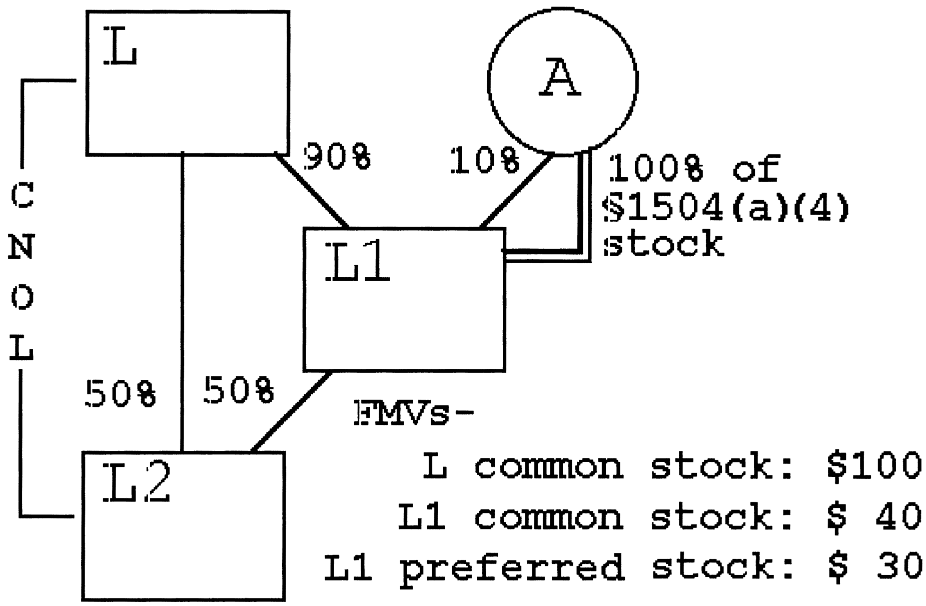
(iii) Stock includes stock described in section 1504(a)(4) and § 1.382–2T(f)(18)(ii) and (iii).

(2) *Adjustment to value*—(i) *In general.* The value of the loss group (or loss subgroup), as determined under paragraph (b)(1) of this section, is adjusted under any rule in section 382 or the regulations thereunder requiring an adjustment to such value for purposes of computing the amount of the section 382 limitation. See, for example, section 382(e)(2) (redemptions and corporate contractions), section 382(l)(1) (certain capital contributions) and section 382(l)(4) (ownership of substantial nonbusiness assets). For purposes of section 382(e)(2), redemptions and corporate contractions that do not effect a transfer of value outside of the loss group (or loss subgroup) are disregarded. For purposes of section 382(l)(1), capital contributions between members of the loss group (or loss subgroup) (or a contribution of stock to a member made solely to satisfy the loss subgroup parent requirement of paragraph (d)(1)(ii) or (2)(ii) of this section), are not taken into account. Also, the substantial nonbusiness asset test of section 382(l)(4) is applied on a group (or subgroup) basis, and is not applied separately to its members.

(ii) *Anti-duplication.* Appropriate adjustments must be made to the extent necessary to prevent any duplication of the value of the stock of a member, even though corporations that do not file consolidated returns may not be required to make such an adjustment. In making these adjustments, the group (or loss subgroup) may apply the principles of § 1.382–8 (relating to controlled groups of corporations) in determining the value of a loss group (or loss subgroup) even if that section would not apply if separate returns were filed. Also, the principles of § 1.382–5(d) (relating to successive ownership changes and absorption of a section 382 limitation) may apply to adjust the consolidated section 382 limitation (or subgroup section 382 limitation) of a loss group (or loss subgroup) to avoid a duplication of value if there are simultaneous (rather than successive) ownership changes.

(3) *Examples.* The following examples illustrate the principles of this paragraph (b):

Example 1. Basic case. (i) L, L1, and L2 compose a loss group. L has outstanding common stock, the value of which is $100. L1 has outstanding common stock and preferred stock that is described in section 1504(a)(4). L owns 90 percent of the L1 common stock, and A owns the remaining 10 percent of the L1 common stock plus all the preferred stock. The value of the L1 common stock is $40, and the value of the L1 preferred stock is $30. L2 has outstanding common stock, 50 percent of which is owned by L and 50 percent by L1. The L group has an ownership change. The following is a graphic illustration of these facts:



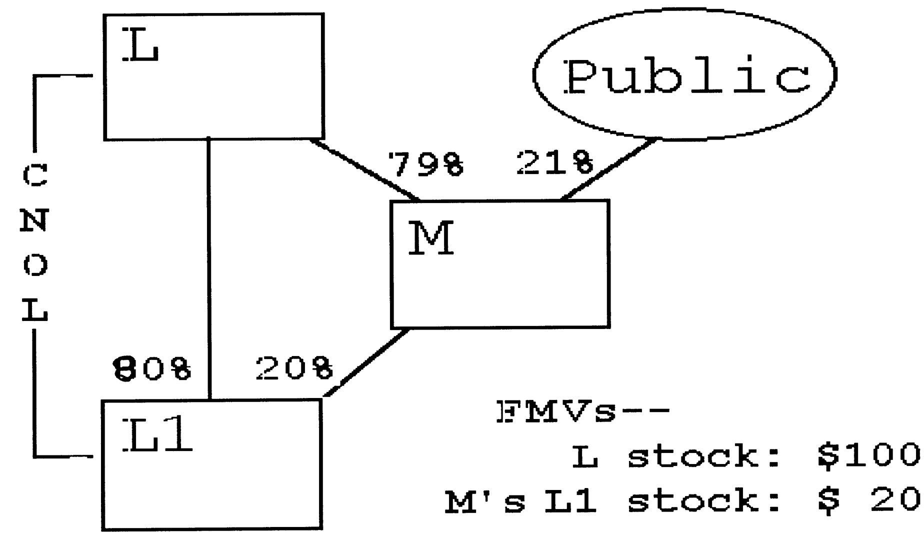
(ii) Under paragraph (b)(1) of this section, the L group does not include the value of the stock of any member that is owned directly or indirectly by another member in computing its consolidated section 382 limitation. Accordingly, the value of the stock of the loss group is $134, the sum of the value of—

(a) The common stock of L ($100);

(b) The 10 percent of the L1 common stock ($4) owned by A; and

(c) The L1 preferred stock ($30) owned by A.

Example 2. Indirect ownership. (i) L and L1 compose a consolidated group. L's stock has a value of $100. L owns 80 shares (worth $80) and corporation M owns 20 shares (worth $20) of the L1 stock. L also owns 79 percent of the stock of corporation M. The L group has an ownership change. The following is a graphic illustration of these facts:



(ii) Under paragraph (b)(1) of this section, because of L's more than 5 percent ownership interest in M, a nonmember, L is considered to indirectly own 15.8 shares of the L1 stock held by M (79% × 20 shares). The value of the L loss group is $104.20, the sum of the values of—

(a) The L stock ($100); and

(b) The L1 stock not owned directly or indirectly by L (21% × $20, or $4.20).

(c) *Recognized built-in gain of a loss group or loss subgroup*—(1) *In general.* If a loss group (or loss subgroup) has a net unrealized built-in gain, any recognized built-in gain of the loss group (or loss subgroup) is taken into account under section 382(h) in determining the consolidated section 382 limitation (or subgroup section 382 limitation).

(2) *Adjustments.* Appropriate adjustments must be made so that any recognized built-in gain of a member that increases more than one section 382 limitation (whether consolidated, subgroup, or separate) does not effect a duplication in the amount of consolidated taxable income that can be offset by pre-change net operating losses. For example, a consolidated section 382 limitation that is increased by recognized built-in gains is reduced to the extent that pre-change net operating losses of a loss subgroup absorb additional consolidated taxable income because the same recognized built-in gains caused an increase in that loss subgroup's section 382 limitation. In addition, recognized built-in gain may not increase the amount of consolidated taxable income that can be offset by recognized built-in losses.

(d) *Continuity of business*—(1) *In general.* A loss group (or a loss subgroup) is treated as a single entity for purposes of determining whether it satisfies the continuity of business enterprise requirement of section 382(c)(1).

(2) *Example.* The following example illustrates the principle of this paragraph (d):

Example. Continuity of business enterprise. L owns all the stock of two subsidiaries, L1 and L2. The L group has an ownership change. It has pre-change consolidated attributes attributable to L2. Each of the members has historically conducted a separate line of business. Each line of business is approximately equal in value. One year after the ownership change, L discontinues its separate business and the business of L2. The separate business of L1 is continued for the remainder of the 2 year period following the ownership change. The continuity of business enterprise requirement of section 382(c)(1) is met even though the separate businesses of L and L2 are discontinued.

(e) *Limitations of losses under other rules.* If a section 382 limitation for a post-change year exceeds the consolidated taxable income that may be offset by pre-change attributes for any reason, including the application of the limitation of § 1.1502–21(c), the amount of the excess is carried forward under section 382(b)(2) (relating to the carryforward of unused section 382 limitation).

[T.D. 8824, 64 FR 36153, July 2, 1999]

§ 1.1502–94 Coordination with section 382 and the regulations thereunder when a corporation becomes a member of a consolidated group.

(a) *Scope*—(1) *In general*. This section applies section 382 and the regulations thereunder to a corporation that is a new loss member of a consolidated group. A corporation is a new loss member if it—

(i) Carries over a net operating loss that arose (or is treated under § 1.1502–21(c) as arising) in a SRLY with respect to the current group, and that is not described in § 1.1502–91(d)(1); or

(ii) Has a net unrealized built-in loss (determined under paragraph (c) of this section immediately before it becomes a member of the current group by treating that day as a change date) that is not taken into account under § 1.1502–91(d)(2) in determining whether two or more corporations compose a loss subgroup.

(2) *Successor corporation as new loss member*. A new loss member also includes any successor to a corporation that has a net operating loss carryover arising in a SRLY and that is treated as remaining in existence under § 1.382–2(a)(1)(ii) following a transaction described in section 381(a).

(3) *Coordination in the case of a loss subgroup*. For rules regarding the determination of whether there is an ownership change of a loss subgroup with respect to a net operating loss or a net unrealized built-in loss described in § 1.1502–91(d) (relating to the definition of loss subgroup) and the computation of a subgroup section 382 limitation following such an ownership change, see §§ 1.1502–92 and 1.1502–93.

(4) *End of separate tracking of certain losses*. If § 1.1502–96(a) (relating to the end of separate tracking of attributes) applies to a new loss member, then, while that member remains a member of the consolidated group, there is an ownership change with respect to its attributes described in § 1.1502–96(a)(2) only if the consolidated group is a loss group and has an ownership change under § 1.1502–92(b)(1)(i) (or that member has an ownership change under § 1.1502–96(b) (relating to ownership changes of subsidiaries)). If, however, the new loss member has had an ownership change before § 1.1502–96(a) applies, see § 1.1502–96(c) for the continuing application of the section 382 limitation with respect to the member's pre-change losses.

(5) *Cross-reference*. See section 382(a) and § 1.1502–96(c) for the continuing effect of an ownership change after a corporation becomes or ceases to be a member.

(b) *Application of section 382 to a new loss member*—(1) *In general*. Section 382 and the regulations thereunder apply to a new loss member to determine, on a separate entity basis, whether and to what extent a section 382 limitation applies to limit the amount of consolidated taxable income that may be offset by the new loss member's pre-change separate attributes. For example, if an ownership change with respect to the new loss member occurs under section 382 and the regulations thereunder, the amount of consolidated taxable income for any post-change year that may be offset by the new loss member's pre-change separate attributes shall not exceed the section 382 limitation as determined separately under section 382(b) with respect to that member for such year. If the post-change year includes the change date, section 382(b)(3)(A) is applied so that the section 382 limitation of the new loss member does not apply to the portion of the taxable income for such year that is allocable to the period in such year on or before the change date. See generally § 1.382–6 (relating to the allocation of income and loss).

(2) *Adjustment to value*. Appropriate adjustments must be made to the extent necessary to prevent any duplication of the value of the stock of a member, even though corporations that do not file consolidated returns may not be required to make such an adjustment. For example, the principles of

§ 1.1502–93(b)(2)(ii) (relating to adjustments to value) apply in determining the value of a new loss member.

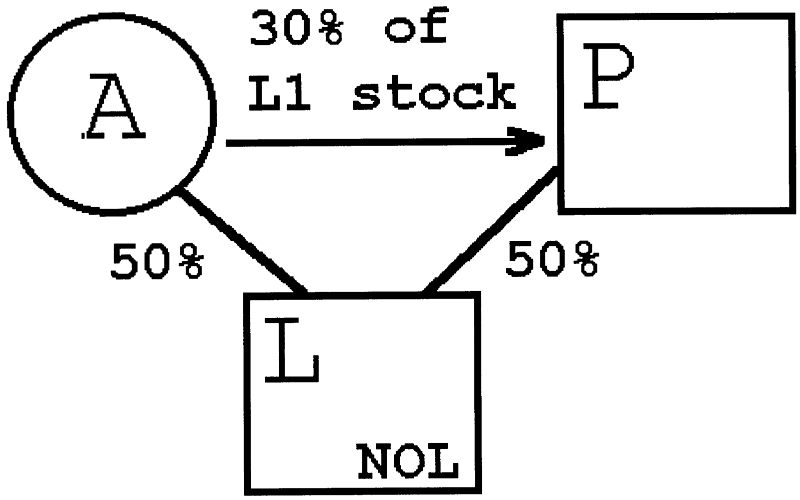
(3) *Pre-change separate attribute defined*. A pre-change separate attribute of a new loss member is—

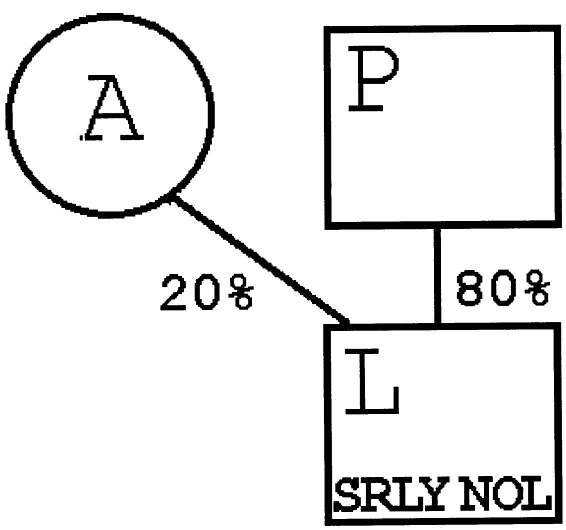
(i) Any net operating loss carryover of the new loss member described in paragraph (a)(1) of this section; and

(ii) Any recognized built-in loss of the new loss member.

(4) *Examples*. The following examples illustrate the principles of this paragraph (b):

Example 1. Basic case. (i) A and P each own 50 percent of the L stock. On December 19, Year 6, P purchases 30 percent of the L stock from A for cash. L has net operating losses arising in Year 1 and Year 2 that it carries over to Year 6 and Year 7. The following is a graphic illustration of these facts:

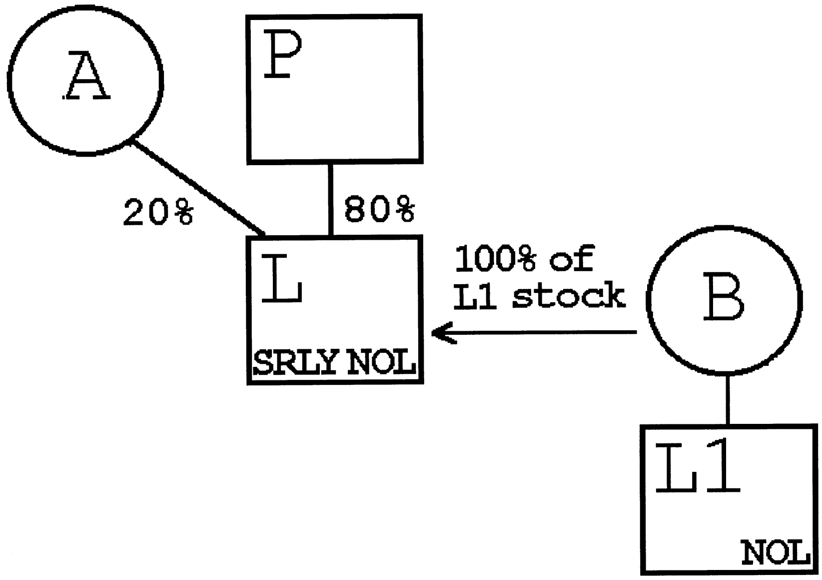


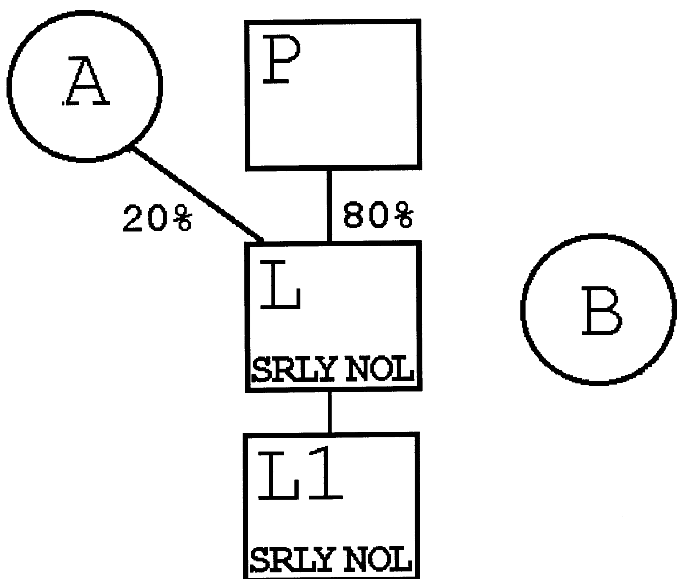


(ii) L is a new loss member because it has net operating loss carryovers that arose in a SRLY with respect to the P group and L is not a member of a loss subgroup under §1.1502–91(d). Under section 382 and the regulations thereunder, L is a loss corporation on December 19, Year 6, that day is a testing date for L, and the testing period for L commences on December 20, Year 3.

(iii) P's purchase of L stock does not cause an ownership change of L on December 19, Year 6, with respect to the net operating loss carryovers from Year 1 and Year 2 under section 382 and §1.382–2T. The use of the loss carryovers, however, is subject to limitation under §1.1502–21(c).

Example 2. Multiple new loss members. (i) The facts are the same as in *Example 1*, and, on December 31, Year 6, L purchases all the stock of L1 from B for cash. L1 has a net operating loss of $40 arising in Year 3 that it carries over to Year 7. The following is a graphic illustration of these facts:





(ii) L1 is a new loss member because it has a net operating loss carryover from Year 3 that arose in a SRLY with respect to the P group and L1 is not a member of a loss subgroup under § 1.1502–91(d)(1).

(iii) L's purchase of all the stock of L1 causes an ownership change of L1 on December 31, Year 6, under section 382 and §1.382–2T. Accordingly, a section 382 limitation based on the value of the L1 stock immediately before the ownership change limits the amount of consolidated taxable income of the P group for any post-change year that may be offset by L1's loss from Year 3.

(iv) L1's ownership change upon becoming a member of the P group is an ownership change described in §1.1502–96(a). Thus, starting on January 1, Year 7, the P group no longer separately tracks owner shifts of the stock of L1 with respect to L1's loss from Year 3, and the P group is a loss group because L1's Year 3 loss is treated as a loss described in §1.1502–91(c).

Example 3. Ownership changes of new loss members. (i) The facts are the same as in Example 2, and, on July 30, Year 7, C purchases all the stock of P for cash.

(ii) L is a new loss member on July 30, Year 7, because its Year 1 and Year 2 losses arose in SRLYs with respect to the P group and it is not a member of a loss subgroup under §1.1502–91(d)(1). The testing period for L commences on August 1, Year 4. C's purchase of all the P stock causes an ownership change of L on July 30, Year 7, under section 382 and §1.382–2T with respect to its Year 1 and Year 2 losses. Accordingly, a section 382 limitation based on the value of the L stock immediately before the ownership change limits the amount of consolidated taxable income of the P group for any post-change year that may be offset by L's Year 1 and Year 2 losses. See §1.1502–21(c) for rules relating to an additional limitation.

(iii) The P group is a loss group on July 30, Year 7, because it is entitled to use L1's loss from Year 3, and such loss is no longer treated as a loss of a new loss member starting the day after L1's ownership change on December 31, Year 6. See §§1.1502–96(a) and 1.1502–91(c)(2). C's purchase of all the P stock causes an ownership change of P, and therefore the P loss group, on July 30, Year 7, with respect to L1's Year 3 loss. Accordingly, a consolidated section 382 limitation based on the value of the P stock immediately before the ownership change limits the amount of consolidated taxable income of the P group for any post-change year that may be offset by L1's Year 3 loss.

(c) *Built-in gains and losses.* As the context may require, the principles of §§1.1502–91(g) and (h) and 1.1502–93(c) (relating to built-in gains and losses) apply to a new loss member on a separate entity basis. See §1.1502–91(g)(4). See §1.1502–13 (including *Example 10* of §1.1502–13(c)(7)) for rules relating to the treatment of intercompany transactions.

(d) *Information statements.* The common parent of a consolidated group that has a new loss member subject to paragraph (b)(1) of this section during a consolidated return year must file the information statement required by §1.382–11(a) because of any owner shift, equity structure shift, or other transaction described in §1.382–2T(a)(2)(i). Instead of filing a separate statement for each new loss member, the common parent may file a single statement described in §1.382–11(a) with respect to the stock ownership of the common parent (which is treated as a loss corporation). In addition to the information concerning stock ownership of the common parent, the single statement must identify each new loss member and state which new loss members, if any, have had ownership changes during the consolidated return year. The new loss member is, however, required to maintain the records necessary to determine if it has an ownership change. This paragraph (d) applies with respect to the attributes of a new loss member until an event occurs which ends separate tracking under §1.1502–96(a). After that time, the information statement described in §1.1502–92(e)(1) must be filed with respect to these attributes.

[T.D. 8824, 64 FR 36155, July 2, 1999, as amended by T.D. 9264, 71 FR 30608, May 30, 2006; T.D. 9329, 72 FR 32807, June 14, 2007]

§1.1502–95 Rules on ceasing to be a member of a consolidated group (or loss subgroup).

(a) *In general*—(1) *Consolidated group.* This section provides rules for applying section 382 on or after the day that a member ceases to be a member of a consolidated group (or loss subgroup). The rules concern how to determine whether an ownership change occurs with respect to losses of the member, and how a consolidated section 382 limitation (or subgroup section 382 limitation) and a loss group's (or loss subgroup's) net unrealized built-in gain or loss is apportioned to the member. As the context requires, a reference in this section to a loss group, a member, or a corporation also includes a reference to a loss subgroup, and a reference to a consolidated section 382 limitation also includes a reference to a subgroup section 382 limitation.

(2) *Election by common parent.* Only the common parent (not the loss subgroup parent) may make the election under paragraph (c) of this section to apportion a consolidated section 382 limitation (or subgroup section 382 limitation) or a loss group's (or loss subgroup's) net unrealized built-in gain.

(3) *Coordination with §§1.1502–91 through 1.1502–93.* For rules regarding the determination of whether there is an ownership change of a loss subgroup and the computation of a subgroup section 382 limitation following such an ownership change, see §§1.1502–91 through 1.1502–93.

(b) *Separate application of section 382 when a member leaves a consolidated group*—(1) *In general.* Except as provided in §§1.1502–91 through 1.1502–93 (relating to rules applicable to loss groups and loss subgroups), section 382 and the regulations thereunder apply to a corporation on a separate entity basis after it ceases to be a member of a consolidated group (or loss subgroup). Solely for purposes of determining whether a corporation has an ownership change—

(i) Any portion of a consolidated net operating loss that is apportioned to the corporation under §1.1502–21(b) is treated as a net operating loss of the corporation beginning on the first day of the taxable year in which the loss arose;

(ii) The testing period may include the period during which (or before which) the corporation was a member of the group (or loss subgroup); and

(iii) Except to the extent provided in §1.1502–96(d) (relating to reattributed losses), the day it ceases to be a member of a consolidated group is treated as a testing date of the corporation within the meaning of §1.382–2(a)(4).

(2) *Effect of a prior ownership change of the group.* If a loss group has had an ownership change under §1.1502–92 before a corporation ceases to be a member of a consolidated group (the former member)—

(i) Any pre-change consolidated attribute that is subject to a consolidated section 382 limitation continues to be treated as a pre-change loss with respect to the former member after it is apportioned to the former member and, if any net unrealized built-in loss is allocated to the former member under paragraph (e) of this section, any recognized built-in loss of the former member is a pre-change loss of the member;

(ii) The section 382 limitation with respect to such pre-change attribute is zero unless the common parent, under paragraph (c) of this section, apportions to the former member all or part of the consolidated section 382 limitation applicable to such attribute. The limitation applicable to a pre-change attribute other than a recognized built-in loss may be increased to the extent that the common parent has apportioned all or part of the loss group's net unrealized built-in gain to the former member, and the former member recognizes built-in gain during the recognition period;

(iii) The testing period for determining a subsequent ownership change with respect to such pre-change attribute (or such net unrealized built-in loss, if any) begins no earlier than the first day following the loss group's most recent change date; and

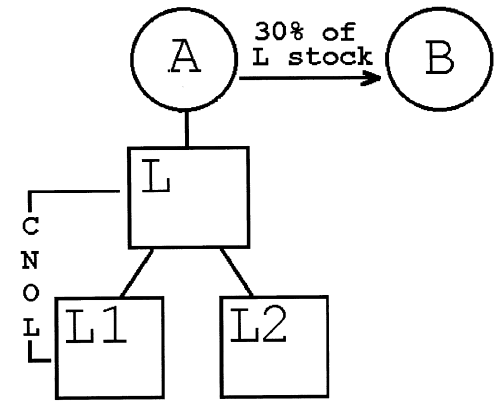
(iv) As generally provided under section 382, an ownership change of the former member that occurs on or after the day it ceases to be a member of a loss group may result in an additional, lesser limitation amount with respect to such losses.

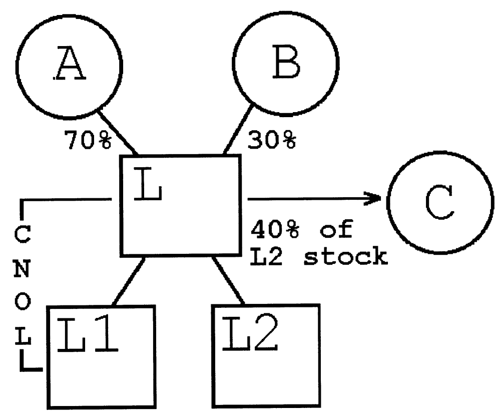
(3) *Application in the case of a loss subgroup.* If two or more former members are included in the same loss subgroup immediately after they cease to be members of a consolidated group, the principles of paragraphs (b), (c) and (e) of this section apply to the loss subgroup. Therefore, for example, an apportionment by the common parent under paragraph (c) of this section is made to the loss subgroup rather than separately to its members. If the common parent of the consolidated group apportions all or part of a limitation (or net unrealized built-in gain) separately to one or more former members that are included in a loss subgroup because the common parent of the acquiring group makes an election under §1.1502–91(d)(4) with respect to those members, the aggregate of those separate amounts is treated as the amount

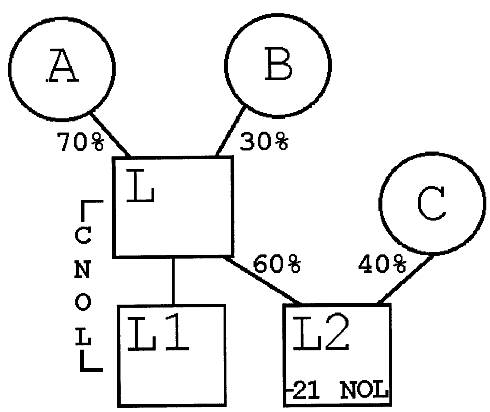
apportioned to the loss subgroup. Such separate apportionment may occur, for example, because the election under §1.1502–91(d)(4) has not been filed at the time that the election of apportionment is made under paragraph (f) of this section.

(4) *Examples*. The following examples illustrate the principles of this paragraph (b):

Example 1. Treatment of departing member as a separate corporation throughout the testing period. (i) A owns all the L stock. L owns all the stock of L1 and L2. The L group has a consolidated net operating loss arising in Year 1 that is carried over to Year 3. On January 12, Year 2, A sells 30 percent of the L stock to B. On February 7, Year 3, L sells 40 percent of the L2 stock to C, and L2 ceases to be a member of the group. A portion of the Year 1 consolidated net operating loss is apportioned to L2 under §1.1502–21(b) and is carried to L2's first separate return year, which ends December 31, Year 3. The following is a graphic illustration of these facts:







(ii) Under paragraph (b)(1) of this section, L2 is a loss corporation on February 7, Year 3. Under paragraph (b)(1)(iii) of this section, February 7, Year 3, is a testing date. Under paragraph (b)(1)(ii) of this section, the testing period for L2 with respect to this testing date commences on January 1, Year 1, the first day of the taxable year in which the portion of the consolidated net operating loss apportioned to L2 arose. Therefore, in determining whether L2 has an ownership change on February 7, Year 3, B's purchase of 30 percent of the L stock and C's purchase of 40 percent of the L2 stock are each owner shifts. L2 has an ownership change under section 382(g) and §1.382–2T because B and C have increased their ownership interests in L2 by 18 and 40 percentage points, respectively, during the testing period.

Example 2. Effect of prior ownership change of loss group. (i) L owns all the L1 stock and L1 owns all the L2 stock. The L loss group had an ownership change under §1.1502–92 in Year 2 with respect to a consolidated net operating loss arising in Year 1 and carried over to Year 2 and Year 3. The consolidated section 382 limitation computed solely on the basis of the value of the stock of L is $100. On December 31, Year 2, L1 sells 25 percent of the stock of L2 to B. L2 is apportioned a portion of the Year 1 consolidated net operating loss which it carries over to its first separate return year ending after December 31, Year 2. L2's separate section 382 limitation with respect to this loss is zero unless L elects to apportion all or a part of the consolidated section 382 limitation to L2. (See paragraph (c) of this section for rules regarding the apportionment of a consolidated section 382 limitation.) L apportions $50 of the consolidated section 382 limitation to L2, and the remaining $50 of the consolidated section 382 limitation stays with the loss group composed of L and L1.

(ii) On December 31, Year 3, L1 sells its remaining 75 percent stock interest in L2 to C, resulting in an ownership change of L2. L2's section 382 limitation computed on the change date with respect to the value of its stock is $30. Accordingly, L2's section 382 limitation for post-change years ending after December 31, Year 3, with respect to its prechange losses, including the consolidated net operating losses apportioned to it from the L group, is $30, adjusted for a short taxable year, carryforward of unused limitation, or any other adjustment required under section 382.

(c) *Apportionment of a consolidated section 382 limitation*—(1) *In general.* The common parent may elect to apportion all or any part of a consolidated section 382 limitation to a former member (or loss subgroup). The common parent also may elect to apportion all or any part of the loss group's net unrealized built-in gain to a former member (or loss subgroup).

(2) *Amount which may be apportioned*—(i) *Consolidated section 382 limitation.* The common parent may apportion all or part of each element of the consolidated section 382 limitation determined under §1.1502–93. For this purpose, the consolidated section 382 limitation consists of two elements—

(A) The value element, which is the element of the limitation determined under section 382(b)(1) (relating to value multiplied by the long-term tax-exempt rate) without regard to such adjustments as those described in section 382(b)(2) (relating to the carryforward of unused section 382 limitation), section 382(b)(3)(B)(relating to the section 382 limitation for the post-change year that includes the change date), section 382(h)(relating to built-in gains and section 338 gains), and section 382(m)(2)(relating to short taxable years); and

(B) The adjustment element, which is so much (if any) of the limitation for the taxable year during which the former member ceases to be a member of the consolidated group that is attributable to a carryover of unused limitation under section 382(b)(2) or to recognized built-in gains under 382(h).

(ii) *Net unrealized built-in gain.* The aggregate amount of the loss group's net unrealized built-in gain that may be apportioned to one or more former members that cease to be members during the same consolidated return year cannot exceed the loss group's excess, immediately after the close of that year, of net unrealized built-in gain over recognized built-in gain, determined under section 382(h)(1)(A)(ii) (relating to a limitation on recognized built-in gain). For this purpose, net unrealized built-in gain apportioned to former members in prior consolidated return years is treated as recognized built-in gain in those years.

(3) Effect of apportionment on the consolidated group—(i) Consolidated section 382 limitation. The value element of the consolidated section 382 limitation for any post-change year ending after the day that a former member (or loss subgroup) ceases to be a member(s) is reduced to the extent that it is apportioned under this paragraph (c). The consolidated section 382 limitation for the post-change year in which the former member (or loss subgroup) ceases to be a member(s) is also

reduced to the extent that the adjustment element for that year is apportioned under this paragraph (c).

(ii) *Net unrealized built-in gain*. The amount of the loss group's net unrealized built-in gain that is apportioned to the former member (or loss subgroup) is treated as recognized built-in gain for a prior taxable year ending in the recognition period for purposes of applying the limitation of section 382(h)(1)(A)(ii) to the loss group's recognition period taxable years beginning after the consolidated return year in which the former member (or loss subgroup) ceases to be a member.

(4) *Effect on corporations to which an apportionment is made*—(i) *Consolidated section 382 limitation*. The amount of the value element that is apportioned to a former member (or loss subgroup) is treated as the amount determined under section 382(b)(1) for purposes of determining the amount of that corporation's (or loss subgroup's) section 382 limitation for any taxable year ending after the former member (or loss subgroup) ceases to be a member(s). Appropriate adjustments must be made to the limitation based on the value element so apportioned for a short taxable year, carryforward of unused limitation, or any other adjustment required under section 382. The adjustment element apportioned to a former member (or loss subgroup) is treated as an adjustment under section 382(b)(2) or section 382(h), as appropriate, for the first taxable year after the member (or members) ceases to be a member (or members).

(ii) *Net unrealized built-in gain*. For purposes of determining the amount by which the former member's (or loss subgroup's) section 382 limitation for any taxable year beginning after the former member (or loss subgroup) ceases to be a member(s) is increased by its recognized built-in gain—

(A) The amount of net unrealized built-in gain apportioned to a former member (or loss subgroup) is treated as if it were an amount of net unrealized built-in gain determined under section 382(h)(1)(A)(i)(without regard to the threshold of section 382(h)(3)(B)) with respect to such member or loss subgroup, and that amount is not reduced under section 382(h)(1)(A)(ii) by the loss group's recognized built-in gain;

(B) The former member's (or loss subgroup's) 5 year recognition period begins on the loss group's change date;

(C) In applying section 382(h)(1)(A)(ii), the former member (or loss subgroup) takes into account only its prior taxable years that begin after it ceases to be a member of the loss group; and

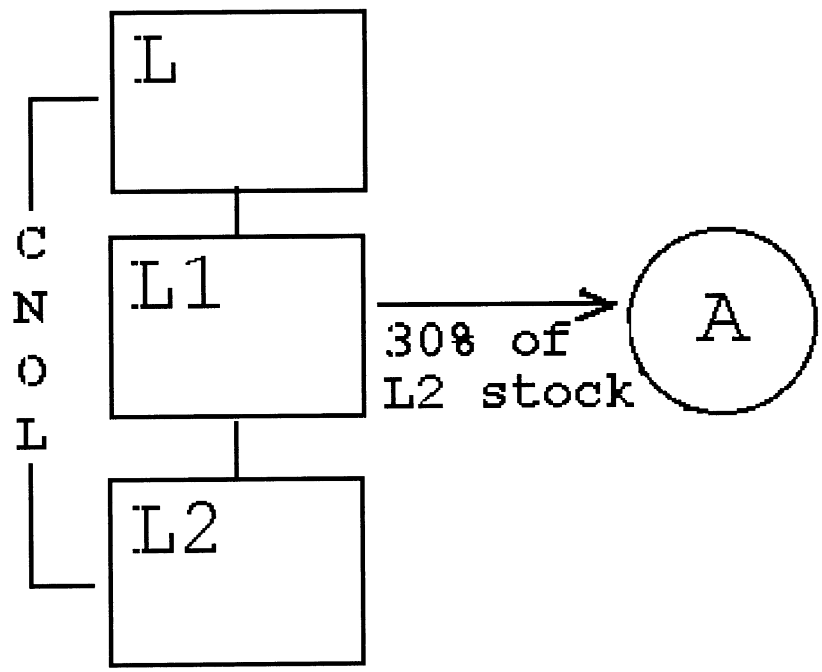
(D) The former member's (or loss subgroup's) recognized built-in gain on the disposition of an asset is determined under section 382(h)(2)(A), treating references to the change date in that section as references to the loss group's change date.

(5) *Deemed apportionment when loss group terminates*. If a loss group terminates, to the extent the consolidated section 382 limitation or net unrealized built-in gain is not apportioned under paragraph (c)(1) of this section, the consolidated section 382 limitation or net unrealized built-in gain is deemed to be apportioned to the loss subgroup that includes the common parent, or, if there is no loss subgroup that includes the common parent immediately after the loss group terminates, to the common parent. A loss group terminates on the first day of the first taxable year that is a separate return year with respect to each member of the former loss group.

(6) *Appropriate adjustments when former member leaves during the year*. Appropriate adjustments are made to the consolidated section 382 limitation for the consolidated return year during which the former member (or loss subgroup) ceases to be a member(s) to reflect the inclusion of the former member in the loss group for a portion of that year.

(7) *Examples*. The following examples illustrate the principles of this paragraph (c):

Example 1. Consequence of apportionment. (i) L owns all the L1 stock and L1 owns all the L2 stock. The L group has a $200 consolidated net operating loss arising in Year 1 that is carried over to Year 2. At the close of December 31, Year 1, the group has an ownership change under §1.1502–92. The ownership change results in a consolidated section 382 limitation of $10 based on the value of the stock of the group. On August 29, Year 2, L1 sells 30 percent of the stock of L2 to A. L2 is apportioned $90 of the group's $200 consolidated net operating loss under §1.1502–21(b). L, the common parent, elects to apportion $6 of the consolidated section 382 limitation to L2. The following is a graphic illustration of these facts:



(ii) For its separate return years ending after December 31, Year 2, L2's section 382 limitation with respect to the $90 of the group's net operating loss apportioned to it is $6, adjusted, as appropriate, for any short taxable year, unused section 382 limitation, or other adjustment. For its consolidated return year ending December 31, Year 2 the L group's consolidated section 382 limitation with respect to the remaining $110 of pre-change consolidated attribute is $4 ($10 minus the $6 value element apportioned to L2), adjusted, as appropriate, for any short taxable year, unused section 382 limitation, or other adjustment.

(iii) For the L group's consolidated return year ending December 31, Year 2, the value element of its consolidated section 382 limitation is increased by $4 (rounded to the nearest dollar), to account for the period during which L2 was a member of the L group ($6, the consolidated section 382 limitation apportioned to L2, times 241/365, the ratio of the number of days during Year 2 that L2 is a member of the group to the number of days in the group's consolidated return year). See paragraph (c)(6) of this section. Therefore, the value element of the consolidated section 382 limitation for Year 2 of the L group is $8 (rounded to the nearest dollar).

(iv) The section 382 limitation for L2's short taxable year ending December 31, Year 2, is $2 (rounded to the nearest dollar), which is the amount that bears the same relationship to $6, the value element of the consolidated section 382 limitation apportioned to L2, as the number of days during that short taxable year, 124 days, bears to 365. See §1.382–5(c).

Example 2. Consequence of no apportionment. The facts are the same as in *Example 1*, except that L does not elect to apportion any portion of the consolidated section 382 limitation to L2. For its separate return years ending after August 29, Year 2, L2's section 382 limitation with respect to the $90 of the group's pre-change consolidated attribute apportioned to L2 is zero under paragraph (b)(2)(ii) of this section. Thus, the $90 consolidated net operating loss apportioned to L2 cannot offset L2's taxable income in any of its separate return years ending after August 29, Year 2. For its consolidated return years ending after August 29, Year 2, the L group's consolidated section 382 limitation with respect to the remaining $110 of pre-change consolidated attribute is $10, adjusted, as appropriate, for any short taxable year, unused section 382 limitation, or other adjustment.

Example 3. Apportionment of adjustment element. The facts are the same as in *Example 1*, except that L2 ceases to be a member of the L group on August 29, Year 3, and the L group has a $4 carryforward of an unused consolidated section 382 limitation (under section 382(b)(2)) to the Year 3 consolidated return year. The carryover of unused limitation increases the consolidated section 382 limitation for the Year 3 consolidated return year from $10 to $14. L may elect to apportion all or any portion of the $10 value element and all or any portion of the $4 adjustment element to L2.

(d) *Rules pertaining to ceasing to be a member of a loss subgroup*—(1) *In general.* A corporation ceases to be a member of a loss subgroup on the earlier of—

(i) The first day of the first taxable year for which it files a separate return; or

(ii) The first day that it ceases to bear a relationship described in section 1504(a)(1) to the loss subgroup parent (treating for this purpose the loss subgroup parent as the common parent described in section 1504(a)(1)(A)).

(2) *Exceptions.* Paragraph (d)(1)(ii) of this section does not apply to a member of a loss subgroup while that member remains a member of the current group—

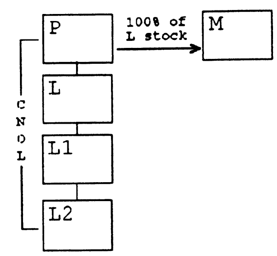
(i) If an election under §1.1502–91(d)(4)(relating to treating the subgroup parent requirement as satisfied) applies to the members of the loss subgroup;

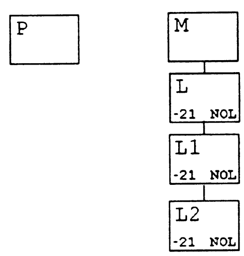
(ii) Starting on the day after the change date (but not earlier than the date the loss subgroup becomes a member of the group), if there is an ownership change of the loss subgroup within six months before, on, or after becoming members of the group; or

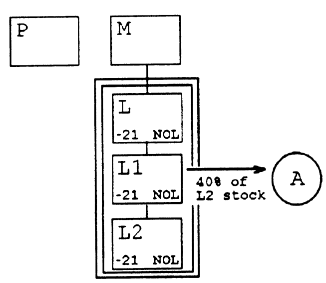
(iii) Starting the day after the period of 5 consecutive years following the day that the loss subgroup become members of the group during which the loss subgroup has not had an ownership change.

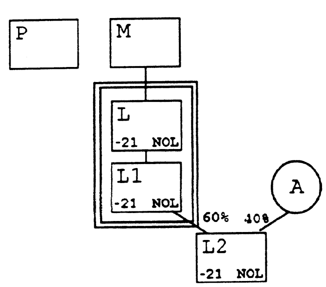
(3) *Examples.* The principles of this paragraph (d) are illustrated by the following examples:

Example 1. Basic case. (i) P owns all the L stock, L owns all the L1 stock and L1 owns all the L2 stock. The P group has a consolidated net operating loss arising in Year 1 that is carried over to Year 2. On December 11, Year 2, P sells all the stock of L to corporation M. Each of L, L1, and L2 is apportioned a portion of the Year 1 consolidated net operating loss, and thereafter each joins with M in filing consolidated returns. Under §1.1502–92, the L loss subgroup has an ownership change on December 11, Year 2. The L loss subgroup has a subgroup section 382 limitation of $100. The following is a graphic illustration of these facts:



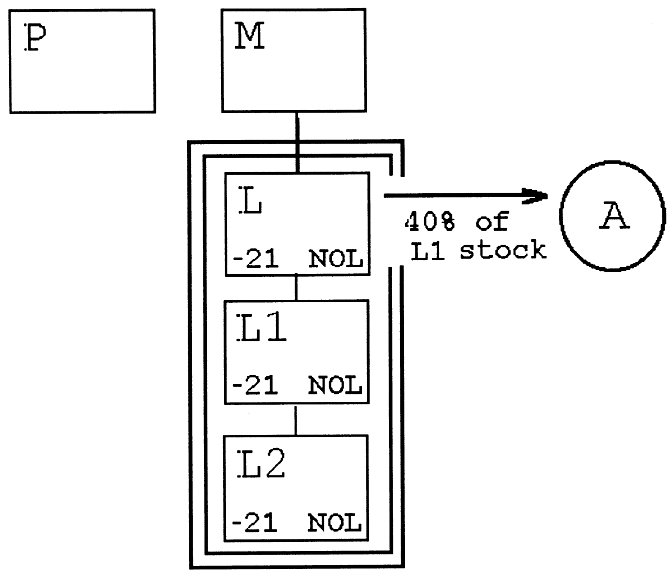


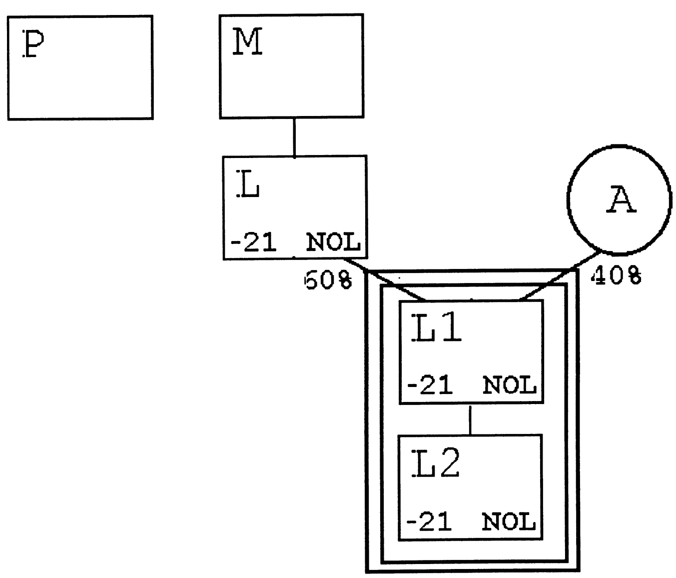




(ii) On May 22, Year 3, L1 sells 40 percent of the L2 stock to A. L2 carries over a portion of the P group's net operating loss from Year 1 to its separate return year ending December 31, Year 3. Under paragraph (d)(1) of this section, L2 ceases to be a member of the L loss subgroup on May 22, Year 3, which is both (1) the first day of the first taxable year for which it files a separate return and (2) the day it ceases to bear a relationship described in section 1504(a)(1) to the loss subgroup parent, L. The net operating loss of L2 that is carried over from the P group is treated as a pre-change loss of L2 for its separate return years ending after May 22, Year 3. Under paragraphs (a)(2) and (b)(2) of this section, the separate section 382 limitation with respect to this loss is zero unless M elects to apportion all or a part of the subgroup section 382 limitation of the L loss subgroup to L2.

Example 2. Formation of a new loss subgroup. The facts are the same as in *Example 1*, except that A purchases 40 percent of the L1 stock from L rather than purchasing L2 stock from L1. L1 and L2 file a consolidated return for their first taxable year ending after May 22, Year 3, and each of L1 and L2 carries over a part of the net operating loss of the P group that arose in Year 1. Under paragraph (d)(1) of this section, L1 and L2 cease to be members of the L loss subgroup on May 22, Year 3. The net operating losses carried over from the P group are treated as pre-change subgroup attributes of the loss subgroup composed of L1 and L2. The subgroup section 382 limitation with respect to those losses is zero unless M elects to apportion all or part of the subgroup section 382 limitation of the L loss subgroup to the L1 loss subgroup. The following is a graphic illustration of these facts:





Example 3. Ownership change upon becoming members of the group. (i) A owns all the stock of P, and P owns all the stock of L1 and L2. The P group has a consolidated net operating loss arising in Year 1 that is carried over to Year 3 and Year 4. Corporation M acquires all the stock of P on November 11, Year 3, and P, L1, and L2 thereafter file consolidated

returns with M. M's acquisition results in an ownership change of the P loss subgroup under §1.1502–92(b)(1)(ii).

(ii) P distributes the L2 stock to M on October 7, Year 4, and L2 ceases to bear the relationship described in section 1504(a)(1) to P, the P loss subgroup parent. However, under paragraph (d)(2) of this section, L2 does not cease to be a member of the P loss subgroup because the P loss subgroup had an ownership change upon becoming members of the M group and L2 remains in the M group.

Example 4. Ceasing to bear a section 1504 (a)(1) to the loss subgroup parent. (i) A owns all the stock of P, and P owns all the stock of L1 and L2. The P group has a consolidated net operating loss arising in Year 1 that is carried over to Year 7. At the close of Year 2, X acquires all of the stock of P, causing an ownership change of the loss subgroup composed of P, L1 and L2 under §1.1502–92(b)(1)(ii). In Year 4, M, which is owned by the same person that owns X, acquires all of the stock of P, and the M acquisition does not cause a second ownership change of the P loss subgroup.

(ii) P distributes the L2 stock to M on February 3, Year 6 (less than 5 years after the P loss subgroup became members of the M group) and L2 ceases to bear the relationship described in section 1504(a)(1) to P, the loss subgroup parent. Thus, the section 382 limitation from the Year 2 ownership change that applies with respect to the pre-change attributes attributable to L2 is zero except to the extent M elects to apportion all or part of the P loss subgroup section 382 limitation to L2.

Example 5. Relationship through a successor. The facts are the same as in *Example 3*, except that M's acquisition of the P stock does not result in an ownership change of the P loss subgroup, and, instead of P's distributing the stock of L2, L2 merges into L1 on October 7, Year 4. L1 (as successor to L2 in the merger within the meaning of §1.1502–1(f)(4)) continues to bear a relationship described in section 1504(a)(1) to P, the loss subgroup parent. Thus, L2 does not cease to be a member of the P loss subgroup as a result of the merger.

Example 6. Reattribution of net operating loss carryover under §1.1502–36(d)(6). The facts are the same as in *Example 3*, except that, instead of distributing the L2 stock to M, P sells that stock to B, and, under §1.1502–36(d)(6), M reattributes $10 of L2's net operating loss carryover to itself. Under §1.1502–36(d)(6)(iv)(A), M succeeds to the reattributed loss as if the loss were succeeded to in a transaction to which section 381(a) applies. M, as successor to L2, does not cease to be a member of the P loss subgroup.

