
Opinion of the Tax Commissioner

Date Issued: June 23, 2006

Opinion No.: 06-0003

Tax: Commercial Activity

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Subject: Consolidated Election

This request for an Opinion of the Tax Commissioner was received on April 17, 2006. The request concerns whether XXXX Corporation and its subsidiaries (collectively referred to as Taxpayer) can modify its consolidated elected taxpayer group election that was made under R.C. 5751.011.

TAXPAYER STATEMENT OF FACTS

Taxpayer originally made its consolidated elected taxpayer group election choosing to only include in its group those entities that the common owner(s) had at least an 80% common ownership. Taxpayer's election was made when it filed its registration in September, 2005. When making the election, Taxpayer also chose to exclude foreign entities. Subsequent to Taxpayer's election, Taxpayer had a change in its organizational structure.

When Taxpayer originally filed its application, it had 100% ownership in both a foreign entity (Foreign) and a domestic entity (Domestic 1). Domestic 1, in turn, had 100% ownership in another entity (Domestic 2). After the reorganization, Domestic 2 issued a new series of stock with voting rights to Foreign, which gave Foreign 48% ownership. Domestic 1 retained the remaining 52% common ownership of Domestic 2.

QUESTIONS PRESENTED BY TAXPAYER

Question 1. Taxpayer wishes to know if it can "modify" the election during the eight calendar quarters following the initial election. By "modify", Taxpayer means can it change its original ownership test from "at least 80%" down to "at least 50%".

Question 2. Taxpayer has excluded foreign entities and wants to know if a domestic entity can still be part of Taxpayer's consolidated elected taxpayer group filing even though a portion of the domestic entity is now owned by an excluded foreign entity.

Question 3. Taxpayer requests an opinion as to the expiration date of the eight calendar quarter period – is it June 30, 2007 or December 31, 2007?

ANALYSIS

R.C. 5751.011 provides the criteria for making a consolidated elected taxpayer group election. As modified by Am. Sub. H.B. 530, R.C. 5751.011(A)(1) states “*** The group shall notify the tax commissioner of the foregoing elections before the due date of the return in which the election is to become effective. ***” Thus, after the due date of the return, the election made by the consolidated elected taxpayer group is binding. In addition, R.C. 5751.011(A)(3)(a) states “The group shall file reports as a single taxpayer for at least the next eight calendar quarters following the election so long as at least two or more of the members of the group meet the requirements of division (A)(1) of this section.” Pursuant to that provision, the election cannot be changed unless there are no longer two or more members in the consolidated elected taxpayer group.

Am. Sub. H.B. 530 also made changes to R.C. 5751.011(A)(1), which addressed “foreign entities”. Prior law referenced an exclusion for “foreign corporations”. The amendment to that provision now states that the exclusion is for all “*** foreign entities that are not incorporated or formed under the laws of a state or of the United States ***”. Such exclusion does not apply to entities (U.S. entities) incorporated or formed under the laws of a state or of the United States.

ANSWER

With regard to Question 1, Taxpayer may not change its election from 80% to 50% because the election it made was binding after the due date of the return for which the election was made by the consolidated elected taxpayer group. Such election will be binding for eight calendar quarters. To effectuate a change in the consolidated elected group, Taxpayer may notify the Tax Commissioner before the expiration of the eight calendar quarters, pursuant to R.C. 5751.011(A)(3)(b), that it is cancelling its designation as a consolidated elected taxpayer group and may make a new election at that time using the 50% threshold for common ownership instead of the prior 80