(e) *Allocation of net unrealized built-in loss*—(1) *In general.* This paragraph (e) provides rules for the allocation of a loss group's (or loss subgroup's) net unrealized built-in loss if a member ceases to be a member of a loss group (or loss subgroup). This paragraph (e) applies if—

(i) A loss group (or loss subgroup) has a net unrealized built-in loss on a change date; and

(ii) Immediately after the close of the consolidated return year in which the departing member ceases to be a member, the amount of the loss group's (or loss subgroup's) excess of net unrealized built-in loss over recognized built-in loss, determined under section 382(h)(1)(B)(ii) (relating to a limitation on recognized built-in loss), is greater than zero. (The amount of such excess is referred to as the remaining NUBIL balance.) In applying section 382(h)(1)(B)(ii) for this purpose, net unrealized built-in loss allocated to departing members in prior consolidated return years is treated as recognized built-in loss in those years.

(2) *Amount of allocation*—(i) *In general.* The amount of net unrealized built-in loss allocated to a departing member is equal to the remaining NUBIL balance, multiplied by a fraction. The numerator of the fraction is the amount of the built-in loss, taken into account on the change date under §1.1502–91(g), in the assets held by the departing member immediately after the member ceases to be a member of the loss group (or loss subgroup). The denominator of the fraction is the sum of the numerator, plus the amount of the built-in loss, taken into account under §1.1502–91(g) on the change date, in the assets held by the loss group (or loss subgroup) immediately after the close of the taxable year in which the departing member ceases to be a member. (Fluctuations in value of the assets between the change date and the date that the member ceases to be a member of the group (or loss subgroup), or the close of the taxable year in which the member ceases to be a member of the loss group, are disregarded.) Because the amount of built-in loss on the change date with respect to a departing member's assets is taken into account (rather than that member's separately computed net unrealized built-in loss

on the change date), a departing member can be apportioned all or part of the loss group's net unrealized built-in loss, even if the departing member had a separately computed net unrealized built-in gain on the change date. Amounts taken into account under section 382(h)(6)(C) (relating to certain deduction items) are treated as if they were assets in determining the numerator and denominator of the fraction.

(ii) *Transferred basis property and deferred gain or loss.* For purposes of paragraph (b)(2)(i) of this section, assets held by the departing member immediately after it ceases to be a member of the group (or by other members immediately after the close of the taxable year) include—

(A) Assets held at that time that are transferred basis property that was held by any member of the group (or loss subgroup) on the change date; and

(B) Assets held at that time by any member of the consolidated group with respect to which gain or loss of the group member or loss subgroup member at issue has been deferred in an intercompany transaction and has not been taken into account.

(iii) *Assets for which gain or loss has been recognized.* For purposes of paragraph (b)(2)(i) of this section, assets held by the departing member immediately after it ceases to be a member of the group (or by other members immediately after the close of the taxable year) do not include assets with respect to which gain or loss has previously been recognized and taken into account during the recognition period (including gain or loss recognized in an intercompany transaction and taken into account immediately before the member leaves the group). Appropriate adjustments must be made if gain or loss on an asset has been only partially recognized and taken into account.

(iv) *Exchanged basis property.* The rules of §1.1502–91(h) apply for purposes of this paragraph (e) (disregarding stock received from the departing member or another member that is a member immediately after the close of the taxable year).

(v) *Two or more members depart during the same year.* If two or more members cease to be members during the same consolidated return year, appropriate adjustments must be made to the denominator of the fraction for each departing member by treating the other departing members as if they had not ceased to be members during that year and as if the assets held by those other departing members immediately after they cease to be members of the group (or loss subgroup) are assets held by the group immediately after the close of the taxable year.

(vi) *Anti-abuse rule.* If assets are transferred between members or a member ceases to be a member with a principal purpose of causing or affecting the allocation of amounts under this paragraph (e), appropriate adjustments must be made to eliminate any benefit of such acquisition, disposition, or allocation.

(3) *Effect of allocation on the consolidated group.* The amount of the net unrealized built-in loss that is allocated to the former member is treated as recognized built-in loss for a prior taxable year ending in the recognition period for purposes applying the limitation of section 382(h)(1)(B)(ii) to a loss group's (or loss subgroup's) recognition period taxable years beginning after the consolidated return year in which the former member ceases to be a member.

(4) *Effect on corporations to which the allocation is made.* For purposes of determining the amount of the former member's recognized built-in losses in any taxable year beginning after the former member ceases to be a member—

(i) The amount of the loss group's (or loss subgroup's) net unrealized built-in loss that is allocated to the former member is treated as if it were an amount of net unrealized built-in loss determined under section 382(h)(1)(B)(i)(without regard to the threshold of section 382(h)(3)(B)) with respect to such member or loss subgroup, and that amount is not reduced under section 382(h)(1)(B)(ii) by the loss group's (or loss subgroup's) recognized built-in losses;

(ii) The former member's 5 year recognition period begins on the loss group's (or loss subgroup's) change date;

(iii) In applying section 382(h)(1)(B)(ii), the former member takes into account only its prior taxable years that begin after it ceases to be a member of the loss group (or loss subgroup); and

(iv) The former member's recognized built-in loss on the disposition of an asset is determined under section 382(h)(2)(B), treating references to the change date in that section as references to the loss group's (or loss subgroup's) change date.

(5) *Subgroup principles.* If two or more former members are members of the same consolidated group (the second group) immediately after they cease to be members of the current group, the principles of paragraphs (e)(1), (2) and (4) of this section apply to those former members on an aggregate basis. Thus, for example, the amount of net unrealized built-in loss allocated to those members is based on the assets held by those members immediately after they cease to be members of the current group and the limitation of section 382(h)(1)(B)(ii) on recognized built-in losses is applied by taking into account the aggregate amount of net unrealized built-in loss allocated to the former members and the aggregate recognized losses of those members in taxable years beginning after they cease to be members of the current group. If one or more of such members cease to be members of the second group, the principles of this paragraph (e) are applied with respect to those members to allocate to them all or part of any remaining unrecognized amount of net unrealized built-in loss allocated to the members that became members of the second group.

(6) *Apportionment of consolidated section 382 limitation (or subgroup section 382 limitation)*—(i) *In general.* For rules relating to the apportionment of a consolidated section 382 limitation (or subgroup section 382 limitation) to a former member, see paragraph (c) of this section.

(ii) *Special rule for former members that become members of the same consolidated group.* If recognized built-in losses of one or more former members would be subject to a consolidated section 382 limitation (or subgroup section 382 limitation) if recognized immediately before the member (or members) cease to be members of the group, an apportionment of that limitation may be made, under paragraph (c) of this section, to a loss subgroup that includes such member (or members), and the recognized built-in losses (if any) of that member (or members) will be subject to that apportioned limitation. If two or more of such former members are not included in a loss subgroup immediately after they cease to be members of the group (for example, because they do not have net operating loss carryovers or, in the aggregate, a net unrealized built-in loss), but are members of the same consolidated group, an apportionment of the consolidated section 382 limitation (or subgroup section 382 limitation) may be made to them as if they were a loss subgroup.

(7) *Examples.* The following examples illustrate the principles of this paragraph (e):

Example 1. Basic allocation case. (i) P owns all of the stock of L1 and L2. On September 4, Year 1, A purchases all of the P stock, causing an ownership change of the P group. On that date P has two assets (other than the L1 and L2 stock), asset 1 with an adjusted basis of $40 and a fair market value of $15 and asset 2 with an adjusted basis of $50 and a fair market value of $100. L1 has two assets, asset 3 , with a fair market value of $50 and an adjusted basis of $100, and asset 4, with an adjusted basis of $125 and a fair market value of $75. L2 has two assets, asset 5, with a fair market value of $150 and an adjusted basis of $100, and asset 6, with an adjusted basis of $90 and a fair market value of $40. Thus, the P loss group has a net unrealized built-in loss of $75.

(ii) On March 19, Year 3, P sells all of the L2 stock to M. At that time, asset 5, which has appreciated in value, has a fair market value of $250 and an adjusted basis of $100. Asset 6, which has declined in value, has an adjusted basis of $90 and a fair market value of $10.

(iii) On April 8, Year 3, P sells asset 1, and has a recognized built-in loss of $25 that is subject to the P group's section 382 limitation. On November 11, Year 4, L2 sells asset 6 for its then fair market value, $10, recognizing a loss of $80. On June 3, Year 5, L1 sells asset 4, recognizing a loss of $50.

(iv) Immediately after the close of Year 3, the P loss group's remaining NUBIL balance is $50 ($75 net unrealized built-in loss reduced by the $25 recognized built-in loss of P). The portion of the remaining NUBIL balance that is allocated to L2 is $17 (rounded to the nearest dollar). Seventeen dollars is the product obtained by multiplying $50 (the remaining NUBIL balance) by $50/$150. The numerator of the fraction ($50) is the amount of built-in loss in asset 6, taken into account on the change date under §1.1502–91(g). The denominator ($150) is the sum of the numerator ($50) and the amount of built-in loss in assets 3 and 4, taken into account on the change date under §1.1502–91(g) ($100). The built-in loss in asset 1 is not included in the denominator of the fraction because it is not held by the P group immediately after the close of Year 3.

(v) Seventeen dollars of L2's $80 loss on the sale of asset 6 is a recognized built-in loss and subject to a section 382 limitation of zero, unless P apportions some or all of the P group's consolidated section 382 limitation to L2 (adjusted for a short taxable year, carryover of unused limitation, or any other adjustment required under section 382).

(vi) Thirty-three dollars of L1's $50 loss on the sale of asset 4 is subject to the P group's consolidated section 382 limitation, reduced by the amount of such limitation apportioned to L2, and adjusted for any short taxable year, a carryforward of unused limitation, or other adjustment. (In applying section 382(h)(1)(B)(ii) with respect to Year 5, the P group's net unrealized built-in loss is reduced by P's $25 recognized built-in loss in Year 3 and the $17 of net unrealized built-in loss allocated to L2, thus limiting the P group's recognized built-in loss in Year 5 to $33.)

Example 2. Two members depart in the same year. The facts are the same as in *Example 1*, except that P sells all of the stock of L1 to C on November 1, Year 3. The amount of net unrealized built-in loss apportioned to L2 (rounded to the nearest dollar) is $17 ($50 remaining NUBIL balance × $50/$150). The amount of net unrealized built-in loss apportioned to L1 (rounded to the nearest dollar) is $33 ($50 remaining NUBIL balance × $100/$150).

(8) *Reporting requirements*—(i) *Common Parent*. Except as provided in paragraph (e)(8)(iii) of this section, if a net unrealized built-in loss is allocated under paragraph (e) of this section, the common parent must include a statement entitled, ''STATEMENT OF NET UNREALIZED BUILT-IN LOSS ALLOCATION PURSUANT TO §1.1502–95(e),'' on or with its income tax return for the taxable year in which the former member(s) (or a new loss subgroup that includes that member) ceases to be a member. The statement must include—

(A) The name and employer identification number of the departing member;

(B) The amount of the remaining NUBIL balance for the taxable year in which the member departs;

(C) The amount of the net unrealized built-in loss allocated to the departing member; and

(D) A representation that the common parent has delivered a copy of the statement to the former member (or the common parent of the group of which the former member is a member) on or before the day the group files its income tax return for the consolidated return year that the former member ceases to be a member.

(ii) *Former member*. Except as provided in paragraph (e)(8)(iii) of this section, the former member must include a statement on or with its first income tax return (or the first return in which the former member joins) that is filed after the close of the consolidated return year of the group of which the former member (or a new loss subgroup that includes that member) ceases to be a member. The statement will be identical to the statement filed by the common parent under paragraph (e)(8)(i) of this section except that instead of including the information described in paragraph (e)(8)(i)(A) of this section the former member must provide the name, employer identification number and tax year of the former common parent, and instead of the representation described in paragraph (e)(8)(i)(D) of this section the former member must represent that it has received and retained the copy of the statement delivered by the common parent as part of its records. See §1.6001–1(e).

(iii) *Exception*. This paragraph (e)(8) does not apply if the required information (other than the amount of the remaining NUBIL balance) is included in a statement of election under paragraph (f) of this section (relating to apportioning a section 382 limitation).

(f) *Filing the election to apportion the section 382 limitation and net unrealized built-in gain*—(1) *Form of the election to apportion*—(i) *Statement*. An election under paragraph (c) of this section must be made in the form set forth in this paragraph (f)(1)(i). The election must be made by the common parent and the party described in paragraph (f)(2) of this section. It must be filed in accordance with paragraph (f)(3) of this section and be entitled, ''THIS IS AN ELECTION UNDER § 1.1502–95 TO APPORTION ALL OR PART OF THE [INSERT THE CONSOLIDATED SECTION 382 LIMITATION, THE SUBGROUP SECTION 382 LIMITATION, THE LOSS GROUP'S NET UNREALIZED BUILT-IN GAIN, OR THE LOSS SUBGROUP'S NET UNREALIZED BUILT-IN GAIN, AS APPROPRIATE] IN THE AMOUNT OF [INSERT THE AMOUNT OF THE LOSS LIMITATION OR NET UNREALIZED BUILT-IN GAIN] TO [INSERT NAME(S) AND EMPLOYER IDENTIFICATION NUMBER(S) OF THE CORPORATION (OR THE CORPORATIONS THAT COMPOSE A NEW LOSS SUBGROUP) TO WHICH ALLOCATION IS MADE].'' The statement must also indicate that an agreement, as described in paragraph (f)(1)(ii) of this section, has been entered into.

(ii) *Agreement*. Both the common parent and the party described in paragraph (f)(2) of this section must sign and date the agreement. The agreement must include, as appropriate—

(A) The date of the ownership change that resulted in the consolidated section 382 limitation (or subgroup section 382 limitation) or the loss group's (or loss subgroup's) net unrealized built-in gain;

(B) The amount of the departing member's (or loss subgroup's) pre-change net operating loss carryovers and the taxable years in which they arose that will be subject to the limitation that is being apportioned to that member (or loss subgroup);

(C) The amount of any net unrealized built-in loss allocated to the departing member (or loss subgroup) under paragraph (e) of this section, which, if recognized, can be a pre-change attribute subject to the limitation that is being apportioned;

(D) If a consolidated section 382 limitation (or subgroup section 382 limitation) is being apportioned, the amount of the consolidated section 382 limitation (or subgroup section 382 limitation) for the taxable year during which the former member (or new loss subgroup) ceases to be a member of the consolidated group (determined without regard to any apportionment under this section);

(E) If any net unrealized built-in gain is being apportioned, the amount of the loss group's (or loss subgroup's) net unrealized built-in gain (as determined under paragraph (c)(2)(ii) of this section) that may be apportioned to members that ceased to be members during the consolidated return year;

(F) The amount of the value element and adjustment element of the consolidated section 382 limitation (or subgroup section 382 limitation) that is apportioned to the former member (or new loss subgroup) pursuant to paragraph (c) of this section;

(G) The amount of the loss group's (or loss subgroup's) net unrealized built-in gain that is apportioned to the former member (or new loss subgroup) pursuant to paragraph (c) of this section;

(H) If the former member is allocated any net unrealized built-in loss under paragraph (e) of this section, the amount of any adjustment element apportioned to the former member that is attributable to recognized built-in gains (determined in a manner that will enable both the group and the former member to apply the principles of § 1.1502–93(c)); and

(*1*) The name and employer identification number of the common parent making the apportionment.

(2) *Signing the agreement*. The agreement must be signed by both the common parent and the former member (or, in the case of a loss subgroup, the common parent and the loss subgroup parent) by persons authorized to sign their respective income tax returns. If the allocation is made to a loss subgroup for which an election under § 1.1502–91(d)(4) is made, and not separately to its members, the agreement under this paragraph (f) must be signed by the common parent and any member of the new loss subgroup by persons authorized to sign their respective income tax returns. Each party signing the agreement must retain either the original or a copy of the agreement as part of its records. See § 1.6001–1(e).

(3) *Filing of the election*—(i) *Filing by the common parent*. The election must be filed by the common parent of the group that is apportioning the consolidated section 382 limitation (or the subgroup section 382 limitation) or the

loss group's net unrealized built-in gain (or loss subgroup's net unrealized built-in gain) by including the statement on or with its income tax return for the taxable year in which the former member (or new loss subgroup) ceases to be a member.

(ii) *Filing by the former member.* An identical statement must be included on or with the first return of the former member (or the first return in which the former member, or the members of a new loss subgroup, join) that is filed after the close of the consolidated return year of the group of which the former member (or the members of a new loss subgroup) ceases to be a member.

(4) *Revocation of election.* An election statement made under paragraph (c) of this section is revocable only with the consent of the Commissioner.

(g) *Effective/applicability date.* Paragraphs (e)(8) and (f) of this section apply to any original consolidated Federal income tax return due (without extensions) after June 14, 2007. For original consolidated Federal income tax returns due (without extensions) after May 30, 2006, and on or before June 14, 2007, see §1.1502–95T as contained in 26 CFR part 1 in effect on April 1, 2007. For original consolidated Federal income tax returns due (without extensions) on or before May 30, 2006, see §1.1502–95 as contained in 26 CFR part 1 in effect on April 1, 2006.

[T.D. 8824, 64 FR 36159, July 2, 1999, as amended by T.D. 9264, 71 FR 30604, 30608, May 30, 2006; T.D. 9329, 72 FR 32805, 32807, June 14, 2007; T.D. 9424, 73 FR 53985, Sept. 17, 2008]

§1.1502–96 Miscellaneous rules.

(a) *End of separate tracking of losses*—(1) *Application.* This paragraph (a) applies to a member (or a loss subgroup) with a net operating loss carryover that arose (or is treated under §1.1502–21(c) as arising) in a SRLY, or a member (or loss subgroup) with a net unrealized built-in loss determined at the time that the member (or loss subgroup) becomes a member of the consolidated group if there is—

(i) An ownership change of the member (or loss subgroup) within six months before, on, or after becoming a member of the group; or

(ii) A period of 5 consecutive years following the day that the member (or loss subgroup) becomes a member of a group during which the member (or loss subgroup) has not had an ownership change.

(2) *Effect of end of separate tracking*—(i) *Net operating loss carryovers.* If this paragraph (a) applies with respect to a member (or loss subgroup) with a net operating loss carryover, then, starting on the day after the earlier of the change date (but not earlier than the day the member (or loss subgroup) becomes a member of the consolidated group) or the last day of the 5 consecutive year period described in paragraph (a)(1)(ii) of this section, such loss carryover is treated as described in §1.1502–91(c)(1)(i). The preceding sentence also applies for purposes of determining whether there is an ownership change with respect to such loss carryover following such change date or 5 consecutive year period. Thus, for example, starting the day after the change date (but not earlier than the day the member (or loss subgroup) becomes a member of the consolidated group) or the end of the 5 consecutive year period—

(A) The consolidated group which includes the new loss member or loss subgroup is no longer required to separately track owner shifts of the stock of the new loss member or subgroup parent to determine if an ownership change occurs with respect to the loss carryover of the new loss member or members included in the loss subgroup;

(B) The group is a loss group because the member's loss carryover is treated as a loss described in §1.1502–91(c)(1)(i);

(C) There is an ownership change with respect to such loss carryover only if the group has an ownership change; and

(D) If the group has an ownership change, such loss carryover is a pre-change consolidated attribute subject to the loss group's consolidated section 382 limitation.

(ii) *Net unrealized built-in losses.* If this paragraph (a) applies with respect to a new loss member described in §1.1502–94(a)(1)(ii) (or a loss subgroup described in §1.1502–91(d)(2)) then, starting on the day after the earlier of the change date (but not earlier than the day the member (or loss subgroup) becomes a member of the group) or the last day of the 5 consecutive year period described in paragraph (a)(1)(ii) of this section, the member (or members of the loss subgroup) are treated, for purposes of applying §1.1502–91(g)(2)(ii), as if they have been affiliated with the common parent for 5 consecutive years. Starting on that day, the member's (or the members of the loss subgroup's) separately computed net unrealized built-in loss is included in the determination whether the group has a net unrealized built-in loss, and there is an ownership change with respect to the member's separately computed net unrealized built-in loss only if the group (including the member) has a net unrealized built-in loss and has an ownership change. Thus, for example, starting the day after the change date (but not earlier than the day the member (or loss subgroup) becomes a member of the consolidated group), or the end of the 5 consecutive period

(A) The consolidated group which includes the new loss member or loss subgroup is no longer required to separately track owner shifts of the stock of the new loss member or subgroup parent to determine if an ownership change occurs with respect to the net unrealized built-in loss of the new loss member or members of the loss subgroup;

(B) The group includes the member's (or the loss subgroup members') separately computed net unrealized built-in loss in determining whether it is a loss group under §1.1502–91(c)(1)(iii);

(C) There is an ownership change with respect to such net unrealized built-in loss only if the group is a loss group and has an ownership change; and

(D) If the group has an ownership change, the member's separately computed net unrealized built-in loss and its assets are taken into account in determining the group's pre-change consolidated attributes described in §1.1502–91(e)(1) (relating to recognized built-in losses) that are subject to the group's consolidated section 382 limitation.

(iii) *Common parent not common parent for five years.* If the common parent has become the common parent of an existing group within the previous 5-year period in a transaction described in §1.1502–75(d)(2)(ii) or (3), appropriate adjustments must be made in applying paragraphs (a)(2)(ii) and (3) of this section. In such a case, as the context requires, references to the common parent are to the former common parent.

(3) *Continuing effect of end of separate tracking*—(i) *In general.* As the context may require, a current group determines which of its members are included in a loss subgroup on any testing date by taking into account the application of this section in the former group. See the example in §1.1502–91(f)(2). For this purpose, corporations that are treated under paragraph (a)(2)(ii) of this section as having been affiliated with the common parent of the former group for 5 consecutive years are also treated as having been affiliated with any other members that have been (or are treated as having been) affiliated with the common parent. The corporations are treated as having been affiliated with such other members for the same period of time that those members have been (or are treated as having been) affiliated with the common parent. If two or more corporations become members of the group at the same time, but paragraph (a)(1) of this section does not apply to every such corporation, then immediately after the corporations become members of the group, the corporations to which paragraph (a)(1) of this section applied are treated as not having been previously affiliated, for purposes of applying this paragraph (a)(3), with the corporations to which paragraph (a)(2)(ii) of this section did not apply.

(ii) *Example.* The following example illustrates the principles of this paragraph (a)(3):

Example. (i) L has owned all the stock of L1 for three years. At the close of December 31, Year 1, the M group purchases all the L stock, and L and L1 become members of the M group. Other than the stock of L1, L has one asset (the L loss asset) with a net unrealized built-in loss of $200 on this date. L1 has one asset with a net unrealized built-in gain of $50 (the L1 gain asset). L and L1 do not compose a loss subgroup because they do not meet the five year affiliation requirement of §1.1502–91(d)(2)(i). L is a new loss member, and M's purchase of L causes an ownership change of L. At the close of December 31, Year 4, at a time when L1 has been affiliated with the M group for three years and has been affiliated with L for six years, the S group purchases all the M stock. On this date, the L loss asset has a net unrealized built-in loss of $300, the L1 gain asset has a net unrealized built-in gain of $80, and M, the common parent of the M group, has one asset with a net unrealized built-in gain of $200.

(ii) Paragraph (a)(1) of this section applies to L because L is a new loss member described in §1.1502–94(a)(1)(ii) that has an ownership change upon becoming a member of the M group on December 31, Year 1. Accordingly, L is treated as having been affiliated with M for 5 consecutive years, and the L loss asset with a net unrealized built-in loss of $300 is included in the determination whether the M group has a net unrealized built-in loss.

(iii) The S group determines which of its members are included in a loss subgroup by taking into account application of paragraph (a) of this section in the M group. For this purpose, application of paragraph (a) of this section causes L to be treated as having been affiliated with M (or as having been a member of the M group) for 5 consecutive years as of January 1, Year 2. Therefore, the S group includes L in the determination whether the M subgroup acquired by S on December 31, Year 4, has a net unrealized built-in loss.

(iv) Because paragraph (a)(1) of this section applied to L when L became a member of the M group, but did not apply to L1, L is treated as not having been affiliated with L1 before L and L1 joined the M group. Also, L1 is not included in the determination whether the M subgroup has a net unrealized built-in loss because L1 has not been continuously affiliated with members of the M group for the five consecutive year period ending immediately before they become members of the S group. See §1.1502–91(g)(2).

(4) *Special rule for testing period.* For purposes of determining the beginning of the testing period for a loss group, the member's (or loss subgroup's) net operating loss carryovers (or net unrealized built-in loss) described in paragraph (a)(2) of this section are considered to arise—

(i) In a case described in paragraph (a)(1)(i) of this section, in a taxable year that begins not earlier than the later of the day following the change date or the day that the member becomes a member of the group; and

(ii) In a case described in paragraph (a)(1)(ii) of this section, in a taxable year that begins 3 years before the end of the 5 consecutive year period.

(5) *Limits on effects of end of separate tracking.* The rule contained in this paragraph (a) applies solely for purposes of §§1.1502–91 through 1.1502–95 and this section (other than paragraph (b)(2)(ii)(B) of this section (relating to the definition of pre-change attributes of a subsidiary)) and §1.1502–98, and not for purposes of other provisions of the consolidated return regulations. However, the rule contained in this paragraph (a) does apply in §§1.1502–15(g), 1.1502–21(g) and 1.1502–22(g) for purposes of determining the composition of loss subgroups defined in §1.1502–91(d). See also paragraph (c) of this section for the continuing effect of an ownership change with respect to pre-change attributes.

(b) *Ownership change of subsidiary*—(1) *Ownership change of a subsidiary because of options or plan or arrangement.* Notwithstanding §1.1502–92, a subsidiary may have an ownership change for purposes of section 382 with respect to its attributes which a group or loss subgroup includes in making a determination under §1.1502–91(c)(1) (relating to the definition of loss group) or §1.1502–91(d) (relating to the definition of loss subgroup). The subsidiary has such an ownership change if it has an ownership change under the principles of §1.1502–95(b) and section 382 and the regulations thereunder (determined on a separate entity basis by treating the subsidiary as not being a member of a consolidated group) in the event of—

(i) The deemed exercise under §1.382–4(d) of an option or options (other than an option with respect to stock of the common parent) held by a person (or persons acting pursuant to a plan or arrangement) to acquire more than 20 percent of the stock of the subsidiary; or

(ii) An increase by 1 or more 5-percent shareholders, acting pursuant to a plan or arrangement to avoid an ownership change of a subsidiary, in their percentage ownership interest in the subsidiary by more than 50 percentage points during the testing period of the subsidiary through the acquisition (or deemed acquisition pursuant to §1.382–4(d)) of ownership interests in the subsidiary and in higher-tier members with respect to the subsidiary.

(2) *Effect of the ownership change*—(i) *In general.* If a subsidiary has an ownership change under paragraph (b)(1) of this section, the amount of consolidated taxable income for any post-change year that may be offset by the pre-change losses of the subsidiary shall not exceed the section 382 limitation for the subsidiary. For purposes of this limitation, the value of the subsidiary is determined solely by reference to the value of the subsidiary's stock.

(ii) *Pre-change losses.* The pre-change losses of a subsidiary are—

(A) Its allocable part of any consolidated net operating loss which is attributable to it under §1.1502–21(b) (determined on the last day of the consolidated return year that includes the change date) that is not carried back and absorbed in a taxable year prior to the year including the change date;

(B) Its net operating loss carryovers that arose (or are treated under §1.1502–21(c) as having arisen) in a SRLY; and

(C) Its recognized built-in loss with respect to its separately computed net unrealized built-in loss, if any, determined on the change date.

(3) *Coordination with §§1.1502–91, 1.1502–92, and 1.1502–94.* If an increase in percentage ownership interest causes an ownership change with respect to an attribute under this paragraph (b) and under §1.1502–92 on the same day, the ownership change is considered to occur only under §1.1502–92 and not under this paragraph (b). See §1.1502–94 for anti-duplication rules relating to value.

(4) *Example.* The following example illustrates paragraph (b)(1)(ii) of this section:

Example. Plan to avoid an ownership change of a subsidiary. (i) L owns all the stock of L1, L1 owns all the stock of L2, L2 owns all the stock of L3, and L3 owns all the stock of L4. The L group has a consolidated net operating loss arising in Year 1 that is carried over to Year 2. L has assets other than its L1 stock with a value of $900. L1, L2, and L3 own no assets other than their L2, L3, and L4 stock. L4 has assets with a value of $100. During Year 2, A, B, C, and D, acting pursuant to a plan to avoid an ownership change of L4, acquire the following ownership interests in the members of the L loss group: (A) on September 11, Year 2, A acquires 20 percent of the L1 stock from L and B acquires 20 percent of the L2 stock from L1; and (B) on September 20, Year 2, C acquires 20 percent of the stock of L3 from L2 and D acquires 20 percent of the stock of L4 from L3.

(ii) The acquisitions by A, B, C, and D pursuant to the plan have increased their respective percentage ownership interests in L4 by approximately 10, 13, 16, and 20 percentage points, for a total of approximately 59 percentage points during the testing period. This more than 50 percentage point increase in the percentage ownership interest in L4 causes an ownership change of L4 under paragraph (b)(2) of this section.

(c) *Continuing effect of an ownership change.* A loss corporation (or loss subgroup) that is subject to a limitation under section 382 with respect to its pre-change losses continues to be subject to the limitation regardless of whether it becomes a member or ceases to be a member of a consolidated group. See §1.382–5(d) (relating to successive ownership changes and absorption of a section 382 limitation).

(d) *Losses reattributed under §1.1502–36(d)(6)*—(1) *In general.* This paragraph (d) contains rules relating to net operating carryovers, capital loss carryovers, and deferred deductions (collectively, loss or losses) that are reattributed to the common parent under §1.1502–36(d)(6). References in this paragraph (d) to a subsidiary are references to the subsidiary (or lower-tier subsidiary) whose loss is reattributed to the common parent.

(2) *Deemed section 381(a) transaction.* Under §1.1502–36(d)(6)(iv)(A), the common parent succeeds to the reattributed losses as if the losses were succeeded to in a transaction to which section 381(a) applies. In general, §§1.1502–91 through 1.1502–95, this section, and §1.1502–98 are applied to the reattributed losses in accordance with that characterization. See generally, §1.382–2(a)(1)(ii) (relating to distributor or transferor loss corporations in transactions under section 381), §1.1502–1(f)(4) (relating to the definition of predecessor and successor) and §1.1502–91(j) (relating to predecessor and successor corporations). For example, if the reattributed loss is a pre-change attribute subject to a section 382 limitation, it remains subject to that limitation following the reattribution. In certain cases, the limitation applicable

to the reattributed loss is zero unless the common parent apportions all or part of the limitation to itself. (See paragraph (d)(4) of this section.)

(3) *Rules relating to owner shifts*—(i) *In general*. Any owner shift of the subsidiary (including any deemed owner shift resulting from section 382(g)(4)(D) or 382(l)(3)) in connection with the disposition of the stock of the subsidiary is not taken into account in determining whether there is an ownership change with respect to the reattributed loss. However, any owner shift with respect to the successor corporation that is treated as continuing in existence under §1.382–2(a)(1)(ii) must be taken into account for such purpose if such owner shift is effected by the reattribution and an owner shift of the stock of the subsidiary not held directly or indirectly by the common parent would have been taken into account if such shift had occurred immediately before the reattribution. See paragraph (d)(3)(ii) *Example 2* of this section.

(ii) *Examples*. The following examples illustrate the principles of this paragraph (d)(3):

Example 1. No owner shift for reattributed loss. (i) *Facts*. P, the common parent of a consolidated group, owns 60% of the stock of L, and B owns the remaining 40%. L has a net operating loss carryover of $100 from year 1 that it carries over to years 2, 3, and 4. At the beginning of year 2, P purchases 40% of the L stock from B, which does not cause an ownership change of L. On December 31, year 3, P sells all of the L stock to M. Pursuant to §1.1502–36(d)(6), P reattributes $10 of L's $100 net operating loss carryover to itself, and L carries $90 of its net operating loss carryover to its year 4.

(ii) *Analysis*. The sale of the L stock to M does not cause an owner shift that is taken into account in determining if there is an ownership change with respect to the $10 reattributed loss. Following the reattribution, §1.1502–94(b) continues to apply to determine if there is an ownership change with respect to the $10 reattributed loss, until, under paragraph (a) of this section, the loss is treated as described in §1.1502–91(c)(1)(i). In applying §1.1502–94(b), the 40 percentage point increase by the P shareholders prior to the reattribution is taken into account. The sale of the L stock to M does cause an ownership change of L with respect to the $90 of its net operating loss that it carries over to year 4.

Example 2. Owner shift for reattributed loss. The facts are the same as in *Example 1*, except that P only purchases 20% of the L stock from B and sells 80% of the L stock to M. L is a new loss member, and, under §1.1502–94(b)(1), an owner shift of the stock of L not held directly or indirectly by the common parent (the 20% of L stock still held by B) would have been taken into account if such shift had occurred immediately before the reattribution. Following the reattribution, §1.1502–94(b) continues to apply to determine if there is an ownership change with respect to the $10 reattributed loss, until, under paragraph (a) of this section, the loss is treated as described in §1.1502–91(c)(1)(i). With respect to the $10 reattributed loss, the P shareholders have increased their percentage ownership interest by 40 percentage points. The P shareholders have increased their ownership interests by 20 percentage points as a result of P's purchase of stock from B, and, under §1.382–2(a)(1)(ii), are treated as increasing their interests by an additional 20 percentage points as a result of the reattribution. (The acquisition of the L stock by M does not, however, effect an owner shift for the $10 of reattributed loss.) The sale of the L stock to M causes an ownership change of L with respect to the $90 of net operating loss that L carries over to Year 4.

(4) *Rules relating to the section 382 limitation*—(i) *Reattributed loss is a pre-change separate attribute of a new loss member*. If the reattributed loss is a pre-change separate attribute of a new loss member that is subject to a separate section 382 limitation prior to the disposition of subsidiary stock, the common parent's limitation with respect to that loss is zero, except to the extent that the common parent apportions to itself, under paragraph (d)(5) of this section, all or part of such limitation. A separate section 382 limitation is the limitation described in §1.1502–94(b) that applies to a pre-change separate attribute.

(ii) *Reattributed loss is a pre-change subgroup attribute*. If the reattributed loss is a pre-change subgroup attribute subject to a subgroup section 382 limitation prior to the disposition of subsidiary stock, and, immediately after the reattribution, the common parent is not a member of the loss subgroup, the section 382 limitation with respect to that loss is zero, except to the extent that the common parent apportions to itself, under paragraph (d)(5) of this section, all or part of the subgroup section 382 limitation. See, however,

§ 1.1502–95(d)(3) *Example 6*, for an illustration of a case where the common parent, as successor to the subsidiary, is a member of the loss subgroup immediately after the reattribution.

(iii) *Potential application of section 382(l)(1)*. In general, the value of the stock of the common parent is used to determine the section 382 limitation for an ownership change with respect to the reattributed loss that occurs at the time of, or after, the reattribution. For example, if the loss is a pre-change consolidated attribute, the value of the stock of the common parent is used to determine the section 382 limitation, and no adjustment to that value is required because of the deemed section 381(a) transaction. However, if the loss is a pre-change separate attribute of a new loss member (or is a pre-change attribute of a loss subgroup member and the common parent was not the loss subgroup parent immediately before the reattribution), the deemed section 381(a) transaction is considered to constitute a capital contribution with respect to the new loss member (or loss subgroup member) for purposes of section 382(l)(1). Accordingly, if that section applies because the deemed capital contribution is (or is considered under section 382(l)(1)(B) to be) part of a plan described in section 382(l)(1)(A), the value of the stock of the common parent after the deemed section 381(a) transaction must be adjusted to reflect the capital contribution. Ordinarily, this will require the value of the stock of the common parent to be reduced to an amount that represents the value of the stock of the subsidiary (or loss subgroup of which the subsidiary was a member) when the reattribution occurred.

(iv) *Duplication or omission of value*. In determining any section 382 limitation with respect to the reattributed loss and with respect to other pre-change losses, appropriate adjustments must be made so that value is not improperly omitted or duplicated as a result of the reattribution. For example, if the subsidiary has an ownership change upon its departure, and the common parent (as successor) has an ownership change with respect to the reattributed pre-change separate attribute upon its reattribution under paragraph (d)(3)(i) of this section, proper adjustments must be made so that the value of the subsidiary is not taken into account more than once in determining the section 382 limitation for the reattributed loss and the loss that is not reattributed.

(v) *Special rule for continuity of business requirement*. If the reattributed loss is a pre-change attribute of new loss member and the reattribution occurs within the two-year period beginning on the change date, then, starting immediately after the reattribution, the continuity of business requirement of section 382(c)(1) is applied with respect to the business enterprise of the common parent. Similar principles apply if the reattributed loss is a pre-change subgroup attribute and, on the day after the reattribution, the common parent is not a member of the loss subgroup.

(5) *Election to reattribute section 382 limitation*—(i) *Effect of election*. The common parent may elect to apportion to itself all or part of any separate section 382 limitation or subgroup section 382 limitation to which the loss is subject immediately before the reattribution. However, no net unrealized built-in gain of the member (or loss subgroup) whose loss is reattributed can be apportioned to the common parent. The principles of § 1.1502–95(c) apply to the apportionment, treating, as the context requires, references to the former member as references to the common parent, and references to the consolidated section 382 limitation as references to the separate section 382 limitation (or subgroup section 382 limitation) that is being apportioned. Thus, for example, the common parent can reattribute to itself all or part of the value element or adjustment element of the limitation, and any part of such element that is apportioned requires a corresponding reduction in such element of the separate section 382 limitation of the subsidiary whose loss is reattributed (or in the subgroup section 382 limitation if the reattributed loss is a pre-change subgroup attribute). Appropriate adjustments must be made to the separate section 382 limitation (or subgroup section 382 limitation) for the consolidated return year in which the reattribution is made

to reflect that the reattributed loss is an attribute acquired by the common parent during the year in a transaction to which section 381(a) applies. The election is made by the common parent as part of the election to reattribute the loss. See §1.1502–36(e)(5)(x) for the time and manner of making the election.

(ii) *Examples*. The following examples illustrate the principles of this paragraph (d)(5):

Example 1. Consequence of apportionment. (i) Facts. P, the common parent of a consolidated group, purchases all of the stock of L on December 31, year 1. L carries over a net operating loss arising in year 1 to each of the next 5 taxable years. The purchase of the L stock causes an ownership change of L, and results in a separate section 382 limitation of $10 for L's net operating loss carryover based on the value of the L stock. On July 2, year 3, P sells 30% of the L stock to A. Under §1.1502–36(d)(6), P elects to reattribute to itself $110 of L's $200 net operating loss carryover. P also elects to apportion to itself $6 of the $10 value element of the separate section 382 limitation.

(ii) *Analysis*. (A) *P's separate section 382 limitation*. For the consolidated return years ending after December 31, year 3, P's separate section 382 limitation with respect to the reattributed net operating loss carryover is $6, adjusted as appropriate for any short taxable year, unused section 382 limitation, or other adjustment. For the P group's consolidated return year ending December 31, year 3, the separate section 382 limitation for L's net operating loss carryover is $8, the sum of $5 and $3. Five dollars of the limitation is the amount that bears the same relationship to $10 as the number of days in the period ending with the deemed section 381(a) transaction, 183 days, bears to 365. Three dollars of the limitation is the amount that bears the same relationship to $6 as the number of days in the period between July 3 and December 31, 182, bears to 365.

(B) *L's separate section 382 limitation*. For L's taxable years ending after December 31, year 3, L's separate section 382 limitation for its $90 of net operating loss carryover that was not reattributed to P is $4, adjusted as appropriate for any short taxable year, unused section 382 limitation, or other adjustment. For L's short taxable year ending December 31, year 3, the section 382 limitation for its $90 of net operating loss carryover is $2, the amount that bears the same relationship to $4 (the portion of the value element that was not apportioned to P), as the number of days during the short taxable year, 182 days, bears to 365. See §1.382–5(c).

Example 2. No apportionment required for consolidated pre-change attribute. (i) *Facts*. P, the common parent of a consolidated group, forms L. For year 1, L has an operating loss of $70 that is not absorbed and is included in the group's consolidated net operating loss that is carried over to subsequent years. On January 1 of year 3, A buys all of the P stock and the P group has an ownership change. The consolidated section 382 limitation based on the value of the P stock is $10.

(ii) *Analysis*. On April 13 of year 4, P sells all of the stock of L to B and, under §1.1502–36(d)(6), elects to reattribute to itself $45 of L's net operating loss carryover. Following the reattribution, the $45 portion of the year 1 net operating loss carryover retains its character as a pre-change consolidated attribute, and remains subject to so much of the $10 consolidated section 382 limitation as P does not elect to apportion to L under §1.1502–95(c).

(e) *Time and manner of making election under §1.1502–91(d)(4)*—(1) *In general*. This paragraph (e) prescribes the time and manner of making the election under §1.1502–91(d)(4), relating to treating two or more corporations as treating the section 1504(a)(1) requirement of §1.1502–91(d)(1)(ii) and (d)(2)(ii) as satisfied.

(2) *Election statement*. An election under §1.1502–91(d)(4) must be made by the common parent. The election must be made in the form of the following statement: "THIS IS AN ELECTION UNDER §1.1502–91(d)(4) TO TREAT THE FOLLOWING CORPORATIONS AS MEETING THE REQUIREMENTS OF §1.1502–91 (d)(1)(ii) AND (d)(2)(ii) IMMEDIATELY AFTER THEY BECAME MEMBERS OF THE GROUP." [List separately the name of each corporation, its E.I.N., and the date that it became a member of the group]. If separate elections are being made for corporations that became members at different times or that were acquired from different affiliated groups, provide a separate statement and list for each election.

(3) The election statement must be filed by the common parent with its income tax return for the consolidated return year in which the members with respect to which the election is made become members of the group. Such election must be filed on or before the due date for such income tax return, including extensions.

(4) An election made under this paragraph (e) is irrevocable.

[T.D. 8824, 64 FR 36170, July 2, 1999, as amended by T.D. 9424, 73 FR 53985, Sept. 17, 2008]

§ 1.1502–97 Special rules under section 382 for members under the jurisdiction of a court in a title 11 or similar case. [Reserved]

§ 1.1502–98 Coordination with section 383.

The rules contained in §§ 1.1502–91 through 1.1502–96 also apply for purposes of section 383, with appropriate adjustments to reflect that section 383 applies to credits and net capital losses. For example, subgroups with respect to the carryover of general business credits, minimum tax credits, unused foreign tax, and net capital loss are determined by applying the principles of § 1.1502–91(d)(1). Similarly, in the case of net capital losses, general business credits, and excess foreign taxes that are pre-change attributes, § 1.383–1 applies the principles of §§ 1.1502–91 through 1.1502–96. For example, if a loss group has an ownership change under § 1.1502–92 and has a carryover of unused general business credits from a pre-change consolidated return year to a post-change consolidated return year, the amount of the group's regular tax liability for the post-change year that can be offset by the carryover cannot exceed the consolidated section 383 credit limitation for that post-change year, determined by applying the principles of §§ 1.383–1(c)(6) and 1.1502–93 (relating to the computation of the consolidated section 382 limitation).

[T.D. 8824, 64 FR 36174, July 2, 1999, as amended by T.D. 8884, 65 FR 33760, May 25, 2000]

§ 1.1502–99 Effective/applicability dates.

(a) *In general.* Except as provided in paragraphs (b) and (c) of this section, §§ 1.1502–91 through 1.1502–96 and § 1.1502–98 apply to any testing date on or after June 25, 1999. Sections 1.1502–94 through 1.1502–96 also apply to a corporation that becomes a member of a group or ceases to be a member of a group (or loss subgroup) on any date on or after June 25, 1999.

(b) *Special rules*—(1) *Election to treat subgroup parent requirement as satisfied.* Section 1.1502–91(d)(4), § 1.1502–91(d)(7), Example 4, § 1.1502–92(b)(1)(iii), § 1.1502–92(b)(2), Example 5, the last two sentences of § 1.1502–95(b)(3), § 1.1502–95(d)(2)(i), and § 1.1502–96(e)(all of which relate to the election under § 1.1502–91(d)(4) to treat the loss subgroup parent requirement as satisfied) apply to corporations that become members of a consolidated group in taxable years for which the due date of the income tax return (without extensions) is after June 25, 1999.

(2) *Principal purpose of avoiding a limitation.* The third sentence of § 1.1502–91(d)(5) (relating to members excluded from a loss subgroup) applies to corporations that become members of a consolidated group on or after June 25, 1999.

(3) *Ceasing to be a member of a loss subgroup*—(i) *Ownership change of a loss subgroup.* Section 1.1502–95(d)(2)(ii) and § 1.1502–95(d)(3), Example 3 apply to corporations that cease to bear a relationship described in section 1504(a)(1) to a loss subgroup parent in taxable years for which the due date of the income tax return (without extensions) is after June 25, 1999.

(ii) *Expiration of 5-year period.* Section 1.1502–95(d)(2)(iii) applies with respect to the day after the last day of any 5 consecutive year period described in that section that ends in a taxable year for which the due date of the income tax return (without extensions) is after June 25, 1999.

(4) *Reattribution of losses under § 1.1502–36(d)(6).* Section 1.1502–96(d) applies to reattributions of net operating loss carryovers, capital loss carryovers, and deferred deductions in connection with a transfer of stock to which § 1.1502–36 applies, and the election under § 1.1502–96(d)(5) (relating to an election to reattribute section 382 limitation) can be made with an election under § 1.1502–36(d)(6) to reattribute a loss to the common parent that is filed at the time and in the manner provided in § 1.1502–36(e)(5)(x).

(5) *Election to apportion net unrealized built-in gain.* In the case of corporations that cease to be members of a loss group (or loss subgroup) before June 25, 1999 in a taxable year for which the due

date of the income tax return (without extensions) is after June 25, 1999, §1.1502–95(a), (b), (c), and (f) apply to those corporations if the common parent makes the election described in the second sentence of paragraph (c)(1) of §1.1502–95 in the time and manner prescribed in paragraph (f) of §1.1502–95.

(c) *Testing period may include a period beginning before June 25, 1999*—

(1) *In general.* A testing period for purposes of §§1.1502–91 through 1.1502–96 and 1.1502–98 may include a period beginning before June 25, 1999. Thus, for example, in applying §1.1502–92(b)(1)(i)(relating to the determination of an ownership change of a loss group), the determination of the lowest percentage of ownership interest of any 5-percent shareholder of the common parent during a testing period ending on a testing date occurring on or after June 25, 1999 takes into account the period beginning before June 25, 1999, except to the extent that the period is more than 3 years before the testing date or is otherwise before the beginning of the testing period. See §1.1502–92(b)(1).

(2) *Transition rule for net unrealized built-in loss.* A loss group (or loss subgroup) that has a net unrealized built-in loss on a testing date on or after June 25, 1999 may apply §1.1502–91A(g) (and §1.1502–96A(a) as it relates to §1.1502–91A(g)) for the period ending on the day before June 25, 1999 to determine under §1.382–2T(d)(ii)(A) the earliest date that its testing period begins (treating the day before June 25, 1999 as the end of a taxable year.) Thus, for example, if a consolidated group with no net operating losses has a net unrealized built-in loss determined under §1.1502–91(g) on a testing date after June 25, 1999, but, under §1.1502–91A(g), does not have a net unrealized built-in loss for the period ending on the day before June 25, 1999, the group's testing period begins no earlier than June 25, 1999.

[T.D. 8824, 64 FR 36174, July 2, 1999, as amended by T.D. 9424, 73 FR 53986, Sept. 17, 2008]

§1.1502–100 Corporations exempt from tax.

(a) *In general*—(1) *Computation of tax liability.* The tax liability for a consolidated return year of a group of two or more corporations described in section 1504(e) which are exempt from taxation under section 501 (hereinafter referred to in this section as ''exempt group'') shall be determined on a consolidated basis by applying the provisions of subchapter F of chapter 1 of the code in the manner provided in this section. See section 1504(e) for tax-exempt corporations eligible to file a consolidated return.

(2) *Applicability of other consolidated return provisions.* The provisions of §1.1502–1 through §1.1502–80 shall be applicable to an exempt group to the extent they are not inconsistent with the provisions of this section or the provisions of subchapter F of chapter 1 of the Code. For purposes of applying the provisions of §1.1502–1 through §1.1502–80 to an exempt group, the following substitutions shall be made:

(i) The term ''exempt group'' shall be substituted for the term ''group'',

(ii) The terms ''unrelated business taxable income'', ''separate unrelated business taxable income'', and ''consolidated unrelated business taxable income'' shall be substituted for the terms ''taxable income'', ''separate taxable income'', and ''consolidated taxable income'', and

(iii) The term ''consolidated liability for tax determined under §1.1502–2'' (or an equivalent term) shall mean the consolidated liability for tax of an exempt group determined under paragraph (b) of this section.

(b) *Consolidated liability for tax.* The tax liability for a consolidated return year of an exempt group is the tax imposed by section 511(a) or section 1201(a) on the consolidated unrelated business taxable income for the year (determined under paragraph (c) of this section), and by allowing the credits and surtax exemption provided in §1.1502–2.

(c) *Consolidated unrelated business taxable income.* The consolidated unrelated business taxable income for a consolidated return year shall be determined by taking into account:

(1) The separate unrelated business taxable income of each member of the exempt group (determined under paragraph (d) of this section);

(2) Any consolidated net operating loss deduction (determined under

§ 1.1502–21A or 1.1502–21 (as appropriate) subject to the limitations provided in section 512(b)(6);

(3) Any consolidated charitable contribution deduction (determined under § 1.1502–24) subject to the limitations provided in section 512(b)(10); and

(4) Any consolidated net gain or net loss from the disposition of debt-financed property (as defined in section 514(b)) taken into account as provided by section 514(a), or from the cutting of timber to which section 631 applies.

(d) *Separate unrelated business taxable income.* The separate unrelated business taxable income of a member of an exempt group shall be computed in accordance with the provisions of section 512 covering the determination of unrelated business taxable income of separate corporations, except that:

(1) The provisions of paragraphs (a) through (k) and (o) of § 1.1502–12 shall apply; and

(2) No charitable contributions deduction shall be taken into account under section 512(b)(10).

See sections 511(c) and 512(a)(3)(C) for special rules applicable to organizations described in section 501(c)(2).

[T.D. 7595, 44 FR 10382, Feb. 20, 1979, as amended by T.D. 8677, 61 FR 33325, June 27, 1996; T.D. 8823, 64 FR 36101, July 2, 1999]

§ 1.1503–1 Computation and payment of tax.

(a) *General rule.* In any case in which a consolidated return is filed or required to be filed, the tax shall be determined, computed, assessed, collected, and adjusted in accordance with the regulations prescribed under section 1502 promulgated prior to the last date prescribed by law for the filing of such return.

(b) *Limitation.* If the affiliated group includes one or more Western Hemisphere trade corporations (as defined in section 921) or one or more regulated public utilities (as defined in section 1503 (c)), the increase in tax described in section 1503 (a) shall be applied in a manner provided in the regulations under section 1502.

[T.D. 6500, 25 FR 12105, Nov. 26, 1960, as amended by T.D. 7244, 37 FR 28897, Dec. 30, 1972]

§ 1.1503–2 Dual consolidated loss.

(a) *Purpose and scope.* This section provides rules for the application of section 1503(d), concerning the determination and use of dual consolidated losses. Paragraph (b) of this section provides a general rule prohibiting a dual consolidated loss from offsetting the taxable income of a domestic affiliate. Paragraph (c) of this section provides definitions of the terms used in this section. Paragraph (d) of this section provides rules for calculating the amount of a dual consolidated loss and for adjusting the basis of stock of a dual resident corporation. Paragraph (e) of this section contains an anti-avoidance provision. Paragraph (f) of this section applies the rules of paragraph (d) of this section to the computation of foreign tax credit limitations. Paragraph (g) of this section provides certain exceptions to the limitation rule of paragraph (b) of this section. Finally, paragraph (h) of this section provides the effective date of the regulations and a provision for the retroactive application of the regulations to qualifying taxpayers.

(b) *In general*—(1) *Limitation on the use of a dual consolidated loss to offset income of a domestic affiliate.* Except as otherwise provided in this section, a dual consolidated loss of a dual resident corporation cannot offset the taxable income of any domestic affiliate in the taxable year in which the loss is recognized or in any other taxable year, regardless of whether the loss offsets income of another person under the income tax laws of a foreign country and regardless of whether the income that the loss may offset in the foreign country is, has been, or will be subject to tax in the United States. Pursuant to paragraph (c) (1) and (2) of this section, the same limitation shall apply to a dual consolidated loss of a separate unit of a domestic corporation as if the separate unit were a wholly owned subsidiary of such corporation.

(2) *Limitation on the use of a dual consolidated loss to offset income of a successor-in-interest.* A dual consolidated loss of a dual resident corporation also cannot be used to offset the taxable income of another corporation by means of a transaction in which the other corporation succeeds to the tax attributes

of the dual resident corporation under section 381 of the Code. Similarly, a dual consolidated loss of a separate unit of a domestic corporation cannot be used to offset income of the domestic corporation following the termination, liquidation, sale, or other disposition of the separate unit. However, if a dual resident corporation transfers its assets to another corporation in a transaction subject to section 381, and the acquiring corporation is a dual resident corporation of the same foreign country of which the transferor dual resident corporation is a resident, or a domestic corporation that carries on the business activities of the transferor dual resident corporation as a separate unit, then income generated by the transferee dual resident corporation, or separate unit, may be offset by the carryover losses of the transferor dual resident corporation. In addition, if a domestic corporation transfers a separate unit to another domestic corporation in a transaction subject to section 381, the income generated by the separate unit following the transfer may be offset by the carryover losses of the separate unit.

(3) *Application of rules to multiple tiers of separate units.* If a separate unit of a domestic corporation is owned indirectly through another separate unit, the principles of paragraph (b) (1) and (2) of this section shall apply as if the upper-tier separate unit were a subsidiary of the domestic corporation and the lower-tier separate unit were a lower-tier subsidiary.

(4) *Examples.* The following examples illustrate the application of this paragraph (b).

Example 1. P, a domestic corporation, owns all of the outstanding stock of DRC, a domestic corporation. P and DRC file a consolidated U.S. income tax return. DRC is managed and controlled in Country W, a country that determines the tax residence of corporations according to their place of management and control. Therefore, DRC is a dual resident corporation and any net operating loss it incurs is a dual consolidated loss. In Years 1 through 3, DRC incurs dual consolidated losses. Under this paragraph (b), the dual consolidated losses may not be used to offset P's income on the group's consolidated U.S. income tax return. At the end of Year 3, DRC sells all of its assets and discontinues its business operations. DRC is then liquidated into P, pursuant to the provisions of section 332. Normally, under section 381, P would succeed to, and be permitted to utilize, DRC's net operating loss carryovers. However, this paragraph (b) prohibits the dual consolidated losses of DRC from reducing P's income for U.S. tax purposes. Therefore, DRC's net operating loss carryovers will not be available to offset P's income.

Example 2. The facts are the same as in *Example 1,* except that DRC does not sell its assets and, following the liquidation of DRC, P continues to operate DRC's business as a separate unit (e.g., a branch). DRC's loss carryovers are available to offset P's income generated by the assets previously owned by DRC and now held by the separate unit.

(c) *Definitions.* The following definitions shall apply for purposes of this section.

(1) *Domestic corporation.* The term ''domestic corporation'' has the meaning assigned to it by section 7701(a) (3) and (4). The term also includes any corporation otherwise treated as a domestic corporation by the Code, including, but not limited to, sections 269B, 953(d), and 1504 (d). For purposes of this section, any separate unit of a domestic corporation, as defined in paragraph (c) (3) and (4) of this section, shall be treated as a separate domestic corporation.

(2) *Dual resident corporation.* A dual resident corporation is a domestic corporation that is subject to the income tax of a foreign country on its worldwide income or on a residence basis. A corporation is taxed on a residence basis if it is taxed as a resident under the laws of the foreign country. An S corporation, as defined in section 1361, is not a dual resident corporation. For purposes of this section, any separate unit of a domestic corporation, as defined in paragraph (c) (3) and (4) of this section, shall be treated as a dual resident corporation. Unless otherwise indicated, any reference in this section to a dual resident corporation refers also to a separate unit.

(3) *Separate unit*—(i) The term ''separate unit'' shall mean any of the following:

(A) A foreign branch, as defined in §1.367(a)-6T(g) (or a successor regulation), that is owned either directly by a domestic corporation or indirectly by a domestic corporation through ownership of a partnership or trust interest (regardless of whether the partnership or trust is a United States person);

(B) an interest in a partnership; or

(C) an interest in a trust.

(ii) If two or more foreign branches located in the same foreign country are owned by a single domestic corporation and the losses of each branch are made available to offset the income of the other branches under the tax laws of the foreign country, within the meaning of paragraph (c)(15)(ii) of this section, then the branches shall be treated as one separate unit.

(4) *Hybrid entity separate unit.* The term ''separate unit'' includes an interest in an entity that is not taxable as an association for U.S. income tax purposes but is subject to income tax in a foreign country as a corporation (or otherwise at the entity level) either on its worldwide income or on a residence basis.

(5) *Dual consolidated loss*—(i) *In general.* The term ''dual consolidated loss'' means the net operating loss (as defined in section 172(c) and the regulations thereunder) of a domestic corporation incurred in a year in which the corporation is dual resident corporation. The dual consolidated loss shall be computed under paragraph (d)(1) of this section. The fact that a particular item taken into account in computing a dual resident corporation's net operating loss is not taken into account in computing income subject to a foreign country's income tax shall not cause such item to be excluded from the calculation of the dual consolidated loss.

(ii) *Exceptions.* A dual consolidated loss shall not include the following—

(A) A net operating loss incurred by a dual resident corporation in a foreign country whose income tax laws—

(*1*) Do not permit the dual resident corporation to use its losses, expenses or deductions to offset the income of any other person that is recognized in the same taxable year in which the losses, expenses or deductions are incurred; and

(*2*) Do not permit the losses, expenses or deductions of the dual resident corporation to be carried over or back to be used, by any means, to offset the income of any other person in other taxable years; or

(B) A net operating loss incurred during that portion of the taxable year prior to the date on which the domestic corporation becomes a dual resident corporation or subsequent to the date on which the domestic corporation ceases to be a dual resident corporation. For purposes of determining the amount of the net operating loss incurred in that portion of the taxable year prior to the date on which the domestic corporation becomes a dual resident corporation or subsequent to the date on which the domestic corporation ceases to be a dual resident corporation, in no event shall more than the aggregate of the equal daily portion of the net operating loss commensurate with the portion of the taxable year during which the domestic corporation was not a dual resident corporation be allocated to that portion of the taxable year in which the domestic corporation was not a dual resident corporation.

(iii) *Dual consolidated losses of separate units that are partnership interests, including interests in hybrid entities.* [Reserved]

(6) *Subject to tax.* For purposes of determining whether a domestic corporation is subject to the income tax of a foreign country on its income, the fact that the corporation has no actual income tax liability to the foreign country for a particular taxable year shall not be taken into account.

(7) *Foreign country.* For purposes of this section, possessions of the United States shall be considered foreign countries.

(8) *Consolidated group.* The term ''consolidated group'' means an affiliated group, as defined in section 1504(a), with which a dual resident corporation or domestic owner files a consolidated U.S. income tax return.

(9) *Domestic owner.* The term ''domestic owner'' means a domestic corporation that owns one or more separate units.

(10) *Affiliated dual resident corporation or affiliated domestic owner.* The term ''affiliated dual resident corporation'' or ''affiliated domestic owner'' means a dual resident corporation or domestic owner that is a member of a consolidated group.

(11) *Unaffiliated dual resident corporation or unaffiliated domestic owner.* The

term ''unaffiliated dual resident corporation'' or ''unaffiliated domestic owner'' means a dual resident corporation or domestic owner that is an unaffiliated domestic corporation.

(12) *Successor-in-interest.* The term ''successor-in-interest'' means an acquiring corporation that succeeds to the tax attributes of an acquired corporation by means of a transaction subject to section 381.

(13) *Domestic affiliate.* The term ''domestic affiliate'' means any member of an affiliated group, without regard to the exceptions contained in section 1504(b) (other than section 1504(b)(3)) relating to includible corporations.

(14) *Unaffiliated domestic corporation.* The term ''unaffiliated domestic corporation'' means a domestic corporation that is not a member of an affiliated group.

(15) *Use of loss to offset income of a domestic affiliate or another person*—(i) A dual consolidated loss shall be deemed to offset income of a domestic affiliate in the year it is included in the computation of the consolidated taxable income of a consolidated group. The fact that no tax benefit results from the inclusion of the dual consolidated loss in the computation of the group's consolidated taxable income in the taxable year shall not be taken into account.

(ii) Except as provided in paragraph (c)(15)(iii) of this section, a loss, expense, or deduction taken into account in computing a dual consolidated loss shall be deemed to offset income of another person under the income tax laws of a foreign country in the year it is made available for such offset. The fact that the other person does not have sufficient income in that year to benefit from such an offset shall not be taken into account. However, where the laws of a foreign country provide an election that would enable a dual resident corporation or separate unit to use its losses, expenses, or deductions to offset income of another person, the losses, expenses, or deductions shall be considered to offset such income only if the election is made.

(iii) The losses, expenses, or deductions taken into account in computing a dual resident corporation's or separate unit's dual consolidated loss shall not be deemed to offset income of another person under the income tax laws of a foreign country for purposes of this section, if under the laws of the foreign country the losses, expenses, or deductions of the dual resident corporation or separate unit are used to offset the income of another dual resident corporation or separate unit within the same consolidated group (or income of another separate unit that is owned by the unaffiliated domestic owner of the first separate unit). If the losses, expenses, or deductions of a dual resident corporation or separate unit are made available under the laws of a foreign country to offset the income of other dual resident corporations or separate units within the same consolidated group (or other separate units owned by the unaffiliated domestic owner of the first separate unit), as well as the income of another person, and the laws of the foreign country do not provide applicable rules for determining which person's income is offset by the losses, expenses, or deductions, then for purposes of this section, the losses, expenses or deductions shall be deemed to offset the income of the other dual resident corporations or separate units, to the extent of such income, before being considered to offset the income of the other person.

(iv) Except to the extent paragraph (g)(1) of this section applies, where the income tax laws of a foreign country deny the use of losses, expenses, or deductions of a dual resident corporation to offset the income of another person because the dual resident corporation is also subject to income taxation by another country on its worldwide income or on a residence basis, the dual resident corporation shall be treated as if it actually had offset its dual consolidated loss against the income of another person in such foreign country.

(16) *Examples.* The following examples illustrate this paragraph (c).

Example 1. X, a member of a consolidated group, conducts business through a branch in Country Y. Under Country Y's income tax laws, the branch is taxed as a permanent establishment and its losses may be used under the Country Y form of consolidation to offset the income of Z, a Country Y affiliate of X. In Year 1, the branch of X incurs an overall loss that would be treated as a net operating loss if the branch were a separate domestic corporation. Under paragraph (c)(3) of this section, the branch of X is treated as a separate domestic corporation and a dual resident corporation. Thus, under paragraph (c)(5), its loss constitutes a dual consolidated loss. Unless X qualifies for an exception under paragraph (g) of this section, paragraph (b) of this section precludes the use of the branch's loss to offset any income of X not derived from the branch operations or any income of a domestic affiliate of X.

Example 2. A and B are members of a consolidated group. FC is a Country X corporation that is wholly owned by B. A and B organize a partnership, P, under the laws of Country X. P conducts business in Country X and its business activity constitutes a foreign branch within the meaning of paragraph (c)(3)(i)(A) of this section. P also earns U.S. source income that is unconnected with the branch operations and, therefore, is not subject to tax by Country X. Under the laws of Country X, the branch can consolidate with FC. The interests in P held by A and B are each treated as a dual resident corporation. The branch is also treated as a separate dual resident corporation. Unless an exception under paragraph (g) of this section applies, any dual consolidated loss incurred by P's branch cannot offset the U.S. source income earned by P or any other income of A or B.

Example 3. X is classified as a partnership for U.S. income tax purposes. A, B, and C are the sole partners of X. A and B are domestic corporations and C is a Country Y corporation. For U.S. income tax purposes, each partner has an equal interest in each item of partnership profit or loss. Under Country Y's law, X is classified as a corporation and its income and losses may be used under the Country Y form of consolidation to offset the income of companies that are affiliates of X. Under paragraph (c)(3) and (4) of this section, the partnership interests held by A and B are treated as separate domestic corporations and as dual resident corporations. Unless an exception under paragraph (g) of this section applies, losses allocated to A and B can only be used to offset profits of X allocated to A and B, respectively.

Example 4. P, a domestic corporation, files a consolidated U.S. income tax return with its two wholly-owned domestic subsidiaries, DRC1 and DRC2. Each subsidiary is also treated as a Country Y resident for Country Y tax purposes. Thus, DRC1 and DRC2 are dual resident corporations. DRC1 owns FC, a Country Y corporation. Country Y's tax laws permit affiliated resident corporations to file a form of consolidated return. In Year 1, DRC1 incurs a $200 net operating loss for both U.S. and Country Y tax purposes, while DRC2 recognizes $200 of income under the tax laws of each country. FC also earns $200 of income for Country Y tax purposes. DRC1, DRC2, and FC file a Country Y consolidated return. However, Country Y has no applicable rules for determining which income is offset by DRC1's $200 loss. Under paragraph (c)(15)(iii) of this section, the loss shall be treated as offsetting DRC2's $200 of income. Because DRC1 and DRC2 are members of the same consolidated group, for purposes of this section, the offset of DRC1's loss against the income of DRC2 is not considered a use of the loss against the income of another person under the laws of a foreign country.

Example 5. DRC, a domestic corporation, files a consolidated U.S. income tax return with its parent, P. DRC is also subject to tax in Country Y on its worldwide income. Therefore, DRC is a dual resident corporation and any net operating loss incurred by DRC is a dual consolidated loss. Country Y's tax laws permit corporations that are subject to tax on their worldwide income to use the Country Y form of consolidation, thus enabling eligible corporations to use their losses to offset income of affiliates. However, to prevent corporations like DRC from offsetting losses against income of affiliates in Country Y and then again offsetting the losses against income of foreign affiliates under the tax laws of another country, Country Y prevents a corporation that is also subject to the income tax of another country on its worldwide income or on a residence basis from using the Country Y form of consolidation. There is no agreement, as described in paragraph (g)(1) of this section, between the United States and Country Y. Because of Country Y's statute, DRC will be treated as having actually offset its losses against the income of affiliates in Country Y under paragraph (c)(15)(iv) of this section. Therefore, DRC will not be able to file an agreement described in paragraph (g)(2) of this section and offset its losses against the income of P or any other domestic affiliate.

(d) *Special rules for accounting for dual consolidated losses*—(1) *Determination of amount of dual consolidated loss*—(i) *Dual resident corporation that is a member of a consolidated group.* For purposes of determining whether a dual resident corporation that is a member of a consolidated group has a dual consolidated loss for the taxable year, the dual resident corporation shall compute its taxable income (or loss) in accordance with the rules set forth in the regulations under section 1502 governing the computation of consolidated taxable income, taking into account only the dual resident corporation's items of income, gain, deduction, and loss for the year. However, for purposes of this computation, the following items shall not be taken into account:

(A) Any net capital loss of the dual resident corporation; and

(B) Any carryover or carryback losses.

(ii) *Dual resident corporation that is a separate unit of a domestic corporation.* For purposes of determining whether a separate unit has a dual consolidated loss for the taxable year, the separate unit shall compute its taxable income (or loss) as if it were a separate domestic corporation and a dual resident corporation in accordance with the provisions of paragraph (d)(1)(i) of this section, using only those items of income, expense, deduction, and loss that are otherwise attributable to such separate unit.

(2) *Effect of a dual consolidated loss.* For any taxable year in which a dual resident corporation or separate unit has a dual consolidated loss to which paragraph (b) of this section applies, the following rules shall apply.

(i) If the dual resident corporation is a member of a consolidated group, the group shall compute its consolidated taxable income without taking into account the items of income, loss, or deduction taken into account in computing the dual consolidated loss. The dual consolidated loss may be carried over or back for use in other taxable years as a separate net operating loss carryover or carryback of the dual resident corporation arising in the year incurred. It shall be treated as a loss incurred by the dual resident corporation in a separate return limitation year and (without regard to whether the dual resident corporation is a common parent) shall be subject to all of the limitations of §§1.1502–21A(c) or 1.1502–21(c), as appropriate (relating to limitations on net operating loss carryovers and carrybacks from separate return limitation years).

(ii) The unaffiliated domestic owner of a separate unit, or the consolidated group of an affiliated domestic owner, shall compute its taxable income without taking into account the items of income, loss or deduction taken into account in computing the separate unit's dual consolidated loss. The dual consolidated loss shall be treated as a loss incurred by a separate corporation and its use shall be subject to all of the limitations of §§1.1502–21A(c) or 1.1502–21(c), as appropriate, as if the separate unit were filing a consolidated return with the unaffiliated domestic owner or with the consolidated group of the affiliated domestic owner.

(3) *Basis adjustments for dual consolidated losses*—(i) *Dual resident corporation that is a member of an affiliated group.* When a dual resident corporation is a member of a consolidated group, each other member owning stock in the dual resident corporation shall adjust the basis of the stock in the following manner.

(A) *Positive adjustments.* Positive adjustments shall be made in accordance with the principles of §1.1502–32(b)(1), except that there shall be no positive adjustment under §1.1502–32(b)(1)(ii) for any amount of the dual consolidated loss that is not absorbed as a result of the application of paragraph (b) of this section. In addition, there shall be no positive adjustment for any amount included in income pursuant to paragraph (g)(2)(vii) of this section.

(B) *Negative adjustments.* Negative adjustments shall be made in accordance with the principles of §1.1502–32(b)(2), except that there shall be no negative adjustment under §1.1502–32(b)(2)(ii) for the amount of the dual consolidated loss subject to paragraph (b) of this section that is absorbed in a carryover year.

(ii) *Dual resident corporation that is a separate unit arising from an interest in a partnership.* Where a separate unit is an interest in a partnership, the domestic owner shall adjust its basis in the separate unit in accordance with section 705, except that no increase in basis shall be permitted for any amount included as income pursuant to paragraph (g)(2)(vii) of this section.

(4) *Examples.* The following examples illustrate this paragraph (d).

Example 1. (i) P, S1, S2, and T are domestic corporations. P owns all of the stock of S1 and S2. S2 owns all of the stock of T. T is a resident of Country FC for Country FC income tax purposes. Therefore, T is a dual resident corporation. P, S1, S2, and T file a consolidated U.S. income tax return. X and Y are corporations that are not members of the consolidated group.

(ii) At the beginning of Year 1, P has a basis of $1000 in the stock of S2. S2 has a $500 basis in the stock of T.

(iii) In Year 1, T incurs interest expense in the amount of $100. In addition, T sells a noncapital asset, *u*, in which it has a basis of

$10, to S1 for $50. T also sells a noncapital asset, *v*, in which it has a basis of $200, to S1 for $100. The sales of *u* and *v* are intercompany transactions described in §1.1502–13. T also sells a capital asset, *z*, in which it has a basis of $180, to Y for $90. In Year 1, S1 earns $200 of separate taxable income, calculated in accordance with §1.1502–12, as well as $90 of capital gain from a sale of an asset to X. P and S2 have no items of income, loss, or deduction for Year 1.

(iv) In Year 1, T has a dual consolidated loss of $100 (attributable to its interest expense). T's $90 capital loss is not included in the computation of the dual consolidated loss. Instead, T's capital loss is included in the computation of the consolidated group's capital gain net income under §1.1502–22(c) and is used to offset S1's $90 capital gain.

(v) No elective agreement, as described in paragraph (g)(1) of this section, exists between the United States and Country FC. For Country FC tax purposes, T's $100 loss is offset against the income of a Country FC affiliate. Therefore, T is not eligible for the exception provided in paragraph (g)(2) of this section.

(vi) Because T has a dual consolidated loss for the year, the consolidated taxable income of the consolidated group is calculated without regard to T's items of income, loss or deduction taken into account in computing the dual consolidated loss. Therefore, the consolidated taxable income of the consolidated group is $200 (the sum of $200 of separate taxable income earned by S1 plus $90 of capital gain earned by S1 minus $90 of capital loss incurred by T). The $40 gain recognized by T upon the sale of item *u* to S1 and the $100 loss recognized by T upon the sale of item *v* to S1 are deferred pursuant to §1.1502–13(c)(1).

(vii) S2 may not make the positive adjustment provided for in §1.1502–32(b)(1)(ii) to its basis in the stock of T for the $100 dual consolidated loss incurred by T. In addition, no positive adjustment in the basis of the stock is required for T's $90 capital loss because the loss has been absorbed by the consolidated group. S2, however, must make the negative adjustment provided for in §1.1502–32(b)(2)(i) for its allocable part of T's deficit in earnings and profits for the taxable year attributable to both T's $100 dual consolidated loss and T's $90 capital loss. Thus, as provided in §1.1502–32(e)(1), S2 must make a $190 net negative adjustment to its basis in the stock of T, reducing its basis to $310. As provided in §1.1502–33(c)(4)(ii)(a), S2's earnings and profits for Year 1 will reflect S2's decrease in its basis in T stock for the taxable year. Since S2 has no other earnings and profits for the taxable year, S2 has a $190 deficit in earnings and profits for the year. As provided in §1.1502–32(b)(2)(i), P must make a negative adjustment to its basis in the stock of S2 for its allocable part of S2's deficit in earnings and profits for the taxable year. Thus, P must make a $190 net negative adjustment to its basis in S2 stock, reducing its basis to $810.

Example 2. (i) The facts are the same as in *Example 1*, except that in Year 2, S1 sells items *u* and *v* to X for no gain or loss. The disposition of items *u* and *v* outside of the consolidated group restores the deferred loss and gain to T. T also incurs $100 of interest expense in Year 2. In addition, T sells a noncapital asset, *r*, in which it has a basis of $100, to Y for $300. P and S2 have no items of income, loss, or deduction for Year 2.

(ii) T has $40 of separate taxable income in Year 2, computed as follows:

($100)	interest expense
($100)	sale of item *v* to S1
$ 40	sale of item *u* to S1
$200	sale of item *r* to Y
$ 40	

Thus, T has no dual consolidated loss for the year.

(iii) Since T does not have a dual consolidated loss for the taxable year, the group's consolidated taxable income is calculated in accordance with the general rule of §1.1502–11 and not in accordance with paragraph (d)(2) of this section. T is the only member of the consolidated group that has any income or loss for the taxable year. Thus, the consolidated taxable income of the group, computed without regard to T's dual consolidated loss carryover, is $40.

(iv) As provided by §1.1502–21A(c), the amount of the dual consolidated loss arising in Year 1 that is included in the group's consolidated net operating loss deduction for Year 2 is $40 (that is, the consolidated taxable income computed without regard to the consolidated net operating loss deduction minus such consolidated taxable income recomputed by excluding the items of income and deduction of T). Thus, the group has no consolidated taxable income for the year.

(v) S2 must make the positive adjustment provided for in §1.502–32(b)(1)(i) to its basis in T stock for its allocable part of T's undistributed earnings and profits for the taxable year. S2 cannot make the negative adjustment provided for in §1.1502–32(b)(2)(ii) for the dual consolidated loss of T incurred in Year 1 and absorbed in Year 2. Thus, as provided in §1.1502–32(e)(2), S2 must make a $40 net positive adjustment to its basis in T stock, increasing its basis to $350. As provided in §1.1502–33(c)(4)(ii)(a), S2's earnings and profits for Year 2 will reflect S2's increase in its basis in T stock for the taxable year. Since S2 has no other earnings and profits for the taxable year, S2 has $40 of earnings and profits for the year. As provided in §1.1502–32(b)(1)(i), P must make a positive adjustment to its basis in the stock of S2 for its allocable part of the undistributed earnings and profits of S2 for the taxable year. Thus, P must make a $40 net positive adjustment to its basis in S2 stock, increasing its basis to $850.

(e) *Special rule for use of dual consolidated loss to offset tainted income*—(1) *In general.* The dual consolidated loss of any dual resident corporation that ceases to be a dual resident corporation shall not be used to offset income of such corporation to the extent that such income is tainted income, as defined in paragraph (e)(2) of this section.

(2) *Tainted income defined.* Tainted income is any income derived from tainted assets, as defined in paragraph (e)(3) of this section, beginning on the date such assets are acquired by the dual resident corporation. In the absence of evidence establishing the actual amount of income that is attributable to the tainted assets, the portion of a corporation's income in a particular taxable year that is treated as tainted income shall be an amount equal to the corporation's taxable income for the year multiplied by a fraction, the numerator of which is the fair market value of the tainted asset at the end of the taxable year and the denominator of which is the fair market value of the total assets owned by the corporation at the end of the taxable year. Documentation submitted to establish the actual amount of income that is attributable to the tainted assets must be attached to the consolidated group's or unaffiliated dual resident corporation's timely filed tax return for the taxable year in which the income is recognized.

(3) *Tainted assets defined.* Tainted assets are any asset acquired by a dual resident corporation in a non-recognition transaction, as defined in section 7701(a)(45), or any assets otherwise transferred to the corporation as a contribution to capital, at any time during the three taxable years immediately preceding the taxable year in which the corporation ceases to be a dual resident corporation or at any time thereafter. Tainted assets shall not include assets that were acquired by such dual resident corporation on or before December 31, 1986.

(4) *Exceptions.* Income derived from assets acquired by a dual resident corporation shall not be subject to the limitation described in paragraph (e)(1) of this section, if—

(i) For the taxable year in which the assets were acquired, the corporation did not have a dual consolidated loss (or a carry forward of a dual consolidated loss to such year); or

(ii) The assets were acquired as replacement property in the ordinary course of business.

(f) *Computation of foreign tax credit limitations.* If a dual resident corporation or separate unit is subject to paragraph (d)(2) of this section, the consolidated group or unaffiliated domestic owner shall compute its foreign tax credit limitation by applying the limitations of paragraph (d)(2). Thus, the dual consolidated loss is not taken into account until the year in which it is absorbed.

(g) *Exception*—(1) *Elective agreement in place between the United States and a foreign country.* Paragraph (b) of this section shall not apply to a dual consolidated loss to the extent the dual resident corporation, or domestic owner of a separate unit, elects to deduct the loss in the United States pursuant to an agreement entered into between the United States and a foreign country that puts into place an elective procedure through which losses offset income in only one country.

(2) *Elective relief provision*—(i) *In general.* Paragraph (b) of this section shall not apply to a dual consolidated loss if the consolidated group, unaffiliated dual resident corporation, or unaffiliated domestic owner elects to be bound by the provisions of this paragraph (g)(2). In order to elect relief under this paragraph (g)(2), the consolidated group, unaffiliated dual resident corporation, or unaffiliated domestic owner must attach to its timely filed (including extensions) U.S. income tax return for the taxable year in which the dual consolidated loss is incurred an agreement described in paragraph (g)(2)(i)(A) of this section. The agreement must be signed under penalties of perjury by the person who signs the return. For taxable years beginning after December 31, 2002, the agreement attached to the income tax return of the consolidated group, unaffiliated dual

resident corporation or unaffiliated domestic owner pursuant to the preceding sentence may be an unsigned copy. If an unsigned copy is attached to the return, the consolidated group, unaffiliated dual resident corporation, or unaffiliated domestic owner must retain the original in its records in the manner specified by § 1.6001–1(e). The agreement must include the following items, in paragraphs labeled to correspond with the items set forth in paragraph (g)(2)(i)(A) through (F) of this section.

(A) A statement that the document submitted is an election and an agreement under the provisions of paragraph (g)(2) of this section.

(B) The name, address, identifying number, and place and date of incorporation of the dual resident corporation, and the country or countries that tax the dual resident corporation on its worldwide income or on a residence basis, or, in the case of a separate unit, identification of the separate unit, including the name under which it conducts business, its principal activity, and the country in which its principal place of business is located.

(C) An agreement by the consolidated group, unaffiliated dual resident corporation, or unaffiliated domestic owner to comply with all of the provisions of § 1.1503–2(g)(2)(iii)-(vii).

(D) A statement of the amount of the dual consolidated loss covered by the agreement.

(E) A certification that no portion of the dual resident corporation's or separate unit's losses, expenses, or deductions taken into account in computing the dual consolidated loss has been, or will be, used to offset the income of any other person under the income tax laws of a foreign country.

(F) A certification that arrangements have been made to ensure that no portion of the dual consolidated loss will be used to offset the income of another person under the laws of a foreign country and that the consolidated group, unaffiliated dual resident corporation, or unaffiliated domestic owner will be informed of any such foreign use of any portion of the dual consolidated loss.

(ii) *Consistency rule*—(A) If any loss, expense, or deduction taken into account in computing the dual consolidated loss of a dual resident corporation or separate unit is used under the laws of a foreign country to offset the income of another person, then the following other dual consolidated losses (if any) shall be treated as also having been used to offset income of another person under the laws of such foreign country, but only if the income tax laws of the foreign country permit any loss, expense, or deduction taken into account in computing the other dual consolidated loss to be used to offset the income of another person in the same taxable year;

(*1*) Any dual consolidated loss of a dual resident corporation that is a member of the same consolidated group of which the first dual resident corporation or domestic owner is a member, if any loss, expense, or deduction taken into account in computing such dual consolidated loss is recognized under the income tax laws of such country in the same taxable year; and

(*2*) Any dual consolidated loss of a separate unit that is owned by the same domestic owner that owns the first separate unit, or that is owned by any member of the same consolidated group of which the first dual resident corporation or domestic owner is a member, if any loss, expense, or deduction taken into account in computing such dual consolidated loss is recognized under the income tax laws of such country in the same taxable year.

(B) The following examples illustrate the application of this paragraph (g)(2)(ii).

Example 1. P, a domestic corporation, owns A and B, which are domestic corporations, and C, a Country X corporation. A is subject to the income tax laws of Country X on a residence basis and, thus, is a dual resident corporation. B conducts business in Country X through a branch, which is a separate unit under paragraph (c)(3) of this section. The income tax laws of Country X permit branches of foreign corporations to elect to file consolidated returns with Country X affiliates. In Year 1, A incurs a dual consolidated loss, which is used to offset the income of C under the Country X form of consolidation. The branch of B also incurs a net operating loss. However, B elects not to use the loss on a Country X consolidated return to offset the income of foreign affiliates. The use of A's loss to offset the income of C in Country X will cause the separate unit of B to be treated as if it too had used its dual consolidated loss to offset the income of an affiliate in Country X. Therefore, an election and agreement under this paragraph (g)(2) cannot be made with respect to the separate unit's dual consolidated loss.

Example 2. The facts are the same as in *Example 1,* except that the income tax laws of Country X do not permit branches of foreign corporations to file consolidated income tax returns with Country X affiliates. Therefore, an election and agreement described in this paragraph (g)(2) may be made for the dual consolidated loss incurred by the separate unit of B.

(iii) *Triggering events requiring the recapture of dual consolidated losses*—(A) The consolidated group, unaffiliated dual resident corporation, or unaffiliated domestic owner must agree that, if there is a triggering event described in this paragraph (g)(2)(iii), and no exception applies under paragraph (g)(2)(iv) of this section, the consolidated group, unaffiliated dual resident corporation, or unaffiliated domestic owner will recapture and report as income the amount of the dual consolidated loss provided in paragraph (g)(2)(vii) of this section on its tax return for the taxable year in which the triggering event occurs (or, when the triggering event is a use of the loss for foreign purposes, the taxable year that includes the last day of the foreign tax year during which such use occurs). In addition, the consolidated group, unaffiliated dual resident corporation, or unaffiliated domestic owner must pay any applicable interest charge required by paragraph (g)(2)(vii) of this section. For purposes of this section, any of the following events shall constitute a triggering event:

(*1*) In any taxable year up to and including the 15th taxable year following the year in which the dual consolidated loss that is the subject of the agreement filed under this paragraph (g)(2) was incurred, any portion of the losses, expenses, or deductions taken into account in computing the dual consolidated loss is used by any means to offset the income of any other person under the income tax laws of a foreign country;

(*2*) An affiliated dual resident corporation or affiliated domestic owner ceases to be a member of the consolidated group that filed the election. For purposes of this paragraph (g)(2)(iii)(A)(*2*), a dual resident corporation or domestic owner shall be considered to cease to be a member of the consolidated group if it is no longer a member of the group within the meaning of §1.1502–1(b), or if the group ceases to exist because the common parent is no longer in existence or is no longer a common parent or the group no longer files on the basis of a consolidated return. Such disaffiliation, however, shall not constitute a triggering event if the taxpayer demonstrates, to the satisfaction of the Commissioner, that the dual resident corporation's or separate unit's losses, expenses, or deductions cannot be used to offset income of another person under the laws of a foreign country at any time after the affiliated dual resident corporation or affiliated domestic owner ceases to be a member of the consolidated group;

(*3*) An unaffiliated dual resident corporation or unaffiliated domestic owner becomes a member of a consolidated group. Such affiliation of the dual resident corporation or domestic owner, however, shall not constitute a triggering event if the taxpayer demonstrates, to the satisfaction of the Commissioner, that the losses, expenses, or deductions of the dual resident corporation or separate unit cannot be used to offset the income of another person under the laws of a foreign country at any time after the dual resident corporation or domestic owner becomes a member of the consolidated group.

(*4*) A dual resident corporation transfers assets in a transaction that results, under the laws of a foreign country, in a carryover of its losses, expenses, or deductions. For purposes of this paragraph (g)(2)(iii)(A)(*4*), a transfer, either in a single transaction or a series of transactions within a twelve-month period, of 50% or more of the dual resident corporation's assets (measured by the fair market value of the assets at the time of such transfer (or for multiple transactions, at the time of the first transfer)) shall be deemed a triggering event, unless the taxpayer demonstrates, to the satisfaction of the Commissioner, that the transfer of assets did not result in a carryover under foreign law of the dual resident corporation's losses, expenses, or deductions to the transferee of the assets;

(*5*) A domestic owner of a separate unit transfers assets of the separate unit in a transaction that results, under the laws of a foreign country, in a carryover of the separate unit's losses, expenses, or deductions. For purposes of this paragraph (g)(2)(iii)(A)(*5*), a transfer, either in a single transaction or a series of transactions over a twelve-month period, of 50% or more of the separate unit's assets (measured by the fair market value of the assets at the time of the transfer (or for multiple transfers, at the time of the first transfer)), shall be deemed a triggering event, unless the taxpayer demonstrates, to the satisfaction of the Commissioner, that the transfer of assets did not result in a carryover under foreign law of the separate unit's losses, expenses, or deductions to the transferee of the assets;

(*6*) An unaffiliated dual resident corporation or unaffiliated domestic owner becomes a foreign corporation by means of a transaction (e.g., a reorganization) that, for foreign tax purposes, is not treated as involving a transfer of assets (and carryover of losses) to a new entity. Such a transaction, however, shall not constitute a triggering event if the taxpayer demonstrates, to the satisfaction of the Commissioner, that the dual resident corporation's or separate unit's losses, expenses, or deductions cannot be used to offset income of another person under the laws of the foreign country at any time after the unaffiliated dual resident corporation or unaffiliated domestic owner becomes a foreign corporation.

(*7*) A domestic owner of a separate unit, either in a single transaction or a series of transactions within a twelve-month period, sells, or otherwise disposes of, 50% or more of the interest in the separate unit (measured by voting power or value) owned by the domestic owner on the last day of the taxable year in which the dual consolidated loss was incurred. For purposes of this paragraph (g)(2)(iii)(A)(*7*), the domestic owner shall be deemed to have disposed of its entire interest in a hybrid entity separate unit if such hybrid entity becomes classified as a foreign corporation for U.S. tax purposes. The disposition of 50% or more of the interest in a separate unit, however, shall not constitute a triggering event if the taxpayer demonstrates, to the satisfaction of the Commissioner, that the losses, expenses, or deductions of the separate unit cannot be used to offset income of another person under the laws of the foreign country at any time after the disposition of the interest in the separate unit; or

(*8*) The consolidated group, unaffiliated dual resident corporation, or unaffiliated domestic owner fails to file a certification required under paragraph (g)(2)(vi)(B) of this section.

(B) A taxpayer wishing to rebut the presumption of a triggering event described in paragraphs (g)(2)(iii)(A)(*2*) through (*7*) of this section, by demonstrating that the losses, expenses, or deductions of the dual resident corporation or separate unit cannot be carried over or otherwise used under the laws of the foreign country, must attach documents demonstrating such facts to its timely filed U.S. income tax return for the year in which the presumed triggering event occurs.

(C) The following example illustrates this paragraph (g)(2)(iii).

Example. DRC, a domestic corporation, is a member of CG, a consolidated group. DRC is a resident Country Y for Country Y income tax purposes. Therefore, DRC is a dual resident corporation. In Year 1, DRC incurs a dual consolidated loss of $100. CG files an agreement described in paragraph (g)(2) of this section and, thus, the $100 dual consolidated loss is included in the computation of CG's consolidated taxable income. In Year 6, all of the stock of DRC is sold to P, a domestic corporation that is a member of NG, another consolidated group. The sale of DRC to P is a triggering event under paragraph (g)(2)(iii)(A) of this section, requiring the recapture of the dual consolidated loss. However, the laws of Country Y provide for a five-year carryover period for losses. At the time of DRC's disaffiliation from CG, the losses, expenses and deductions that were included in the computation of the dual consolidated loss had expired for Country Y purposes. Therefore, upon adequate documentation that the losses, expenses, or deductions have expired for Country Y purposes, CG can rebut the presumption that a triggering event has occurred.

(iv) *Exceptions*—(A) *Acquisition by a member of the consolidated group.* The following events shall not constitute triggering events, requiring the recapture of the dual consolidated loss under paragraph (g)(2)(vii) of this section:

(*1*) An affiliated dual resident corporation or affiliated domestic owner ceases to be a member of a consolidated group solely by reason of a transaction in which a member of the same consolidated group succeeds to the tax attributes of the dual resident corporation or domestic owner under the provisions of section 381;

(*2*) Assets of an affiliated dual resident corporation or assets of a separate unit of an affiliated domestic owner are acquired by a member of its consolidated group in any other transaction; or

(*3*) An affiliated domestic owner of a separate unit transfers its interest in the separate unit to another member of its consolidated group.

(B) *Acquisition by an unaffiliated domestic corporation or a new consolidated group*—(*1*) If all the requirements of paragraph (g)(2)(iv)(B)(*3*) of this section are met, the following events shall not constitute triggering events requiring the recapture of the dual consolidated loss under paragraph (g)(2)(vii) of this section:

(*i*) An affiliated dual resident corporation or affiliated domestic owner becomes an unaffiliated domestic corporation or a member of a new consolidated group (other than in a transaction described in paragraph (g)(2)(iv)(B)(*2*)(*ii*) of this section);

(*ii*) Assets of a dual resident corporation or a separate unit are acquired by an unaffiliated domestic corporation or a member of a new consolidated group; or

(*iii*) A domestic owner of a separate unit transfers its interest in the separate unit to an unaffiliated domestic corporation or to a member of a new consolidated group.

(*2*) If the requirements of paragraph (g)(2)(iv)(B)(*3*)(*iii*) of this section are met, the following events shall not constitute triggering events requiring the recapture of the dual consolidated loss under paragraph (g)(2)(vii) of this section—

(*i*) An unaffiliated dual resident corporation or unaffiliated domestic owner becomes a member of a consolidated group;

(*ii*) A consolidated group that filed an agreement under this paragraph (g)(2) ceases to exist as a result of a transaction described in §1.1502–13(j)(5)(i) (other than a transaction in which any member of the terminating group, or the successor-in-interest of such member, is not a member of the surviving group immediately after the terminating group ceases to exist).

(*3*) If the following requirements (as applicable) are satisfied, the events listed in paragraphs (g)(2)(iv)(B)(*1*) and (*2*) of this section shall not constitute triggering events requiring recapture under paragraph (g)(2)(vii) of this section.

(*i*) The consolidated group, unaffiliated dual resident corporation, or unaffiliated domestic owner that filed the agreement under this paragraph (g)(2) and the unaffiliated domestic corporation or new consolidated group must enter into a closing agreement with the Internal Revenue Service providing that the consolidated group, unaffiliated dual resident corporation, or unaffiliated domestic owner and the unaffiliated domestic corporation or new consolidated group will be jointly and severally liable for the total amount of the recapture of dual consolidated loss and interest charge required in paragraph (g)(2)(vii) of this section, if there is a triggering event described in paragraph (g)(2)(iii) of this section;

(*ii*) The unaffiliated domestic corporation or new consolidated group must agree to treat any potential recapture amount under paragraph (g)(2)(vii) of this section as unrealized built-in gain for purposes of section 384(a), subject to any applicable exceptions thereunder;

(*iii*) The unaffiliated domestic corporation or new consolidated group must file, with its timely filed (including extensions) income tax return for the taxable year in which the event described in paragraph (g)(2)(iv)(B)(*1*) or (*2*) of this section occurs, an agreement described in paragraph (g)(2)(i) of this section (new (g)(2)(i) agreement), whereby it assumes the same obligations with respect to the dual consolidated loss as the corporation or consolidated group that filed the original (g)(2)(i) agreement with respect to that loss. The new (g)(2)(i) agreement must be signed under penalties of perjury by the person who signs the return and must include a reference to this paragraph (g)(2)(iv)(B)(*3*)(*iii*). For taxable years beginning after December 31, 2002, the agreement attached to the return pursuant to the preceding sentence may be an unsigned copy. If an unsigned copy is attached to the return, the corporation or consolidated group must retain the original in its records in the manner specified by §1.6001–1(e).

(C) *Subsequent triggering events.* Any triggering event described in paragraph (g)(2)(iii) of this section that occurs subsequent to one of the transactions described in paragraph (g)(2)(iv) (A) or (B) of this section and does not fall within the exceptions provided in paragraph (g)(2)(iv) (A) or (B) of this section shall require recapture under paragraph (g)(2)(vii) of this section.

(D) *Example.* The following example illustrates the application of paragraph (g)(2)(iv)(B)(*2*)(*ii*) of this section:

Example. (i) Facts. C is the common parent of a consolidated group (the C Group) that includes DRC, a domestic corporation. DRC is a dual resident corporation and incurs a dual consolidated loss in its taxable year ending December 31, Year 1. The C Group elects to be bound by the provisions of this paragraph (g)(2) with respect to the Year 1 dual consolidated loss. No member of the C Group incurs a dual consolidated loss in Year 2. On December 31, Year 2, stock of C is acquired by D in a transaction described in §1.1502–13(j)(5)(i). As a result of the acquisition, all the C Group members, including DRC, become members of a consolidated group of which D is the common parent (the D Group).

(ii) Acquisition not a triggering event. Under paragraph (g)(2)(iv)(B)(*2*)(*ii*) of this section, the acquisition by D of the C Group is not an event requiring the recapture of the Year 1 dual consolidated loss of DRC, or the payment of an interest charge, as described in paragraph (g)(2)(vii) of this section, provided that the D Group files the new (g)(2)(i) agreement described in paragraph (g)(2)(iv)(B)(*3*)(*iii*) of this section.

(iii) Subsequent event. A triggering event occurs on December 31, Year 3, that requires recapture by the D Group of the dual consolidated loss that DRC incurred in Year 1, as well as the payment of an interest charge, as provided in paragraph (g)(2)(vii) of this section. Each member of the D Group, including DRC and the other former members of the C Group, is severally liable for the additional tax (and the interest charge) due upon the recapture of the dual consolidated loss of DRC.

(v) *Ordering rules for determining the foreign use of losses.* If the laws of a foreign country provide for the use of losses of a dual resident corporation to offset the income of another person but do not provide applicable rules for determining the order in which such losses are used to offset the income of another person in a taxable year, then for purposes of this section, the following rules shall govern:

(A) If under the laws of the foreign country the dual resident corporation has losses from different taxable years, the dual resident corporation shall be deemed to use first the losses from the earliest taxable year from which a loss may be carried forward or back for foreign law purposes.

(B) Any net loss, or income, that the dual resident corporation has in a taxable year shall first be used to offset net income, or loss, recognized by affiliates of the dual resident corporation in the same taxable year before any carryover of the dual resident corporation's losses is considered to be used to offset any income from the taxable year.

(C) Where different losses, expenses, or deductions (e.g., capital losses and ordinary losses) of a dual resident corporation incurred in the same taxable year are available to offset the income of another person, the different losses shall be deemed to offset such income on a pro rata basis.

Example. DRC, a domestic corporation, is taxed as a resident under the tax laws of Country Y. Therefore, DRC is a dual resident corporation. FA is a Country Y affiliate of DRC. Country Y's tax laws permit affiliated corporations to file a form of consolidated return. In Year 1, DRC incurs a capital loss of $80 which, for Country Y purposes, offsets completely $30 of capital gain recognized by FA. Neither corporation has any other taxable income or loss for the year. In Year 1 (and in other years), DRC recognizes the same amount of income for U.S. purposes as it does for Country Y purposes. Under paragraph (d)(1)(i) of this section, however, DRC's

$80 capital loss is not a dual consolidated loss. In Year 2, DRC incurs a net operating loss of $100, while FA incurs a net operating loss of $50. DRC's $100 loss is a dual consolidated loss. Since the dual consolidated loss is not used to offset the income of another person under Country Y law, DRC is permitted to file an agreement described in this paragraph (g)(2). In Year 3, DRC has a net operating loss of $10 and FA has capital gains of $60. For Country Y purposes, DRC's $10 net operating loss is used to offset $10 of FA's $60 capital gain. DRC's $10 loss is a dual consolidated loss. Because the loss is used to offset FA's income, DRC will not be able to file an agreement under this paragraph (g)(2) with respect to the loss. Country Y permits FA's remaining $50 of Year 3 income to be offset by carryover losses. However, Country Y has no applicable rules for determining which carryover losses from Years 1 and 2 are used to offset such income. Under the ordering rules of paragraph (g)(2)(v)(A) of this section, none of DRC's $100 Year 2 loss will be deemed to offset FA's remaining $50 of Year 3 income. Instead, the $50 of capital loss carryover from Year 1 will be considered to offset the income.

(vi) *Reporting requirements*—(A) *In general*. The consolidated group, unaffiliated dual resident corporation, or unaffiliated domestic owner must answer the applicable questions regarding dual consolidated losses on its U.S. income tax return filed for the year in which the dual consolidated loss is incurred and for each of the following fifteen taxable years.

(B) *Annual certification*. Except as provided in §1.1503–2(g)(2)(vi)(C), until and unless Form 1120 or the Schedules thereto contain questions pertaining to dual consolidated losses, the consolidated group, unaffiliated dual resident corporation, or unaffiliated domestic owner must file with its income tax return for each of the 15 taxable years following the taxable year in which the dual consolidated loss is incurred a certification that the losses, expenses, or deductions that make up the dual consolidated loss have not been used to offset the income of another person under the tax laws of a foreign country. For taxable years beginning before January 1, 2003, the annual certification must be signed under penalties of perjury by a person authorized to sign the agreement described in §1.1503–2(g)(2)(i). For taxable years beginning after December 31, 2002, the certification is verified by signing the return with which the certification is filed. The certification for a taxable year must identify the dual consolidated loss to which it pertains by setting forth the taxpayer's year in which the loss was incurred and the amount of such loss. In addition, the certification must warrant that arrangements have been made to ensure that the loss will not be used to offset the income of another person under the laws of a foreign country and that the taxpayer will be informed of any such foreign use of any portion of the loss. If dual consolidated losses of more than one taxable year are subject to the rules of this paragraph (g)(2)(vi)(B), the certifications for those years may be combined in a single document but each dual consolidated loss must be separately identified.

(C) *Exception*. A consolidated group or unaffiliated domestic owner is not required to file annual certifications under paragraph (g)(2)(vi)(B) of this section with respect to a dual consolidated loss of any separate unit other than a hybrid entity separate unit.

(vii) *Recapture of loss and interest charge*—(A) *Presumptive rule*—*(1) Amount of recapture*. Except as otherwise provided in this paragraph (g)(2)(vii), upon the occurrence of a triggering event described in paragraph (g)(2)(iii) of this section, the taxpayer shall recapture and report as gross income the total amount of the dual consolidated loss to which the triggering event applies on its income tax return for the taxable year in which the triggering event occurs (or, when the triggering event is a use of the loss for foreign tax purposes, the taxable year that includes the last day of the foreign tax year during which such use occurs).

(*2*) *Interest charge*. In connection with the recapture, the taxpayer shall pay an interest charge. Except as otherwise provided in this paragraph (g)(2)(vii), such interest shall be determined under the rules of section 6601(a) as if the additional tax owed as a result of the recapture had accrued and been due and owing for the taxable year in which the losses, expenses, or deductions taken into account in computing the dual consolidated loss gave rise to a tax benefit for U.S. income tax purposes.

For purposes of this paragraph (g)(2)(vii)(A)(*2*), a tax benefit shall be considered to have arisen in a taxable year in which such losses, expenses or deductions reduced U.S. taxable income.

(B) *Rebuttal of presumptive rule*—(*1*) *Amount of recapture*. The amount of dual consolidated loss that must be recaptured under this paragraph (g)(2)(vii) may be reduced if the taxpayer demonstrates, to the satisfaction of the Commissioner, the offset permitted by this paragraph (g)(2)(vii)(B). The reduction in the amount of recapture is the amount by which the dual consolidated loss would have offset other taxable income reported on a timely filed U.S. income tax return for any taxable year up to and including the year of the triggering event if such loss had been subject to the restrictions of paragraph (b) of this section (and therefore had been subject to the separate return limitation year restrictions of §§ 1.1502–21A(c) or 1.1502–21(c) (as appropriate) commencing in the taxable year in which the loss was incurred. A taxpayer utilizing this rebuttal rule must attach to its timely filed U.S. income tax return a separate accounting showing that the income for each year that offsets the dual resident corporation's or separate unit's recapture amount is attributable only to the dual resident corporation or separate unit.

(*2*) *Interest charge*. The interest charge imposed under this paragraph (g)(2)(vii) may be appropriately reduced if the taxpayer demonstrates, to the satisfaction of the Commissioner, that the net interest owed would have been less than that provided in paragraph (g)(2)(vii)(A)(*2*) of this section if the taxpayer had filed an amended return for the year in which the loss was incurred, and for any other affected years up to and including the year of recapture, treating the dual consolidated loss as a loss subject to the restrictions of paragraph (b) of this section (and therefore subject to the separate return limitation year restrictions of §§ 1.1502–21A(c) or 1.1502–21(c) (as appropriate). A taxpayer utilizing this rebuttal rule must attach to its timely filed U.S. income tax return a computation demonstrating the reduction in the net interest owed as a result of treating the dual consolidated loss as a loss subject to the restrictions of paragraph (b) of this section.

(C) *Computation of taxable income in year of recapture—(1) Presumptive rule*. Except as otherwise provided in paragraph (g)(2)(vii)(C)(*2*) of this section, for purposes of computing the taxable income for the year of recapture, no current, carryover or carryback losses of the dual resident corporation or separate unit, of other members of the consolidated group, or of the domestic owner that are not attributable to the separate unit, may offset and absorb the recapture amount.

(*2*) *Rebuttal of presumptive rule*. The recapture amount included in gross income may be offset and absorbed by that portion of the taxpayer's (consolidated or separate) net operating loss carryover that is attributable to the dual consolidated loss being recaptured, if the taxpayer demonstrates, to the satisfaction of the Commissioner, the amount of such portion of the carryover. A taxpayer utilizing this rebuttal rule must attach to its timely filed U.S. income tax return a computation demonstrating the amount of net operating loss carryover that, under this paragraph (g)(2)(vii)(C)(*2*), may absorb the recapture amount included in gross income.

(D) *Character and source of recapture income*. The amount recaptured under this paragraph (g)(2)(vii) shall be treated as ordinary income in the year of recapture. The amount recaptured shall be treated as income having the same source and falling within the same separate category for purposes of section 904 as the dual consolidated loss being recaptured.

(E) *Reconstituted net operating loss*. Commencing in the taxable year immediately following the year in which the dual consolidated loss is recaptured, the dual resident corporation or separate unit shall be treated as having a net operating loss in an amount equal to the amount actually recaptured under paragraph (g)(2)(vii) (A) or (B) of this section. This reconstituted net operating loss shall be subject to the restrictions of paragraph (b) of this section (and therefore, the separate return limitation year restrictions of §§ 1.1502–

21A(c) or 1.1502–21T(c) (as appropriate). The net operating loss shall be available only for carryover, under section 172(b), to taxable years following the taxable year of recapture. For purposes of determining the remaining carryover period, the loss shall be treated as if it had been recognized in the taxable year in which the dual consolidated loss that is the basis of the recapture amount was incurred.

(F) *Consequences of failing to comply with recapture provisions*—(*1*) *In general*. If the taxpayer fails to comply with the recapture provisions of this paragraph (g)(2)(vii) upon the occurrence of a triggering event, then the dual resident corporation or separate unit that incurred the dual consolidated loss (or a successor-in-interest) shall not be eligible for the relief provided in paragraph (g)(2) of this section with respect to any dual consolidated losses incurred in the five taxable years beginning with the taxable year in which recapture is required.

(*2*) *Exceptions*. In the case of a triggering event other than a use of the losses, expenses, or deductions taken into account in computing the dual consolidated loss to offset income of another person under the income tax laws of a foreign country, this rule shall not apply in the following circumstances:

(*i*) The failure to recapture is due to reasonable cause; or

(*ii*) A taxpayer seeking to rebut the presumption of a triggering event satisfies the filing requirements of paragraph (g)(2)(iii)(B) of this section.

(G) *Examples*. The following examples illustrate this paragraph (g)(2)(vii).

Example 1. P, a domestic corporation, files a consolidated return with DRC, a dual resident corporation. In Year 1, DRC incurs a dual consolidated loss of $100 and P earns $100. P files an agreement under this paragraph (g)(2). Therefore, the consolidated group is permitted to offset P's $100 of income with DRC's $100 loss. In Year 2, DRC earns $30, which is completely offset by a $30 net operating loss incurred by P. In Year 3, DRC earns income of $25 while P recognizes no income or loss. In addition, there is a triggering event in Year 3. Therefore, under the presumptive rule of paragraph (g)(2)(vii)(A) of this section, DRC must recapture $100. However, the $100 recapture amount may be reduced by $25 (the amount by which the dual consolidated loss would have offset other taxable income if it had been subject to the separate return limitation year restrictions from Year 1) upon adequate documentation of such offset under paragraph (g)(2)(vii)(B)(*1*) of this section. Commencing in Year 4, the $100 (or $75) recapture amount is treated as a loss incurred by DRC in a separate return limitation year, subject to the restrictions of §§1.1502–21A(c) or 1.1502–21(c), as appropriate. The carryover period of the loss, for purposes of section 172(b), will start from Year 1, when the dual consolidated loss was incurred.

Example 2. The facts are the same as in EXAMPLE 1, except that in Year 2, DRC earns $75 and P earns $50. In Year 3, DRC earns $25 while P earns $30. A triggering event occurs in Year 3. The $100 presumptive amount of recapture can be reduced to zero by the $75 and $25 earned by DRC in Years 2 and 3, respectively, upon adequate documentation of such offset under paragraph (g)(2)(vii)(B)(*1*) of this section. Nevertheless, an interest charge will be owed. Under the presumptive rule of paragraph (g)(2)(vii)(A)(*2*) of this section, interest will be charged on the additional tax owed on the $100 of recapture income as if the tax had accrued in Year 1 (the year in which the dual consolidated loss reduced the income of P). However, the net interest will be reduced to the amount that would have been owed if the consolidated group had filed amended returns, treating the dual consolidated loss as a loss subject to the separate return limitation year restrictions of §1.1502–21A(c) or 1.1502–21(c), as appropriate, upon adequate documentation of such reduction of interest under paragraph (g)(2)(vii)(B)(*2*) of this section.

Example 3. P, a domestic corporation, owns DRC, a domestic corporation that is subject to the income tax laws of Country Z on a residence basis. DRC owns FE, a Country Z corporation. In Year 1, DRC incurs a net operating loss for U.S. tax purposes. Under the tax laws of Country Z, the loss is not recognized until Year 3. The Year 1 net operating loss is a dual consolidated loss under paragraph (c)(5) of this section. The consolidated group elects relief under paragraph (g)(2) of this section by filing the appropriate agreement and uses the dual consolidated loss on its U.S. income tax return. In Year 3, the dual consolidated loss is used under the laws of Country Z to offset the income of FE, which is a triggering event under paragraph (g)(2)(iii) of this section. However, the consolidated group does not recapture the dual consolidated loss. The consolidated group's failure to comply with the recapture provisions of this paragraph (g)(2)(vii) prevents DRC from being eligible for the relief provided under paragraph (g)(2) of this section for any dual consolidated losses incurred in Years 3 through 7, inclusive.

(h) *Effective date*—(1) *In general.* These regulations are effective for taxable years beginning on or after October 1, 1992. Section 1.1503–2A is effective for taxable years beginning after December 31, 1986, and before October 1, 1992. Paragraph (g)(2)(iv)(B)(*2*) of this section shall apply with respect to transactions otherwise constituting triggering events occurring on or after January 1, 2002.

(2) *Taxpayers that have filed for relief under §1.1503–2A*—(i) *In general.* Except as provided in paragraph (h)(ii)(b) of this section, taxpayers that have filed agreements described in §1.1503–2A(c)(3) or certifications described in §1.1503–2A(d)(3) shall continue to be subject to the provisions of such agreements or certifications, including the amended return or recapture requirements applicable in the event of a triggering event, for the remaining term of such agreements or certifications.

(ii) *Special transition rule.* A taxpayer that has filed an agreement described in §1.1503–2A(c)(3) or a certification described in §1.1503–2A(d)(3) and that is in compliance with the provisions of §1.1503–2A may elect to replace such agreement or certification with an agreement described in paragraph (g)(2)(i) of this section. However, a taxpayer making this election must replace all agreements and certifications filed under §1.1503–2A. If the taxpayer is a consolidated group, the election must be made with respect to all dual resident corporations or separate units within the group. Likewise, if the taxpayer is an unaffiliated domestic owner, the election must be made with respect to all separate units of the domestic owner. The taxpayer must file the replacement agreement with its timely filed income tax return for its first taxable year commencing on or after October 1, 1992, stating that such agreement is a replacement for the agreement filed under §1.1503–2A(c)(3) or the certification filed under §1.1503–2A(d)(3) and identifying the taxable year for which the original agreement or certification was filed. A single agreement described in paragraph (g)(2)(i) of this section may be filed to replace more than one agreement or certification filed under §1.1503–2A; however, each dual consolidated loss must be separately identified. A taxpayer may also elect to apply §1.1503–2 for all open years, with respect to agreements filed under §1.1503–2A(c)(3) or certifications filed under §1.1503–2A(d)(3), in cases where the agreement or certification is no longer in effect and the taxpayer has complied with the provisions of §1.1503–2A. For example, a taxpayer may have had a triggering event under §1.1503–2A that is not a triggering event under §1.1503–2. If the taxpayer fully complied with the requirements of the agreement entered into under §1.1503–2A(c)(3) and filed amended U.S. income tax returns within the time required under §1.1503–2A(c)(3), the taxpayer may file amended U.S. income tax returns consistent with the position that the earlier triggering event is no longer a triggering event.

(3) *Taxpayers that are in compliance with §1.1503–2A but have not filed for relief thereunder.* A taxpayer that is in compliance with the provisions of §1.1503–2A but has not filed an agreement described in §1.1503–2A(c)(3) or a certification described in §1.1503–2A(d)(3) may elect to have the provisions of §1.1503–2 apply for any open year. In particular, a taxpayer may elect to apply the provisions of §1.1503–2 in a case where the dual consolidated loss has been subjected to the separate return limitation year restrictions of §1.1502–21A(c) or 1.1502–21(c) (as appropriate) but the losses, expenses, or deductions taken into account in computing the dual consolidated loss have not been used to offset the income of another person for foreign tax purposes. However, if a taxpayer is a consolidated group, the election must be made with respect to all dual resident corporations or separate units within the group. Likewise, if the taxpayer is an unaffiliated domestic owner, the election must be made with respect to all separate units of the domestic owner.

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[T.D. 9315, 72 FR 12914, Mar. 19, 2007; 72 FR 20424, Apr. 23, 2007]

§ 1.1503(d)–1 Definitions and special rules for filings under section 1503(d).

(a) *In general.* This section and §§ 1.1503(d)–2 through 1.1503(d)–8 provide rules concerning the determination and use of dual consolidated losses pursuant to section 1503(d). Paragraph (b) of this section provides definitions that apply for purposes of this section and §§ 1.1503(d)–2 through 1.1503(d)–8. Paragraph (c) of this section provides a reasonable cause exception and a signature requirement for filings.

(b) *Definitions.* The following definitions apply for purposes of this section and §§ 1.1503(d)–2 through 1.1503(d)–8:

(1) *Domestic corporation* means an entity classified as a domestic corporation under section 7701(a)(3) and (4) or otherwise treated as a domestic corporation by the Internal Revenue Code, including, but not limited to, sections 269B, 953(d), 1504(d), and 7874. However, solely for purposes of section 1503(d), the term domestic corporation shall not include a regulated investment company as defined in section 851, a real estate investment trust as defined in section 856, or an S corporation as defined in section 1361.

(2) *Dual resident corporation* means—

(i) A domestic corporation that is subject to an income tax of a foreign country on its worldwide income or on a residence basis. A corporation is taxed on a residence basis if it is taxed as a resident under the laws of the foreign country; and

(ii) A foreign insurance company that makes an election to be treated as a domestic corporation pursuant to section 953(d) and is treated as a member of an affiliated group for purposes of chapter 6, even if such company is not subject to an income tax of a foreign country on its worldwide income or on a residence basis. See section 953(d)(3).

(3) *Hybrid entity* means an entity that is not taxable as an association for Federal tax purposes, but is subject to an income tax of a foreign country as a corporation (or otherwise at the entity level) either on its worldwide income or on a residence basis.

(4) *Separate unit*—(i) *In general*. The term *separate unit* means either of the following that is carried on or owned, as applicable, directly or indirectly, by a domestic corporation (including a dual resident corporation):

(A) Except to the extent provided in paragraph (b)(4)(iii) of this section, a business operation outside the United States that, if carried on by a U.S. person, would constitute a foreign branch as defined in §1.367(a)–6T(g)(1) (foreign branch separate unit).

(B) An interest in a hybrid entity (hybrid entity separate unit).

(ii) *Separate unit combination rule*. Except as otherwise provided in this paragraph, if a domestic owner, or two or more domestic owners that are members of the same consolidated group, have two or more separate units (individual separate units), then all such individual separate units that are located (in the case of a foreign branch separate unit) or subject to an income tax either on their worldwide income or on a residence basis (in the case of a hybrid entity an interest in which is a hybrid entity separate unit) in the same foreign country shall be treated as one separate unit (combined separate unit). See §1.1503(d)–7(c) *Example 1*. Separate units of a foreign insurance company that is a dual resident corporation under paragraph (b)(2)(ii) of this section, however, shall not be combined with separate units of any other domestic corporation. Except as specifically provided in this section or §§1.1503(d)–2 through 1.1503(d)–8, any individual separate unit composing a combined separate unit loses its character as an individual separate unit.

(iii) *Business operations that do not constitute a permanent establishment*. A business operation carried on by a domestic corporation that is not a dual resident corporation shall not constitute a foreign branch separate unit, provided the business operation:

(A) Is not carried on indirectly through a hybrid entity or a transparent entity; and

(B) Is conducted in a country with which the United States has entered into an income tax convention and is not treated as a permanent establishment pursuant to that convention, or is not otherwise subject to tax on a net basis under that convention. See §1.1503(d)–7(c) *Example 2*.

(iv) *Foreign branch separate units held by dual resident corporations or hybrid entities in the same foreign country*. A foreign branch separate unit may be owned by a dual resident corporation, or through a hybrid entity (an interest in which is a separate unit), even where the foreign branch is located in the same foreign country that subjects such dual resident corporation or hybrid entity to tax on its worldwide income or on a residence basis. But see the rule under paragraph (b)(4)(ii) of this section that combines certain same-country hybrid entity separate units and foreign branch separate units. See also §1.1503(d)–7(c) *Example 1*.

(5) *Dual consolidated loss* means—

(i) In the case of a dual resident corporation, and except to the extent provided in §1.1503(d)–5(b), the net operating loss (as defined in section 172(c) and the related regulations) incurred in a year in which the corporation is a dual resident corporation; and

(ii) In the case of a separate unit, the net loss attributable to the separate unit under §1.1503(d)–5(c) through (e).

(6) *Subject to tax*. For purposes of determining whether a domestic corporation or another entity is subject to an income tax of a foreign country on its income, the fact that it has no actual income tax liability to the foreign country for a particular taxable year shall not be taken into account.

(7) *Foreign country* includes any possession of the United States.

(8) *Consolidated group* has the meaning provided in §1.1502–1(h).

(9) *Domestic owner* means—

(i) A domestic corporation (including a dual resident corporation) that has one or more separate units or interests in a transparent entity; and

(ii) In the case of a combined separate unit, a domestic corporation (including a dual resident corporation) that has one or more individual separate units that are treated as part of the combined separate unit under paragraph (b)(4)(ii) of this section.

(10) *Affiliated dual resident corporation* and *affiliated domestic owner* mean a dual resident corporation and a domestic owner, respectively, that is a member of a consolidated group.

(11) *Unaffiliated dual resident corporation*, *unaffiliated domestic corporation*, and *unaffiliated domestic owner* mean a dual resident corporation, domestic corporation, and domestic owner, respectively, that is not a member of a consolidated group.

(12) *Domestic affiliate* means—

(i) A member of an affiliated group, without regard to the exceptions contained in section 1504(b) (other than section 1504(b)(3)) relating to includible corporations;

(ii) A domestic owner;

(iii) A separate unit; or

(iv) An interest in a transparent entity, as defined in paragraph (b)(16) of this section.

(13) *Domestic use.* See §1.1503(d)–2.

(14) *Foreign use.* See §1.1503(d)–3.

(15) *Grantor trust* means a trust, any portion of which is treated as being owned by the grantor or another person under subpart E of subchapter J of this chapter.

(16) *Transparent entity*—(i) *In general.* The term *transparent entity* means an entity described in this paragraph (b)(16) where all or a portion of its interests are owned, directly or indirectly, by a domestic corporation. An entity is described in this paragraph (b)(16) if the entity—

(A) Is not taxable as an association for Federal tax purposes;

(B) Is not subject to income tax in a foreign country as a corporation (or otherwise at the entity level) either on its worldwide income or on a residence basis; and

(C) Is not a pass-through entity under the laws of the applicable foreign country. For purposes of applying the preceding sentence, the applicable foreign country is the foreign country in which the relevant foreign branch separate unit is located, or the foreign country that subjects the relevant hybrid entity (an interest in which is a separate unit) or dual resident corporation to an income tax either on its worldwide income or on a residence basis.

(ii) *Example.* A U.S. limited liability company (LLC) does not elect to be taxed as an association for Federal tax purposes and is not subject to income tax in a foreign country as a corporation (or otherwise at the entity level) either on its worldwide income or on a residence basis. The LLC is owned by a hybrid entity (an interest in which is a separate unit) that is the relevant hybrid entity. Provided the LLC is not treated as a pass-through entity by the applicable foreign country that subjects the relevant hybrid entity to an income tax either on its worldwide income or on a residence basis, the LLC would qualify as a transparent entity. See also §1.1503(d)–7(c) *Example 26*.

(17) *Disregarded entity* means an entity that is disregarded as an entity separate from its owner, under §§301.7701–1 through 301.7701–3 of this chapter, for Federal tax purposes.

(18) *Partnership* means an entity that is classified as a partnership, under §§301.7701–1 through 301.7701–3 of this chapter, for Federal tax purposes.

(19) *Indirectly*, when used in reference to ownership, means ownership through a partnership, a disregarded entity, or a grantor trust, regardless of whether the partnership, disregarded entity, or grantor trust is a U.S. person.

(20) *Certification period* means the period of time up to and including the fifth taxable year following the year in which the dual consolidated loss that is the subject of a domestic use agreement (as described in §1.1503(d)–6(d)(1)) was incurred.

(c) *Special rules for filings under section 1503(d)*—(1) *Reasonable cause exception.* A person that is permitted or required to file an election, agreement, statement, rebuttal, computation, or other information pursuant to section 1503(d) and these regulations, that fails to make such filing in a timely manner, shall be considered to have satisfied the timeliness requirement with respect to such filing if the person is able to demonstrate, to the Area Director, Field Examination, Small Business/Self Employed or the Director of Field Operations, Large and Mid-Size Business (Director) having jurisdiction of the taxpayer's tax return for the taxable year, that such failure was due to reasonable cause and not willful neglect. In determining whether the taxpayer has reasonable cause, the Director shall consider whether the taxpayer acted reasonably and in good faith. In general, the taxpayer must demonstrate that it exercised ordinary care and prudence in meeting its tax obligations but nonetheless did not comply with the prescribed duty within the prescribed time. Whether the taxpayer acted reasonably and in good faith will be determined after considering all the facts and circumstances. The Director shall notify the person in writing within 120 days of the filing if it is determined that the failure to comply was not due to reasonable cause, or if additional time will be needed to make such determination. For this purpose, the 120-day period shall begin on the date the taxpayer is notified in writing that the request has been received and assigned for review. If, once such period commences, the taxpayer is not again notified within 120 days, then the taxpayer shall be deemed to have established reasonable cause. The reasonable cause exception of this paragraph (c) shall only apply if, once the person becomes aware of its failure to file the election, agreement, statement, rebuttal, computation or other information in a timely manner, the person complies with the requirements of paragraph (c)(2) of this section.

(2) *Requirements for reasonable cause relief*—(i) *Time of submission.* Requests for reasonable cause relief will only be considered if once the person becomes aware of the failure to file the election, agreement, statement, rebuttal, computation or other information, the person attaches all the documents that should have been filed, as well as a written statement setting forth the reasons for the failure to timely comply, to an amended return that amends the return to which the documents should have been attached pursuant to the rules of section 1503(d) and these regulations.

(ii) *Notice requirement.* In addition to the requirements of paragraph (c)(2)(i) of this section, the taxpayer must provide a copy of the amended return and all required attachments to the Director as follows:

(A) If the taxpayer is under examination for any taxable year when the taxpayer requests relief, the taxpayer must provide a copy of the amended return and attachments to the personnel conducting the examination.

(B) If the taxpayer is not under examination for any taxable year when the taxpayer requests relief, the taxpayer must provide a copy of the amended return and attachments to the Director having jurisdiction of the taxpayer's return.

(3) *Signature requirement.* When an election, agreement, statement, rebuttal, computation, or other information is required pursuant to section 1503(d) and these regulations to be attached to and filed by the due date (including extensions) of a U.S. tax return and signed under penalties of perjury by the person who signs the return, the attachment and filing of an unsigned copy is considered to satisfy such requirement, provided the taxpayer retains the original in its records in the manner specified by § 1.6001–1(e).

[T.D. 9315, 72 FR 12914, Mar. 19, 2007]

§ 1.1503(d)–2 Domestic use.

A *domestic use* of a dual consolidated loss shall be deemed to occur when the dual consolidated loss is made available to offset, directly or indirectly, the income of a domestic affiliate (other than the dual resident corporation or separate unit that, in each case, incurred the dual consolidated loss) in the taxable year in which the dual consolidated loss is recognized, or in any other taxable year, regardless of whether the dual consolidated loss offsets income under the income tax laws of a foreign country and regardless of whether any income that the dual consolidated loss may offset in the foreign country is, has been, or will be subject to tax in the United States. A domestic use shall be deemed to occur in the year the dual consolidated loss is included in the computation of the taxable income of a consolidated group, unaffiliated dual resident corporation, or an unaffiliated domestic owner, as applicable, even if no tax benefit results from such inclusion in that year. See §1.1503(d)–7(c) *Examples 2* through *4*.

[T.D. 9315, 72 FR 12914, Mar. 19, 2007]

§ 1.1503(d)–3 Foreign use.

(a) *Foreign use*—(1) *In general.* Except as provided in paragraph (c) of this section, a *foreign use* of a dual consolidated loss shall be deemed to occur when any portion of a deduction or loss taken into account in computing the dual consolidated loss is made available under the income tax laws of a foreign country to offset or reduce, directly or indirectly, any item that is recognized as income or gain under such laws and that is, or would be, considered under U.S. tax principles to be an item of—

(i) A foreign corporation as defined in section 7701(a)(3) and (a)(5); or

(ii) A direct or indirect owner of an interest in a hybrid entity, provided such interest is not a separate unit. See §1.1503(d)–7(c) *Examples 5* through *10* and *37*.

(2) *Indirect use*—(i) *General rule.* Except to the extent provided in paragraph (a)(2)(ii) of this section, an item of deduction or loss shall be deemed to be made available indirectly if—

(A) One or more items are taken into account as deductions or losses for foreign tax purposes, but do not give rise to corresponding items of income or gain for U.S. tax purposes; and

(B) The item or items described in paragraph (a)(2)(i)(A) of this section have the effect of making an item of deduction or loss composing the dual consolidated loss available for a foreign use as described in paragraph (a)(1) of this section.

(ii) *Exception.* The general rule provided in paragraph (a)(2)(i) of this section shall not apply if the consolidated group, unaffiliated domestic owner, or unaffiliated dual resident corporation demonstrates, to the satisfaction of the Commissioner, that the item or items described in paragraph (a)(2)(i)(A) of this section that gave rise to the indirect foreign use—

(A) Were not incurred, or taken into account, with a principal purpose of avoiding the provisions of section 1503(d). For purposes of this paragraph (a)(2)(ii), an item incurred or taken into account as interest for foreign tax purposes, but disregarded for U.S. tax purposes, shall be deemed to have been incurred, or taken into account, with a principal purpose of avoiding the provisions of section 1503(d). Similarly, for purposes of this paragraph (a)(2)(ii), an item incurred or taken into account as the result of an instrument that is treated as debt for foreign tax purposes and equity for U.S. tax purposes, shall be deemed to have been incurred, or taken into account, with a principal purpose of avoiding the provisions of section 1503(d); and

(B) Were incurred, or taken into account, in the ordinary course of the dual resident corporation's or separate unit's trade or business.

(iii) *Examples.* See §1.1503(d)–7(c) *Examples 6* through *8*.

(3) *Deemed use.* See paragraph (e) of this section for a deemed foreign use pursuant to the mirror legislation rule.

(b) *Available for use.* A foreign use shall be deemed to occur in the year in which any portion of a deduction or loss taken into account in computing the dual consolidated loss is made available for an offset described in paragraph (a) of this section, regardless of whether it actually offsets or reduces any items of income or gain under the income tax laws of the foreign country in such year, and regardless of whether any of the items that may be so offset or reduced are regarded as income under U.S. tax principles.

(c) *Exceptions*—(1) *In general.* Paragraphs (c)(2) through (9) of this section provide exceptions to the general definition of foreign use set forth in paragraphs (a) and (b) of this section. These exceptions only apply to a foreign use that occurs solely as a result of the conditions or circumstances described therein, and do not apply if a foreign use occurs in any other case or by any other means. For example, the exception under paragraph (c)(4) of this section (regarding certain interests in partnerships or grantor trusts) shall not apply where the item of deduction or loss is made available through a foreign consolidation regime (or similar method). In addition, these exceptions do not apply when attempting to demonstrate that no foreign use of a dual consolidated loss can occur in any other year by any means under §1.1503(d)–6(c), (e)(2)(i), or (j)(2). But see §1.1503(d)–6(e)(2)(ii), which takes into account the exception under paragraph (c)(7) of this section for purposes of rebutting certain asset transfers.

(2) *Election or merger required to enable foreign use.* Where the laws of a foreign country provide an election that would enable a foreign use, a foreign use shall be considered to occur only if the election is made. Similarly, where the laws of a foreign country would enable a foreign use through a sale, merger, or similar transaction, a foreign use shall be considered to occur only if the sale, merger, or similar transaction occurs.

(3) *Presumed use where no foreign country rule for determining use.* This paragraph (c)(3) applies if the losses or deductions composing the dual consolidated loss are made available under the laws of a foreign country both to offset income that would constitute a foreign use and to offset income that would not constitute a foreign use, and the laws of the foreign country do not provide applicable rules for determining which income is offset by the losses or deductions. In such a case, the losses or deductions shall be deemed to be made available to offset the income that does not constitute a foreign use, to the extent of such income, before being considered to be made available to offset the income that does constitute a foreign use. See §1.1503(d)–7(c) *Example 11.*

(4) *Certain interests in partnerships or grantor trusts*—(i) *General rule.* Except to the extent provided in paragraph (c)(4)(iii) of this section, this paragraph (c)(4)(i) applies to a dual consolidated loss attributable to an interest in a hybrid entity partnership or a hybrid entity grantor trust, or to a separate unit owned indirectly through a partnership or grantor trust. In such a case, a foreign use will not be considered to occur if the foreign use is solely the result of another person's ownership of an interest in the partnership or grantor trust, as applicable, and the allocation or carry forward of an item of deduction or loss composing such dual consolidated loss as a result of such ownership. See §1.1503(d)–7(c) *Example 13.*

(ii) *Combined separate unit.* This paragraph applies to a dual consolidated loss attributable to a combined separate unit that includes an individual separate unit to which paragraph (c)(4)(i) of this section would apply, but for the application of the separate unit combination rule provided under §1.1503(d)–1(b)(4)(ii). In such a case, paragraph (c)(4)(i) of this section shall apply to the portion of the dual consolidated loss of such combined separate unit that is attributable, as provided under §1.1503(d)–5(c) through (e), to the individual separate unit (otherwise described in paragraph (c)(4)(i) of this section) that is a component of the combined separate unit. See §1.1503(d)–7(c) *Example 14.*

(iii) *Reduction in interest.* The exception under paragraph (c)(4)(i) of this section shall not apply if, at any time following the year in which the dual consolidated loss is incurred, there is more than a *de minimis* reduction in the domestic owner's percentage interest in the partnership or grantor trust, as applicable, as described in paragraph (c)(5) of this section. In such a case, a foreign use shall be deemed to occur at the time the reduction in interest exceeds the *de minimis* amount. See §1.1503(d)–7(c) *Example 13.*

(5) *De minimis reduction of an interest in a separate unit*—(i) *General rule.* This paragraph applies to a *de minimis* reduction of a domestic owner's interest in a separate unit (including an interest described in paragraph (c)(4)(i) of this section). Except to the extent provided in paragraph (c)(5)(ii) of this section, no foreign use shall be considered to occur with respect to a dual consolidated loss as a result of an item of deduction or loss composing such dual consolidated loss being made available solely as a result of a reduction in the domestic owner's interest in the separate unit, as provided under paragraph (c)(5)(iii) of this section. See §1.1503(d)–7(c) *Example 5.*

(ii) *Limitations.* The exception provided in paragraph (c)(5)(i) of this section shall not apply if—

(A) During any 12-month period the domestic owner's percentage interest in the separate unit is reduced by 10 percent or more, as determined by reference to the domestic owner's interest at the beginning of the 12-month period; or

(B) At any time the domestic owner's percentage interest in the separate unit is reduced by 30 percent or more, as determined by reference to the domestic owner's interest at the end of the taxable year in which the dual consolidated loss was incurred.

(iii) *Reduction in interest.* The following rules apply for purposes of paragraphs (c)(4) and (5) of this section. A reduction of a domestic owner's interest in a separate unit shall include a reduction resulting from another person acquiring through sale, exchange, contribution, or other means, an interest in the foreign branch or hybrid entity, as applicable. A reduction may occur either directly or indirectly, including through an interest in a partnership, a disregarded entity, or a grantor trust through which a separate unit is carried on or owned. In the case of an interest in a hybrid entity partnership or a separate unit all or a portion of which is carried on or owned through a partnership, an interest in such separate unit (or portion of such separate unit) is determined by reference to the owner's interest in the profits or the capital in the separate unit. In the case of an interest in a hybrid entity grantor trust or a separate unit all or a portion of which is carried on or owned through a grantor trust, an interest in such separate unit (or portion of such separate unit) is determined by reference to the domestic owner's share of the assets and liabilities of the separate unit.

(iv) *Examples and coordination with exceptions to other triggering events.* See §1.1503(d)–7(c) *Examples 5*, *13*, and *14*. See also §1.1503(d)–6(f)(3) and (f)(5) for rules that coordinate the de minimis exception to foreign use with exceptions to other triggering events described in §1.1503(d)–6(e)(1), and provide an exception to foreign use following certain compulsory transfers.

(6) *Certain asset basis carryovers.* No foreign use shall be considered to occur with respect to a dual consolidated loss solely as a result of items of deduction or loss composing such dual consolidated loss being made available as a result of the transfer of assets of a dual resident corporation or separate unit, provided—

(i) Such items of loss and deduction are made available solely as a result of the basis of the transferred assets being determined, under foreign law, in whole or in part by reference to the basis of the assets in the hands of the dual resident corporation or separate unit;

(ii) The aggregate adjusted basis, as determined under U.S. tax principles, of all the assets so transferred during any 12-month period is less than 10 percent of the aggregate adjusted basis, as determined under U.S. tax principles, of all the dual resident corporation's or separate unit's assets, determined by reference to the assets held at the beginning of such 12-month period; and

(iii) The aggregate adjusted basis, as determined under U.S. tax principles, of all the assets so transferred at any time is less than 30 percent of the aggregate adjusted basis, as determined under U.S. tax principles, of all the dual resident corporation's or separate unit's assets, determined by reference to the assets held at the end of the taxable year in which the dual consolidated loss was generated. See §1.1503(d)–7(c) *Example 15*.

(7) *Assumption of certain liabilities*—(i) *In general.* Except to the extent provided in paragraph (c)(7)(ii) of this section, no foreign use shall be considered to occur with respect to any dual consolidated loss solely as a result of an item of deduction or loss composing such dual consolidated loss being made available following the assumption of liabilities of a dual resident corporation or separate unit, provided such availability arises solely as the result of an item of deduction or loss incurred with respect to, or as a result of, such liabilities. See §1.1503(d)–7(c) *Example 16*.

(ii) *Ordinary course limitation.* Paragraph (c)(7)(i) of this section shall apply only to the extent the liabilities assumed were incurred in the ordinary course of the dual resident corporation's, or separate unit's, trade or business. For purposes of this paragraph, liabilities incurred in the ordinary course of a trade or business shall include debt incurred to finance the trade or business of the dual resident corporation or separate unit.

(8) *Multiple-party events.* This paragraph applies to a transaction that qualifies for the triggering event exception described in §1.1503(d)–6(f)(2)(i)(B) where the acquiring unaffiliated domestic corporation or consolidated group owns, directly or indirectly, more than 90 percent, but less than 100 percent, of the transferred assets or interests immediately after the transaction. In such a case, no foreign use shall be considered to occur with respect to a dual consolidated loss of the dual resident corporation or separate unit whose assets or interests were acquired, solely as a result of the less than 10 percent direct or indirect ownership of the acquired assets or interests by persons other than the acquiring unaffiliated domestic corporation or consolidated group, as applicable, immediately after the transaction. See §1.1503(d)–7(c) *Example 37.*

(9) *Additional guidance.* The Commissioner may provide, by guidance published in the Internal Revenue Bulletin, that certain events or transactions do or do not result in a foreign use. Such guidance may also modify the triggering events and rebuttals described in §1.1503(d)–6(e), and the exceptions thereto under §1.1503(d)–6(f), as appropriate.

(d) *Ordering rules for determining the foreign use of losses.* If the laws of a foreign country provide for the foreign use of losses of a dual resident corporation or a separate unit, but do not provide applicable rules for determining the order in which such losses are used in a taxable year, the following rules shall apply:

(1) Any net loss, or net income, that the dual resident corporation or separate unit has in a taxable year shall first be used to offset net income, or loss, recognized by its affiliates in the same taxable year before any carry over of its losses is considered to be used to offset any income from the taxable year.

(2) If under the laws of the foreign country the dual resident corporation or separate unit has losses from different taxable years, it shall be deemed to use first the losses which would not constitute a triggering event that would result in the recapture of a dual consolidated loss pursuant to §1.1503(d)–6(h). Thereafter, it shall be deemed to use first the losses from the most recent taxable year from which a loss may be carried forward or back for foreign law purposes.

(3) Where different losses or deductions (for example, capital losses and ordinary losses) of a dual resident corporation or separate unit incurred in the same taxable year are available for foreign use, the different losses shall be deemed to be used on a pro rata basis. See §1.1503(d)–7(c) *Example 12.*

(e) *Mirror legislation rule*—(1) *In general.* Except as provided in paragraph (e)(2) of this section and §1.1503(d)–6(b) (relating to agreements entered into between the United States and a foreign country), a foreign use shall be deemed to occur if the income tax laws of a foreign country would deny any opportunity for the foreign use of the dual consolidated loss in the year in which the dual consolidated loss is incurred (mirror legislation), determined by assuming that such foreign country had recognized the dual consolidated loss in such year, for any of the following reasons:

(i) The dual resident corporation or separate unit that incurred the loss is subject to income taxation by another country (for example, the United States) on its worldwide income or on a residence basis.

(ii) The loss may be available to offset income (other than income of the dual resident corporation or separate unit) under the laws of another country (for example, the United States).

(iii) The deductibility of any portion of a deduction or loss taken into account in computing the dual consolidated loss depends on whether such amount is deductible under the laws of another country (for example, the United States). See §1.1503(d)–7(c) *Examples 17* through *19.*

(2) *Stand-alone exception*—(i) *In general.* This paragraph (e)(2) applies if, in the absence of the mirror legislation described in paragraph (e)(1) of this section, no item of deduction or loss composing the dual consolidated loss of such dual resident corporation or separate unit would otherwise be available for a foreign use in the taxable year in

which such dual consolidated loss is incurred. This determination is made without regard to whether such availability is limited by election (or other similar procedure). However, for purposes of this paragraph (e)(2)(i), no item of deduction or loss composing the dual consolidated loss of a dual resident corporation or separate unit is considered to be made available for foreign use solely because the laws of a foreign country would enable a foreign use through a sale, merger, or similar transaction (provided no such sale, merger, or similar transaction actually occurs). In such a case, no foreign use shall be considered to occur pursuant to paragraph (e)(1) of this section with respect to the dual consolidated loss, provided the requirements of paragraph (e)(2)(ii) of this section are satisfied. See §1.1503(d)–7(c) *Examples 17* through *19*.

(ii) *Stand-alone domestic use agreement*. In order to qualify for the exception under paragraph (e)(2)(i) of this section, the consolidated group, unaffiliated dual resident corporation, or unaffiliated domestic owner, as the case may be, must enter into a domestic use agreement in accordance with the provisions of §1.1503(d)–6(d) and, in addition, must include the following items in such domestic use agreement:

(A) A statement that the document is also being submitted under the provisions of paragraph (e)(2) of this section.

(B) A certification that the conditions of paragraph (e)(2)(i) of this section are satisfied during the taxable year in which the dual consolidated loss is incurred.

(C) An agreement to include with each annual certification required under §1.1503(d)–6(g), a certification that the conditions described in paragraph (e)(2)(i) of this section are satisfied during the taxable year of each such certification.

(iii) *Termination of stand-alone domestic use agreement*. This paragraph (e)(2)(iii) applies to a consolidated group, unaffiliated dual resident corporation, or unaffiliated domestic owner, as the case may be, that entered into a domestic use agreement pursuant to paragraph (e)(2)(ii) of this section, with respect to a dual consolidated loss, and which subsequently makes an election pursuant to §1.1503(d)–6(b) (relating to agreements entered into between the United States and a foreign country) with respect to such dual consolidated loss. In such a case, the dual consolidated loss shall be subject to the election under §1.1503(d)–6(b) (and any related agreements, representations and conditions), and the domestic use agreement entered into pursuant to paragraph (e)(2)(ii) of this section shall terminate and have no further effect.

[T.D. 9315, 72 FR 12914, Mar. 19, 2007]

§ 1.1503(d)–4 Domestic use limitation and related operating rules.

(a) *Scope*. This section prescribes rules that apply when the general limitation on the domestic use of a dual consolidated loss under paragraph (b) of this section applies. Thus, the rules of this section do not apply when an exception to the domestic use limitation applies (for example, as a result of a domestic use election under §1.1503(d)–6(d)). In general, when the domestic use limitation applies, the dual consolidated loss of a dual resident corporation or separate unit is subject to the separate return limitation year (SRLY) provisions of §1.1502–21(c), as modified under this section. Paragraph (c) of this section provides rules that determine the effect of a dual consolidated loss on a consolidated group, an unaffiliated dual resident corporation, or an unaffiliated domestic owner. Paragraph (d) of this section provides rules that eliminate dual consolidated losses following certain transactions or events. Paragraph (e) of this section contains provisions that prevent dual consolidated losses from offsetting tainted income. Finally, paragraph (f) of this section provides rules for computing foreign tax credits.

(b) *Limitation on domestic use of a dual consolidated loss*. Except as provided in §1.1503(d)–6, the domestic use of a dual consolidated loss is not permitted. See §1.1503(d)–2 for the definition of a domestic use. See also §1.1503(d)–7(c) *Examples 2* through *4*.

(c) *Effect of a dual consolidated loss on a consolidated group, unaffiliated dual resident corporation, or unaffiliated domestic owner*. For any taxable year in which a dual resident corporation or separate unit has a dual consolidated loss that is subject to the domestic use limitation of paragraph (b) of this section, the following rules shall apply:

(1) *Dual resident corporation.* This paragraph (c)(1) applies to a dual consolidated loss of a dual resident corporation. The unaffiliated dual resident corporation, or consolidated group that includes the dual resident corporation, shall compute its taxable income (or loss), or consolidated taxable income (or loss), respectively, without taking into account those items of deduction and loss that compose the dual resident corporation's dual consolidated loss. For this purpose, the dual consolidated loss shall be treated as composed of a pro rata portion of each item of deduction and loss of the dual resident corporation taken into account in calculating the dual consolidated loss. The dual consolidated loss is subject to the limitations on its use contained in paragraph (c)(3) of this section and, subject to such limitations, may be carried over or back for use in other taxable years as a separate net operating loss carryover or carryback of the dual resident corporation arising in the year incurred. If the dual resident corporation owns a separate unit or an interest in a transparent entity, the limitations contained in paragraph (c)(3) of this section shall apply to the dual resident corporation as if the separate unit or interest in a transparent entity were a separate domestic corporation that filed a consolidated return with the unaffiliated dual resident corporation, or with the consolidated group of the affiliated dual resident corporation, as applicable.

(2) *Separate unit.* This paragraph (c)(2) applies to a dual consolidated loss that is attributable to a separate unit. The unaffiliated domestic owner of a separate unit, or the consolidated group of an affiliated domestic owner of a separate unit, shall compute its taxable income (or loss) or consolidated taxable income (or loss), respectively, without taking into account those items of deduction and loss that compose the separate unit's dual consolidated loss. For this purpose, the dual consolidated loss shall be treated as composed of a pro rata portion of each item of deduction and loss of the separate unit taken into account in calculating the dual consolidated loss. The dual consolidated loss is subject to the limitations contained in paragraph (c)(3) of this section as if the separate unit to which the dual consolidated loss is attributable were a separate domestic corporation that filed a consolidated return with its unaffiliated domestic owner or with the consolidated group of its affiliated domestic owner, as applicable. Subject to such limitations, the dual consolidated loss may be carried over or back for use in other taxable years as a separate net operating loss carryover or carryback of the separate unit arising in the year incurred. See §1.1503(d)–7(c) *Examples 29* and *38*.

(3) *SRLY limitation.* The dual consolidated loss shall be treated as a loss incurred by the dual resident corporation or separate unit in a separate return limitation year and shall be subject to all of the limitations of §1.1502–21(c) (SRLY limitation), subject to the following modifications—

(i) Notwithstanding §1.1502–1(f)(2)(i), the SRLY limitation is applied to any dual consolidated loss of a common parent that is a dual resident corporation, or any dual consolidated loss attributable to a separate unit of a common parent;

(ii) The SRLY limitation is applied without regard to §1.1502–21(c)(2) (SRLY subgroup limitation) and 1.1502–21(g) (overlap with section 382);

(iii) For purposes of calculating the general SRLY limitation under §1.1502–21(c)(1)(i), the calculation of aggregate consolidated taxable income shall only include items of income, gain, deduction, and loss generated—

(A) In the case of a hybrid entity separate unit, in years in which the hybrid entity (an interest in which is a separate unit) is taxed as a corporation (or otherwise at the entity level) either on its worldwide income or as a resident in the same foreign country in which it was so taxed during the year in which the dual consolidated loss was generated; and

(B) In the case of a foreign branch separate unit, in years in which the foreign branch qualified as a separate unit in the same foreign country in which it so qualified during the year in which the dual consolidated loss was generated.

(iv) For purposes of calculating the general SRLY limitation under § 1.1502–21(c)(1)(i), the calculation of aggregate consolidated taxable income shall not include any amount included in income pursuant to § 1.1503(d)–6(h) (relating to the recapture of a dual consolidated loss).

(4) *Items of a dual consolidated loss used in other taxable years.* A pro rata portion of each item of deduction or loss that composes the dual consolidated loss shall be considered to be used when the dual consolidated loss is used in other taxable years. See § 1.1503(d)–7(c) *Examples 29* and *38*.

(5) *Reconstituted net operating losses.* For additional rules and limitations that apply to reconstituted net operating losses, see § 1.1503(d)–6(h)(6).

(d) *Elimination of a dual consolidated loss after certain transactions*—(1) *General rule.* In general, a dual resident corporation has a net operating loss (and, therefore, a dual consolidated loss) only if it sustains such loss, or succeeds to such loss as a result of acquiring the assets of a corporation that sustained the loss in a transaction described in section 381(a). Similarly, a net loss generally is attributable to a separate unit of a domestic owner (and therefore is a dual consolidated loss) only if the domestic owner incurs the deductions or losses, or succeeds to such deductions or losses in a transaction described in section 381(a). Except as provided in § 1.1503(d)–6(h)(6)(iii), section 1503(d) and these regulations do not alter these general rules. Thus, the provisions of §§ 1.1503(d)–1 through 1.1503(d)–8 generally do not cause a corporation to have a dual consolidated loss if it did not sustain (or inherit) the loss. Instead, these regulations either eliminate a dual consolidated loss that a corporation sustained (or inherited), or prevent the carryover of a dual consolidated loss under section 381 that would ordinarily occur, as a result of certain transactions.

(i) *Transactions described in section 381(a).* This paragraph (d)(1)(i) applies to a dual consolidated loss of a dual resident corporation, or of a domestic owner attributable to a separate unit, that is subject to the domestic use limitation rule of paragraph (b) of this section. In such a case, and except as provided in paragraph (d)(2) of this section, the dual consolidated loss shall not carry over to another corporation in a transaction described in section 381(a) and, as a result, shall be eliminated. See § 1.1503(d)–7(c) *Example 20*.

(ii) *Cessation of separate unit status.* This paragraph (d)(1)(ii) applies when a separate unit of an unaffiliated domestic owner ceases to be a separate unit of its domestic owner, or when a separate unit of an affiliated domestic owner ceases to be a separate unit with respect to its domestic owner and all other members of the affiliated domestic owner's consolidated group. In such a case, and except as provided in paragraph (d)(2)(iii) of this section, a dual consolidated loss of the domestic owner attributable to such separate unit, that is subject to the domestic use limitation of paragraph (b) of this section, shall be eliminated. For purposes of this paragraph (d)(1)(ii), a separate unit may cease to be a separate unit if, for example, such separate unit is terminated, dissolved, liquidated, sold, or otherwise disposed of. See § 1.1503(d)–7(c) *Example 21*.

(2) *Exceptions*—(i) *Certain section 368(a)(1)(F) reorganizations.* Paragraph (d)(1)(i) of this section (relating to transactions described in section 381(a)) shall not apply to a dual consolidated loss of a dual resident corporation that undergoes a reorganization described in section 368(a)(1)(F) in which the resulting corporation is a domestic corporation. In such a case, the dual consolidated loss of the resulting corporation continues to be subject to the limitations of paragraphs (b) and (c) of this section, applied as if the resulting corporation incurred the dual consolidated loss.

(ii) *Acquisition of a dual resident corporation by another dual resident corporation.* If a dual resident corporation transfers its assets to another dual resident corporation in a transaction described in section 381(a), and the transferee corporation is a resident of (or is taxed on its worldwide income by) the same foreign country of which the transferor was a resident (or was taxed on its worldwide income), then paragraph (d)(1)(i) of this section shall not apply with respect to dual consolidated losses of the dual resident corporation, and income generated by the transferee may be offset by the carryover dual consolidated losses of the transferor, subject to the limitations of paragraphs (b) and (c) of this section applied as if the transferee incurred the dual consolidated loss. Dual consolidated losses of the transferor dual resident corporation may not, however, be used to offset income attributable to separate units or interests in transparent entities owned by the transferee because they constitute domestic affiliates under § 1.1503(d)–1(b)(12)(iii) and (iv), respectively.

(iii) *Acquisition of a separate unit by a domestic corporation.* This paragraph (d)(2)(iii) provides exceptions to the general rules in paragraphs (d)(1)(i) and (ii) of this section that eliminate the dual consolidated loss of a domestic owner that is attributable to a separate unit following certain transactions or events. The exceptions set forth in this paragraph (d)(2)(iii) shall only apply where a domestic owner transfers its assets to a domestic corporation (transferee corporation) in a transaction described in section 381(a).

(A) *Acquisition by a corporation that is not a member of the same consolidated group*—(1) *General rule.* If a domestic owner transfers either an individual separate unit or a combined separate unit to a transferee corporation that is not a member of its consolidated group in a transaction described in section 381(a), and the transferee corporation, or a member of the transferee's consolidated group, is a domestic owner of the transferred separate unit immediately after the transaction, then paragraphs (d)(1)(i) and (ii) of this section shall not apply to such transfer. In addition, income of the transferee, or a member of the transferee's consolidated group, that is attributable to the transferred separate unit may be offset by the carryover dual consolidated losses of the transferor domestic owner that were attributable to the transferred separate unit, subject to the limitations of paragraphs (b) and (c) of this section applied as if the transferee incurred the dual consolidated losses and such losses were attributable to the separate unit. See § 1.1503(d)–7(c) *Example 21.*

(*2*) *Combination with separate units of the transferee.* This paragraph (d)(2)(iii)(A)(*2*) applies to a transaction described in paragraph (d)(2)(iii)(A)(*1*) of this section where the transferred separate unit is combined with another separate unit of the transferee, or another member of the transferee's consolidated group, immediately after the transfer as provided under § 1.1503(d)–1(b)(4)(ii). In such a case, income generated by the transferee, or another member of the transferee's consolidated group, that is attributable to the combined separate unit may be offset by the carryover dual consolidated losses that were attributable to the transferred separate unit, subject to the limitations of paragraphs (b) and (c) of this section, applied as if the transferee incurred the dual consolidated losses and such losses were attributable to the combined separate unit.

(B) *Acquisition by a member of the same consolidated group.* If an affiliated domestic owner transfers its assets to another member of its consolidated group in a transaction described in section 381(a), and the transferee corporation or another member of such consolidated group is a domestic owner of the separate unit to which the dual consolidated loss was attributable, then paragraphs (d)(1)(i) and (ii) of this section shall not apply. In addition, income generated by the transferee that is attributable to the transferred separate unit may be offset by the carryover dual consolidated losses that were attributable to the transferred separate unit, subject to the limitations of paragraphs (b) and (c) of this section, applied as if the transferee incurred the dual consolidated losses and such losses were attributable to the separate unit. See § 1.1503(d)–7(c) *Example 21.*

(iv) *Special rules for foreign insurance companies.* See § 1.1503(d)–6(a) for additional limitations that apply where the transferor is a foreign insurance company that is a dual resident corporation under § 1.1503(d)–1(b)(2)(ii).

(e) *Special rule denying the use of a dual consolidated loss to offset tainted income*—(1) *In general.* Dual consolidated losses incurred by a dual resident corporation that are subject to the domestic use limitation rule under paragraph (b) of this section shall not be used to offset income it earns after it ceases to be a dual resident corporation to the extent that such income is tainted income.

(2) *Tainted income*—(i) *Definition.* For purposes of paragraph (e)(1) of this section, the term *tainted income* means—

(A) Income or gain recognized on the sale or other disposition of tainted assets; and

(B) Income derived as a result of holding tainted assets.

(ii) *Income presumed to be derived from holding tainted assets.* In the absence of evidence establishing the actual amount of income that is attributable to holding tainted assets, the portion of a corporation's income in a particular taxable year that is treated as tainted income derived as a result of holding tainted assets shall be an amount equal to the corporation's taxable income for the year (other than income described in paragraph (e)(2)(i)(A) of this section) multiplied by a fraction, the numerator of which is the fair market value of all tainted assets acquired by the corporation (determined at the time such assets were so acquired) and the denominator of which is the fair market value of the total assets owned by the corporation at the end of such taxable year. To establish the actual amount of income that is attributable to holding tainted assets, documentation must be attached to, and filed by the due date (including extensions) of, the domestic corporation's tax return or the consolidated tax return of an affiliated group of which it is a member, as the case may be, for the taxable year in which the income is generated. See §1.1503(d)–7(c) *Example 22.*

(3) *Tainted assets defined.* For purposes of paragraph (e)(2) of this section, tainted assets are any assets acquired by a domestic corporation in a nonrecognition transaction, as defined in section 7701(a)(45), any assets otherwise transferred to the corporation as a contribution to capital, or any assets otherwise received from a separate unit or a transparent entity owned by such domestic corporation, at any time during the three taxable years immediately preceding the taxable year in which the corporation ceases to be a dual resident corporation or at any time thereafter.

(4) *Exceptions.* Income derived from assets acquired by a domestic corporation shall not be subject to the limitation described in paragraph (e)(1) of this section, and in addition shall not be treated as tainted assets as defined in paragraph (e)(3) of this section, if—

(i) For the taxable year in which the assets were acquired, the corporation did not have a dual consolidated loss (or a carryforward of a dual consolidated loss to such year); or

(ii) The assets were acquired as replacement property in the ordinary course of business.

(f) *Computation of foreign tax credit limitation.* If a dual consolidated loss is subject to the domestic use limitation rule under paragraph (b) of this section, the consolidated group, unaffiliated dual resident corporation, or unaffiliated domestic owner shall compute its foreign tax credit limitation by applying the limitations of paragraph (c) of this section. Thus, the items constituting the dual consolidated loss are not taken into account until the year in which such items are absorbed.

[T.D. 9315, 72 FR 12914, Mar. 19, 2007]

§ 1.1503(d)–5 Attribution of items and basis adjustments.

(a) *In general.* This section provides rules for determining the amount of income or dual consolidated loss of a dual resident corporation. This section also provides rules for determining the income or dual consolidated loss attributable to a separate unit, as well as the income or loss attributable to an interest in a transparent entity. Paragraph (b) of this section provides rules with respect to dual resident corporations. Paragraph (c) of this section provides rules with respect to separate units and interests in transparent entities. These determinations are required for various purposes under section 1503(d). For example, it is necessary for purposes of applying the domestic use limitation rule under §1.1503(d)–4(b) to a dual consolidated loss, and for determining the extent to which a dual consolidated loss is available to offset income as provided under §1.1503(d)–4(c).

These determinations are also necessary for purposes of determining whether the amount subject to recapture may be reduced pursuant to §1.1503(d)–6(h)(2). Paragraph (d) of this section provides rules with respect to the foreign tax treatment of items. Paragraph (e) of this section provides rules regarding the treatment of items where a dual resident corporation, separate unit, or transparent entity only qualified as such during a portion of a taxable year. Paragraph (f) of this section provides rules for determining the assets and liabilities of a separate unit. Finally, paragraph (g) of this section provides rules for making basis adjustments to stock of certain members of a consolidated group and to certain interests in partnerships. The rules in this section apply for purposes of §§1.1503(d)–1 through 1.1503(d)–7.

(b) *Determination of amount of income or dual consolidated loss of a dual resident corporation*—(1) *In general*. For purposes of determining whether a dual resident corporation has income or a dual consolidated loss for the taxable year, and except as provided in paragraph (b)(2) of this section, the dual resident corporation shall compute its income or dual consolidated loss taking into account only those items of income, gain, deduction, and loss from such year (including any items recognized by such corporation as a result of an election under section 338). In the case of an affiliated dual resident corporation, such calculation shall be made in accordance with the rules set forth in the regulations under section 1502 governing the computation of consolidated taxable income. See also paragraphs (d) and (e) of this section.

(2) *Exceptions*. For purposes of determining the income or dual consolidated loss of a dual resident corporation, the following shall not be taken into account—

(i) Any net capital loss of the dual resident corporation;

(ii) Any carryover or carryback losses; or

(iii) Any items of income, gain, deduction, and loss that are attributable to a separate unit or an interest in a transparent entity of the dual resident corporation.

(c) *Determination of amount of income or dual consolidated loss attributable to a separate unit, and income or loss attributable to an interest in a transparent entity*—(1) *In general*—(i) *Scope and purpose*. Paragraphs (c) through (e) of this section apply for purposes of determining the income or dual consolidated loss attributable to a separate unit, and the income or loss attributable to an interest in a transparent entity, for the taxable year. In the case of an affiliated domestic owner, this determination shall be made in accordance with the rules set forth in the regulations under section 1502 governing the computation of consolidated taxable income. These rules apply solely for purposes of section 1503(d).

(ii) *Only items of domestic owner taken into account*. The computation made under paragraphs (c) through (e) of this section shall be made using only those existing items of income, gain, deduction, and loss of the separate unit's or transparent entity's domestic owner (or owners, in the case of certain combined separate units), as determined for U.S. tax purposes. These items must be translated into U.S. dollars (if necessary) at the appropriate exchange rate provided under section 989(b), as modified by regulations. The computation shall be made as if the separate unit or interest in a transparent entity were a domestic corporation, using items that are attributable to the separate unit or interest in a transparent entity. However, for purposes of making this computation, net capital losses, and carryover or carryback losses, of the domestic owner shall not be taken into account. Items of income, gain, deduction, and loss that are otherwise disregarded for U.S. tax purposes shall not be regarded or taken into account for purposes of this section. See §1.1503(d)–7(c) *Examples 6* and *23* through *25*.

(iii) *Separate application*. The attribution rules of this section shall apply separately to each separate unit or interest in a transparent entity. Thus, an item of income, gain, deduction, or loss shall not be considered attributable to more than one separate unit or interest in a transparent entity. In addition, for purposes of this section items of income, gain, deduction, and loss attributable to a separate unit or an interest in a transparent entity shall not offset items of income, gain, deduction, and loss of another separate unit or interest in a transparent entity. See §1.1503(d)–7(c) *Example 24*. See also the separate unit combination rule in §1.1503(d)–1(b)(4)(ii).

(2) *Foreign branch separate unit*—(i) *In general*. Except to the extent provided in paragraph (c)(4) of this section, for purposes of determining the items of income, gain, deduction (other than interest), and loss of a domestic owner that are attributable to the domestic owner's foreign branch separate unit, the principles of section 864(c)(2), (c)(4), and (c)(5), as set forth in §1.864–4(c), and §§1.864–5 through 1.864–7, shall apply. The principles apply without regard to limitations imposed on the effectively connected treatment of income, gain, or loss under the trade or business safe harbors in section 864(b) and the limitations for treating foreign source income as effectively connected under section 864(c)(4)(D). Except as provided in paragraph (c)(2)(iii) of this section, for purposes of determining the domestic owner's interest expense that is attributable to a foreign branch separate unit, the principles of §1.882–5, as modified in paragraph (c)(2)(ii) of this section, shall apply. When applying the principles of section 864(c) (as modified by this paragraph) and §1.882–5 (as modified in paragraph (c)(2)(ii) of this section), the foreign branch separate unit's domestic owner shall be treated as a foreign corporation, the foreign branch separate unit shall be treated as a trade or business within the United States, and the other assets of the domestic owner shall be treated as assets that are not U.S. assets.

(ii) *Principles of §1.882–5*. For purposes of paragraph (c)(2)(i) of this section, the principles of §1.882–5 shall be applied, subject to the following modifications—

(A) Except as otherwise provided in this section, only the assets, liabilities, and interest expense of the domestic owner shall be taken into account in the §1.882–5 formula;

(B) Except as provided under paragraph (c)(2)(ii)(C) of this section, a taxpayer may use the alternative tax book value method under §1.861–9(i) for purposes of determining the value of its U.S. assets pursuant to §1.882–5(b)(2) and its worldwide assets pursuant to §1.882–5(c)(2);

(C) For purposes of determining the value of a U.S. asset pursuant to §1.882–5(b)(2), and worldwide assets pursuant to §1.882–5(c)(2), the taxpayer must use the same methodology under §1.861–9T(g) (that is, tax book value, alternative tax book value, or fair market value) that the taxpayer uses for purposes of allocating and apportioning interest expense for the taxable year under section 864(e);

(D) Asset values shall be determined pursuant to §1.861–9T(g)(2); and

(E) For purposes of determining the step-two U.S. connected liabilities, the amounts of worldwide assets and liabilities under §1.882–5(c)(2)(iii) and (iv) must be determined in accordance with U.S. tax principles, rather than substantially in accordance with U.S. tax principles.

(iii) *Exception where foreign country attributes interest expense solely by reference to books and records*. The principles of §1.882–5 shall not apply if the foreign country in which the foreign branch separate unit is located determines, for purposes of computing taxable income (or loss) of a permanent establishment or branch of a nonresident corporation under the laws of the foreign country, the interest expense of the foreign branch separate unit by taking into account only the items of interest expense reflected on the foreign branch separate unit's books and records. In such a case, only those items of the domestic owner's interest expense reflected on the foreign branch separate unit's books and records (as provided in paragraph (c)(3)(i) of this section), adjusted to conform to U.S. tax principles, shall be attributable to the foreign branch separate unit. This paragraph shall not apply where the foreign country does not use a method of attributing interest based solely on the interest that is reflected on the books and records. For example, this paragraph does not apply if the foreign country uses a method for attributing interest expense similar to § 1.882–5 or that set forth in the Organization for Economic Co-operation and Development Report on the Attribution of Profits to Permanent Establishments, Part II (Banks), December 2006. See *http://www.oecd.org*.

(3) *Hybrid entity separate unit and an interest in a transparent entity*—(i) *General rule*. This paragraph (c)(3) applies to determine the items of income, gain, deduction, and loss of a domestic owner that are attributable to a hybrid entity separate unit, or an interest in a transparent entity, of such domestic owner. Except to the extent provided in paragraph (c)(4) of this section, the domestic owner's items of income, gain, deduction, and loss are attributable to the extent they are reflected on the books and records of the hybrid entity or transparent entity, as applicable, as adjusted to conform to U.S. tax principles. See § 1.1503(d)–7(c) *Examples 23* through *26*. For purposes of this paragraph (c)(3), the term ''books and records'' has the meaning provided under § 1.989(a)–1(d). The treatment of items for foreign tax purposes, including under any type of foreign anti-deferral regime, is not relevant for purposes of determining whether items are reflected on the books and records of the entity, or for purposes of making adjustments to such items to conform to U.S. tax principles. The method described in the second sentence of this paragraph shall not apply to the extent that the Commissioner determines that booking practices are employed with a principal purpose of avoiding the principles of section 1503(d), including inconsistently treating the same or similar items of income, gain, deduction, and loss. In such a case, the Commissioner may reallocate the items of income, gain, deduction, and loss between or among a domestic owner, its hybrid entities, its transparent entities (and interests therein), its separate units, or any other entity, as applicable, in a manner consistent with the principles of section 1503(d) and which properly reflects income (or loss).

(ii) *Interests in certain disregarded entities, partnerships, and grantor trusts owned by a hybrid entity or transparent entity*. This paragraph (c)(3)(ii) applies if a hybrid entity or transparent entity to which paragraph (c)(3)(i) of this section applies owns, directly or indirectly (other than through a hybrid entity or transparent entity), an interest in an entity that is treated as a disregarded entity, partnership, or grantor trust for U.S. tax purposes, but is not a hybrid entity or a transparent entity. For example, the rules of this paragraph would apply when a hybrid entity holds an interest in a limited partnership created in the United States and, for both U.S. and foreign tax purposes the entity is considered a partnership. In such a case, and except to the extent provided in paragraph (c)(4) of this section, items of income, gain, deduction, and loss that are reflected on the books and records of such disregarded entity, partnership or grantor trust, as determined under paragraph (c)(3)(i) of this section, shall be treated as being reflected on the books and records of the hybrid entity or transparent entity for purposes of applying paragraph (c)(3)(i) of this section. See § 1.1503(d)–7(c) *Example 26*.

(4) *Special rules*. The following special rules shall apply for purposes of attributing items to separate units or interests in transparent entities under this section:

(i) *Allocation of items between certain tiered separate units and interests in transparent entities*—(A) *Foreign branch separate unit*. This paragraph (c)(4)(i) applies where a hybrid entity or transparent entity owns directly or indirectly (other than through a hybrid entity or a transparent entity), a foreign branch separate unit. For purposes of determining items of income, gain, deduction, and loss of the domestic owner that are attributable to the domestic owner's foreign branch separate unit described in the preceding sentence, only items of income, gain, deduction, and loss that are attributable to the domestic owner's interest in the hybrid entity, or transparent entity, as provided in paragraph (c)(3) of this section, shall be taken into account. Further, only assets, liabilities, and activities of the domestic owner's interest in the hybrid entity or the transparent entity shall be taken into account under paragraph (c)(2) of this section when applying the principles of 864(c)(2), (c)(4), (c)(5) (as set forth in § 1.864–4(c), and §§ 1.864–5 through 1.864–

7), and § 1.882–5 (as modified in paragraph (c)(2)(ii) of this section). See § 1.1503(d)–7(c) *Examples 25* and *26*.

(B) *Hybrid entity separate unit or interest in a transparent entity*. For purposes of determining items of income, gain, deduction, and loss that are attributable to a hybrid entity separate unit or an interest in a transparent entity described in paragraph (c)(3) of this section, such items shall not be taken into account to the extent they are attributable to a foreign branch separate unit pursuant to paragraph (c)(4)(i)(A) of this section. See § 1.1503(d)–7(c) *Examples 25* and *26*.

(ii) *Combined separate unit*. If two or more individual separate units defined in § 1.1503(d)–1(b)(4)(i) are treated as one combined separate unit pursuant to § 1.1503(d)–1(b)(4)(ii), the items of income, gain, deduction, and loss that are attributable to the combined separate unit shall be determined as follows:

(A) Items of income, gain, deduction, and loss are first attributed to each individual separate unit without regard to § 1.1503(d)–1(b)(4)(ii), pursuant to the rules of paragraphs (c) through (e) of this section.

(B) The combined separate unit then takes into account all of the items of income, gain, deduction, and loss attributable to its individual separate units pursuant to paragraph (c)(4)(ii)(A) of this section. See § 1.1503(d)–7(c) *Examples 25* and *26*.

(iii) *Gain or loss on the direct or indirect disposition of a separate unit or an interest in a transparent entity*—(A) *In general*. This paragraph (c)(4)(iii) applies for purposes of attributing items of income, gain, deduction, and loss that are recognized on the sale, exchange, or other disposition of a separate unit or an interest in a transparent entity (or an interest in a disregarded entity, partnership, or grantor trust that owns, directly or indirectly, a separate unit or an interest in a transparent entity). For purposes of this paragraph (c)(4)(iii), items taken into account on the sale, exchange, or other disposition include loss recapture income or gain under section 367(a)(3)(C) or 904(f)(3), and gain or loss recognized by the domestic owner as the result of an election under section 338. In cases where this paragraph (c)(4)(iii)(A) applies, items taken into account on the sale, exchange, or other disposition shall be attributable to the separate unit or the interest in the transparent entity to the extent of gain or loss that would have been recognized had the separate unit or transparent entity sold all its assets (as determined in paragraph (f) of this section) in a taxable exchange, immediately before the sale, exchange, or other disposition (deemed sale). For purposes of a deemed sale described in this paragraph (c)(4)(iii), the assets are treated as being sold for an amount equal to their fair market value, plus the assumption of the liabilities of the separate unit or interest in a transparent entity (as determined in paragraph (f) of this section). See § 1.1503(d)–7(c) *Example 27*.

(B) *Multiple separate units or interests in transparent entities*. This paragraph (c)(4)(iii)(B) applies to a sale, exchange, or other disposition described in paragraph (c)(4)(iii)(A) of this section that results in more than one separate unit or interest in a transparent entity being, directly or indirectly, disposed of. In such a case, items of income, gain, deduction, and loss recognized on such sale, exchange, or other disposition are allocated and attributed to each separate unit or interest in a transparent entity, based on the relative gain or loss that would have been recognized by each separate unit or interest in a transparent entity pursuant to a deemed sale of their assets. See § 1.1503(d)–7(c) *Example 28*.

(iv) *Inclusions on stock*. Any amount included in income of a domestic owner arising from ownership of stock in a foreign corporation (for example, under sections 78, 951, or 986(c)) through a separate unit, or interest in a transparent entity, shall be attributable to the separate unit or interest in a transparent entity, if an actual dividend from such foreign corporation would have been so attributed. See § 1.1503(d)–7(c) *Example 24*.

(v) *Foreign currency gain or loss recognized under section 987*. Foreign currency gain or loss of a domestic owner recognized under section 987 as a result of a transfer or remittance shall not be attributable to a separate unit or an interest in a transparent entity.

(vi) *Recapture of dual consolidated loss.* If all or a portion of a dual consolidated loss that was attributable to a separate unit is included in the gross income of a domestic owner under the recapture provisions of §1.1503(d)–6(h), such amount shall be attributable to the separate unit that incurred the dual consolidated loss being recaptured. See §1.1503(d)–7(c) *Examples 38* and *40*.

(d) *Foreign tax treatment disregarded.* The fact that a particular item taken into account in computing the income or dual consolidated loss of a dual resident corporation or a separate unit, or the income or loss of an interest in a transparent entity, is not taken into account in computing income (or loss) subject to a foreign country's income tax shall not cause such item to be excluded from being taken into account under paragraph (b), (c), or (e) of this section.

(e) *Items generated or incurred while a dual resident corporation, a separate unit, or a transparent entity.* For purposes of determining the amount of the dual consolidated loss of a dual resident corporation for the taxable year, only the items of income, gain, deduction, and loss generated or incurred during the period the dual resident corporation qualified as such shall be taken into account. For purposes of determining the amount of income of a dual resident corporation for the taxable year, all the items of income, gain, deduction, and loss generated or incurred during the year shall be taken into account. For purposes of determining the amount of the income or dual consolidated loss attributable to a separate unit, or the income or loss attributable to an interest in a transparent entity, for the taxable year, only the items of income, gain, deduction, and loss generated or incurred during the period the separate unit or the interest in the transparent entity qualified as such shall be taken into account. For purposes of this paragraph (e), the allocation of items to periods shall be made under the principles of §1.1502–76(b).

(f) *Assets and liabilities of a separate unit or an interest in a transparent entity.* A separate unit or an interest in a transparent entity shall be treated as owning assets to the extent items of income, gain, deduction, and loss from such assets would be attributable to the separate unit or interest in the transparent entity under paragraphs (c) through (e) of this section. Similarly, liabilities shall be treated as liabilities of a separate unit, or an interest in a transparent entity, to the extent interest expense incurred on such liabilities would be attributable to the separate unit, or the interest in a transparent entity, under paragraphs (c) through (e) of this section.

(g) *Basis adjustments*—(1) *Affiliated dual resident corporation or affiliated domestic owner.* If a member of a consolidated group owns stock in an affiliated dual resident corporation or an affiliated domestic owner that is a member of the same consolidated group, the member shall adjust the basis of the stock in accordance with the provisions of §1.1502–32. Corresponding adjustments shall be made to the stock of other members in accordance with the provisions of §1.1502–32. In the case where two or more individual separate units are treated as a combined separate unit pursuant to §1.1503(d)–1(b)(4)(ii), see paragraph (g)(3) of this section.

(2) *Interests in hybrid entities that are partnerships or interests in partnerships through which a separate unit is owned indirectly*—(i) *Scope.* This paragraph (g)(2) applies for purposes of determining the adjusted basis of an interest in—

(A) A hybrid entity that is a partnership; and

(B) A partnership through which a domestic owner indirectly owns a separate unit.

(ii) *Determination of basis of partner's interest.* The adjusted basis of an interest described in paragraph (g)(2)(i) of this section shall be adjusted in accordance with section 705 and this paragraph (g)(2). The adjusted basis shall not be decreased for any amount of a dual consolidated loss that is attributable to the partnership interest, or separate unit owned indirectly through the partnership interest, as applicable, that is not absorbed as a result of the application of §1.1503(d)–4(b) and (c). The adjusted basis shall, however, be decreased for the amount of such dual consolidated loss that is absorbed in a carryover or carryback taxable year. The adjusted basis shall be increased for any amount included in income pursuant to § 1.1503(d)–6(h) as a result of the recapture of a dual consolidated loss that was attributable to the interest in the hybrid partnership, or separate unit owned indirectly through the partnership interest, as applicable.

(3) *Combined separate units.* This paragraph (g)(3) applies where two or more individual separate units of one or more affiliated domestic owners are treated as one combined separate unit pursuant to § 1.1503(d)–1(b)(4)(ii). In such a case, a member owning stock in an affiliated domestic owner of the combined separate unit shall adjust the basis in the stock of such domestic owner as provided in paragraph (g)(1) of this section, and an affiliated domestic owner shall adjust its basis in a partnership, as provided in paragraph (g)(2) of this section, taking into account only those items of income, gain, deduction, or loss attributable to each individual separate unit, prior to combination. For purposes of this rule, if the dual consolidated loss attributable to a combined separate unit is subject to the domestic use limitation of § 1.1503(d)–4(b), then for purposes of this paragraph (g) and § 1.1502–32, the dual consolidated loss shall be allocated to an individual separate unit to the extent such individual separate unit contributed items of deduction or loss giving rise to the dual consolidated loss. In addition, if one or more affiliated domestic owners are required to recapture all or a portion of a dual consolidated loss pursuant to paragraph (h) of this section, such recapture amount shall be allocated to the affiliated domestic owner of the individual separate units composing the combined separate unit, to the extent such individual separate units contributed items of deduction or loss giving rise to the recaptured dual consolidated loss.

[T.D. 9315, 72 FR 12914, Mar. 19, 2007; 72 FR 20424, Apr. 25, 2007]

§ 1.1503(d)–6 Exceptions to the domestic use limitation rule.

(a) *In general*—(1) *Scope and purpose.* This section provides certain exceptions to the domestic use limitation rule of § 1.1503(d)–4(b). Paragraph (b) of this section provides an exception for bilateral elective agreements. Paragraph (c) of this section provides rules regarding an exception that applies when there is no possibility of a foreign use. Paragraphs (d) through (h) of this section provide rules for an exception where a domestic use election is made. Paragraph (e) of this section provides rules with respect to triggering events, and paragraph (f) of this section provides rules regarding exceptions to triggering events. Paragraph (g) of this section provides rules with respect to the annual certification reporting requirement. Paragraph (h) of this section provides rules regarding the recapture of dual consolidated losses. Finally, paragraph (j) of this section provides rules regarding the termination of domestic use agreements and the annual certification requirement.

(2) *Absence of foreign affiliate or foreign consolidation regime.* The absence of a foreign affiliate or a foreign consolidation regime alone does not constitute an exception to the domestic use limitation rule. This is the case because it is still possible that all or a portion of the dual consolidated loss may be put to a foreign use. For example, there may be a foreign use with respect to an affiliate acquired in a year subsequent to the year in which the dual consolidated loss was incurred. In addition, a foreign use may occur in the absence of a foreign consolidation regime through a sale, merger, or similar transaction. See § 1.1503(d)–7(c) *Example 2.*

(3) *Foreign insurance companies treated as domestic corporations.* The exceptions contained in this section shall not apply to losses of a foreign insurance company that is a dual resident corporation under § 1.1503(d)–1(b)(2)(ii), or to losses attributable to any separate unit of such foreign insurance company. In addition, these exceptions shall not apply to losses described in the preceding sentence that, subject to the rules of § 1.1503(d)–4(d), carry over to a domestic corporation pursuant to a transaction described in section 381(a).

(b) *Elective agreement in place between the United States and a foreign country*—

(1) *In general*. The domestic use limitation rule of §1.1503(d)–4(b) shall not apply to a dual consolidated loss to the extent the consolidated group, unaffiliated dual resident corporation, or unaffiliated domestic owner, as the case may be, elects to deduct the loss in the United States pursuant to an agreement entered into between the United States and a foreign country that puts into place an elective procedure through which losses in a particular year may be used to offset income in only one country. This exception shall apply only if all the terms and conditions required under such agreement are satisfied, including any reporting or filing requirements. See §1.1503(d)–3(e)(2)(iii) for the effect of an agreement described in this paragraph on a stand-alone domestic use agreement.

(2) *Application to combined separate units*. This paragraph (b)(2) applies where two or more individual separate units are treated as one combined separate unit pursuant to §1.1503(d)–1(b)(4)(ii), and an agreement described in paragraph (b)(1) of this section would apply to at least one of the individual separate units. In such a case, and except to the extent provided in the agreement, the consolidated group, unaffiliated dual resident corporation, or unaffiliated domestic owner, as the case may be, may apply the agreement to the individual separate units, as applicable, provided the terms and conditions of the agreement are otherwise satisfied. See §1.1503(d)–7(c) *Example 19*.

(c) *No possibility of foreign use*—(1) *In general*. The domestic use limitation rule of §1.1503(d)–4(b) shall not apply to a dual consolidated loss if the consolidated group, unaffiliated dual resident corporation, or unaffiliated domestic owner, as the case may be—

(i) Demonstrates, to the satisfaction of the Commissioner, that no foreign use (as defined in §1.1503(d)–3) of the dual consolidated loss occurred in the year in which it was incurred, and that no foreign use can occur in any other year by any means; and

(ii) Prepares a statement described in paragraph (c)(2) of this section that is attached to, and filed by the due date (including extensions) of, its U.S. income tax return for the taxable year in which the dual consolidated loss is incurred. See §1.1503(d)–7(c) *Examples 2*, *30*, and *31*.

(2) *Statement*. The statement described in this paragraph (c)(2) must be signed under penalties of perjury by the person who signs the tax return. The statement must be labeled ''No Possibility of Foreign Use of Dual Consolidated Loss Statement'' at the top of the page and must include the following items, in paragraphs labeled to correspond with the items set forth in paragraphs (c)(2)(i) through (iv) of this section:

(i) A statement that the document is submitted under the provisions of paragraph (c) of this section.

(ii) The name, address, taxpayer identification number, and place and date of incorporation of the dual resident corporation, and the country or countries that tax the dual resident corporation on its worldwide income or on a residence basis, or, in the case of a separate unit, identification of the separate unit, including the name under which it conducts business, its principal activity, and the country in which its principal place of business is located. In the case of a combined separate unit, such information must be provided for each individual separate unit that is treated as part of the combined separate unit under §1.1503(d)–1(b)(4)(ii).

(iii) A statement of the amount of the dual consolidated loss at issue.

(iv) An analysis, in reasonable detail and specificity, of the treatment of the losses and deductions composing the dual consolidated loss under the relevant facts. The analysis must include the reasons supporting the conclusion that no foreign use of the dual consolidated loss can occur as described in paragraph (c)(1)(i) of this section. The analysis must be supported with official or certified English translations of the relevant provisions of foreign law. The analysis may, for example, be based on the taxpayer's interpretation of foreign law, on advice received from local tax advisers in an opinion, or on a ruling from local country tax authorities. In all cases, however, the determination must be made to the satisfaction of the Commissioner.

(d) *Domestic use election*—(1) *In general*. The domestic use limitation rule of §1.1503(d)–4(b) shall not apply to a dual consolidated loss if an election to be bound by the provisions of paragraphs (d) through (j) of this section is made by the consolidated group, unaffiliated dual resident corporation, or unaffiliated domestic owner, as the case may be (elector). In order to elect such relief, an agreement described in this paragraph (d)(1) (domestic use agreement) must be attached to, and filed by the due date (including extensions) of, the U.S. income tax return of the elector for the taxable year in which the dual consolidated loss is incurred. The domestic use agreement must be signed under penalties of perjury by the person who signs the return. If dual consolidated losses of more than one dual resident corporation or separate unit requires the filing of domestic use agreements by the same elector, the agreements may be combined in a single document, but the information required by paragraphs (d)(1)(ii) and (iv) of this section must be provided separately with respect to each dual consolidated loss. The domestic use agreement must be labeled ''Domestic Use Election and Agreement'' at the top of the page and must include the following items, in paragraphs labeled to correspond with the following:

(i) A statement that the document submitted is an election and an agreement under the provisions of paragraph (d) of this section.

(ii) The information required by paragraph (c)(2)(ii) of this section.

(iii) An agreement by the elector to comply with all of the provisions of paragraphs (d) through (j) of this section, as applicable.

(iv) A statement of the amount of the dual consolidated loss at issue.

(v) A certification that there has not been, and will not be, a foreign use (as defined in §1.1503(d)–3) during the certification period (as defined in §1.1503(d)–1(b)(20)).

(vi) A certification that arrangements have been made to ensure that there will be no foreign use of the dual consolidated loss during the certification period, and that the elector will be informed of any such foreign use of the dual consolidated loss during such period.

(vii) If applicable, a notification that an excepted triggering event under paragraph (f)(2) of this section has occurred with respect to the dual consolidated loss within the taxable year in which the loss is incurred. See paragraph (g) of this section for notification of excepted triggering events occurring during the certification period.

(2) *No domestic use election available if there is a triggering event in the year the dual consolidated loss is incurred.* Except as otherwise provided in this section, if a dual resident corporation or separate unit incurs a dual consolidated loss in a taxable year and a triggering event, as described in paragraph (e)(1) of this section, occurs (and no exception applies) with respect to the dual consolidated loss in such taxable year, then the consolidated group, unaffiliated dual resident corporation, or unaffiliated domestic owner, as the case may be, may not make a domestic use election with respect to such dual consolidated loss and the loss will be subject to the domestic use limitation rule of §1.1503(d)–4(b). See §1.1503(d)–7(c) *Examples 5* through *7*. See also §1.1503(d)–4(d) for rules that eliminate a dual consolidated loss after certain transactions.

(e) *Triggering events requiring the recapture of a dual consolidated loss*—(1) *Events.* Except as provided under paragraphs (e)(2) (rebuttal of triggering events) and (f) (exceptions to triggering events) of this section, if there is a triggering event described in this paragraph (e)(1) with respect to a dual consolidated loss of a dual resident corporation or a separate unit during the certification period (as defined in §1.1503(d)–1(b)(20)), the elector will recapture and report as ordinary income the amount of such dual consolidated loss as provided in paragraph (h) of this section on its tax return for the taxable year in which the triggering event occurs (or, when the triggering event is a foreign use of the dual consolidated loss, the taxable year that includes the last day of the foreign taxable year during which such use occurs). In addition, the elector must pay any applicable interest charge required by paragraph (h) of this section. For purposes of this section, any of the following events shall constitute a triggering event:

(i) *Foreign use.* A foreign use (as defined in §1.1503(d)–3) of the dual consolidated loss. See §1.1503(d)–3(c) for exceptions to foreign use.

(ii) *Disaffiliation.* An affiliated dual resident corporation or affiliated domestic owner that incurred directly or through a separate unit, respectively, a dual consolidated loss that is subject to a domestic use election, ceases to be a member of the consolidated group that made the domestic use election. For purposes of this paragraph (e)(1)(ii), an affiliated dual resident corporation or affiliated domestic owner shall be considered to cease to be a member of the consolidated group if it is no longer a member of the group within the meaning of §1.1502–1(b), or if the group ceases to exist (for example, when the group no longer files a consolidated return). See §1.1503(d)–7(c) *Example 34.* Any consequences resulting from this triggering event (for example, recapture of a dual consolidated loss) shall be taken into account on the tax return of the consolidated group for the taxable year that includes the date on which the affiliated dual resident corporation or affiliated domestic owner ceases to be a member of the consolidated group. This paragraph (e)(1)(ii) shall not apply to an acquisition described in §1.1502–75(d)(3) where the consolidated group that includes the affiliated dual resident corporation or affiliated domestic owner, as applicable, is treated as remaining in existence.

(iii) *Affiliation.* An unaffiliated dual resident corporation or unaffiliated domestic owner becomes a member of a consolidated group. Any consequences resulting from this triggering event (for example, recapture of a dual consolidated loss) shall be taken into account on the tax return of the unaffiliated dual resident corporation or unaffiliated domestic owner for the taxable year that ends at the end of the day on which such corporation becomes a member of the consolidated group.

(iv) *Transfer of assets.* Fifty percent or more of the dual resident corporation's or separate unit's gross assets (measured by the fair market value of the assets at the time of such transaction or, for multiple transactions, at the time of the first transaction) is sold or otherwise disposed of in either a single transaction or a series of transactions within a twelve-month period. See §1.1503(d)–7(c) *Examples 5* and *35* through *37.* In determining whether fifty percent or more of such assets is sold or otherwise disposed of, any dispositions occurring in the ordinary course of the dual resident corporation's or separate unit's trade or business shall be disregarded. In addition, for purposes of this paragraph (e)(1)(iv), an interest in another separate unit and the shares of a dual resident corporation shall not be treated as assets of a separate unit or a dual resident corporation.

(v) *Transfer of an interest in a separate unit.* Fifty percent or more of the interest in a separate unit (measured by voting power or value at the time of such transaction, or for multiple transactions, at the time of the first transaction) of the domestic owner, as determined by reference to such domestic owner's percentage interest on the last day of the taxable year in which the dual consolidated loss was incurred, is sold or otherwise disposed of either in a single transaction or a series of transactions within a twelve-month period. See §1.1503(d)–7(c) *Examples 5* and *35* through *37.*

(vi) *Conversion to a foreign corporation.* An unaffiliated dual resident corporation, unaffiliated domestic owner, or hybrid entity an interest in which is a separate unit, that incurred the dual consolidated loss, becomes a foreign corporation (for example, as a result of a reorganization or an election to be classified as a corporation under §301.7701–3(c) of this chapter).

(vii) *Conversion to a regulated investment company, a real estate investment trust, or an S corporation.* An unaffiliated dual resident corporation or unaffiliated domestic owner elects to be a regulated investment company pursuant to section 851(b)(1), a real estate investment trust pursuant to section 856(c)(1), or an S corporation pursuant to section 1362(a).

(viii) *Failure to certify.* The elector fails to file a certification with respect to a dual consolidated loss as required under paragraph (g) of this section.

(ix) *Cessation of stand-alone status.* In the case of a dual consolidated loss that is subject to the stand-alone exception described in §1.1503(d)–3(e)(2), the conditions described in §1.1503(d)–3(e)(2)(i) are no longer satisfied. See §1.1503(d)–7(c) *Example 18*.

(2) *Rebuttal*—(i) *General rule*. An event described in paragraph (e)(1) of this section shall not constitute a triggering event if the elector demonstrates, to the satisfaction of the Commissioner, that there can be no foreign use (as defined in §1.1503(d)–3) of the dual consolidated loss during the remaining certification period by any means. See paragraph (j)(1) of this section for rules regarding the termination of domestic use agreements and annual certifications following rebuttals under this general rule.

(ii) *Certain asset transfers*. An event described in paragraph (e)(1)(iv) of this section shall not constitute a triggering event if the elector demonstrates, to the satisfaction of the Commissioner, that the transfer of assets did not result in a carryover under foreign law of the dual resident corporation's, or separate unit's, losses, expenses, or deductions to the transferee of the assets. For purposes of this determination, the exception to foreign use in §1.1503(d)–3(c)(7) shall be taken into account. Following rebuttal under this paragraph (e)(2)(ii), the domestic use agreement continues in effect.

(iii) *Reporting*. In order to satisfy the requirements of paragraph (e)(2)(i) or (ii) of this section, the elector must prepare a statement, labeled ''Rebuttal of Triggering Event'' at the top of the page, that indicates that it is submitted under the provisions of this paragraph (e)(2). The statement must include the information described in paragraphs (c)(2)(ii) and (iii) of this section. The statement must also include the information described in paragraph (c)(2)(iv) of this section that supports the conclusions under paragraph (e)(2)(i) or (ii) of this section, as applicable. The statement must be attached to, and filed by the due date (including extensions) of, the elector's income tax return for the taxable year in which the presumed triggering event occurs.

(iv) *Examples*. See §1.1503(d)–7(c) *Examples 32* and *33*.

(f) *Triggering event exceptions*—(1) *Continuing ownership of assets or interests*. The following events shall not constitute triggering events, requiring the recapture of the dual consolidated loss under paragraph (h) of this section:

(i) *Disaffiliation as a result of a transaction described in section 381*. An affiliated dual resident corporation or affiliated domestic owner ceases to be a member of a consolidated group solely by reason of a transaction in which a member of the same consolidated group succeeds to the tax attributes of the dual resident corporation or domestic owner under the provisions of section 381.

(ii) *Continuing ownership by consolidated group*. This paragraph (f)(1)(ii) applies when assets of an affiliated dual resident corporation, or assets of, or interests in, a separate unit of an affiliated domestic owner are sold or otherwise disposed of. In such a case, the sale or disposition shall not be treated as a triggering event to the extent the assets or interests are acquired by one or more members of the consolidated group that includes the affiliated dual resident corporation or affiliated domestic owner, or by a partnership or a grantor trust, but only if immediately after the acquisition more than 90 percent of the partnership's or grantor trust's interests is owned, directly or indirectly, by members of such consolidated group.

(iii) *Continuing ownership by unaffiliated dual resident corporation or unaffiliated domestic owner*. This paragraph (f)(1)(iii) applies when assets of an unaffiliated dual resident corporation, or assets of, or interests in, a separate unit of an unaffiliated domestic owner, are sold or otherwise disposed of. In such a case, the sale or disposition shall not be a triggering event to the extent such assets or interests are acquired by the unaffiliated dual resident corporation, or unaffiliated domestic owner, as applicable, or by a partnership or grantor trust, but only if immediately after the acquisition more than 90 percent of the partnership's or grantor trust's interests is owned, directly or indirectly, by the unaffiliated dual resident corporation or unaffiliated domestic owner. For example, this paragraph (f)(1)(iii) applies when an unaffiliated domestic owner acquires direct ownership of the assets of a separate unit that it had immediately before owned indirectly through a partnership.

(2) *Transactions requiring a new domestic use agreement*—(i) *Multiple-party events*. If all the requirements of paragraph (f)(2)(iii) of this section are satisfied, the following events shall not constitute triggering events requiring the recapture of the dual consolidated loss under paragraph (h) of this section:

(A) An affiliated dual resident corporation or affiliated domestic owner becomes an unaffiliated domestic corporation or a member of a new consolidated group (other than in a transaction described in paragraph (f)(2)(ii)(B) of this section).

(B) Assets of a dual resident corporation or assets of, or interests in, a separate unit, are sold or otherwise disposed of in a transaction in which such assets or interests are acquired by an unaffiliated domestic corporation, one or more members of a new consolidated group, or by a partnership or grantor trust, but only if immediately after the sale or disposition more than 90 percent of the partnership's or grantor trust's interests is owned, directly or indirectly, by the unaffiliated domestic owner or by members of a new consolidated group, as applicable. See the related exception to foreign use provided under §1.1503(d)–3(c)(8). See also §1.1503(d)–7(c) *Examples 36* and *37*.

(ii) *Events resulting in a single consolidated group*. If the requirements of paragraph (f)(2)(iii)(A) of this section are satisfied, the following events shall not constitute triggering events requiring the recapture of the dual consolidated loss under paragraph (h) of this section:

(A) An unaffiliated dual resident corporation or unaffiliated domestic owner becomes a member of a consolidated group.

(B) A consolidated group ceases to exist as a result of a transaction described in §1.1502–13(j)(5)(i) (relating to acquisitions of the common parent of the consolidated group), other than a transaction in which any member of the terminating group, or the successor-in-interest of such member, is not a member of the surviving group immediately after the terminating group ceases to exist. See §1.1503(d)–7(c) *Example 34*.

(iii) *Requirements*—(A) *New domestic use agreement*. The unaffiliated domestic corporation or new consolidated group (subsequent elector) must file an agreement described in paragraph (d)(1) of this section (new domestic use agreement). The new domestic use agreement must be labeled "New Domestic Use Agreement" at the top of the page, and must be attached to and filed by the due date (including extensions) of, the subsequent elector's income tax return for the taxable year in which the event described in paragraph (f)(2)(i) or (f)(2)(ii) of this section occurs. The new domestic use agreement must be signed under penalties of perjury by the person who signs the return and must include the following items:

(*1*) A statement that the document submitted is an election and agreement under the provisions of paragraph (f)(2) of this section.

(*2*) An agreement to assume the same obligations with respect to the dual consolidated loss as the unaffiliated dual resident corporation, unaffiliated domestic owner, or consolidated group, as applicable, that filed the original domestic use agreement (original elector) with respect to that loss. In such a case, obligations of an elector provided under this section shall also be considered to be obligations of a subsequent elector.

(*3*) In the event of a transaction described in section 384(a) involving the subsequent elector, an agreement to treat any potential recapture amount under paragraph (h) of this section with respect to the dual consolidated loss as unrealized built-in gain for purposes of section 384(a), subject to any applicable exceptions (for example, the threshold requirements under section 382(h)(3)(B)). The potential recapture amount treated as unrealized built-in gain under this paragraph (f)(2)(iii)(A)(*3*) may be reduced to the extent permitted by paragraph (h)(2)(i) of this section.

(*4*) In the case of a multiple-party event described in paragraph (f)(2)(i) of this section, an agreement to be subject to the rules provided in paragraph (h)(3) of this section.

(*5*) The name, U.S. taxpayer identification number, and address of the original elector and prior subsequent electors, if any, with respect to the dual consolidated loss.

(B) *Statement filed by original elector*. In the case of a multiple-party event described in paragraph (f)(2)(i) of this section, the original elector must file a statement that is attached to and filed by the due date (including extensions) of its income tax return for the taxable year in which the event occurs. The statement must be labeled ''Original Elector Statement'' at the top of the page, must be signed under penalties of perjury by the person who signs the tax return, and must include the following items:

(*1*) A statement that the document submitted is an election and agreement under the provisions of paragraph (f)(2) of this section.

(*2*) An agreement to be subject to the rules provided in paragraph (h)(3) of this section.

(*3*) The name, U.S. taxpayer identification number, and address of the subsequent elector.

(3) *Certain transfers qualifying for the de minimis exception to foreign use*. If a transaction or event qualifies for the de minimis exception to foreign use described in §1.1503(d)–3(c)(5), the transaction or event shall not constitute a triggering event under paragraph (e)(1)(iv) (transfers of assets) or (v) (transfers of an interest in a separate unit) of this section. For purposes of the preceding sentence, the transaction or event shall include deemed transfers that occur as a result of the transaction or event. See, for example, deemed transfers occurring pursuant to Rev. Rul. 99–5 (1999–1 CB 434), see §601.601(d)(2)(ii)(*b*), and section 708 and the related regulations. See also §1.1503(d)–7 *Example 5*. This paragraph (f)(3) only applies if the entire transaction or event qualifies for the de minimis exception to foreign use. For example, if a domestic owner sells five percent of a separate unit to a foreign corporation, which would qualify for the de minimis exception to foreign use if it were the only transfer, but pursuant to the same transaction also sells 70 percent of the same separate unit to another corporation in a manner that results in a triggering event under paragraph (e)(1)(v) of this section, this paragraph shall not apply to prevent the transaction from resulting in a triggering event.

(4) *Deemed transactions as a result of certain transfers that do not result in a foreign use*. The rules in this paragraph (f)(4) apply where the assets of, or the interests in, a separate unit are transferred in a transaction that would not result in a foreign use and, but for resulting deemed transactions or events, would not result in a triggering event described in paragraph (e)(1) of this section. For purposes of this paragraph (f)(4), deemed transactions or events shall include transactions or events that are deemed to occur pursuant to Rev. Rul. 99–5 and section 708 and the related regulations. In such a case, the deemed transactions shall not result in a triggering event under paragraph (e)(1)(iv) (transfers of assets) or (v) (transfers of an interest in a separate unit) of this section. See also §1.1503(d)–7 *Example 35*.

(5) *Compulsory transfers*. Transfers of the assets or stock of a dual resident corporation, or of the assets or interests in a separate unit, shall not constitute a triggering event (including a foreign use that occurs as a result of, or following, the transfer) if such transfers are—

(i) Legally required by a foreign government as a necessary condition of doing business in a foreign country;

(ii) Compelled by a genuine threat of immediate expropriation by a foreign government; or

(iii) The result of the expropriation of assets by the foreign government.

(6) *Subsequent triggering events*. Any triggering event described in paragraph (e) of this section that occurs subsequent to one of the transactions described in this paragraph (f), and that itself does not meet any of the exceptions provided in this paragraph (f), shall require recapture under paragraph (h) of this section by the elector or subsequent elector, as applicable.

(g) *Annual certification reporting requirement.* Unless and until the domestic use agreement is terminated pursuant to paragraph (j) of this section, the elector must file a certification, labeled ''Certification of Dual Consolidated Loss'' at the top of the page, that is attached to, and filed by the due date (including extensions) of, its income tax return for each taxable year during the certification period. The certification must provide that there has been no foreign use of the dual consolidated loss. The certification must identify the dual consolidated loss to which it pertains by setting forth the elector's year in which the loss was incurred and the amount of such loss. In addition, the certification must warrant that arrangements have been made to ensure that there will be no foreign use of the dual consolidated loss and that the elector will be informed of any such foreign use. If applicable, the certification must include a notification that an excepted triggering event under paragraph (f)(2) of this section has occurred with respect to the dual consolidated loss within the taxable year being certified. If dual consolidated losses of more than one taxable year are subject to the rules of this paragraph (g), the certification for those years may be combined in a single document, but each dual consolidated loss must be separately identified. See §1.1503(d)–3(e)(2)(ii) for additional certifications required where taxpayers elect the stand-alone exception of §1.1503(d)–3(e)(2).

(h) *Recapture of dual consolidated loss and interest charge*—(1) *Presumptive rules*—(i) *Amount of recapture.* Except as otherwise provided in this section, upon the occurrence of a triggering event described in paragraph (e) of this section that does not meet any of the exceptions provided in paragraph (f) of this section, the dual resident corporation or domestic owner of the separate unit shall recapture as gross income the total amount of the dual consolidated loss to which the triggering event applies on its income tax return for the taxable year in which the triggering event occurs (or, when the triggering event is a foreign use of the dual consolidated loss, the taxable year that includes the last day of the foreign taxable year during which such foreign use occurs). See §1.1503(d)–5(c)(4)(vi) for rules with respect to the attribution of recapture income to a separate unit. See also §1.1503(d)–7 *Examples 38* through *40*.

(ii) *Interest charge.* In connection with the recapture, the elector shall pay an interest charge. An interest charge may be due even if the amount of recapture income is reduced to zero pursuant to paragraph (h)(2)(i) of this section. See §1.1503(d)–7(c) *Example 39.* Except as otherwise provided in this section, the amount of the interest shall be computed under the rules of section 6601(a) by treating the additional tax resulting from the recapture as though it had been due and unpaid as of the date for payment of the tax for the taxable year in which the taxpayer received a tax benefit from the dual consolidated loss. For purposes of this paragraph (h)(1)(ii), a tax benefit shall be considered to have arisen in a taxable year in which the losses or deductions taken into account in computing the dual consolidated loss reduced U.S. taxable income. For the purpose of computing the interest charge, the additional tax resulting from the recapture is determined by treating the recapture income as the last income earned in the year of recapture. The interest shall be computed to the date for payment of the tax for the year of recapture and the interest thus computed becomes a part of the tax liability for that taxable year. See section 6601 for the computation of interest on a tax liability that it is not paid timely. The recapture interest charge shall be deductible to the same extent as interest under section 6601.

(2) *Reduction of presumptive recapture amount and presumptive interest charge*—(i) *Amount of recapture.* The dual resident corporation or domestic owner may recapture an amount less than the total dual consolidated loss if the elector demonstrates, to the satisfaction of the Commissioner, the lesser amount described in this paragraph (h)(2)(i). The reduction in the amount of recapture is the amount by which the dual consolidated loss would have offset other taxable income reported on a timely filed U.S. income tax return for any taxable year up to and including

the taxable year of the triggering event (or, when the triggering event is a foreign use of the dual consolidated loss, the taxable year that includes the last day of the foreign taxable year during which such foreign use occurs) if no domestic use election had been made for the loss such that it was subject to the domestic use limitation of §1.1503(d)–4(b) (and therefore subject to the limitation under §1.1503(d)–4(c)). For this purpose, the rules for attributing items of income, gain, deduction, and loss under §1.1503(d)–5 shall apply. An elector using this rebuttal rule must prepare a separate accounting showing the income for each year that would have offset the dual resident corporation's or separate unit's recapture amount if no domestic use election had been made for the dual consolidated loss. The separate accounting must be signed under penalties of perjury by the person who signs the elector's tax return, must be labeled ''Reduction of Recapture Amount'' at the top of the page, and must indicate that it is submitted under the provisions of this paragraph (h)(2)(i). The accounting must be attached to, and filed by the due date (including extensions) of, the elector's income tax return for the taxable year in which the triggering event occurs. See §1.1503(d)–7(c) *Examples 38* through *40*.

(ii) *Interest charge.* The interest charge imposed under this section may be reduced if the elector demonstrates, to the satisfaction of the Commissioner, that the net interest owed would have been less than that provided in paragraph (h)(1)(ii) of this section if the elector had filed an amended return for the taxable year in which the recaptured dual consolidated loss was incurred, and for any other affected taxable years up to and including the taxable year of recapture, if no domestic use election had been made for the dual consolidated loss such that it had been subject to the restrictions of §1.1503(d)–4(b) (and therefore subject to the limitations under §1.1503(d)–4(c)). An elector using this rebuttal rule must prepare a computation demonstrating the reduction in the net interest owed as a result of treating the dual consolidated loss as a loss subject to the restrictions of §1.1503(d)–4(b) (and therefore subject to the limitations under §1.1503(d)–4(c)). The computation must be labeled ''Reduction of Interest Charge'' at the top of the page and must indicate that it is submitted under the provisions of this paragraph (h)(2)(ii). The computation must be signed under penalties of perjury by the person who signs the elector's tax return, and must be attached to, and filed by the due date (including extensions) of, the elector's income tax return for the taxable year in which the triggering event occurs. See §1.1503(d)–7(c) *Examples 39* and *40*.

(3) *Rules regarding multiple-party event exceptions to triggering events*—(i) *Scope.* The rules of this paragraph (h)(3) apply when, after a triggering event described in paragraph (e) of this section with respect to which the requirements of paragraph (f)(2)(i) of this section were met (excepted event), a triggering event under paragraph (e) of this section occurs, and no exception applies to such triggering event under paragraph (f) of this section (subsequent triggering event). See §1.1503(d)–7(c) *Examples 36* and *37*.

(ii) *Original elector and prior subsequent electors not subject to recapture or interest charge*—(A) Except to the extent otherwise provided in this paragraph (h)(3), neither the original elector nor any prior subsequent elector shall be subject to the rules of this paragraph (h) with respect to dual consolidated losses subject to the original domestic use agreement.

(B) In the case of a dual consolidated loss with respect to which multiple excepted events have occurred, only the subsequent elector that owns the dual resident corporation or separate unit at the time of the subsequent triggering event shall be subject to the recapture rules of this paragraph (h). For purposes of this paragraph (h), the term prior subsequent elector refers to all other subsequent electors.

(iii) *Recapture tax amount and required statement*—(A) *In general.* If a subsequent triggering event occurs, the subsequent elector shall take into account the recapture tax amount as determined under paragraph (h)(3)(iii)(B) of this section. The subsequent elector must prepare a statement that computes the recapture tax amount, as provided under paragraph (h)(3)(iii)(B) of this section, with respect to the dual consolidated loss subject to the new domestic use agreement. This statement must be attached to, and filed by the due date (including extensions) of, the subsequent elector's income tax return for the taxable year in which the subsequent triggering event occurs (or, when the subsequent triggering event is a foreign use of the dual consolidated loss, the taxable year that includes the last day of the foreign taxable year during which such foreign use occurs). The statement must be signed under penalties of perjury by the person who signs the return. The statement must be labeled ''Statement Identifying Liability'' at the top and, in addition to the calculation of the recapture tax amount, must include the following items, in paragraphs labeled to correspond with the items set forth in paragraphs (h)(3)(iii)(A)(*1*) through (*3*) of this section:

(*1*) A statement that the document is submitted under the provisions of §1.1503(d)–6(h)(3)(iii).

(*2*) A statement identifying the amount of the dual consolidated losses at issue and the taxable years in which they were used.

(*3*) The name, address, and taxpayer identification number of the original elector and all prior subsequent electors.

(B) *Recapture tax amount.* The recapture tax amount equals the excess (if any) of—

(*1*) The income tax liability of the subsequent elector for the taxable year that includes the amount of recapture and related interest charge with respect to the dual consolidated losses that are recaptured as a result of the subsequent triggering event, as provided under paragraphs (h)(1) and (h)(2) of this section; over

(*2*) The income tax liability of the subsequent elector for such taxable year, computed by excluding the amount of recapture and related interest charge described in paragraph (h)(3)(iii)(B)(*1*) of this section.

(iv) *Tax assessment and collection procedures*—(A) *In general*—(*1*) *Subsequent elector.* An assessment identifying an income tax liability of the subsequent elector is considered an assessment of the recapture tax amount where the recapture tax amount is part of the income tax liability being assessed and the recapture tax amount is reflected in a statement attached to the subsequent elector's income tax return as provided under paragraph (h)(3)(iii) of this section.

(*2*) *Original elector and prior subsequent electors.* The assessment of the recapture tax amount as set forth in paragraph (h)(3)(iv)(A)(*1*) of this section shall be considered as having been properly assessed as an income tax liability of the original elector and of each prior subsequent elector, if any. The date of such assessment shall be the date the income tax liability of the subsequent elector was properly assessed. The Commissioner may collect all or a portion of such recapture tax amount from the original elector and/or the prior subsequent electors under the circumstances set forth in paragraph (h)(3)(iv)(B) of this section.

(B) *Collection from original elector and prior subsequent electors; joint and several liability*—(*1*) *In general.* If the subsequent elector does not pay in full the income tax liability that includes a recapture tax amount, the Commissioner may collect that portion of the unpaid balance of such income tax liability attributable to the recapture tax amount in full or in part from the original elector and/or from any prior subsequent elector, provided that the following conditions are satisfied with respect to such elector:

(*i*) The Commissioner properly has assessed the recapture tax amount pursuant to paragraph (h)(3)(iv)(A)(*1*) of this section.

(*ii*) The Commissioner has issued a notice and demand for payment of the recapture tax amount to the subsequent elector in accordance with §301.6303–1 of this chapter.

(*iii*) The subsequent elector has failed to pay all of the recapture tax amount by the date specified in such notice and demand.

(*iv*) The Commissioner has issued a notice and demand for payment of the unpaid portion of the recapture tax amount to the original elector, or prior subsequent elector (as the case may be), in accordance with §301.6303–1 of this chapter.

(*2*) *Joint and several liability.* The liability imposed under this paragraph (h)(3)(iv)(B) on the original elector and each prior subsequent elector shall be joint and several.

(C) *Allocation of partial payments of tax.* If the subsequent elector's income tax liability for a taxable period includes a recapture tax amount, and if such income tax liability is satisfied in part by payment, credit, or offset, such payment, credit or offset shall be allocated first to that portion of the income tax liability that is not attributable to the recapture tax amount, and then to that portion of the income tax liability that is attributable to the recapture tax amount.

(D) *Refund.* If the Commissioner makes a refund of any income tax liability that includes a recapture tax amount, the Commissioner shall allocate and pay the refund to each elector who paid a portion of such income tax liability as follows:

(*1*) The Commissioner shall first determine the total amount of recapture tax paid by and/or collected from the original elector and from any prior subsequent electors. The Commissioner shall then allocate and pay such refund to the original elector and prior subsequent electors, with each such elector receiving an amount of such refund on a pro rata basis, not to exceed the amount of recapture tax paid by and/or collected from such elector.

(*2*) The Commissioner shall pay the balance of such refund, if any, to the subsequent elector.

(v) *Definition of income tax liability.* Solely for purposes of paragraph (h)(3) of this section, the term *income tax liability* means the income tax liability imposed on a domestic corporation under title 26 of the United States Code for a taxable year, including additions to tax, additional amounts, penalties, and any interest charge related to such income tax liability.

(vi) *Example.* See §1.1503(d)–7(c) *Example 36.*

(4) *Computation of taxable income in year of recapture*—(i) *Presumptive rule.* Except to the extent provided in paragraph (h)(4)(ii) of this section, for purposes of computing the taxable income for the year of recapture, no current, carryover or carryback losses may offset and absorb the recapture amount.

(ii) *Exception to presumptive rule.* The recapture amount included in gross income may be offset and absorbed by that portion of the elector's net operating loss carryover that is attributable to the dual resident corporation or separate unit that incurred the dual consolidated loss being recaptured, if the elector demonstrates, to the satisfaction of the Commissioner, the amount of such portion of the carryover. The principles of §1.1502–21(b)(2)(iv) shall apply for purposes of determining whether any portion of a net operating loss carryover is attributable to the dual resident corporation or separate unit. In the case of a separate unit, such determination shall be made by treating the separate unit as a domestic corporation and a member of the consolidated group composing its unaffiliated domestic owner, or members of the consolidated group of which its affiliated domestic owner is a member, as appropriate. An elector utilizing this rebuttal rule must prepare a computation demonstrating the amount of net operating loss carryover that, under this paragraph (h)(4)(ii), may absorb the recapture amount included in gross income. Such computation must be signed under penalties of perjury and attached to and filed by the due date (including extensions) of, the income tax return for the taxable year in which the triggering event occurs (or, when the triggering event is a foreign use of the dual consolidated loss, the taxable year that includes the last day of the foreign taxable year during which such foreign use occurs).

(5) *Character and source of recapture income.* The amount recaptured under this paragraph (h) shall be treated as ordinary income. Except as provided in the prior sentence, such income shall be treated, as applicable, as income from the same source, having the same character, and falling within the same separate category, for all purposes, including sections 904(d) and 907, to which the items of deduction or loss composing the dual consolidated loss were allocated and apportioned, as provided under sections 861(b), 862(b), 863(a), 864(e), 865, and the related regulations. For this determination, the

pro rata computation of the items of deduction or loss composing the dual consolidated loss as described in §1.1503(d)–4(c)(4) shall apply. See §1.1503(d)–7(c) *Example 38*.

(6) *Reconstituted net operating loss*—(i) *General rule*. Except as provided in paragraphs (h)(6)(ii) and (iii) of this section, commencing in the taxable year immediately following the year in which the dual consolidated loss is recaptured, the dual resident corporation, or the domestic owner of the separate unit, that incurred the dual consolidated loss that is recaptured shall be treated as having a net operating loss (reconstituted net operating loss) in an amount equal to the amount actually recaptured under this paragraph (h). If a domestic corporation (transferee) acquires the assets of the dual resident corporation or domestic owner in a transaction described in section 381(a), the preceding sentence shall be applied by treating the transferee as the dual resident corporation or domestic owner, as applicable. In a case to which this paragraph (h)(6) applies, the transferee corporation shall be treated as having a reconstituted net operating loss in an amount equal to the amount actually recaptured under this paragraph (h). In no event, however, shall more than one corporation be treated as having a reconstituted net operating loss as a result of a single dual consolidated loss being recaptured. A reconstituted net operating loss of a domestic owner shall be attributable under §1.1503(d)–5 to the separate unit that incurred the dual consolidated loss that was recaptured. Moreover, a reconstituted net operating loss shall be subject to the domestic use limitation of §1.1503(d)–4(b) (and therefore subject to the limitation under §1.1503(d)–4(c)), without regard to the exceptions contained in paragraphs (b) through (d) of this section (relating to elective agreements in place between the United States and a foreign country, the ability to demonstrate no possibility of a foreign use, and a domestic use election, respectively). The reconstituted net operating loss shall be available only for carryover, under section 172(b), to taxable years following the taxable year of recapture. For purposes of determining the remaining carryover period, the reconstituted net operating loss shall be treated as if it had been recognized in the taxable year in which the dual consolidated loss that is the basis of the recapture amount was incurred. See §1.1503(d)–7(c) *Examples 36*, *38*, and *40*.

(ii) *Exception*. Paragraph (h)(6)(i) of this section shall not apply to the extent the dual consolidated loss that is the basis of the recapture amount would have been eliminated pursuant to §1.1503(d)–4(d) if no domestic use election had been made for such loss. See §1.1503(d)–7(c) *Example 40*.

(iii) *Special rule for recapture following multiple-party event exception to a triggering event*. This paragraph applies to an excepted event described in paragraph (f)(2)(i)(B) of this section that is followed by a subsequent triggering event requiring recapture as described in paragraph (f)(6) of this section. In such a case, the domestic corporation that owns, directly or indirectly, the assets of the dual resident corporation, or the assets of or the interests in a separate unit, immediately following the excepted event shall be treated as if it incurred the dual consolidated loss that is recaptured for purposes of applying paragraph (h)(6)(i) of this section. See §1.1503(d)–7(c) *Example 36*.

(i) [Reserved]

(j) *Termination of domestic use agreement and annual certifications*—(1) *Rebuttals, exceptions to triggering events, and recapture*. The domestic use agreement filed with respect to a dual consolidated loss shall terminate prior to the end of the certification period and have no further effect if—

(i) An elector is able to rebut the presumption of a triggering event pursuant to the general rule in paragraph (e)(2)(i) of this section;

(ii) An event described in paragraph (e)(1) of this section is not a triggering event as a result of the application of paragraphs (f)(2)(i) or (ii) (relating to events requiring a new domestic use agreement) of this section; this paragraph (j)(1)(ii) does not, however, apply to terminate the new domestic use agreement filed in connection with the event pursuant to paragraph (f)(2)(iii)(A) of this section. See also paragraph (h)(3)(iv) of this section regarding collection from the original elector and prior subsequent electors in certain cases; or

(iii) A dual consolidated loss is recaptured pursuant to paragraph (h) of this section. See §1.1503(d)–7(c) *Examples 32* through *34*.

(2) *Termination of ability for foreign use*—(i) *In general.* A domestic use agreement filed with respect to a dual consolidated loss shall terminate and have no further effect as of the end of a taxable year if the elector—

(A) Demonstrates, to the satisfaction of the Commissioner, that as of the end of such taxable year no foreign use (as defined in §1.1503(d)-3) of the dual consolidated loss can occur in any other year by any means; and

(B) Prepares a statement described in paragraph (j)(2)(ii) of this section that is attached to, and filed by the due date (including extensions) of, its U.S. income tax return for such taxable year.

(ii) *Statement.* The statement described in this paragraph (j)(2)(ii) must be signed under penalties of perjury by the person who signs the return. The statement must be labeled ''Termination of Ability for Foreign Use'' at the top of the page and must include the following information, in paragraphs labeled to correspond with the following:

(A) A statement that the document is submitted under the provisions of paragraph (j)(2) of this section.

(B) The information required by paragraph (c)(2)(ii) of this section.

(C) A statement of the amount of the dual consolidated loss at issue and the year in which such dual consolidated loss was incurred.

(D) The information described in paragraph (c)(2)(iv) of this section that supports the conclusion that no foreign use can occur as provided in paragraph (j)(2)(i)(A) of this section.

(3) *Agreements filed in connection with stand-alone exception.* See §1.1503(d)–3(e)(2)(iii) for the termination of domestic use agreements filed in connection with the stand-alone exception to the mirror legislation rule when a subsequent election is made under paragraph (b) of this section (relating to agreements entered into between the United States and a foreign country).

[T.D. 9315, 72 FR 12914, Mar. 19, 2007]

§ 1.1503(d)–7 Examples.

(a) *In general.* This section provides examples that illustrate the application of §§1.1503(d)–1 through 1.1503(d)–6. This section also provides facts that are presumed for such examples.

(b) *Presumed facts for examples.* For purposes of the examples in this section, unless otherwise indicated, the following facts are presumed:

(1) Each entity has only a single class of equity outstanding, all of which is held by a single owner.

(2) P, a domestic corporation and the common parent of the P consolidated group, owns S, a domestic corporation and a member of the P consolidated group.

(3) DRC_X, a domestic corporation, is subject to Country X tax on its worldwide income or on a residence basis, and is a dual resident corporation.

(4) $DE1_X$ and $DE2_X$ are both Country X entities, subject to Country X tax on their worldwide income or on a residence basis, and disregarded as entities separate from their owners for U.S. tax purposes. $DE3_Y$ is a Country Y entity, subject to Country Y tax on its worldwide income or on a residence basis, and disregarded as an entity separate from its owner for U.S. tax purposes. All the interests in $DE1_X$, $DE2_X$, and $DE3_Y$ constitute hybrid entity separate units.

(5) FB_X is a Country X business operation that, if carried on by a U.S. person, would constitute a foreign branch, as defined in §1.367(a)–6T(g)(1), and is a Country X foreign branch separate unit.

(6) Neither the assets nor the activities of an entity constitute a foreign branch separate unit.

(7) FS_X is a Country X entity that is subject to Country X tax on its worldwide income or on a residence basis and is classified as a foreign corporation for U.S. tax purposes.

(8) The applicable foreign country has a consolidation regime that—

(i) Includes as members of a consolidated group any commonly controlled branches and permanent establishments in such jurisdiction, and entities that are subject to tax in such jurisdiction on their worldwide income or on a residence basis; and

(ii) Allows the losses of members of consolidated groups to offset income of other members.

(9) There is no mirror legislation, within the meaning of §1.1503(d)–3(e)(1), in the applicable foreign country.

(10) There is no elective agreement described in §1.1503(d)–6(b) between the United States and the applicable foreign country.

(11) There is no income tax convention between the United States and the applicable foreign country.

(12) If a domestic use election, within the meaning of §1.1503(d)–6(d), is made, all the necessary filings related to such election are properly completed on a timely basis.

(13) If there is a triggering event requiring recapture of a dual consolidated loss, the amount of recapture is not reduced pursuant to §1.1503(d)–6(h)(2).

(14) There are no other items of income, gain, deduction, and loss. In addition, the United States and the applicable foreign country recognize the same items of income, gain, deduction, and loss in each taxable year.

(15) All taxpayers use the calendar year as their taxable year.

(c) *Examples.* The following examples illustrate the application of §§1.1503(d)–1 through 1.1503(d)–6:

Example 1. Separate unit combination rule. (i) *Facts.* P owns $DE3_Y$ which, in turn, owns $DE1_X$. $DE1_X$ owns FB_X. PRS, an entity treated as a partnership for both U.S. and Country X tax purposes, is owned 50 percent by P and 50 percent by an unrelated foreign person. PRS carries on a business operation in Country X that, if carried on by a U.S. person, would constitute a foreign branch within the meaning of §1.367(a)–6T(g)(1). In addition, P owns DRC_X, a member of the consolidated group of which P is the parent, which carries on business operations in Country X that constitute a foreign branch within the meaning of §1.367(a)–6T(g)(1). S owns $DE2_X$.

(ii) *Result.* Pursuant to §1.1503(d)–1(b)(4)(ii), the interest in $DE1_X$, the interest in $DE2_X$, FB_X, P's share of the Country X business operations carried on by PRS (which is owned by P indirectly through its interest in PRS), and DRC_X's Country X business operations are combined and treated as a single separate unit of the consolidated group of which P is the parent. This is the case regardless of whether the losses of each individual separate unit are made available to offset the income of the other individual separate units under Country X tax laws. Because DRC_X is a dual resident corporation, it is not combined and treated as part of this combined separate unit and, as a result, DRC_X's income or dual consolidated loss is not taken into account in determining the income or dual consolidated loss of the combined separate unit. In addition, P's interest in $DE3_Y$ is not combined and is another separate unit because it is subject to tax in Country Y, rather than Country X.

Example 2. Definition of a separate unit and application of domestic use limitation—foreign branch separate unit. (i) *Facts.* P carries on business operations in Country X that constitute a permanent establishment under the U.S.–Country X income tax convention. In year 1, a loss is attributable to P's Country X permanent establishment, as determined under §1.1503(d)–5.

(ii) *Result.* Under §§1.1503(d)–1(b)(4)(i)(A) and 1.367(a)–6T(g)(1), P's Country X permanent establishment constitutes a foreign branch separate unit. Therefore, the year 1 loss attributable to the foreign branch separate unit constitutes a dual consolidated loss pursuant to §1.1503(d)–1(b)(5)(ii). The dual consolidated loss rules apply to the dual consolidated loss even though there is no affiliate of the foreign branch separate unit in Country X, because it is still possible that all or a portion of the dual consolidated loss can be put to a foreign use. For example, there may be a foreign use with respect to a Country X affiliate acquired in a year subsequent to the year in which the dual consolidated loss was incurred. See §1.1503(d)–6(a)(2). Accordingly, unless an exception under §1.1503(d)–6 applies (such as a domestic use election), the year 1 dual consolidated loss attributable to P's Country X permanent establishment is subject to the domestic use limitation rule of §1.1503(d)–4(b). As a result, pursuant to §1.1503(d)–4(c), the year 1 dual consolidated loss cannot offset income of P that is not attributable to its Country X foreign branch separate unit, nor can it offset income of any other domestic affiliate. The loss can, however, offset income of the Country X foreign branch separate unit, subject to the application of §1.1503(d)–4(c). The result would be the same even if Country X did not have a consolidation regime that includes as members of consolidated groups Country X branches or permanent establishments of nonresident corporations. The dual consolidated loss rules apply even in the absence of a consolidation regime in the foreign country because it is possible that all or a portion of a dual consolidated loss can be put to a foreign use by other means, such as through a sale, merger, or similar transaction. See §1.1503(d)–6(a)(2).

(iii) *Alternative Facts.* The facts are the same as in paragraph (i) of this *Example 2*, except that P's Country X business operations constitute a foreign branch as defined in §1.367(a)–6T(g)(1), but do not constitute a permanent establishment under the U.S.–Country X income tax convention. Although the activities carried on by P in Country X would otherwise constitute a foreign branch separate unit as described in §1.1503(d)–1(b)(4)(i)(A), the exception under §1.1503(d)–1(b)(4)(iii) applies because the activities do not constitute a permanent establishment under the U.S.–Country X income tax convention. Thus, the Country X business operations do not constitute a foreign branch separate unit, and the year 1 loss is not subject to the dual consolidated loss rules. If P instead carried on its Country X business operations through $DE1_X$, then the exception under §1.1503(d)–1(b)(4)(iii) would not apply because P carries on the business operations through a hybrid entity and, as a result, the business operations would constitute a foreign branch separate unit. Thus, in such a case the year 1 loss would be subject to the dual consolidated loss rules.

Example 3. Domestic use limitation—foreign branch separate unit owned through a partnership. (i) *Facts.* P and S organize a partnership, PRS_X, under the laws of Country X. PRS_X is treated as a partnership for both U.S. and Country X tax purposes. PRS_X owns FB_X. PRS_X earns U.S. source income that is unconnected with its FB_X branch operations, and such income is not subject to tax by Country X. In addition, such U.S. source income is not attributable to FB_X under §1.1503(d)–5.

(ii) *Result.* Under §1.1503(d)–1(b)(4)(i)(A), P's and S's shares of FB_X owned indirectly through their interests in PRS_X are individual foreign branch separate units. Pursuant to §1.1503(b)–1(b)(4)(ii), these individual separate units are combined and treated as a single separate unit of the consolidated group of which P is the parent. Unless an exception under §1.1503(d)–6 applies, any dual consolidated loss attributable to FB_X cannot offset income of P or S (other than income attributable to FB_X, subject to the application of §1.1503(d)–4(c)), including their distributive share of the U.S. source income earned through their interests in PRS_X, nor can it offset income of any other domestic affiliates.

Example 4. Definition of a separate unit and domestic use limitation—interest in hybrid entity partnership and indirectly owned foreign branch separate unit. (i) *Facts.* HPS_X is a Country X entity that is subject to Country X tax on its worldwide income. HPS_X is classified as a partnership for Federal tax purposes. P, S, and FS_X, are the sole partners of HPS_X. For U.S. tax purposes, P, S, and FS_X each has an equal interest in each item of HPS_X's profit or loss. HPS_X carries on operations in Country Y that, if carried on by a U.S. person, would constitute a foreign branch within the meaning of §1.367(a)–6T(g)(1).

(ii) *Result.* Under §1.1503(d)–1(b)(4)(i)(B), the partnership interests in HPS_X held by P and S are individual hybrid entity separate units. These individual separate units are combined into a single separate unit under §1.1503(d)–1(b)(4)(ii). In addition, P's and S's share of the Country Y operations owned indirectly through their interests in HPS_X are individual foreign branch separate units under §1.1503(d)–1(b)(4)(i)(B). These individual separate units are also combined into a single separate unit under §1.1503(d)–1(b)(4)(ii). Unless an exception under §1.1503(d)–6 applies, dual consolidated losses attributable to P's and S's combined interests in HPS_X can only be used to offset income attributable to their combined interests in HPS_X (other than income attributable to P's and S's combined interests in the Country Y foreign branch separate unit), subject to the application of §1.1503(d)–4(c). Similarly, dual consolidated losses attributable to P's and S's combined interests in the Country Y operations of HPS_X can only be used to offset income attributable to their combined interests in such Country Y operations, subject to the application of §1.1503(d)–4(c). Neither FS_X's interest in HPS_X, nor its share of the Country Y operations owned by HPS_X, is a separate unit because FS_X is not a domestic corporation.

Example 5. Foreign use—general rule and de minimis reduction exception. (i) *Facts.* P owns $DE1_X$. $DE1_X$ owns FS_X. In year 1, there is a \$100x loss attributable to P's interest in $DE1_X$ that is a dual consolidated loss. Also in year 1, FS_X earns \$200x of income. $DE1_X$ and FS_X file a Country X consolidated tax return. For Country X tax purposes, the year 1 \$100x loss of $DE1_X$ is used to offset \$100x of year 1 income generated by FS_X. Under Country X tax law, unused losses are carried forward and available to offset income in subsequent taxable years.

(ii) *Result.* The \$100x loss attributable to P's interest in $DE1_X$ is available to, and in fact does, offset FS_X's income under the laws of Country X. In addition, under U.S. tax principles, such income is considered to be an item of FS_X, a foreign corporation. As a result, under §1.1503(d)–3(a), there has been a foreign use of the year 1 dual consolidated loss attributable to P's interest in $DE1_X$. Therefore, P cannot make a domestic use election with respect to the loss as provided under §1.1503(d)–6(d)(2), and such loss will be subject to the domestic use limitation rule of §1.1503(d)–4(b). The result would be the same even if FS_X, under Country X tax law, had no income against which the dual consolidated loss of $DE1_X$ could be offset (unless FS_X's ability to use the loss under Country X tax law requires an election, and no such election is made).

(iii) *Alternative Facts.* The facts are the same as in paragraph (i) of this *Example 5*, except that FS_X cannot use the loss of $DE1_X$

under Country X tax law without an election, and no such election is made. Pursuant to the exception in §1.1503(d)–3(c)(2), there is no foreign use of the year 1 dual consolidated loss attributable to P's interest in $DE1_X$. In addition, P files a domestic use election with respect to the year 1 dual consolidated loss attributable to its interest in $DE1_X$ and, at the beginning of year 3, P sells its interest in $DE1_X$ to F, a Country Y entity that is a foreign corporation. The sale of the interest in $DE1_X$ to F results in a foreign use triggering event pursuant to §1.1503(d)–6(e)(1)(i) because, immediately after the sale, the loss attributable to the interest in $DE1_X$ carries over under Country X law and, therefore, is available under U.S. tax principles to offset income of the owner of the interest in $DE1_X$ which, in the hands of F, is not a separate unit. It is also a foreign use because the loss is available under U.S. tax principles to offset the income of F, a foreign corporation. See §1.1503(d)–3(a)(1). Finally, the transfer is a triggering event pursuant to §1.1503(d)–6(e)(1)(iv) and (v).

(iv) *Alternative Facts.* The facts are the same as in paragraph (iii), of this *Example 5*, except that P only sells 5 percent of its interest in $DE1_X$ to F. Pursuant to Rev. Rul. 99–5 (1999–1 CB 434), see §601.601(d)(2)(ii)(*b*) of this chapter, the transaction is treated as if P sold 5 percent of its interest in each of $DE1_X$'s assets to F, and then immediately thereafter P and F transferred their interests in the assets of $DE1_X$ to a partnership in exchange for an ownership interest therein. The sale of the 5 percent interest in $DE1_X$ generally results in a foreign use triggering event because a portion of the dual consolidated loss carries over under Country X tax law and is available under U.S. tax principles to offset income of the owner of the interest in $DE1_X$, a hybrid entity, which in the hands of F is not a separate unit. It is also a foreign use because the loss is available under U.S. tax principles to offset the income of F, a foreign corporation. See §1.1503(d)–3(a)(1). However, pursuant to the exception under §1.1503(d)–3(c)(5) (relating to a de minimis reduction of an interest in a separate unit), such availability does not result in a foreign use. In addition, pursuant to §1.1503(d)–6(f)(1) and (3), the deemed transfers pursuant to Rev. Rul. 99–5 as a result of the sale are not treated as triggering events described in §1.1503(d)–6(e)(1)(iv) or (v).

Example 6. Foreign use and indirect foreign use—foreign reverse hybrid structure and disregarded payments. (i) *Facts.* P owns $DE1_X$. $DE1_X$ owns 99 percent and S owns 1 percent of FRH_X, a Country X partnership that elected to be treated as a corporation for U.S. tax purposes. FRH_X conducts a trade or business in Country X. In year 1, $DE1_X$ incurs interest expense on a third-party loan, which constitutes a dual consolidated loss attributable to P's interest in $DE1_X$. In year 1, for Country X tax purposes, $DE1_X$ takes into account its distributive share of income generated by FRH_X and offsets such income with its interest expense.

(ii) *Result.* In year 1, the dual consolidated loss attributable to P's interest in $DE1_X$ is available to, and in fact does, offset income recognized in Country X and, under U.S. tax principles, the income is considered to be income of FRH_X, a foreign corporation. Accordingly, pursuant to §1.1503(d)–3(a)(1), there is a foreign use of the dual consolidated loss. Therefore, P cannot make a domestic use election with respect to the year 1 dual consolidated loss attributable to its interest in $DE1_X$, as provided under §1.1503(d)–6(d)(2), and such loss will be subject to the domestic use limitation rule of §1.1503(d)–4(b).

(iii) *Alternative Facts.* (A) The facts are the same as in paragraph (i) of this *Example 6*, except as follows. Instead of owning $DE1_X$, P owns $DE3_Y$ which, in turn, owns $DE1_X$. In addition, $DE3_Y$, rather than $DE1_X$, is the obligor on the third-party loan and therefore incurs the interest expense on such loan. Finally, $DE3_Y$ on-lends the loan proceeds from the third-party loan to $DE1_X$, and $DE1_X$ pays interest to $DE3_Y$ on such loan that is generally disregarded for U.S. tax purposes.

(B) Pursuant to §1.1503(d)–5(c)(1)(ii), for purposes of calculating income or a dual consolidated loss, $DE3_Y$ and $DE1_X$ do not take into account interest income or interest expense, respectively, with respect to amounts paid on the disregarded loan from $DE3_Y$ to $DE1_X$. As a result, such items neither create a dual consolidated loss with respect to the interest in $DE1_X$, nor do they reduce (or eliminate) the dual consolidated loss attributable to the interest in $DE3_Y$. Thus, in year 1, there is a dual consolidated loss attributable to P's interest in $DE3_Y$, but not to P's indirect interest in $DE1_X$.

(C) In year 1, interest expense paid by $DE1_X$ to $DE3_Y$ on the disregarded loan is taken into account as a deduction in computing $DE1_X$'s taxable income for Country X tax purposes, but does not give rise to a corresponding item of income or gain for U.S. tax purposes (because it is generally disregarded). In addition, such interest has the effect of making an item of deduction or loss composing the dual consolidated loss attributable to P's interest in $DE3_Y$ available for a foreign use. This is the case because it may reduce or offset items of deduction or loss composing the dual consolidated loss for foreign tax purposes, and creates another deduction or loss that may reduce or offset income of $DE1_X$ for foreign tax purposes that, under U.S. tax principles, is treated as income of FRH_X, a foreign corporation. Moreover, because the disregarded item is incurred or taken into account as interest for foreign tax purposes, it is deemed to have been incurred or taken into account with a principal purpose of avoiding the provisions of section 1503(d). Accordingly, there is an indirect foreign use of the year 1 dual consolidated loss attributable to P's interest in $DE3_Y$, and P cannot make a domestic use election with respect to such loss as provided under §1.1503(d)–6(d)(2). Thus, the loss will be subject to the domestic use limitation rule of §1.1503(d)–4(b).

Example 7. Indirect foreign use—hybrid instrument. (i) *Facts.* P owns $DE1_X$ which, in turn, owns FS_X. $DE1_X$ borrows cash from an unrelated lender and transfers the cash to FS_X in exchange for an instrument (hybrid instrument). The hybrid instrument is treated as equity for U.S. tax purposes and debt for Country X tax purposes. Interest expense on the loan from the unrelated lender results in a dual consolidated loss being attributable to P's interest in $DE1_X$ in year 1. $DE1_X$ does not elect under Country X law to consolidate with FS_X. In year 1, FS_X distributes its stock as a payment on the hybrid instrument to $DE1_X$. For U.S. tax purposes, such payment is excluded from P's gross income under section 305. However, for Country X tax purposes, such payment is treated as interest and gives rise to a deduction taken into account in computing FS_X's Country X tax liability; the payment also gives rise to interest income to $DE1_X$ for Country X tax purposes.

(ii) *Result.* The payment on the hybrid instrument does not give rise to an item of income or gain for U.S. tax purposes and therefore does not reduce (or eliminate) the dual consolidated loss attributable to P's interest in $DE1_X$. In addition, such payment is taken into account as a deduction in computing FS_X's taxable income for Country X tax purposes. Moreover, such payment has the effect of making an item of deduction or loss composing the dual consolidated loss attributable to P's interest in $DE1_X$ available for a foreign use. This is the case because it may reduce or offset items of deduction or loss composing the dual consolidated loss for foreign tax purposes, and creates a deduction that reduces or offsets income of FS_X for foreign tax purposes that, under U.S. tax principles, is income of a foreign corporation. Further, because the item is incurred, or taken into account, using an instrument that is treated as equity for U.S. tax purposes and debt for foreign tax purposes, it is deemed to have been engaged in with the principal purpose of avoiding the provisions of section 1503(d). As a result, there has been an indirect foreign use of the year 1 dual consolidated loss, and P cannot make a domestic use election with respect to such loss, as provided under §1.1503(d)–6(d)(2). Thus, the year 1 dual consolidated loss will be subject to the domestic use limitation rule of §1.1503(d)–4(b).

Example 8. No indirect foreign use—transaction entered into in the ordinary course of business. (i) *Facts.* P owns $DE1_X$ and FB_Y. FB_Y is a foreign branch separate unit located in Country Y. $DE1_X$ owns FB_X and FS_X. P's interest in $DE1_X$ and FB_X are combined and treated as a single separate unit (Country X separate unit) pursuant to §1.1503(d)–1(b)(4)(ii). Under Country X tax laws, $DE1_X$ elects to consolidate with FS_X. FB_Y engages in the business of providing services and, in connection with its ordinary course of business, provides services to unrelated third parties and to $DE1_X$. As compensation for services, $DE1_X$ makes a payment to FB_Y. Under Country X tax law, the payment is deductible. However, the payment is generally disregarded for U.S. tax purposes and, pursuant to §1.1503(d)–5(c)(1)(ii), is not taken into account in calculating the income or dual consolidated loss attributable to the Country X separate unit or FB_Y. In year 1, the Country X separate unit and FB_Y each has a dual consolidated loss. The dual consolidated loss attributable to the Country X separate unit is subject to the domestic use limitation under §1.1503(d)–4(b) because $DE1_X$ and FS_X elect to consolidate and, as a result, the dual consolidated loss is put to a foreign use.

(ii) *Result.* The payment made by $DE1_X$ to FB_Y in connection with the performance of services is taken into account as a deduction in computing $DE1_X$'s taxable income for Country X tax purposes, but does not give rise to an item of income or gain for U.S. tax purposes. In addition, such payment has the effect of making an item of deduction or loss composing the dual consolidated loss attributable to FB_Y available for a foreign use. This is the case because it may reduce or offset items of deduction or loss composing the dual consolidated loss of FB_Y for foreign tax purposes, and creates another deduction that reduces or offsets income of FS_X for foreign tax purposes (because $DE1_X$ and FS_X elect to file a consolidated return) that, under U.S. tax principles, is income of a foreign corporation. However, the transaction between $DE1_X$ and FB_Y was entered into in the ordinary course of FB_Y's trade or business. As a result, if P can demonstrate to the satisfaction of the Commissioner that the transaction was not entered into with a principal purpose of avoiding the provisions of section 1503(d), FB_Y's year 1 dual consolidated loss will not be treated as having been made available for an indirect foreign use. In such a case, P would be entitled to make a domestic use election with respect to such loss.

Example 9. Foreign use—dual resident corporation with hybrid entity joint venture. (i) *Facts.* P owns DRC_X, a member of the P consolidated group. DRC_X owns 80 percent of HPS_X, a Country X entity that is subject to Country X tax on its worldwide income. HPS_X is classified as a partnership for U.S. tax purposes. FS_X owns the remaining 20 percent of HPS_X. In year 1, DRC_X generates a $100x net operating loss (without regard to items attributable to DRC_X's interest in

HPS_X). Also in year 1, HPS_X generates $100x of income, $80x of which is attributable to DRC_X's interest in HPS_X. DRC_X and HPS_X file a consolidated tax return for Country X tax purposes, and HPS_X offsets its $100x of income with the $100x loss generated by DRC_X.

(ii) *Result.* DRC_X and its interest in HPS_X are not combined because DRC_X is a dual resident corporation and the combination rule under §1.1503(d)–1(b)(4)(ii) only applies to separate units. The $100x year 1 net operating loss incurred by DRC_X (without regard to items attributable to DRC_X's interest in HPS_X) is a dual consolidated loss. In addition, HPS_X is a hybrid entity and DRC_X's interest in HPS_X is a hybrid entity separate unit; however, there is no dual consolidated loss attributable to such separate unit in year 1 (instead, there is $80x of income attributable to such separate unit). DRC_X's year 1 dual consolidated loss offsets $100x of income for Country X purposes, and $20x of such income is, under U.S. tax principles, income of FS_X, which owns an interest in HPS_X that is not a separate unit (in addition, FS_X is a foreign corporation). As a result, pursuant to §1.1503(d)–3(a), there is a foreign use of the year 1 dual consolidated loss of DRC_X, and P cannot make a domestic use election with respect to such loss pursuant to §1.1503(d)–6(d)(2). Therefore, such loss will be subject to the domestic use limitation rule of §1.1503(d)–4(b). The result would be the same even if HPS_X, under Country X laws, had no income against which the dual consolidated loss could be offset (unless the ability to use the loss under Country X laws required an election, and no such election is made).

Example 10. Foreign use—foreign parent corporation. (i) *Facts.* F1 and F2, nonresident alien individuals, each owns 50 percent of FP_X, a Country X entity that is subject to Country X tax on its worldwide income. FP_X is classified as a foreign corporation for U.S. tax purposes. FP_X owns DRC_X. DRC_X is the parent of a consolidated group that includes as a member DS, a domestic corporation. In year 1, DRC_X incurs a dual consolidated loss of $100x and, for Country X tax purposes, FP_X generates $100x of income. In year 1, FP_X elects to consolidate with DRC_X for Country X tax purposes, and the $100x year 1 loss of DRC_X is used to offset the income of FP_X under the laws of Country X. For U.S. tax purposes, the items of FP_X do not constitute items of income in year 1.

(ii) *Result.* The year 1 dual consolidated loss of DRC_X offsets the income of FP_X under the laws of Country X. Pursuant to §1.1503(d)–3(a), the offset constitutes a foreign use because the items constituting such income are considered under U.S. tax principles to be items of a foreign corporation. This is the case even though the United States does not recognize such items as income in year 1. Therefore, DRC_X cannot make a domestic use election with respect to its year 1 dual consolidated loss pursuant to §1.1503(d)–6(d)(2). As a result, such loss will be subject to the domestic use limitation rule of §1.1503(d)–4(b).

(iii) *Alternative Facts.* The facts are the same as in paragraph (i) of this *Example 10*, except that FP_X is classified as a partnership for U.S. tax purposes. The result would be the same as in paragraph (ii) of this *Example 10*, because the offset of the income generated by FP_X is a foreign use pursuant to §1.1503(d)–3(a). This is the case because the items constituting such income are considered under U.S. tax principles to be items of F1 and F2, the owners of interests in FP_X (a hybrid entity), that are not separate units. Moreover, the result would be the same if F1 and F2 owned their interests in FP_X indirectly through another partnership.

Example 11. No foreign use—absence of foreign loss allocation rules. (i) *Facts.* P owns $DE1_X$ and DRC_X. DRC_X is a member of the P consolidated group and owns FS_X. $DE1_X$ owns FB_X. P's interest in $DE1_X$ and P's indirect interest in FB_X are individual separate units that are combined into a single separate unit (Country X separate unit) pursuant to §1.1503(d)–1(b)(4)(ii). In year 1, DRC_X incurs a $200x net operating loss and $200x of income is attributable to P's Country X separate unit. The $200x net operating loss incurred by DRC_X is a dual consolidated loss. FS_X also earns $200x of income in year 1. DRC_X, $DE1_X$, and FS_X file a Country X consolidated tax return. However, Country X has no applicable rules for determining which income is offset by DRC_X's year 1 $200x loss.

(ii) *Result.* Under §1.1503(d)–3(c)(3), DRC_X's $200x loss shall be treated as having been made available to offset the $200x of income attributable to P's Country X separate unit. P's Country X separate unit is not, under U.S. tax principles, a foreign corporation, and there is no interest in $DE1_X$ (which is a hybrid entity) that is not a separate unit. As a result, DRC_X's loss being made available to offset the income attributable to P's Country X separate unit is not considered a foreign use of such loss. Therefore, P can make a domestic use election with respect to DRC_X's year 1 dual consolidated loss.

(iii) *Alternative Facts.* The facts are the same as in paragraph (i) of this *Example 11*, except that in year 1 only $150x of income is attributable to P's Country X separate unit. Because only $150x of income is attributed to P's Country X separate unit, $50x of DRC_X's year 1 dual consolidated loss is treated as being made available to offset the income of FS_X, a foreign corporation, and therefore constitutes a foreign use. As a result, DRC_X cannot make a domestic use election with respect to its year 1 dual consolidated loss pursuant to §1.1503(d)–6(d)(2), and such loss will be subject to the domestic use limitation rule of §1.1503(d)–4(b).

Example 12. No foreign use—absence of foreign loss usage ordering rules. (i) *Facts.* (A) P owns DRC_X, a member of the P consolidated group. DRC_X owns FS_X. Under the Country X consolidation regime, a consolidated group may elect in any given year to use all or a portion of the losses of one consolidated group member to offset income of other consolidated group members. If no such election is made in a year in which losses are generated by a consolidated member, such losses carry forward and are available, at the election of the consolidated group, to offset income of consolidated group members in subsequent taxable years. Country X law does not provide ordering rules for determining when a loss from a particular taxable year is used because, under Country X law, losses never expire. In addition, Country X law does not provide ordering rules for determining when a particular type of loss (for example, capital or ordinary) is used.

(B) In year 1, DRC_X incurs a capital loss of $80x which, under §1.1503(d)–5(b)(2), is not a dual consolidated loss. DRC_X also incurs a net operating loss of $80x in year 1 which is a dual consolidated loss. FS_X generates $60x of capital gain in year 1 which, for Country X purposes, can be offset by capital losses and net operating losses. Under the laws of Country X, DRC_X elects to use $60x of its total year 1 loss of $160x to offset the $60x of capital gain generated by FS_X in year 1; the remaining $100x of year 1 loss carries forward. In both year 2 and year 3, DRC_X incurs a net operating loss of $100x, while FS_X incurs no income or loss in years 2 and 3. DRC_X's $100x losses incurred in year 2 and year 3 are dual consolidated losses. Because DRC_X does not elect under the laws of Country X to use all or a portion of its year 2 or year 3 net operating losses of $100x to offset the income of other members of the Country X consolidated group, P is permitted to make (and in fact does make) a domestic use election with respect to both the year 2 and year 3 dual consolidated losses of DRC_X. In year 4, DRC_X has a net operating loss of $10x and FS_X generates $125x of income. Country X law permits, upon an election, FS_X's $125x of income generated in year 4 to be offset by losses (including carryover losses from prior years) of other group members. Accordingly, in year 4, DRC_X elects to use $125x of its accumulated losses to offset the $125x of year 4 income generated by FS_X.

(ii) *Result.* (A) Under the ordering rules of §1.1503(d)–3(d)(3), a pro rata amount of DRC_X's year 1 net operating loss ($30x) and capital loss ($30x) is considered to be used to offset FS_X's year 1 $60x capital gain. As a result, P cannot make a domestic use election with respect to DRC_X's year 1 $80x dual consolidated loss because a portion of such loss is put to a foreign use.

(B) DRC_X's $10x year 4 net operating loss is also a dual consolidated loss. Under the ordering rules of §1.1503(d)–3(d)(1), such loss is considered to be used to offset $10x of FS_X's year 4 $125x of income. Consequently, P cannot make a domestic use election with respect to such loss. Under the ordering rules of §1.1503(d)–3(d)(2), $50x of capital loss carryover and $50x of ordinary loss from year 1 will be considered to offset $100x of FS_X's year 4 income because the income is first deemed to have been offset by losses the use of which would not constitute a triggering event that would result in the recapture of a dual consolidated loss. The remaining $15x of FS_X's year 4 income is considered to be offset by losses from year 3 because it is the most recent taxable year from which a loss may be carried forward. Thus, a portion of the year 3 dual consolidated loss has been put to a foreign use and the entire year 3 dual consolidated loss is recaptured. However, none of DRC_X's $100x year 2 net operating loss will be deemed to offset FS_X's year 4 income. As a result, DRC_X's year 2 dual consolidated loss will not be recaptured.

Example 13. Exception to foreign use through partnership interest. (i) *Facts.* (A) P owns 80 percent of HPS_X, a Country X entity subject to Country X tax on its worldwide income. FS_Z, an unrelated foreign corporation, owns the remaining 20 percent of HPS_X. HPS_X is classified as a partnership for Federal tax purposes and carries on operations in Country X that, if carried on by a U.S. person, would constitute a foreign branch within the meaning of §1.367(a)–6T(g)(1). P's interest in HPS_X and P's indirect interest in the Country X branch are individual separate units that are combined into a single separate unit (Country X separate unit) pursuant to §1.1503(d)–1(b)(4)(ii).

(B) In year 1, HPS_X incurs a loss of $100x, $80x of which is attributable to P's Country X separate unit. The $80x of loss attributable to P's Country X separate unit constitutes a dual consolidated loss and P makes a domestic use election with respect to such loss. In year 2, HPS_X generates $50x of income, $40x of which is attributable to P's interest in the Country X separate unit. Under Country X income tax laws, the $100x of year 1 loss incurred by HPS_X is carried forward and offsets the $50x of income generated by HPS_X in year 2; the remaining $50x of loss is carried forward and is available to offset income generated by HPS_X in subsequent years. P and FS_Z maintain their ownership interests in HPS_X throughout years 1 and 2.

(ii) *Result.* In year 2, under the laws of Country X, the $100x of year 1 loss, which includes the $80x dual consolidated loss attributable to P's Country X separate unit, is made available to offset income of HPS_X. Such income is attributable to P's interest in HPS_X, which is a separate unit. Such income also is income of FS_Z, a foreign corporation that is an owner of an interest in HPS_X, which is not a separate unit. However, pursuant to §1.1503(d)–3(c)(4), there is no foreign use of the year 1 dual consolidated loss in year 2. This is the case because P's interest in HPS_X as of the end of year 1 has not been reduced by more than a de minimis amount, and the portion of the $80x dual consolidated loss was made available for a foreign use in year 2 solely as a result of FS_Z's ownership in HPS_X and the allocation or carry forward of the dual consolidated loss as a result of such ownership.

(iii) *Alternative Facts.* The facts are the same as in paragraph (i) of this *Example 13,* except that P also owns FS_X. In addition, FS_X and HPS_X elect to file a consolidated return under Country X law. The exception to foreign use under §1.1503(d)–3(c)(4) does not apply because there is a foreign use other than by reason of the dual consolidated loss being made available as a result of FS_Z's ownership in HPS_X and the allocation or carry forward of the dual consolidated loss as a result of such ownership. That is, the exception does not apply because there is also a foreign use of the dual consolidated loss as a result of FS_X and HPS_X filing a consolidated return under Country X law.

(iv) *Alternative Facts.* The facts are the same as in paragraph (i) of this *Example 13,* except that at the end of year 2, FS_Z contributes cash to HPS_X in exchange for additional equity of HPS_X. As a result of the contribution, FS_Z's interest in HPS_X increases from 20 percent to 30 percent, and P's interest in HPS_X decreases from 80 percent to 70 percent. P's interest in HPS_X is reduced within a single 12-month period by 12.5 percent (10/80), as compared to P's interest in HPS_X as of the beginning of such 12-month period. Accordingly, pursuant to §1.1503(d)–3(c)(4)(iii), the exception to foreign use provided under §1.1503(d)–3(c)(4)(i) does not apply. Therefore, in year 2 there is a foreign use of the $80x year 1 dual consolidated loss attributable to P's Country X separate unit. Such foreign use constitutes a triggering event in year 2 and the $80x year 1 dual consolidated loss is recaptured. Alternatively, if FS_Z were a domestic corporation, there would not be a foreign use of the $80x year 1 dual consolidated loss because the loss would not be available to offset income that, under U.S. tax principles, is income of a foreign corporation or a direct or indirect owner of an interest in a hybrid entity that is not a separate unit.

Example 14. Exception to foreign use through partnership interest—combination rule. (i) *Facts.* (A) P and FS_X form PRS_X. P and FS_X each own 50 percent of PRS_X throughout years 1 and 2. PRS_X is treated as a partnership for both U.S. and Country X tax purposes. PRS_X owns DE_Y. DE_Y is a Country Y entity subject to Country Y tax on its worldwide income and disregarded as an entity separate from its owner for U.S. tax purposes. DE_Y conducts business operations in Country Y that, if carried on by a U.S. person, would constitute a foreign branch as defined in §1.367(a)–6T(g)(1). P's interest in the Country Y operations conducted by DE_Y is an individual foreign branch separate unit. P's interest in DE_Y, owned indirectly through PRS_X, is a hybrid entity individual separate unit. P also owns FB_Y, a Country Y foreign branch individual separate unit. Under §1.1503(d)–1(b)(4)(ii), FB_Y and P's indirect interests in DE_Y and DE_Y's Country Y business operations are treated as a combined separate unit (Country Y separate unit).

(B) In year 1, there is a $100x loss attributable to the Country Y business operations conducted by DE_Y. Thus, there is a $50x loss attributable to P's interest in DE_Y's Country Y business operations in year 1. Also in year 1, there is a $200x loss attributable to FB_Y. No income or loss is attributable to P's interest in DE_Y in year 1. Under §1.1503(d)–5(c)(4)(ii), the dual consolidated loss attributable to P's combined Country Y separate unit is $250x ($50x loss attributable to P's indirect interest in DE_Y's Country Y operations, plus $200x loss attributable to FB_Y). In year 2, neither DE_Y nor DE_Y's Country Y operations generates income or loss. Under Country Y law, the $100x of year 1 loss incurred by DE_Y is carried forward and is available to offset income of DE_Y in year 2.

(ii) *Result.* As a result of the carryover of the year 1 $100x loss (which includes $50x of the year 1 dual consolidated loss) under Country Y law, a portion of such loss will be available to offset income of DE_Y that is attributable to P's interest in DE_Y owned indirectly through PRS_X. A portion of such loss will also be available to offset income of DE_Y that is attributable to FS_X's indirect ownership of DE_Y. Accordingly, under §1.1503(d)–3(a), there would be a foreign use of a portion of P's $250x year 1 dual consolidated loss because it is available to offset an item of income of the owner of an interest in a hybrid entity, which is not a separate unit (there would also be a foreign use in this case because FS_X is a foreign corporation). However, there has not been a reduction of P's interest in DE_Y, DE_Y has not consolidated under the laws of Country Y, and there has not been any other foreign use of the dual consolidated losses. As a result, no foreign use occurs as a result of the carryforward pursuant to §1.1503(d)–3(c)(4)(i) and (ii).

Example 15. No foreign use—asset basis carryover exception. (i) *Facts.* P owns FB_X and FS_X. In year 1, there is a dual consolidated loss attributable to FB_X. P's items of income, gain, deduction, and loss that are taken into account in calculating FB_X's dual consolidated loss include depreciation deductions attributable to FB_X's assets. P makes a domestic use election under §1.1503(d)–6(d) with respect to the year 1 dual consolidated loss of FB_X. At the end of year 2, P contributes a portion of FB_X's assets to FS_X, in exchange for stock in FS_X. The aggregate adjusted basis of the assets transferred by P to FS_X is less than 10 percent of the aggregate adjusted basis of all of FB_X's assets held at the beginning of year 2. In addition, no other assets of FB_X are transferred during the certification period. Under Country X law, FS_X's basis in the transferred assets is determined by reference to P's basis in such assets. In addition, under Country X law, a portion of the depreciation deductions that were taken into account in year 1 for U.S. tax purposes, are taken into account in year 2 for Country X tax purposes.

(ii) *Result.* As a result of the transfer of assets from P to FS_X, a portion of the year 1 dual consolidated loss is available for a foreign use. This is the case because a portion of the basis in FB_X's assets, which gave rise to depreciation deductions that were taken into account in computing the year 1 dual consolidated loss, will give rise to a depreciation deduction under Country X laws that will be available, under U.S. tax principles, to offset the income of FS_X, a foreign corporation, in year 2. However, the aggregate adjusted basis of all the assets transferred by P to FS_X, within the 12-month period ending at the end of year 2, is less than 10 percent of the aggregate adjusted basis of all of FB_X's assets at the beginning of such 12-month period. Moreover, the aggregate adjusted basis of the assets transferred by P to FS_X at any time during the certification period is less than 30 percent of the aggregate adjusted basis of FB_X's assets held at the end of year 1. In addition, the item of deduction giving rise to the foreign use is being made available solely as a result of the adjusted basis of the transferred assets being determined in whole, or in part, by reference to the adjusted basis of such transferred assets in the hands of FB_X. As a result, this transfer will not result in a foreign use pursuant to §1.1503(d)–3(c)(6).

Example 16. No foreign use—liability assumption exception. (i) *Facts.* P owns FB_X. In year 1, there is a dual consolidated loss attributable to FB_X for which P makes a domestic use election under §1.1503(d)–6(d). The dual consolidated loss includes a deduction for salary expense that was deductible for U.S. tax purposes at the end of year 1, even though it was not paid until year 2. The deduction was incurred in the ordinary course of FB_X's trade or business. During year 2, and before the accrued salary expense liability was paid, P sells all the assets of FB_X to FS_X in exchange for cash and FS_X's assumption of the liabilities of the FB_X trade or business, including the obligation to pay the accrued salary expense. Under Country X law, the accrued salary expense of FB_X is deductible, and is taken into account for purposes of computing the taxable income of FB_X, when paid. FB_X pays the accrued salary expense after the sale of FB_X to FS_X.

(ii) *Result.* (A) As a result of FS_X's assumption of the FB_X liabilities, including the accrued salary expense, a portion of the dual consolidated loss is available for a foreign use in year 2. This is the case because the deduction that was taken into account in year 1 in computing the dual consolidated loss under U.S. tax principles will, under Country X tax law, be taken into account and will be available to offset the income of FS_X, a foreign corporation, in year 2. However, because this item of expense is made available solely as a result of the assumption of a liability of FB_X, and such liability was incurred in the ordinary course of FB_X's trade or business, there will not be a foreign use of the year 1 dual consolidated loss pursuant to §1.1503(d)–3(c)(7).

(B) The transfer of all the assets of FB_X to FS_X is a triggering event under §1.1503(d)–6(e)(1)(iv), unless P can rebut the triggering event under §1.1503(d)–6(e)(2). For purposes of determining whether, under §1.1503(d)–6(e)(2)(ii), the transfer of assets resulted in a carryover under foreign law of FB_X's losses, expenses, or deductions, the exception to foreign use for the assumption of liabilities is taken into account. However, the other exceptions to foreign use do not apply for this purpose (or for purposes of demonstrating that no foreign use of a dual consolidated loss can occur in any other year under §1.1503(d)–6(c), (e)(2)(i) or (j)(2)). See §1.1503(d)–3(c)(1). Provided the other requirements of §1.1503(d)–6(e)(2)(ii) and (iii) are satisfied, P may be able to rebut the occurrence of a triggering event upon the transfer of FB_X's assets to FS_X.

Example 17. Mirror legislation rule—dual resident corporation and hybrid entity separate unit. (i) *Facts.* P owns DRC_X, a member of the P consolidated group. DRC_X owns FS_X. In year 1, DRC_X incurs a \$100x net operating loss that is a dual consolidated loss. To prevent corporations like DRC_X from offsetting losses both against income of affiliates in Country X and against income of foreign affiliates under the tax laws of another country, Country X mirror legislation prevents a corporation that is subject to the income tax of another country on its worldwide income or on a residence basis from using the Country X form of consolidation. Accordingly, the Country X mirror legislation prevents the loss of DRC_X from being made available to offset income of FS_X.

(ii) *Result.* Under §1.1503(d)–3(e), because the losses of DRC_X are subject to Country X's mirror legislation, there is a deemed foreign use of DRC_X's year 1 dual consolidated loss. The stand-alone exception to the mirror rule in §1.1503(d)–3(e)(2) does not apply because, absent the mirror legislation, DRC_X's year 1 dual consolidated loss would be available for a foreign use (as defined in §1.1503(d)–3), without regard to whether such availability is limited by election or similar procedure. That is, absent the mirror legislation, all or a portion of the dual consolidated loss would be available to offset the income of FS_X under the Country X consolidation regime. This is the case even if Country X did not recognize DRC_X as having a loss in year 1. Therefore, P may not make a domestic use election with respect to DRC_X's year 1 dual consolidated loss pursuant to §1.1503(d)–3(d)(2).

(iii) *Alternative Facts.* The facts are the same as in paragraph (i) of this *Example 17*, except that P owns $DE1_X$ (rather than DRC_X) and, in year 1, there is a $100 dual consolidated loss attributable to P's interest in $DE1_X$ (rather than of DRC_X). The Country X mirror legislation only applies to Country X dual resident corporations and, therefore, does not apply to losses attributable to P's interest in $DE1_X$. As a result, the mirror legislation rule under §1.1503(d)–3(e) would not deny the opportunity of such loss from being put to a foreign use (for example, by offsetting the income of FS_X through the Country X consolidation regime). Therefore, a domestic use election can be made with respect to the dual consolidated loss (provided the conditions for such an election are otherwise satisfied).

Example 18. Mirror legislation rule—standalone foreign branch separate unit. (i) *Facts.* P owns FB_X. In year 1, there is a $100x dual consolidated loss attributable to FB_X. Country X enacted mirror legislation to prevent Country X branches and permanent establishments of nonresident corporations from offsetting losses both against income of Country X affiliates and against other income of its owner (or foreign affiliates thereof) under the tax laws of another country. The Country X mirror legislation prevents a Country X branch or permanent establishment of a nonresident corporation from offsetting its losses against the income of Country X affiliates if such losses may be deductible against income (other than income of the Country X branch or permanent establishment) under the laws of another country.

(ii) *Result.* In general, under §1.1503(d)–3(e), because the losses of FB_X are subject to Country X's mirror legislation, there is a deemed foreign use of FB_X's year 1 dual consolidated loss. However, in the absence of the Country X mirror legislation, no item of deduction or loss composing FB_X's year 1 dual consolidated loss would be available in the year incurred for a foreign use (as defined in §1.1503(d)–3), without regard to whether such availability is limited by election or otherwise. This is the case because there is no Country X entity through which the dual consolidated loss could be put to a foreign use (absent a sale, merger, or similar transaction involving FB_X). As a result, the standalone exception in §1.1503(d)–3(e)(2) may apply, provided P complies with the requirements of §1.1503(d)–3(e)(2)(ii). Accordingly, P may make a domestic use election with respect to the year 1 dual consolidated loss of FB_X pursuant to §1.1503(d)–6(d). If, however, any item of the dual consolidated loss would otherwise be available for a foreign use during the certification period (for example, as a result of P acquiring a foreign corporation that is organized under the laws of Country X such that losses of FB_X could be put to a foreign use through consolidation or similar means), then such loss would be recaptured pursuant to §1.1503(d)–6(e)(1)(ix).

(iii) *Alternative Facts.* The facts are the same as in paragraph (i) of this *Example 18*, except that the Country X mirror legislation operates in a manner similar to the rules under section 1503(d). That is, it allows the taxpayer to elect to use the loss to either offset income of an affiliate in Country X, or income of an affiliate (or other income of the owner of the Country X branch or permanent establishment) in the other country, but not both. Because the Country X mirror legislation permits the taxpayer to choose to put the dual consolidated loss to a foreign use, it does not deny the opportunity to put the loss to a foreign use. Therefore, there is no deemed foreign use of the dual consolidated loss pursuant to §1.1503(d)–4(e) and a domestic use election can be made for such loss.

Example 19. Application of mirror legislation rule to combined separate unit. (i) *Facts.* P owns FB_X, FS_X, and $DE1_X$. In year 1, there is a $50x dual consolidated loss attributable to FB_X and $10x of income attributable to P's interest in $DE1_X$. FS_X has income of $100x. Pursuant to §1.1503(d)–1(b)(4)(ii), FB_X and P's interest in $DE1_X$ are combined and treated as a single separate unit (Country X separate unit) which has a year 1 dual consolidated loss of $40x. Country X enacted mirror legislation to prevent Country X branches or permanent establishments of nonresident corporations from offsetting losses both against income of Country X affiliates and against other income of its owner (or foreign affiliates thereof) under the tax laws of another country. The Country X mirror legislation prevents a Country X branch or permanent establishment of a nonresident corporation from offsetting its losses against the income of Country X affiliates if such losses may be deductible against income (other than income of the Country X branch or permanent establishment) under the laws of another country. However, the United States and Country X have entered into an agreement described in §1.1503(d)–6(b) pursuant to the U.S.-Country X income tax convention (mirror agreement). The mirror agreement applies to Country X foreign branch separate units of domestic corporations, but not to

Country X hybrid entity separate units. The mirror agreement provides that neither the Country X mirror legislation nor the mirror legislation rule under §1.1503(d)–3(e) will apply to losses attributable to Country X foreign branch separate units, provided certain conditions and reporting requirements are satisfied (including a domestic use election, if the loss is to be used to offset income of a domestic affiliate). Thus, losses attributable to Country X foreign branch separate units can, subject to the requirements of the mirror agreement, be used to offset income of a domestic affiliate or a Country X affiliate (but not both).

(ii) *Result.* The Country X mirror legislation only applies to Country X foreign branch separate units and does not apply to hybrid entity separate units. In addition, if P complies with the terms and conditions of the mirror agreement, the Country X mirror legislation would not apply to FB_X. As a result, the income tax laws of Country X would not deny the opportunity of a loss of either individual separate unit that composes P's combined Country X separate unit from being put to a foreign use. Therefore, notwithstanding §1.1503(d)–3(e), a domestic use election can be made with respect to the dual consolidated loss attributable to P's Country X separate unit, provided the terms and conditions of the mirror agreement are satisfied. See §1.1503(d)–6(b)(2).

(iii) *Alternative Facts.* The facts are the same as in paragraph (i) of this *Example 19*, except that the Country X mirror legislation also applies to losses attributable to $DE1_X$, but the mirror agreement does not apply to such losses. The mirror legislation rule would apply with respect to P's interest in $DE1_X$ and, as a result, there is a deemed foreign use of the dual consolidated loss attributable to the Country X separate unit and a domestic use election cannot be made for such loss. This is the case even though, pursuant to §1.1503(d)–5(c)(4)(ii)(A), P's interest in $DE1_X$ (which is subject to the Country X mirror legislation) does not, as an individual separate unit, have a dual consolidated loss in year 1. Further, the stand-alone exception to the mirror legislation rule in §1.1503(d)–3(e)(2) does not apply because, absent the mirror legislation, the Country X combined separate unit's dual consolidated loss would be available in the year incurred for a foreign use (as defined in §1.1503(d)–3) because it could be used to offset income of FS_X under the Country X consolidation regime. This is the case even if Country X requires an election to consolidate and no such election is made. The result would be the same even if Country X did not recognize $DE1_X$ as having a loss.

Example 20. Dual consolidated loss limitation after section 381 transaction. disposition of assets and subsequent liquidation of dual resident corporation. (i) *Facts.* P owns DRC_X, a member of the P consolidated group. In year 1, DRC_X incurs a dual consolidated loss and P does not make a domestic use election with respect to such loss. Under §1.1503(d)–4(b), DRC_X's year 1 dual consolidated loss is subject to the limitations under §1.1503(d)–4(c) and, therefore, may not be used to offset the income of P or S (or any other domestic affiliate) on the group's U.S. income tax return. At the beginning of year 2, DRC_X sells all of its assets for cash and distributes the cash to P pursuant to a liquidation that qualifies under section 332.

(ii) *Result.* In general, under section 381, P would succeed to, and be permitted to use, DRC_X's net operating loss carryover. However, §1.1503(d)–4(d)(1)(i) prohibits the dual consolidated loss of DRC_X from carrying over to P. Therefore, DRC_X's year 1 net operating loss carryover is eliminated.

Example 21. Dual consolidated loss limitation applied to a separate unit transferred in a section 381 transaction. (i) *Facts.* S owns $DE1_X$ which, in turn, owns FB_X. S's interest in $DE1_X$ and its indirect interest in FB_X are combined and treated as a single separate unit (Country X separate unit) pursuant to §1.1503(d)–1(b)(4)(ii). In year 1, a dual consolidated loss is attributable to the Country X separate unit, and P does not make a domestic use election with respect to such loss. Under §1.1503(d)–4(b), the year 1 dual consolidated loss attributable to the Country X separate unit may not be used to offset the income of P or S (other than income attributable to the Country X separate unit, subject to the application of §1.1503(d)–4(c)) on the group's consolidated U.S. income tax return (nor may it be used to offset the income of any other domestic affiliates). At the beginning of year 2, S transfers its entire interest in $DE1_X$, and thus its entire indirect interest in FB_X, to FS_X in a transaction described in section 381.

(ii) *Result.* Section 1.1503(d)–4(d)(1)(ii) provides that the dual consolidated loss attributable to a separate unit that is subject to the domestic use limitation under §1.1503(d)–4(b) is eliminated if the separate unit ceases to be a separate unit of its affiliated domestic owner and all other members of the affiliated domestic owner's separate group. As a result of the transfer of the Country X separate unit to FS_X, the Country X separate unit ceases to be a separate unit of S, and is not a separate unit of any other member of the P consolidated group. In addition, the exceptions in §1.1503(d)–4(d)(2)(iii) do not apply because FS_X is not a domestic corporation. Thus, the year 1 dual consolidated loss attributable to the Country X separate unit is eliminated.

(iii) *Alternative Facts.* Assume the same facts as in paragraph (i) of this *Example 21*, except S transfers its assets to DC, a domestic corporation that is not a member of the

P consolidated group, in a transaction described in section 381(a). Immediately after the transaction, the Country X separate unit is a separate unit of DC. Under §1.1503(d)–4(d)(1)(ii), the year 1 dual consolidated loss of the Country X separate unit would be eliminated because it ceases to be a separate unit of S, and is not a separate unit of any other member of the P consolidated group. However, because the transferee is a domestic corporation and the Country X separate unit is a separate unit in the hands of DC immediately after the transaction, the exception under §1.1503(d)–4(d)(2)(iii)(A) applies. As a result, the year 1 dual consolidated loss of the Country X separate unit is not eliminated and any income generated by DC that is attributable to the Country X separate unit following the transfer may be offset by the carryover dual consolidated losses attributable to the Country X separate unit, subject to the limitations of §1.1503(d)–4(b) and (c) applied as if DC generated the dual consolidated loss and such loss was attributable to the Country X separate unit.

(iv) *Alternative Facts.* Assume the same facts as in paragraph (iii) of this *Example 21*, except that P owns $DE2_X$ and the interest in $DE2_X$ is combined with and therefore included in the Country X separate unit. In addition, a portion of the dual consolidated loss of the Country X separate unit is attributable to P's interest in $DE2_X$. Pursuant to §1.1503(d)–4(d)(2)(iii)(A), the result would be the same as in paragraph (iii) of this *Example 21*, with respect to the portion of the dual consolidated loss attributable to the combined separate unit that is succeeded to and taken into account by DC pursuant to section 381. The portion of the dual consolidated loss attributable to P's interest in $DE2_X$, however, does not carry over to DC but is retained by P and continues to be subject to the limitations of §1.1503(d)–4(b) and (c) with respect to P's interest in $DE2_X$.

(v) *Alternative Facts.* Assume the same facts as in paragraph (iv) of this *Example 21*, except that DC is a member of the P consolidated group. Pursuant to §1.1503(d)–4(d)(2)(iii)(B), the dual consolidated loss of the Country X separate unit is not eliminated and income attributable to the Country X separate unit may continue to be offset by the dual consolidated loss that is succeeded to and taken into account by DC pursuant to section 381, subject to the limitations of §1.1503(d)–4(b) and (c). The result would be the same even if the interest in $DE1_X$ ceased to be a separate unit in the hands of DC (for example, because it dissolved under Country X law in connection with the transaction), provided P, or another member of the P consolidated group, continued to own a portion of the Country X separate unit.

Example 22. Tainted income. (i) *Facts.* P owns 100 percent of DRC_Z, a domestic corporation that is included as a member of the P consolidated group. DRC_Z conducts a business in the United States. During year 1, DRC_Z was managed and controlled in Country Z and therefore was subject to tax as a resident of Country Z and was a dual resident corporation. In year 1, DRC_Z incurred a dual consolidated loss of $200x, and P did not make a domestic use election with respect to such loss. As a result, such loss is subject to the domestic use limitation rule of §1.1503(d)–4(b). At the end of year 1, DRC_Z moved its management and control to the United States and, as a result, ceased being a dual resident corporation. At the beginning of year 2, P transferred asset A, a non-depreciable asset, to DRC_Z in exchange for common stock in a transaction that qualified for nonrecognition under section 351. At the time of the transfer, P's tax basis in asset A equaled $50x and the fair market value of asset A equaled $100x. The tax basis of asset A in the hands of DRC_Z immediately after the transfer equaled $50x pursuant to section 362. Asset A did not constitute replacement property acquired in the ordinary course of business. DRC_Z did not generate income or gain during years 2, 3, or 4. On June 30, year 5, DRC_Z sold asset A to a third party for $100x, its fair market value at the time of the sale, and recognized $50x of income on such sale. In addition to the $50x income generated on the sale of asset A, DRC_Z generated $100x of operating income in year 5. At the end of year 5, the fair market value of all the assets of DRC_Z was $400x.

(ii) *Result.* DRC_Z ceased being a dual resident corporation at the end of year 1. Therefore, its year 1 dual consolidated loss cannot be offset by tainted income. Asset A is a tainted asset because it was acquired in a nonrecognition transaction after DRC_Z ceased being a dual resident corporation (and was not replacement property acquired in the ordinary course of business). As a result, the $50x of income recognized by DRC_Z on the disposition of asset A is tainted income and cannot be offset by the year 1 dual consolidated loss of DRC_Z. In addition, absent evidence establishing the actual amount of tainted income, $25x of the $100x year 5 operating income of DRC_Z (($100x/$400x) × $100x) also is treated as tainted income and cannot be offset by the year 1 dual consolidated loss of DRC_Z under §1.1503(d)–4(e)(2)(ii). Therefore, $75x of the $150x year 5 income of DRC_Z constitutes tainted income and may not be offset by the year 1 dual consolidated loss of DRC_Z; however, the remaining $75x of year 5 income of DRC_Z may be offset by such dual consolidated loss. The result would be the same if, instead of P transferring asset A to DRC_Z, such asset was received from a separate unit or a transparent entity of DRC_Z.

Example 23. Treatment of disregarded item and books and records of a hybrid entity. (i) *Facts.* P owns $DE1_X$ which, in turn, owns FS_X. In year 1, P borrows from a third party and on-lends the proceeds to $DE1_X$. In year 1, P incurs interest expense attributable to the third-party loan. Also in year 1, $DE1_X$ incurs interest expense attributable to its loan from P, but such expense is generally disregarded for U.S. tax purposes because $DE1_X$ is disregarded as an entity separate from P. The third-party loan and related interest expense are reflected on the books and records of P (and not on the books and records of $DE1_X$). The loan from P to $DE1_X$ and related interest expense are reflected on the books and records of $DE1_X$. There are no other items of income, gain, deduction, or loss reflected on the books and records of $DE1_X$ in year 1.

(ii) *Result.* Because the interest expense on P's third-party loan is not reflected on the books and records of $DE1_X$, no portion of such expense is attributable to P's interest in $DE1_X$ pursuant to §1.1503(d)–5(c)(3) for purposes of calculating the year 1 dual consolidated loss, if any, attributable to such interest. In addition, even though P's interest in $DE1_X$ is treated as a separate domestic corporation for purposes of determining the amount of income or dual consolidated loss attributable to it pursuant to §1.1503(d)–5(c)(1)(ii), such treatment does not cause the interest expense incurred on the loan from P to $DE1_X$ that is generally disregarded for U.S. tax purposes to be regarded for purposes of calculating the year 1 dual consolidated loss, if any, attributable to P's interest in $DE1_X$. As a result, even though the disregarded interest expense is reflected on the books and records of $DE1_X$, it is not taken into account for purposes of calculating income or a dual consolidated loss. Therefore, there is no dual consolidated loss attributable to P's interest in $DE1_X$ in year 1.

Example 24. Dividend income attributable to a separate unit. (i) *Facts.* P owns $DE1_X$ which, in turn, owns FB_X. P's interest in $DE1_X$ and its indirect interest in FB_X are combined and treated as a single separate unit (Country X separate unit) pursuant to §1.1503(d)–1(b)(4)(ii). $DE1_X$ owns $DE3_Y$. $DE3_Y$ owns the stock of FS_X. P's Country X separate unit would, without regard to year 1 dividend income (or related section 78 gross-up) received from FS_X, have a dual consolidated loss of $75x in year 1. In year 1, FS_X distributes $50x to $DE3_Y$ that is taxable as a dividend. $DE3_Y$ distributes the same amount to $DE1_X$. P computes foreign taxes deemed paid on the dividend under section 902 of $25x and includes that amount in gross income under section 78.

(ii) *Result.* The $50x dividend is reflected on the books and records of $DE3_Y$ and, therefore, is attributable to P's interest in $DE3_Y$ pursuant to §1.1503(d)–5(c)(3)(i). In addition, the $25x section 78 gross-up is attributable to P's interest in $DE3_Y$ pursuant to §1.1503(d)–5(c)(4)(iv). The distribution of $50x from $DE3_Y$ to $DE1_X$ is generally disregarded for U.S. tax purposes and, therefore, does not give rise to an item that is taken into account for purposes of calculating income or a dual consolidated loss. This is the case even though the item would be reflected on the books and records of $DE1_X$. In addition, pursuant to §1.1503(d)–5(c)(1)(iii), each separate unit must calculate its own income or dual consolidated loss, and each item of income, gain, deduction, and loss must be taken into account only once. As a result, the dual consolidated loss of $75x attributable to P's Country X separate unit in year 1 is not reduced by the amount of dividend income attributable to P's indirect interest in $DE3_Y$.

Example 25. Items reflected on books and records of a combined separate unit. (i) *Facts.* P owns $DE1_X$ which, in turn, owns FB_X. P's interest in $DE1_X$ and its indirect interest in FB_X are combined and treated as a single separate unit (Country X separate unit) pursuant to §1.1503(d)–1(b)(4)(ii). The following items are reflected on the books and records of $DE1_X$ in year 1: Sales, depreciation expense, a political contribution, royalty expense paid to P, repairs and maintenance expense paid to a third party, and Country X income tax expense. The amount of sales under U.S. tax principles equals the amount of sales reported for accounting purposes. The depreciation expense is calculated on a straight-line basis over the useful life of the asset for accounting purposes, but is subject to accelerated depreciation for U.S. tax purposes. In addition, the repairs and maintenance expense, which is deducted when paid for accounting purposes, is properly capitalized and amortized over five years for U.S. tax purposes. Finally, P elects to claim as a credit under section 901 the Country X income tax expense that was paid in year 1.

(ii) *Result.* (A) For purposes of determining the income or dual consolidated loss attributable to P's Country X separate unit, items of income, gain, deduction, and loss must first be attributed to the individual separate units (that is, P's interest in $DE1_X$ and its indirect interest in FB_X). For purposes of attributing items to P's interest in $DE1_X$, P's items that are reflected on $DE1_X$'s books and records, as adjusted to conform to U.S. tax principles, are taken into account. See §1.1503(d)–5(c)(3)(i). For purposes of attributing items (other than interest expense) to FB_X, the principles of section 864(c)(2), (c)(4), and (c)(5) (as set forth in §1.864–4(c) and §§1.864–5 through 1.864–7) must be applied and, for interest expense, the principles of §1.882–5, as modified under §1.1503(d)–5(c)(2)(ii), must be applied; however, for these purposes, pursuant to §1.1503(d)–5(c)(4)(i)(A), FB_X only takes into account items attributable to P's interest in $DE1_X$ and the assets, liabilities, and activities of such interest. In addition, to the extent such items are taken into account by FB_X, they are not taken into account in determining the items attributable to P's interest in $DE1_X$. §1.1503(d)–5(c)(4)(i)(B). Because P's interest in $DE1_X$ has no assets or liabilities, and conducts no activities, other than through its ownership of FB_X, all of the items that are reflected on the books and records of $DE1_X$, as adjusted to conform to U.S. tax principles, are attributable to FB_X; no items are attributable to P's interest in $DE1_X$.

(B) The items reflected on the books and records of $DE1_X$ must be adjusted to conform to U.S. tax principles. No adjustment is required to sales because the amount of sales under U.S. tax principles equals the amount of sales for accounting purposes. The amount of straight-line depreciation expense reflected on $DE1_X$'s books and records must be adjusted to reflect the amount of depreciation on the asset that is allowable for U.S. tax purposes. The political contribution is not taken into account because it is not deductible for U.S. tax purposes. Similarly, because the royalty expense is paid to P, and therefore is generally disregarded for U.S. tax purposes, it is not taken into account. The repair and maintenance expense that is deducted in year 1 for accounting purposes also must be adjusted to conform to U.S. tax principles. Thus, the repair and maintenance expense will be taken into account in computing the income or dual consolidated loss attributable to P's Country X separate unit over five years (even though no item related to such expense would be reflected on the books and records of $DE1_X$ for years 2 through 5). Finally, because P elected to claim as a credit the Country X foreign taxes paid during year 1, no deduction is allowed for such amount pursuant to section 275(a)(4) and, therefore, the Country X tax expense is not taken into account.

(C) Pursuant to §1.1503(d)–5(c)(4)(ii)(B), the combined Country X separate unit of P calculates its income or dual consolidated loss by taking into account all the items of income, gain, deduction, and loss that were separately attributable to P's interest in $DE1_X$ and FB_X. However, in this case, there are no items attributable to P's interest in $DE1_X$. Therefore, the items attributable to the Country X separate unit are the items attributable to FB_X.

Example 26. Items attributable to a combined separate unit. (i) *Facts.* P owns $DE1_X$. $DE1_X$ owns a 50 percent interest in PRS_Z, a Country Z entity that is classified as a partnership both for Country Z tax purposes and for U.S. tax purposes. FS_X, which is unrelated to P, owns the remaining 50 percent interest in PRS_Z. PRS_Z carries on operations in Country X that, if carried on by a U.S. person, would constitute a foreign branch as defined in §1.367(a)-6T(g)(1). Therefore, P's share of the Country X operations carried on by PRS_Z constitutes a foreign branch separate unit. PRS_Z also owns assets that do not constitute a part of its Country X branch, including all of the interests in TE_T, a disregarded entity. TE_T is an entity incorporated under the laws of Country T, a country that does not have an income tax. Under the laws of Country X, an interest holder of TE_T does not take into account on a current basis the interest holder's share of items of income, gain, deduction, and loss of TE_T.

(ii) *Result.* (A) Pursuant to §1.1503(d)–1(b)(4)(ii), P's interest in $DE1_X$, and P's indirect ownership of a portion of the Country X operations carried on by PRS_Z, are combined and treated as a single separate unit (Country X separate unit). Pursuant to §1.1503(d)–5(c)(4)(ii)(A), for purposes of determining P's items of income, gain, deduction, and loss attributable to the Country X separate unit, the items of P are first attributed to each separate unit that composes the Country X separate unit.

(B) Pursuant to §1.1503(d)–5(c)(2)(i), the principles of section 864(c)(2), (c)(4), and (c)(5) (as set forth in §1.864–4(c) and §§1.864–5 through 1.864–7), apply for purposes of determining P's items of income, gain, deduction (other than interest expense), and loss that are attributable to P's indirect interest in the Country X operations carried on by PRS_Z. For purposes of determining P's interest expense that is attributable to P's indirect interest in the Country X operations carried on by PRS_Z, the principles of §1.882–5, as modified under §1.1503(d)–5(c)(2)(ii), shall apply. For purposes of applying these rules, P is treated as a foreign corporation, the Country X operations carried on by PRS_Z are treated as a trade or business within the United States, and the assets of P (including its share of the PRS_Z assets, other than those of the Country X operations) are treated as assets that are not U.S. assets. In addition, because P carries on its share of the Country X operations through $DE1_X$, a hybrid entity, §1.1503(d)–5(c)(4)(i)(A) provides that only the items attributable to P's interest in $DE1_X$, and only the assets, liabilities, and activities of P's interest in $DE1_X$, are taken into account for purposes of this determination.

(C) TE_T is a transparent entity as defined in §1.1503(d)–1(b)(16) because it is not taxable as an association for Federal tax purposes, is not subject to income tax in a foreign country as a corporation (or otherwise at the entity level) either on its worldwide income or on a residence basis, and is not treated as a pass-through entity under the laws of Country X (the applicable foreign country). TE_T is not a pass-through entity under the laws of Country X because a Country X holder of an interest in TE_T does not take into account on a current basis the interest holder's share of items of income, gain, deduction, and loss of TE_T. For purposes of determining P's items of income, gain, deduction, and loss that are attributable to P's interest in TE_T, only those items of P that are reflected on the books and records of TE_T, as adjusted to conform to U.S. tax principles, are taken into account. §1.1503(d)–5(c)(3)(i). Because the interest in TE_T is not a separate unit, a loss attributable to such interest is not a dual consolidated loss and is not subject to section 1503(d) and these regulations. Items must nevertheless be attributed to the interests in TE_T. For example, such attribution is required for purposes of calculating the income or dual consolidated loss attributable to the Country X separate unit, and for purposes of applying the domestic use limitation under §1.1503(d)–4(b) to a dual consolidated loss attributable to the Country X separate unit.

(D) For purposes of determining P's items of income, gain, deduction, and loss that are attributable to P's interest in $DE1_X$, only those items of P that are reflected on the books and records of $DE1_X$, as adjusted to conform to U.S. tax principles, are taken into account. §1.1503(d)–5(c)(3)(i). For this purpose, $DE1_X$'s distributive share of the items of income, gain, deduction, and loss that are reflected on the books and records of PRS_Z, as adjusted to conform to U.S. tax principles, are treated as being reflected on the books and records of $DE1_X$, except to the extent such items are taken into account by the Country X operations of PRS_Z. See §1.1503(d)–5(c)(3)(ii) and (4)(i)(B). Because TE_T is a transparent entity, the items reflected on its books and records are not treated as being reflected on the books and records of $DE1_X$.

(E) Pursuant to §1.1503(d)–5(c)(4)(ii)(B), the combined Country X separate unit of P calculates its income or dual consolidated loss by taking into account all the items of income, gain, deduction, and loss that were separately attributable to P's interest in $DE1_X$ and the Country X operations of PRS_Z owned indirectly by P.

Example 27. Sale of separate unit by another separate unit. (i) *Facts.* P owns $DE3_Y$ which, in turn, owns $DE1_X$. $DE3_Y$ also owns other assets that do not constitute a foreign branch separate unit. $DE1_X$ owns FB_X. Pursuant to §1.1503(d)–1(b)(4)(ii), P's indirect interests in $DE1_X$ and FB_X are combined and treated as one Country X separate unit (Country X separate unit). $DE3_Y$ sells its interest in $DE1_X$ at the end of year 1 to an unrelated foreign person for cash. The sale results in an ordinary loss of $30x. Items of income, gain, deduction, and loss derived from the assets that gave rise to the $30x loss would be attributable to the Country X separate unit under §1.1503(d)–5(c) through (e). Without regard to the sale of $DE1_X$, no items of income, gain, deduction, and loss are attributable to P's Country X separate unit in year 1.

(ii) *Result.* Pursuant to §1.1503(d)–5(c)(4)(iii)(A), the $30x ordinary loss recognized on the sale is attributable to the Country X separate unit, and not P's interest in $DE3_Y$. This is the case because the Country X separate unit is treated as owning the assets that gave rise to the loss under §1.1503(d)–5(f). Thus, the loss attributable to the sale creates a year 1 dual consolidated loss attributable to the Country X separate unit. In addition, pursuant to §1.1503(d)–6(d)(2), P cannot make a domestic use election with respect to the dual consolidated loss because the sale of the interest in $DE1_X$ is a triggering event described in §1.1503(d)–6(e)(1)(iv) and (v). Further, although the year 1 dual consolidated loss would otherwise be subject to the domestic use limitation rule of §1.1503(d)–4(b), it is eliminated pursuant to §1.1503(d)–4(d)(1)(ii). Finally, if there were a dual consolidated loss attributable to P's interest in $DE3_Y$, the sale of the interest in $DE1_X$ would not be taken into account for purposes of determining whether there is an asset triggering event with respect to such dual consolidated loss under §1.1503(d)–6(e)(1)(iv).

Example 28. Gain on sale of tiered separate units. (i) *Facts.* P owns 75 percent of HPS_X, a Country X entity subject to Country X tax on its worldwide income. FS_X owns the remaining 25 percent of HPS_X. HPS_X is classified as a partnership for Federal tax purposes. HPS_X carries on operations in Country Y that, if carried on by a U.S. person, would constitute a foreign branch within the meaning of §1.367(a)–6T(g)(1). HPS_X also owns assets that do not constitute a part of its Country Y operations and would not themselves constitute a foreign branch within the meaning of §1.367(a)–6T(g)(1) if owned by a U.S. person. Neither HPS_X nor the Country Y operations has liabilities. P's indirect interest in the Country Y operations carried on by HPS_X, and P's interest in HPS_X, are each separate units. P sells its interest in HPS_X and recognizes a gain of $150x on such sale. Immediately prior to P's sale of its interest in HPS_X, P's portion of the assets of the Country Y operations (that is, assets the income, gain, deduction and loss from which would be attributable to P's Country Y foreign branch separate unit) had a built-in gain of $200x, and P's portion of HPS_X's other assets (that is, assets the income, gain, deduction and loss from which would be attributable to P's interest in HPS_X) had a built-in gain of $100x.

(ii) *Result.* Pursuant to §1.1503(d)–5(c)(4)(iii)(B), $100x of the total $150x of gain recognized ($200x/$300x × $150x) is attributable to P's indirect interest in its share of the Country Y operations carried on by HPS_X. Similarly, $50x of such gain ($100x/$300x × $150x) is attributable to P's interest in HPS_X.

Example 29. Effect on domestic affiliate. (i) *Facts.* (A) P owns $DE1_X$ which, in turn, owns FB_X. P's interest in $DE1_X$ and its indirect interest in FB_X are combined and treated as a single separate unit (Country X separate unit) pursuant to § 1.1503(d)–1(b)(4)(ii). In years 1 and 2, the items of income, gain, deduction, and loss that are attributable to P's Country X separate unit pursuant to § 1.1503(d)–5 are as follows:

Item	Year 1	Year 2
Sales income	$100x	$160x
Salary expense	($75x)	($75x)
Research and experimental expense	($50x)	($50x)
Interest expense	($25x)	($25x)
Income/(dual consolidated loss)	($50x)	$10x

(B) P does not make a domestic use election with respect to the year 1 dual consolidated loss attributable to its Country X separate unit. Pursuant to § 1.1503(d)–4(b) and (c)(2), the year 1 dual consolidated loss of $50x is treated as a loss incurred by a separate domestic corporation and is subject to the limitations under § 1.1503(d)–4(c)(3). The P consolidated group has $100x of consolidated taxable income in year 2.

(ii) *Result.* (A) P must compute its taxable income for year 1 without taking into account the $50x dual consolidated loss, pursuant to § 1.1503(d)–4(c)(2). Such amount consists of a pro rata portion of the expenses that were taken into account in calculating the year 1 dual consolidated loss. Thus, the items of the dual consolidated loss that are not taken into account by P in computing its taxable income are as follows: $25x of salary expense ($75x/$150x × $50x); $16.67x of research and experimental expense ($50x/$150x × $50x); and $8.33x of interest expense ($25x/ $150x × $50x). The remaining amounts of each of these items, together with the $100x of sales income, are taken into account by P in computing its taxable income for year 1 as follows: $50x of salary expense ($75x − $25x); $33.33x of research and experimental expense ($50x − $16.67x); and $16.67x of interest expense ($25x − $8.33x).

(B) Subject to the limitations provided under § 1.1503(d)–4(c), the year 1 $50x dual consolidated loss is carried forward and is available to offset the $10x of income attributable to the Country X separate unit in year 2. Pursuant to § 1.1503(d)–4(c)(4), a pro rata portion of each item of deduction or loss included in such dual consolidated loss is considered to be used to offset the $10x of income, as follows: $5x of salary expense ($25x / $50x × $10x); $3.33x of research and experimental expense ($16.67x/$50x × $10x); and $1.67x of interest expense ($8.33x / $50x × $10x). The remaining amount of each item shall continue to be subject to the limitations under § 1.1503(d)–4(c).

Example 30. Exception to domestic use limitation—no possibility of foreign use because items are not deducted or capitalized under foreign law. (i) *Facts.* P owns $DE1_X$ which, in turn, owns FS_X. In year 1, the sole item of income, gain, deduction, and loss attributable to P's interest in $DE1_X$, as provided under § 1.1503(d)–5, is $100x of interest expense paid on a loan to an unrelated lender. For Country X tax purposes, the $100x interest expense attributable to P's interest in $DE1_X$ in year 1 is treated as a repayment of principal and therefore cannot be deducted (at any time) or capitalized.

(ii) *Result.* The $100x of interest expense attributable to P's interest in $DE1_X$ constitutes a dual consolidated loss. However, because the sole item constituting the dual consolidated loss cannot be deducted or capitalized (at any time) for Country X tax purposes, P can demonstrate that there can be no foreign use of the dual consolidated loss at any time. As a result, pursuant to § 1.1503(d)–6(c)(1), if P prepares a statement described in § 1.1503(d)–6(c)(2) and attaches it to its timely filed tax return, the year 1 dual consolidated loss attributable to P's interest in $DE1_X$ will not be subject to the domestic use limitation rule of § 1.1503(d)–4(b).

Example 31. No exception to domestic use limitation—inability to demonstrate no possibility of foreign use. (i) *Facts.* P owns $DE1_X$ which, in turn, owns FB_X. P's interest in $DE1_X$ and its indirect interest in FB_X are combined and treated as a single separate unit (Country X separate unit) pursuant to § 1.1503(d)–1(b)(4)(ii). In year 1, the sole items of income, gain, deduction, and loss attributable to P's Country X separate unit, as provided under § 1.1503(d)–5, are $75x of sales income and $100x of depreciation expense. For Country X tax purposes, $DE1_X$ also generates $75x of sales income in year 1, but the $100x of depreciation expense is not deductible until year 2.

(ii) *Result.* The year 1 $25x net loss attributable to P's interest in the Country X separate unit constitutes a dual consolidated loss. In addition, even though $DE1_X$ has positive income in year 1 for Country X tax purposes, P cannot demonstrate that there is no possibility of foreign use with respect to the Country X separate unit's dual consolidated loss as provided under § 1.1503(d)–6(c)(1)(i). P cannot make such a demonstration because the depreciation expense, an item composing the year 1 dual consolidated loss, is deductible (in a later year) for Country X tax purposes and, therefore, may be available to offset or reduce income for Country X purposes that would constitute a foreign use. For example, if $DE1_X$ elected to be classified as a corporation pursuant to § 301.7701–3(c) of this chapter effective as of the end of year 1, and the deferred depreciation expense were available for Country X tax purposes to offset year 2 income of $DE1_X$, an entity treated as a foreign corporation in year 2 for U.S. tax purposes, there would be a foreign use.

(iii) *Alternative Facts.* (A) The facts are the same as in paragraph (i) of this *Example 31*, except as follows. In year 1, the sole items of income, gain, deduction, and loss attributable to P's Country X separate unit, as provided in §1.1503(d)–5, are $75x of sales income, $100x of interest expense, and $25x of depreciation expense. For Country X tax purposes, $DE1_X$ generates $75x of sales income in year 1; the $100x interest expense is treated as a repayment of principal and therefore cannot be deducted or capitalized (at any time); and the $25x of depreciation expense is not deductible in year 1, but is deductible in year 2.

(B) In year 1, the $50x net loss attributable to P's Country X separate unit constitutes a dual consolidated loss. Even though the $100x interest expense, a nondeductible and noncapital item for Country X tax purposes, exceeds the $50x year 1 dual consolidated loss attributable to P's Country X separate unit, P cannot demonstrate that there is no possibility of foreign use of the dual consolidated loss as provided under §1.1503(d)–6(c)(1)(i). P cannot make such a demonstration because the $25x depreciation expense, an item of deduction or loss composing the year 1 dual consolidated loss, is deductible under Country X law (in year 2) and, therefore, may be available to offset or reduce income for Country X tax purposes that would constitute a foreign use.

Example 32. Triggering event rebuttal—expiration of losses in foreign country. (i) *Facts.* P owns DRC_X, a member of the P consolidated group. In year 1, DRC_X incurs a dual consolidated loss of $100x. P makes a domestic use election with respect to DRC_X's year 1 dual consolidated loss and such loss therefore is included in the computation of the P group's consolidated taxable income. DRC_X has no income or loss in year 2 through year 5. In year 5, P sells the stock of DRC_X to FS_X. At the time of the sale of the stock of DRC_X, all of the losses and deductions that were included in the computation of the year 1 dual consolidated loss of DRC_X had expired for Country X tax purposes because the laws of Country X only provide for a three-year carryover period for such items.

(ii) *Result.* The sale of DRC_X to FS_X generally would be a triggering event under §1.1503(d)–6(e)(1)(ii), which would require DRC_X to recapture the year 1 dual consolidated loss (and pay an applicable interest charge) on the P consolidated group's tax return for the year that includes the date on which DRC_X ceases to be a member of the P consolidated group. However, upon adequate documentation that the losses and deductions have expired for Country X tax purposes, P can rebut the presumption that a triggering event has occurred pursuant to §1.1503(d)–6(e)(2)(i). If the triggering event presumption is rebutted, the domestic use agreement filed by the P consolidated group with respect to the year 1 dual consolidated loss of DRC_X is terminated and has no further effect pursuant to §1.1503(d)–6(j)(1)(i). If the presumptive triggering event is not rebutted, the domestic use agreement would terminate and have no further effect pursuant to §1.1503(d)–6(j)(1)(iii) because the dual consolidated loss would be recaptured.

Example 33. Triggering events and rebuttals—tax basis carryover transaction. (i) *Facts.* (A) P owns $DE1_X$. $DE1_X$'s sole asset is A, which it acquired at the beginning of year 1 for $100x. $DE1_X$ does not have any liabilities. For U.S. tax purposes, $DE1_X$'s tax basis in A at the beginning of year 1 is $100x and $DE1_X$'s sole item of income, gain, deduction, and loss for year 1 is a $20x depreciation deduction attributable to A. As a result, the $20x depreciation deduction constitutes a dual consolidated loss attributable to P's interest in $DE1_X$. P makes a domestic use election with respect to the year 1 dual consolidated loss.

(B) For Country X tax purposes, $DE1_X$ has a $100x tax basis in A at the beginning of year 1, but A is not a depreciable asset. As a result, $DE1_X$ does not have any items of income, gain, deduction, and loss in year 1 for Country X tax purposes.

(C) During year 2, P sells its interest in $DE1_X$ to FS_X for $80x. P's disposition of its interest in $DE1_X$ constitutes a presumptive triggering event under §1.1503(d)–6(e)(1)(iv) and (v) requiring the recapture of the year 1 $20x dual consolidated loss (plus the applicable interest charge). For Country X tax purposes, $DE1_X$ retains its tax basis of $100x in A following the sale.

(ii) *Result.* The year 1 dual consolidated loss is a result of the $20x depreciation deduction attributable to A. Although no item of deduction or loss was recognized by $DE1_X$ at the time of the sale for Country X tax purposes, the deduction composing the dual consolidated loss was retained by $DE1_X$ after the sale in the form of tax basis in A. As a result, a portion of the dual consolidated loss may be available to offset income for Country X tax purposes in a manner that would constitute a foreign use. For example, if $DE1_X$ were to dispose of A, the amount of gain recognized by $DE1_X$ would be reduced (or an amount of loss recognized by $DE1_X$ would be increased) and, therefore, an item composing the dual consolidated loss would be available, under U.S. tax principles, to reduce income of a foreign corporation (and an owner of an interest in a hybrid entity that is not a separate unit). Thus, P cannot demonstrate pursuant to §1.1503(d)–6(e)(2)(i) that there can be no foreign use of the year 1 dual consolidated loss following the triggering event, and must recapture the year 1 dual consolidated loss. Pursuant to §1.1503(d)–6(j)(1)(iii), the domestic use agreement filed by the P consolidated group with respect to the year 1 dual consolidated loss is terminated and has no further effect.

(iii) *Alternative Facts.* The facts are the same as paragraph (i) of this *Example 33*, except that instead of P selling its interest in

$DE1_X$ to FS_X, $DE1_X$ sells asset A to FS_X for \$80x and, for Country X tax purposes, FS_X's tax basis in A immediately after the sale is \$80x. P's disposition of Asset A constitutes a presumptive triggering event under § 1.1503(d)–6(e)(1)(iv) requiring the recapture of the year 1 \$20x dual consolidated loss (plus the applicable interest charge). For Country X tax purposes, FS_X's tax basis in A was not determined, in whole or in part, by reference to the basis of A in the hands of $DE1_X$. As a result, the deduction composing the dual consolidated loss will not give rise to an item of deduction or loss in the form of tax basis for Country X tax purposes (for example, when FS_X disposes of A). Therefore, P may be able to demonstrate (for example, by obtaining the opinion of a Country X tax advisor) pursuant to § 1.1503(d)–6(e)(2)(i) that there can be no foreign use of the year 1 dual consolidated loss and, thus, would not be required to recapture the year 1 dual consolidated loss.

Example 34. Triggering event resulting in a single consolidated group where acquirer files a new domestic use agreement. (i) *Facts.* P owns DRC_X, a member of the P consolidated group. In year 1, DRC_X incurs a dual consolidated loss and P makes a domestic use election with respect to such loss. No member of the P consolidated group incurs a dual consolidated loss in year 2. At the end of year 2, T, the parent of the T consolidated group, acquires all the stock of P, and all the members of the P group, including DRC_X, become members of a consolidated group of which T is the common parent.

(ii) *Result.* (A) Under § 1.1503(d)–6(f)(2)(ii)(B), the acquisition by T of the P consolidated group is not an event described in § 1.1503(d)–6(e)(1)(ii) requiring the recapture of the year 1 dual consolidated loss of DRC_X (and the payment of an interest charge), provided that the T consolidated group files a new domestic use agreement described in § 1.1503(d)–6(f)(2)(iii)(A). If a new domestic use agreement is filed, then pursuant to § 1.1503(d)–6(j)(1)(ii), the domestic use agreement filed by the P consolidated group with respect to the year 1 dual consolidated loss of DRC_X is terminated and has no further effect.

(B) Assume that T files a new domestic use agreement and a triggering event occurs at the end of year 3. As a result, the T consolidated group must recapture the dual consolidated loss that DRC_X incurred in year 1 (and pay an interest charge), as provided in § 1.1503(d)–6(h). Each member of the T consolidated group, including DRC_X and any former members of the P consolidated group, is severally liable for the additional tax (and the interest charge) due upon the recapture of the dual consolidated loss of DRC_X. In addition, pursuant to § 1.1503(d)–6(j)(1)(iii), the new domestic use agreement filed by the T group with respect to the year 1 dual consolidated loss of DRC_X is terminated and has no further effect.

Example 35. Triggering event exceptions for certain deemed transfers. (i) *Facts.* P owns $DE1_X$. In year 1, there is a \$100x dual consolidated loss attributable to P's interest in $DE1_X$. P files a domestic use agreement under § 1.1503(d)–6(d) with respect to such loss. During year 2, P sells 33 percent of its interest in $DE1_X$ to T, an unrelated domestic corporation.

(ii) *Result.* Pursuant to Rev. Rul. 99–5, the transaction is treated as if P sold 33 percent of its interest in each of $DE1_X$'s assets to T and then immediately thereafter P and T transferred their interests in the assets of $DE1_X$ to a partnership in exchange for an ownership interest therein. Upon the transfer of 33 percent of P's interest to T, a domestic corporation, no foreign use occurs and, therefore, there is no foreign use triggering event. However, P's deemed transfer of 67 percent of its interest in the assets of $DE1_X$ to a partnership is nominally a triggering event under § 1.1503(d)–6(e)(1)(iv). Because the initial transfer of 33 percent of $DE1_X$'s interest was to a domestic corporation and there is only a triggering event because of the deemed transfer under Rev. Rul. 99–5, the deemed asset transfer is not treated as resulting in a triggering event pursuant to § 1.1503(d)–6(f)(4).

(iii) *Alternative Facts.* The facts are the same as in paragraph (i) of this *Example 35*, except that P sells 60 percent (rather than 33 percent) of its interest in $DE1_X$ to T. The sale is a triggering event under § 1.1503(d)–6(e)(1)(iv) and (v) without regard to the occurrence of a deemed transaction. Therefore, § 1.1503(d)–6(f)(4) does not apply.

Example 36. Triggering event exception involving multiple parties. (i) *Facts.* P owns $DE1_X$ which, in turn, owns FB_X. P's interest in $DE1_X$ and its indirect interest in FB_X are combined and treated as a single separate unit (Country X separate unit) pursuant to § 1.1503(d)–1(b)(4)(ii). In year 1, there is a \$100x dual consolidated loss attributable to P's Country X separate unit and P makes a domestic use election with respect to such loss. No member of the P consolidated group incurs a dual consolidated loss in year 2. At the end of year 2, T, the parent of the T consolidated group, acquires all of P's interest in $DE1_X$ for cash.

(ii) *Result.* (A) Under § 1.1503(d)–6(f)(2)(i)(B), the acquisition by T of the interest in $DE1_X$ is not an event described in § 1.1503(d)–6(e)(1)(iv) or (v) requiring the recapture of the year 1 dual consolidated loss attributable to the Country X separate unit (and the payment of an interest charge), provided: (1) the T consolidated group files a new domestic use agreement described in § 1.1503(d)–6(f)(2)(iii)(A) with respect to the year 1 dual consolidated loss of the Country X separate unit; and (2) the P consolidated group files a statement described in §1.1503(d)–6(f)(2)(iii)(B) with respect to the year 1 dual consolidated loss. If these requirements are satisfied, then pursuant to §1.1503(d)–6(j)(1)(ii) the domestic use agreement filed by the P consolidated group with respect to the year 1 dual consolidated loss is terminated and has no further effect (if these requirements are not satisfied such that the P consolidated group recaptures the dual consolidated loss, the domestic use agreement would terminate pursuant to §1.1503(d)–6(j)(1)(iii)).

(B) Assume a triggering event occurs at the end of year 3 that requires recapture by the T consolidated group of the year 1 dual consolidated loss, as well as the payment of an interest charge, as provided in §1.1503(d)–6(h). T continues to own the Country X separate unit after the triggering event. In that case, each member of the T consolidated group is severally liable for the additional tax (and the interest charge) due upon the recapture of the year 1 dual consolidated loss. The T consolidated group must prepare a statement that computes the recapture tax amount as provided under §1.1503(d)–6(h)(3)(iii). Pursuant to §1.1503(d)–6(h)(3)(iv)(A), the recapture tax amount is assessed as an income tax liability of the T consolidated group and is considered as having been properly assessed as an income tax liability of the P consolidated group. If the T consolidated group does not pay in full the income tax liability attributable to the recapture tax amount, the unpaid balance of such recapture tax amount may be collected from the P consolidated group in accordance with the provisions of §1.1503(d)–6(h)(3)(iv)(B). Pursuant to §1.1503(d)–6(j)(1)(iii), the new domestic use agreement filed by the T consolidated group is terminated and has no further effect. Finally, pursuant to §1.1503(d)–6(h)(6)(iii), T is treated as if it incurred the dual consolidated loss that is recaptured for purposes of applying §1.1503(d)–6(h)(6)(i). Thus, T has a reconstituted net operating loss equal to the amount of the year 1 dual consolidated loss that was recaptured, and such loss is attributable to the Country X separate unit (and subject to the rules and limitations under §1.1503(d)–6(h)(6)(i)). Because T is treated as if it incurred the year 1 dual consolidated loss, P shall not be treated as having a net operating loss under §1.1503(d)–6(h)(6)(i).

Example 37. No foreign use following multiple-party event exception to triggering event. (i) *Facts.* P owns $DE1_X$ which, in turn, owns FB_X. P's interest in $DE1_X$ and its indirect interest in FB_X are combined and treated as a single separate unit (Country X separate unit) pursuant to §1.1503(d)–1(b)(4)(ii). In year 1, there is a $100x dual consolidated loss attributable to P's Country X separate unit and P makes a domestic use election with respect to such loss. T, a domestic corporation unrelated to P, owns 95 percent of PRS, a partnership. FS_X owns the remaining 5 percent of PRS. At the beginning of year 3, PRS purchases 100 percent of the interest in $DE1_X$ from P for cash. For Country X tax purposes, the $100x loss incurred by $DE1_X$ in year 1 carries forward and is available to offset income of $DE1_X$ in subsequent years.

(ii) *Result.* P's sale of its interest in $DE1_X$ is a triggering event under §1.1503(d)–6(e)(1)(iv) and (v). However, if P and T comply with the requirements under §1.1503(d)–6(f)(2)(iii), the sale would qualify for the multiple-party event exception under §1.1503(d)–6(f)(2)(i). In addition, because the $100x loss of $DE1_X$ carries forward to subsequent years for Country X purposes and is available to offset income of $DE1_X$, there would be a foreign use of the dual consolidated loss immediately after the sale pursuant to §1.1503(d)–3(a)(1). This is the case because the dual consolidated loss would be available to offset or reduce income that is considered, under U.S. tax principles, to be an item of FS_X, a foreign corporation (it would also be a foreign use because FS_X is an indirect owner of an interest in a hybrid entity that is not a separate unit). However, there is no foreign use in this case as a result of FS_X's 5 percent interest in $DE1_X$ pursuant to §1.1503(d)–3(c)(8).

Example 38. Character and source of recapture income. (i) *Facts.* (A) P owns FB_X. In year 1, the items of income, gain, deduction, and loss that are attributable to FB_X for purposes of determining whether it has a dual consolidated loss are as follows:

Sales income	$100x
Salary expense	($75x)
Interest expense	($50x)
Dual consolidated loss	($25x)

(B) P makes a domestic use election with respect to the year 1 dual consolidated loss attributable to FB_X and, thus, the $25x dual consolidated loss is used to offset the P group's consolidated taxable income.

(C) Pursuant to §1.861–8, the $75x of salary expense incurred by FB_X is allocated and apportioned entirely to foreign source general limitation income. Pursuant to §1.861–9T, $25x of the $50x interest expense attributable to FB_X is allocated and apportioned to domestic source income, $15x of such interest expense is allocated and apportioned to foreign source general limitation income, and the remaining $10x of such interest expense is allocated and apportioned to foreign source passive income.

(D) During year 2, $5x of income is attributable to FB_X under the rules of §1.1503(d)–5, and the P consolidated group has $100x of consolidated taxable income. At the end of year 2, FB_X undergoes a triggering event described in §1.1503(d)–6(e)(1), and P continues to own FB_X following the triggering event. Pursuant to §1.1503(d)–6(h)(2)(i), P is able to demonstrate to the satisfaction of the Commissioner that the $25x dual consolidated loss attributable to FB_X in year 1 would have offset the $5x of income attributable to FB_X in year 2, if no domestic use election were made with respect to the year 1 loss such that it was subject to the limitations of §1.1503(d)–4(b) and (c).

(ii) *Result.* P must recapture and report as ordinary income $20x ($25x − $5x) of FB_X's year 1 dual consolidated loss, plus applicable interest. The $20x recapture income is attributable to FB_X pursuant to §1.1503(d)–5(c)(4)(vi). Pursuant to §1.1503(d)–6(h)(5), the recapture income is treated as ordinary income whose source and character (including section 904 separate limitation character) is determined by reference to the manner in which the recaptured items of expense or loss taken into account in calculating the dual consolidated loss were allocated and apportioned. Further, pursuant to §1.1503(d)–6(h)(5), the pro rata computation described in §1.1503(d)–4(c)(4) shall apply. Thus, the character and source of the recapture income is determined in the same proportion as each item of deduction or loss that contributed to the dual consolidated loss being recaptured. Accordingly, P's $20x of recapture income is characterized and sourced as follows: $4x of domestic source income (($25x/$125x) × $20x); $14.4x of foreign source general limitation income (($75x + $15x)/$125x) × $20x); and $1.6x of foreign source passive income (($10x/$125x) × $20x). Pursuant to §1.1503(d)–6(h)(6)(i), commencing in year 3, the $20x recapture amount is reconstituted and treated as a net operating loss incurred by FB_X in a separate return limitation year, subject to the limitation under §1.1503(d)–4(b) (and therefore subject to the restrictions of §1.1503(d)–4(c)). Pursuant to §1.1503(d)–6(j)(1)(iii), the domestic use agreement filed by the P consolidated group with respect to the year 1 dual consolidated loss of FB_X is terminated and has no further effect.

Example 39. Interest charge without recapture. (i) *Facts.* P owns $DE1_X$ which, in turn, owns FB_X. P's interest in $DE1_X$ and its indirect interest in FB_X are combined and treated as a single separate unit (Country X separate unit) pursuant to §1.1503(d)–1(b)(4)(ii). In year 1, a dual consolidated loss of $100x is attributable to P's Country X separate unit. P makes a domestic use election with respect to such loss and uses the loss to offset the P group's consolidated taxable income. In year 2, there is $100x of income attributable to P's Country X separate unit and the P consolidated group has $200x of consolidated taxable income. At the end of year 2, the Country X separate unit undergoes a triggering event within the meaning of §1.1503(d)–6(e)(1). P demonstrates, to the satisfaction of the Commissioner, that if no domestic use election were made with respect to the year 1 dual consolidated loss such that it was subject to the limitations of §1.1503(d)–4(b) and (c), the year 1 $100x dual consolidated loss would have been offset by the $100x of year 2 income.

(ii) *Result.* There is no recapture of the year 1 dual consolidated loss attributable to P's Country X separate unit because it is reduced to zero under §1.1503(d)–6(h)(2)(i). However, P is liable for one year of interest charge under §1.1503(d)–6(h)(1)(ii), even though P's recapture amount is zero. This is the case because the P consolidated group had the benefit of the dual consolidated loss in year 1, and the income that offset the recapture income was not recognized until year 2. Pursuant to §1.1503(d)–6(j)(1)(iii), the domestic use agreement filed by the P consolidated group with respect to the year 1 dual consolidated loss is terminated and has no further effect.

Example 40. Reduced recapture and interest charge, and reconstituted dual consolidated loss. (i) *Facts.* S owns $DE1_X$ which, in turn, owns FB_X. S's interest in $DE1_X$ and its indirect interest in FB_X are combined and treated as a single separate unit (Country X separate unit) pursuant to §1.1503(d)–1(b)(4)(ii). In year 1, there is a $100x dual consolidated loss attributable to S's Country X separate unit, and P earns $100x. P makes a domestic use election with respect to the Country X separate unit's year 1 dual consolidated loss. Therefore, the consolidated group is permitted to offset P's $100x of income with the Country X separate unit's $100x dual consolidated loss. In year 2, $30x of income is attributable to the Country X separate unit under the rules of §1.1503(d)–5 and such income is offset by a $30x net operating loss incurred by P in such year. In year 3, $25x of income is attributable to the Country X separate unit under the rules of §1.1503(d)–5, and P earns $15x of income. In addition, at the end of year 3 there is a foreign use of the year 1 dual consolidated loss that constitutes a triggering event. S continues to own the Country X separate unit after the triggering event.

(ii) *Result.* (A) Under the presumptive rule of §1.1503(d)–6(h)(1)(i), S must recapture $100x (plus applicable interest). However, under §1.1503(d)–6(h)(2)(i), S may be able to demonstrate that a lesser amount is subject to recapture. The lesser amount is the amount of the $100x dual consolidated loss that would have remained subject to §1.1503(d)–4(c) at the time of the foreign use triggering event if a domestic use election had not been made for such loss.

(B) Although the combined separate unit earned $30x of income in year 2, there was no consolidated taxable income in such year. As a result, as of the end of year 2 the $100x dual consolidated loss would continue to be subject to §1.1503(d)–4(c) if a domestic use election had not been made for such loss. However, the $30x earned in year 2 can be carried forward to subsequent taxable years and may reduce the recapture income to the extent of consolidated taxable income generated in subsequent years. In year 3, $25x of income was attributable to the Country X separate unit and P earns $15x of income. Thus, the P consolidated group has $40x of consolidated taxable income in year 3. As a result, the $100x of recapture income can be reduced by $40x. This is the case because if a domestic use election had not been made for the $100x year 1 dual consolidated loss such that it was subject to the limitations of §1.1503(d)–4(b) and (c), only $60x of the loss would have remained subject to such limitations at the time of the foreign use triggering event. Accordingly, if S can adequately document the lesser amount, the amount of recapture income is $60x ($100x − $40x). The $60x recapture income is attributable to the Country X separate unit pursuant to §1.1503(d)–5(c)(4)(vi).

(C) Pursuant to §1.1503(d)–6(h)(6)(i), commencing in year 4, the $60x recapture amount is reconstituted and treated as a net operating loss incurred by the Country X separate unit of S in a separate return limitation year, subject to the limitation under §1.1503(d)–4(b) (and therefore subject to the restrictions of §1.1503(d)–4(c)). The loss is only available for carryover to taxable years after year 3 (and is not available for carryback). The carryover period of the loss, for purposes of section 172(b), will start from year 1, when the dual consolidated loss that was subject to recapture was incurred. In addition, such reconstituted net operating loss is not eligible for the exceptions contained in §1.1503(d)–6(b) through (d). Pursuant to §1.1503(d)–6(j)(1)(iii), the domestic use agreement filed by the P consolidated group with respect to the year 1 dual consolidated loss of the Country X separate unit is terminated and has no further effect.

(iii) *Alternative Facts*. The facts are the same as in paragraph (i) of this *Example 40*, except that the triggering event that occurs at the end of year 3 is a sale by S of its entire interest in $DE1_X$ to B, an unrelated domestic corporation. The sale does not qualify as a transaction described in section 381. The results are the same as in paragraph (ii) of this *Example 40*, except that pursuant to §1.1503(d)–6(h)(6)(ii) the $60x net operating loss is not reconstituted (with respect to either S or B). The loss is not reconstituted with respect to S because the Country X separate unit ceases to be a separate unit of S (or any other member of the consolidated group that includes S) and therefore would have been eliminated pursuant to §1.1503(d)–4(d)(1)(ii) if no domestic use election had been made with respect to such loss. The loss is not reconstituted with respect to B because B was not the domestic owner of the combined separate unit when the dual consolidated loss that is recaptured was incurred, and B did not acquire the Country X separate unit in a section 381 transaction.

[T.D. 9315, 72 FR 12914, Mar. 19, 2007; 72 FR 20424, Apr. 25, 2007]

§ 1.1503(d)–8 Effective dates.

(a) *General rule*. Except as provided in paragraph (b) of this section, this paragraph (a) provides the dates of applicability of §§1.1503(d)–1 through 1.1503(d)–7. Sections 1.1503(d)–1 through 1.1503(d)–7 shall apply to dual consolidated losses incurred in taxable years beginning on or after April 18, 2007. However, a taxpayer may apply §§1.1503(d)–1 through 1.1503(d)–7, in their entirety, to dual consolidated losses incurred in taxable years beginning on or after January 1, 2007, by filing its return and attaching to such return the domestic use agreements, certifications, or other information in accordance with these regulations. For purposes of this section, the term *application date* means either April 18, 2007, or, if the taxpayer applies these regulations pursuant to the preceding sentence, January 1, 2007. Section 1.1503–2 applies for dual consolidated losses incurred in taxable years beginning on or after October 1, 1992, and before the application date.

(b) *Special rules*—(1) *Reduction of term of agreements filed under §§1.1503–2A(c)(3), 1.1503–2A(d)(3), 1.1503–2(g)(2)(i), or 1.1503–2T(g)(i)*. If an agreement is filed in accordance with §§1.1503–2A(c)(3), 1.1503–2A(d)(3), 1.1503–2(g)(2)(i), or 1.1503–2T(g)(2)(i) with respect to a dual consolidated loss incurred in a taxable year beginning prior to the application date and an event requiring recapture with respect to the dual consolidated loss subject to the agreement has not occurred as of the application date, then such agreement will be considered by the Internal Revenue Service to apply only for any taxable year up to and including the fifth taxable year following the year in which the dual consolidated loss that is the subject of the agreement was incurred and thereafter will have no effect.

(2) *Reduction of term of agreements filed under §§1.1503–2(g)(2)(iv)(B)(2)(i) (1992), 1.1503–2(g)(2)(iv)(B)(3)(i), or Rev. Proc. 2000–42*. Taxpayers subject to the terms of a closing agreement entered into with the Internal Revenue Service pursuant to §§1.1503–2(g)(2)(iv)(B)(*2*)(*i*)

(1992), 1.1503–2(g)(2)(iv)(B)(*3*)(*i*), or Rev. Proc. 2000–42 (2000–2 CB 394), see §601.601(d)(2)(ii)(*b*) of this chapter, will be deemed to have satisfied the closing agreement's fifteen-year certification period requirement if the five-year certification period specified in §1.1503(d)–1(b)(20) has elapsed, provided such closing agreement is still in effect as of the application date, and provided the dual consolidated losses have not been recaptured. For example, if a calendar year taxpayer that has a January 1, 2007, application date entered into a closing agreement with respect to a dual consolidated loss incurred in 2003 and, as of January 1, 2007, the closing agreement is still in effect and the dual consolidated loss subject to the closing agreement has not been recaptured, then the closing agreement's fifteen-year certification period will be deemed satisfied when the five-year certification period described in §1.1503(d)–1(b)(20) has elapsed. Thus, the dual consolidated loss will be subject to the recapture and certification provisions of the closing agreement in such a case only through December 31, 2008. Alternatively, if a calendar year taxpayer that has a January 1, 2007, application date entered into a closing agreement with respect to a dual consolidated loss incurred in 2000 and, as of January 1, 2007, the closing agreement is still in effect and the dual consolidated loss subject to the closing agreement has not been recaptured, then the certification period is deemed to be satisfied.

(3) *Relief for untimely filings*. Paragraphs (b)(3)(i) through (iii) of this section set forth the effective dates for rules that provide relief for the failure to make timely filings of an election, agreement, statement, rebuttal, computation, closing agreement, or other information, pursuant to section 1503(d) and these regulations.

(i) *General rule*. Except as provided in paragraphs (b)(3)(ii) and (iii) of this section, the reasonable cause relief standard of §1.1503(d)–1(c) applies for all untimely filings with respect to dual consolidated losses, including with respect to dual consolidated losses incurred in taxable years beginning before the application date.

(ii) *Closing agreements*. Solely with respect to closing agreements described in §1.1503–2(g)(2)(iv)(B)(*3*)(i) and Rev. Proc. 2000–42, taxpayers must request relief for untimely requests through the process provided under §§301.9100–1 through 301.9100–3 of this chapter. See paragraph (b)(4) of this section for rules that permit the multiple-party event exception, rather than closing agreements, for certain triggering events.

(iii) *Pending requests for relief*. Taxpayers that have letter ruling requests under §§301.9100–1 through 301.9100–3 of this chapter pending as of March 19, 2007 (other than requests under paragraph (b)(3)(ii) of this section) are not required to use the reasonable cause procedure under §1.1503(d)–1(c); however, if such taxpayers have not yet received a determination of their request, they may withdraw their request consistent with the procedures contained in Rev. Proc. 2007–1 (2007–1 IRB 1), see §601.601(d)(2)(ii)(*b*) of this chapter, (or any succeeding document) and use the reasonable cause procedure set forth in §1.1503(d)–1(c). In that event, the Internal Revenue Service will refund the taxpayer's user fee.

(4) *Multiple-party event exception to triggering events*. This paragraph (b)(4) applies to events described in §1.1503–2(g)(2)(iv)(B)(*1*)(*i*) through (*iii*) that occur after April 18, 2007 and that are with respect to dual consolidated losses that were incurred in taxable years beginning on or after October 1, 1992, and before the application date. The events described in the previous sentence are not eligible for the exception described in §1.1503–2(g)(2)(iv)(B)(*1*), but instead are eligible for the multiple-party event exception described in §1.1503(d)–6(f)(2)(i), as modified by this paragraph (b)(4). Thus, such events are not eligible for a closing agreement described in §1.1503–2(g)(2)(iv)(B)(*3*)(*i*) and Rev. Proc. 2000–42. For purposes of applying §1.1503(d)–6(f)(2)(i) to transactions covered by this paragraph, agreements described in §1.1503–2(g)(2)(i) (rather than domestic use agreements) shall be filed, and subsequent triggering events and exceptions thereto have the meaning provided in §1.1503–2(g)(2)(iii)(A) and (iv) (other than the exception provided under §1.1503–2(g)(2)(iv)(B)(*1*)).

For example, if a calendar year taxpayer that has a January 1, 2007, application date filed an election under §1.1503–2(g)(2)(i) with respect to a dual consolidated loss that was incurred in 2004, and a triggering event described in §1.1503–2(g)(2)(iv)(B)(*1*)(*ii*) occurs with respect to such dual consolidated loss after April 18, 2007, then the event is eligible for the multiple-party event exception under §1.1503(d)–6(f)(2)(i) (and not the exception under §1.1503–2(g)(2)(iv)(B)(*1*)). However, in order to comply with §1.1503(d)–6(f)(2)(iii)(A), the subsequent elector must file a new agreement described in §1.1503–2(g)(2)(i) (rather than a new domestic use agreement). In addition, for purposes of determining whether there is a subsequent triggering event, and exceptions thereto, pursuant to such new agreement, §1.1503–2(g)(2)(iii)(A) and (iv) (other than the exception provided under §1.1503–2(g)(2)(iv)(B)(*1*)) shall apply. Notwithstanding the general application of this paragraph (b)(4) to events described in §1.1503–2(g)(2)(iv)(B)(*1*)(*i*) through (*iii*) that occur after April 18, 2007, a taxpayer may choose to apply this paragraph (b)(4) to events described in §1.1503–2(g)(2)(iv)(B)(*1*)(*i*) through (*iii*) that occur after March 19, 2007 and on or before April 18, 2007.

(5) *Basis adjustment rules.* Taxpayers may apply the basis adjustment rules of §1.1503(d)–5(g) for all open years in which such basis is relevant, even if the basis adjustment is attributable to a dual consolidated loss incurred (or recaptured) in a closed taxable year. Taxpayers applying the provisions of §1.1503(d)–5(g), however, must do so consistently for all open years.

[T.D. 9315, 72 FR 12914, Mar. 19, 2007; 72 FR 20424, Apr. 25, 2007]

§ 1.1504–0 Outline of provisions.

In order to facilitate the use of §§1.1504–1 through 1.1504–4, this section lists the captions contained in §§1.1504–1 through 1.1504–4.

[T.D. 8462, 57 FR 61800, Dec. 29, 1992]

§ 1.1504–1 Definitions.

The privilege of filing consolidated returns is extended to all includible corporations constituting affiliated groups as defined in section 1504. See the regulations under §1.1502 for a description of an affiliated group and the corporations which may be considered as includible corporations.

[T.D. 6500, 25 FR 12106, Nov. 26, 1960]

§§ 1.1504–2—1.1504–3 [Reserved]

§ 1.1504–4 Treatment of warrants, options, convertible obligations, and other similar interests.

(a) *Introduction*—(1) *General rule.* This section provides regulations under section 1504(a)(5) (A) and (B) regarding the circumstances in which warrants, options, obligations convertible into stock, and other similar interests are treated as exercised for purposes of determining whether a corporation is a member of an affiliated group. The fact that an instrument may be treated as an option under these regulations does not prevent such instrument from being treated as stock under general principles of law. Except as provided in paragraph (a)(2) of this section, this section applies to all provisions under the Internal Revenue Code and the regulations to which affiliation within the meaning of section 1504(a) (with or without the exceptions in section 1504(b)) is relevant, including those provisions that refer to section 1504(a)(2) (with or without the exceptions in section 1504(b)) without referring to affiliation, provided that the 80 percent voting power and 80 percent value requirements of section 1504(a)(2) are not modified therein.

(2) *Exceptions.* This section does not apply to sections 163(j), 864(e), or 904(i) or to the regulations thereunder. This section also does not apply to any other provision specified by the Internal Revenue Service in regulations, a revenue ruling, or revenue procedure. See §601.601(d)(2)(ii)(*b*) of this chapter.

(b) *Options not treated as stock or as excerised*—(1) *General rule.* Except as provided in paragraph (b)(2) of this section, an option is not considered either as stock or as exercised. Thus, options are disregarded in determining whether a corporation is a member of an affiliated group unless they are described in paragraph (b)(2) of this section.

(2) *Options treated as exercised*—(i) *In general.* Solely for purposes of determining whether a corporation is a member of an affiliated group, an option is treated as exercised if, on a measurement date with respect to such option—

(A) It could reasonably be anticipated that, if not for this section, the issuance or transfer of the option in lieu of the issuance, redemption, or transfer of the underlying stock would result in the elimination of a substantial amount of federal income tax liability (as described in paragraphs (e) and (f) of this section); and

(B) It is reasonably certain that the option will be exercised (as described in paragraph (g) of this section).

(ii) *Aggregation of options.* All options with the same measurement date are aggregated in determining whether the issuance or transfer of an option in lieu of the issuance, redemption, or transfer of the underlying stock would result in the elimination of a substantial amount of federal income tax liability.

(iii) *Effect of treating option as exercised*—(A) *In general.* An option that is treated as exercised is treated as exercised for purposes of determining the percentage of the value of stock owned by the holder and other parties, but is not treated as exercised for purposes of determining the percentage of the voting power of stock owned by the holder and other parties.

(B) *Cash settlement options, phantom stock, stock appreciation rights, or similar interests.* If a cash settlement option, phantom stock, stock appreciation right, or similar interest is treated as exercised, the option is treated as having been converted into stock of the issuing corporation. If the amount to be received upon the exercise of such an option is determined by reference to a multiple of the increase in the value of a share of the issuing corporation's stock on the exercise date over the value of a share of the stock on the date the option is issued, the option is treated as converted into a corresponding number of shares of such stock. Appropriate adjustments must be made in any situation in which the amount to be received upon exercise of the option is determined in another manner.

(iv) *Valuation.* For purposes of section 1504(a)(2)(B) and this section, all shares of stock within a single class are considered to have the same value. Thus, control premiums and minority and blockage discounts within a single class are not taken into account.

(3) *Example.* The provisions of paragraph (b)(2) of this section may be illustrated by the following example:

Example. (i) Corporation P owns all 100 shares of the common stock of Corporation S, the only class of S stock outstanding. Each share of S stock has a fair market value of $10 and has one vote. On June 30, 1992, P issues to Corporation X an option to acquire 80 shares of the S stock from P.

(ii) If, under the provisions of this section, the option is treated as exercised, then, solely for purposes of determining affiliation, P is treated as owning only 20 percent of the value of the outstanding S stock and X is treated as owing the remaining 80 percent of the value of the S stock. P is still treated as owning all of the voting power of S. Accordingly, because P is treated as owning less than 80 percent of the value of the outstanding S stock, P and S are no longer affiliated. However, because X is not treated as owning any of the voting power of S, X and S are also not affiliated.

(c) *Definitions.* For purposes of this section—

(1) *Issuing corporation.* ''Issuing corporation'' means the corporation whose stock is subject to an option.

(2) *Related or sequential option.* ''Related or sequential option'' means an option that is one of a series of options issued to the same or related persons. For purposes of this section, any options issued to the same person or related persons within a two-year period are presumed to be part of a series of options. This presumption may be rebutted if the facts and circumstances clearly establish that the options are not part of a series of options. Any options issued to the same person or related persons more than two years apart are presumed not to be part of a series of options. This presumption may be rebutted if the facts and circumstances clearly establish that the options are part of a series of options.

(3) *Related persons.* Persons are related if they are related within the meaning of section 267(b) (without the application of sections 267(c) and 1563(e)(1)) or 707(b)(1), substituting ''10 percent'' for ''50 percent'' wherever it appears.

(4) *Measurement date*—(i) *General rule.* ''Measurement date'' means a date on which an option is issued or transferred or on which the terms of an existing option or the underlying stock are adjusted (including an adjustment pursuant to the terms of the option or the underlying stock).

(ii) *Issuances, transfers, or adjustments not treated as measurement dates.* A measurement date does not include a date on which—

(A) An option is issued or transferred by gift, at death, or between spouses or former spouses under section 1041;

(B) An option is issued or transferred—

(*1*) Between members of an affiliated group (determined with the exceptions in section 1504(b) and without the application of this section); or

(*2*) Between persons none of which is a member of the affiliated group (determined without the exceptions in section 1504(b) and without the application of this section), if any, of which the issuing corporation is a member, unless—

(*i*) Any such person is related to (or acting in concert with) the issuing corporation or any member of its affiliated group; and

(*ii*) The issuance or transfer is pursuant to a plan a principal purpose of which is to avoid the application of section 1504 and this section;

(C) An adjustment occurs in the terms or pursuant to the terms of an option or the underlying stock that does not materially increase the likelihood that the option will be exercised; or

(D) A change occurs in the exercise price of an option or in the number of shares that may be issued or transferred pursuant to the option as determined by a bona fide, reasonable, adjustment formula that has the effect of preventing dilution of the interests of the holders of the options.

(iii) *Transactions increasing likelihood of exercise.* If a change or alteration referred to in this paragraph (c)(4)(iii) is made for a principal purpose of increasing the likelihood that an option will be exercised, a measurement date also includes any date on which—

(A) The capital structure of the issuing corporation is changed; or

(B) The fair market value of the stock of the issuing corporation is altered through a transfer of assets to or from the issuing corporation (other than regular, ordinary dividends) or by any other means.

(iv) *Measurement date for options issued pursuant to a plan.* In the case of options issued pursuant to a plan, a measurement date for any of the options constitutes a measurement date for all options issued pursuant to the plan that are outstanding on the measurement date.

(v) *Measurement date for related or sequential options.* In the case of related or sequential options, a measurement date for any of the options constitutes a measurement date for all related or sequential options that are outstanding on the measurement date.

(vi) *Example.* The provisions of paragraph (c)(4)(v) of this section may be illustrated by the following example.

Example. (i) Corporation P owns all 80 shares of the common stock of Corporation S, the only class of S stock outstanding. On January 1, 1992, S issues a warrant, exercisable within 3 years, to U, an unrelated corporation, to acquire 10 newly issued shares of S common stock. On July 1, 1992, S issues a second warrant to U to acquire 10 additional newly issued shares of S common stock. On January 1, 1993, S issues a third warrant to T, a wholly owned subsidiary of U, to acquire 10 newly issued shares of S common stock. Assume that the facts and circumstances do not clearly establish that the options are not part of a series of options.

(ii) January 1, 1992, July 1, 1992, and January 1, 1993, constitute measurement dates for the first warrant, the second warrant, and the third warrant, respectively, because the warrants were issued on those dates.

(iii) Because the first and second warrants were issued within two years of each other, and both warrants were issued to U, the warrants constitute related or sequential options. Accordingly, July 1, 1992, constitutes a measurement date for the first warrant as well as for the second warrant.

(iv) Because the first, second, and third warrants were all issued within two years of each other, and were all issued to the same or related persons, the warrants constitute related or sequential options. Accordingly, January 1, 1993, constitutes a measurement date for the first and second warrants, as well as for the third warrant.

(5) *In-the-money.* ''In-the-money'' means the exercise price of the option is less than (or in the case of an option to sell stock, greater than) the fair market value of the underlying stock.

(d) *Options*—(1) *Instruments treated as options.* For purposes of this section, except to the extent otherwise provided in this paragraph (d), the following are treated as options:

(i) A call option, warrant, convertible obligation, put option, redemption agreement (including a right to cause the redemption of stock), or any other instrument that provides for the right to issue, redeem, or transfer stock (including an option on an option); and

(ii) A cash settlement option, phantom stock, stock appreciation right, or any other similar interest (except for stock).

(2) *Instruments generally not treated as options.* For purposes of this section, the following will not be treated as options:

(i) *Options on section 1504(a)(4) stock.* Options on stock described in section 1504(a)(4);

(ii) *Certain publicly traded options*—(A) *General rule.* Options which on the measurement date are traded on (or subject to the rules of) a qualified board or exchange as defined in section 1256(g)(7), or on any other exchange, board of trade, or market specified by the Internal Revenue Service in regulations, a revenue ruling, or revenue procedure. See § 601.601(d)(2)(ii)(*b*) of this chapter;

(B) *Exception.* Paragraph (d)(2)(ii)(A) of this section does not apply to options issued, transferred, or listed with a principal purpose of avoiding the application of section 1504 and this section. For example, a principal purpose of avoiding the application of section 1504 and this section may exist if warrants, convertible or exchangeable debt instruments, or other similar instruments have an exercise price (or, in the case of convertible or exchangeable instruments, a conversion or exchange premium) that is materially less than, or a term that is materially longer than, those that are customary for publicly traded instruments of their type. A principal purpose may also exist if a large percentage of an issuance of an instrument is placed with one investor (or group of investors) and a very small percentage of the issuance is traded on a qualified board or exchange;

(iii) *Stock purchase agreements.* Stock purchase agreements or similar arrangements whose terms are commercially reasonable and in which the parties' obligations to complete the transaction are subject only to reasonable closing conditions;

(iv) *Escrow, pledge, or other security agreements.* Agreements for holding stock in escrow or under a pledge or other security agreement that are part of a typical commercial transaction and that are subject to customary commercial conditions;

(v) *Compensatory options*—(A) *General rule.* Stock appreciation rights, warrants, stock options, phantom stock, or other similar instruments provided to employees, directors, or independent contractors in connection with the performance of services for the corporation or a related corporation (and that is not excessive by reference to the services performed) and which—

(*1*) Are nontransferable within the meaning of § 1.83–3(d); and

(*2*) Do not have a readily ascertainable fair market value as defined in § 1.83–7(b) on the measurement date;

(B) *Exceptions.* (*1*) Paragraph (d)(2)(v)(A) of this section does not apply to options issued or transferred with a principal purpose of avoiding the application of section 1504 and this section; and

(*2*) Paragraph (d)(2)(v)(A) of this section ceases to apply to options that become transferable;

(vi) *Options granted in connection with a loan.* Options granted in connection with a loan if the lender is actively and regularly engaged in the business of lending and the options are issued in connection with a loan to the issuing corporation that is commercially reasonable. This paragraph (d)(2)(vi) continues to apply if the option is transferred with the loan (or if a portion of the option is transferred with a corresponding portion of the loan). However, if the option is transferred without a corresponding portion of the loan, this paragraph (d)(2)(vi) ceases to apply;

(vii) *Options created pursuant to a title 11 or similar case.* Options created by the solicitation or receipt of acceptances to a plan of reorganization in a title 11 or similar case (within the meaning of section 368(a)(3)(A)), the option created by the confirmation of the plan, and any option created under the plan prior to the time the plan becomes effective;

(viii) *Convertible preferred stock.* Convertible preferred stock, provided the terms of the conversion feature do not permit or require the tender of any consideration other than the stock being converted; and

(ix) *Other enumerated instruments.* Any other instruments specified by the Internal Revenue Service in regulations, a revenue ruling, or revenue procedure. See § 601.601(d)(2)(ii)(*b*) of this chapter.

(e) *Elimination of federal income tax liability.* For purposes of this section, the elimination of federal income tax liability includes the elimination or deferral of federal income tax liability. In determining whether there is an elimination of federal income tax liability, the tax consequences to all involved parties are considered. Examples of elimination of federal income tax liability include the use of a loss or deduction that would not otherwise be utilized, the acceleration of a loss or deduction to a year earlier than the year in which the loss or deduction would otherwise be utilized, the deferral of gain or income to a year later than the year in which the gain or income would otherwise be reported, and the acceleration of gain or income to a year earlier than the year in which the gain or income would otherwise be reported, if such gain or income is offset by a net operating loss or net capital loss that would otherwise expire unused. The elimination of federal income tax liability does not include the deferral of gain with respect to the stock subject to the option that would be recognized if such stock were sold on a measurement date.

(f) *Substantial amount of federal income tax liability*. The determination of what constitutes a substantial amount of federal income tax liability is based on all the facts and circumstances, including the absolute amount of the elimination, the amount of the elimination relative to overall tax liability, and the timing of items of income and deductions, taking into account present value concepts.

(g) *Reasonable certainty of exercise*—(1) *Generally*. The determination of whether, as of a measurement date, an option is reasonably certain to be exercised is based on all the facts and circumstances, including:

(i) *Purchase price*. The purchase price of the option in absolute terms and in relation to the fair market value of the stock or the exercise price of the option;

(ii) *In-the-money option*. Whether and to what extent the option is in-the-money on the measurement date;

(iii) *Not in-the-money option*. If the option is not in-the-money on the measurement date, the amount or percentage by which the exercise price of the option is greater than (or in the case of an option to sell stock, is less than) the fair market value of the underlying stock;

(iv) *Exercise price*. Whether the exercise price of the option is fixed or fluctuates depending on the earnings, value, or other indication of economic performance of the issuing corporation;

(v) *Time of exercise*. The time at which, or the period of time during which, the option can be exercised;

(vi) *Related or sequential options*. Whether the option is one in a series of related or sequential options;

(vii) *Stockholder rights*. The existence of an arrangement (either within the option agreement or in a related agreement) that, directly or indirectly, affords managerial or economic rights in the issuing corporation that ordinarily would be afforded to owners of the issuing corporation's stock (e.g., voting rights, dividend rights, or rights to proceeds on liquidation) to the person who would acquire the stock upon exercise of the option or a person related to such person. For this purpose, managerial or economic rights in the issuing corporation possessed because of actual stock ownership in the issuing corporation are not taken into account;

(viii) *Restrictive covenants*. The existence of restrictive covenants or similar arrangements (either within the option agreement or in a related agreement) that, directly or indirectly, prevent or limit the ability of the issuing corporation to undertake certain activities while the option is outstanding (e.g., covenants limiting the payment of dividends or borrowing of funds);

(ix) *Intention to alter value*. Whether it was intended that through a change in the capital structure of the issuing corporation or a transfer of assets to or from the issuing corporation (other than regular, ordinary dividends) or by any other means, the fair market value of the stock of the issuing corporation would be altered for a principal purpose of increasing the likelihood that the option would be exercised; and

(x) *Contingencies*. Any contingency (other than the mere passage of time) to which the exercise of the option is subject (e.g., a public offering of the issuing corporation's stock or reaching a certain level of earnings).

(2) *Cash settlement options, phantom stock, stock appreciation rights, or similar interests*. A cash settlement option, phantom stock, stock appreciation right, or similar interest is treated as reasonably certain to be exercised if it is reasonably certain that the option will have value at some time during the period in which the option may be exercised.

(3) *Safe harbors*—(i) *Options to acquire stock*. Except as provided in paragraph

(g)(3)(iv) of this section, an option to acquire stock is not considered reasonably certain, as of a measurement date, to be exercised if—

(A) The option may be exercised no more than 24 months after the measurement date and the exercise price is equal to or greater than 90 percent of the fair market value of the underlying stock on the measurement date; or

(B) The terms of the option provide that the exercise price of the option is equal to or greater than the fair market value of the underlying stock on the exercise date.

(ii) *Options to sell stock.* Except as provided in paragraph (g)(3)(iv) of this section, an option to sell stock is not considered reasonably certain, as of a measurement date, to be exercised if—

(A) The option may be exercised no more than 24 months after the measurement date and the exercise price is equal to or less than 110 percent of the fair market value of the underlying stock on the measurement date; or

(B) The terms of the option provide that the exercise price of the option is equal to or less than the fair market value of the underlying stock on the exercise date.

(iii) *Options exercisable at fair market value.* For purposes of paragraphs (g)(3)(i)(B) and (g)(3)(ii)(B) of this section, an option whose exercise price is determined by a formula is considered to have an exercise price equal to the fair market value of the underlying stock on the exercise date if the formula is agreed upon by the parties when the option is issued in a bona fide attempt to arrive at fair market value on the exercise date and is to be applied based upon the facts in existence on the exercise date.

(iv) *Exceptions.* The safe harbors of this paragraph (g)(3) do not apply if—

(A) An arrangement exists that provides the holder or a related party with stockholder rights described in paragraph (g)(1)(vii) of this section (except for rights arising upon a default under the option or a related agreement);

(B) It is intended that through a change in the capital structure of the issuing corporation or a transfer of assets to or from the issuing corporation (other than regular, ordinary dividends) or by any other means, the fair market value of the stock of the issuing corporation will be altered for a principal purpose of increasing the likelihood that the option will be exercised; or

(C) The option is one in a series of related or sequential options, unless all such options satisfy paragraph (g)(3) (i) or (ii) of this section.

(v) *Failure to satisfy safe harbor.* Failure of an option to satisfy one of the safe harbors of this paragraph (g)(3) does not affect the determination of whether an option is treated as reasonably certain to be exercised.

(h) *Examples.* The provisions of this section may be illustrated by the following examples. These examples assume that the measurement dates set forth in the examples are the only measurement dates that have taken place or will take place.

Example 1. (i) P is the common parent of a consolidated group, consisting of P, S, and T. P owns all 100 shares of S's only class of stock, which is voting common stock. P also owns all the stock of T. On June 30, 1992, when the fair market value of the S stock is $40 per share, P sells to U, an unrelated corporation, an option to acquire 40 shares of the S stock that P owns at an exercise price of $30 per share, exercisable at any time within 3 years after the granting of the option. P and T have had substantial losses for 5 consecutive years while S has had substantial income during the same period. Because P, S, and T have been filing consolidated returns, P and T have been able to use all of their losses to offset S's income. It is anticipated that P, S, and T will continue their earnings histories for several more years. On July 31, 1992, S declares and pays a dividend of $1 per share to P.

(ii) If P, S, and T continue to file consolidated returns after June 30, 1992, it could reasonably be anticipated that P, S, and T would eliminate a substantial amount of federal income tax liability by using P's and T's future losses to offset S's income in consolidated returns. Furthermore, based on the difference between the exercise price of the option and the fair market value of the S stock, it is reasonably certain, on June 30, 1992, a measurement date, that the option will be exercised. Therefore, the option held by U is treated as exercised. As a result, for purposes of determining whether P and S are affiliated, P is treated as owning only 60 percent of the value of outstanding shares of S stock and U is treated as owning the remaining 40 percent. P is still treated as owning 100 percent of the voting power. Because members of the P group are no longer treated as owning stock possessing 80 percent of the total value of the S stock as of June 30, 1992, S is no longer a member of the P group. Additionally, P is not entitled to a 100 percent dividends received deduction under section 243(a)(3) because P and S are also treated as not affiliated for purposes of section 243. P is only entitled to an 80 percent dividends received deduction under section 243(c).

Example 2. (i) The facts are the same as in *Example 1* except that rather than P issuing an option to acquire 40 shares of S stock to U on June 30, 1992, P, pursuant to a plan, issues an option to U1 on July 1, 1992, to acquire 20 shares of S stock, and issues an option to U2 on July 2, 1992, to acquire 20 shares of S stock.

(ii) Because the options issued to U1 and U2 were issued pursuant to a plan, July 2, 1992, constitutes a measurement data for both options. Therefore, both options are aggregated in determining whether the issuance of the options, rather than the sale of the S stock, would result in the elimination of a substantial amount of federal income tax liability. Accordingly, as in *Example 1,* because the continued affiliation of P, S, and T could reasonably be anticipated to result in the elimination of a substantial amount of federal income tax liability and the options are reasonably certain to be exercised, the options are treated as exercised for purposes of determining whether P and S are affiliated, and P and S are no longer affiliated as of July 2, 1992.

Example 3. (i) The facts are the same as in *Example 1* except that the option gives U the right to acquire all 100 shares of the S stock, and U is the common parent of a consolidated group. The U group has had substantial losses for 5 consecutive years and it is anticipated that the U group will continue its earnings history for several more years.

(ii) If P sold the S stock, in lieu of the option, to U, S would become a member of the U group. Because the U group files consolidated returns, if P sold the S stock to U, U would be able to use its future losses to offset future income of S. When viewing the transaction from the effect on all parties, the sale of the option, in lieu of the underlying S stock, does not result in the elimination of federal income tax liability because S's income would be offset by the losses of members of either the P or U group. Accordingly, the option is disregarded and S remains a member of the P group.

Example 4. (i) P is the common parent of a consolidated group, consisting of P and S. P owns 90 of the 100 outstanding shares of S's only class of stock, which is voting common stock, and U, an unrelated corporation, owns the remaining 10 shares. On August 31, 1992, when the fair market value of the S stock is $100 per share, P sells a call option to U that entitles U to purchase 20 shares of S stock from P, at any time before August 31, 1993, at an exercise price of $115 per share. The call option does not provide U with any voting rights, dividend rights, or any other managerial or economic rights ordinarily afforded to owners of the S stock. There is no intention on August 31, 1992, to alter the value of S to increase the likelihood of the exercise of the call option.

(ii) Because the exercise price of the call option is equal to or greater than 90 percent of the fair market value of the S stock on August 31, 1992, a measurement date, the option may be exercised no more than 24 months after the measurement date, and none of the items described in paragraph (g)(3)(iv) of this section that preclude application of the safe harbor are present, the safe harbor of paragraph (g)(3)(i) of this section applies and the call option is treated as if it is not reasonably certain to be exercised. Therefore, regardless of whether the continued affiliation of P and S would result in the elimination of a substantial amount of federal income tax liability, the call option is disregarded in determining whether S remains a member of the P group.

Example 5. (i) The facts are the same as in *Example 4* except that the call option gives U the right to vote similar to that of a shareholder.

(ii) Under paragraph (g)(3)(iv) of this section, the safe harbor of paragraph (g)(3)(i) of this section does not apply because the call option entitles U to voting rights equivalent to that of a shareholder. Accordingly, all of the facts and circumstances surrounding the sale of the call option must be taken into consideration in determining whether it is reasonably certain that the call option will be exercised.

Example 6. (i) In 1992, two unrelated corporations, X and Y, decide to engage jointly in a new business venture. To accomplish this purpose, X organizes a new corporation, S, on September 30, 1992. X acquires 100 shares of the voting common stock of S, which are the only shares of S stock outstanding. Y acquires a debenture of S which is convertible, on September 30, 1995, into 100 shares of S common stock. If the conversion right is not exercised, X will have the right, on September 30, 1995, to put 50 shares of its S stock to Y in exchange for 50 percent of the debenture held by Y. The likelihood of the success of the venture is uncertain. It is anticipated that S will generate substantial losses in its early years of operation. X expects to have substantial taxable income during the three years following the organization of S.

(ii) Under the terms of this arrangement, it is reasonably certain on September 30, 1992, a measurement date, that on September 30, 1995, either through Y's exercise of its conversion right or X's right to put S stock to

Y, that Y will own 50 percent of the S stock. Additionally, it could reasonably be anticipated, on September 30, 1992, a measurement date, that the affiliation of X and S would result in the elimination of a substantial amount of federal income tax liability. Accordingly, for purposes of determining whether X and S are affiliated, X is treated as owning only 50 percent of the value of the S stock as of September 30, 1992, a measurement date, and S is not a member of the X affiliated group.

Example 7. (i) The facts are the same as in *Example 6* except that rather than acquiring 100 percent of the S stock and the right to put S stock to Y, X acquires only 80 percent of the S stock, while S, rather than acquiring a convertible debenture, acquires 20 percent of the S stock, and an option to acquire an additional 30 percent of the S stock. The terms of the option are such that the option will only be exercised if the new business venture succeeds.

(ii) In contrast to *Example 6*, because of the true business risks involved in the start-up of S and whether the business venture will ultimately succeed, along with the fact that X does not have an option to put S stock to Y, it is not reasonably certain on September 30, 1992, a measurement date, that the option will be exercised and that X will only own 50 percent of the S stock on September 30, 1995. Accordingly, the option is disregarded in determining whether S is a member of the X group.

(i) *Effective date*. This section applies, generally, to options with a measurement date on or after February 28, 1992. This section does not apply to options issued prior to February 28, 1992, which have a measurement date on or after February 28, 1992, if the measurement date for the option occurs solely because of an adjustment in the terms of the option pursuant to the terms of the option as it existed on February 28, 1992. Paragraph (b)(2)(iv) of this section applies to stock outstanding on or after February 28, 1992.

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REGULATIONS APPLICABLE FOR TAX YEARS FOR WHICH A RETURN IS DUE ON OR BEFORE AUGUST 11, 1999

§ 1.1502–9A Application of overall foreign loss recapture rules to corporations filing consolidated returns due on or before August 11, 1999.

(a) *Scope*—(1) *Effective date*. This section applies only to consolidated return years for which the due date of the income tax return (without extensions) is on or before August 11, 1999.

(2) *In general*. Affiliated group of corporations filing a consolidated return sustains an overall foreign loss (a consolidated overall foreign loss) in any taxable year in which its gross income from sources without the United States subject to a separate limitation (as defined in §1.904(f)–1(c)(2)) is exceeded by the sum of the deductions properly allocated and apportioned thereto. However, for taxable years prior to 1983, affiliated groups may have determined their overall foreign losses for income subject to the passive interest limitation, DISC dividend limitation, and general limitation on a combined basis in accordance with the rules in §1.904(f)–1(c)(1). The rules contained in §§1.904(f)–1 through 1.904(f)–6 are applicable to affiliated groups filing consolidated returns. This section provides special rules for applying those sections to such groups. Paragraph (b) provides rules for additions and subtractions of a portion of overall foreign losses to and from consolidated overall foreign loss accounts. Paragraph (c) requires that separate notional overall foreign loss accounts be kept for each member of the group that contributes to a consolidated overall foreign loss account and provides for allocation of a portion of the group's overall foreign loss account to a member when the member leaves the group prior to recapture of the entire amount of the loss account. These rules are similar to the rules provided in §1.1502–21(b)(2) (or §1.1502-79A, as appropriate) concerning the apportionment of consolidated net operating losses to a member who leaves the group. However, the rules differ somewhat because the absorption rule of §1.1502–21(b)(1) (or §1.1502-79A, as appropriate) is applied year-by-year, consistently with the sequence rules of section 172(b), and recapture of overall foreign losses is based on overall foreign loss accounts that may consist of losses in more than one year. Paragraph (d) provides rules for recapture of amounts in consolidated overall foreign loss accounts. Paragraph (e) provides special rules pertaining to section 904(f)(3) dispositions between members of a group. Paragraphs (b),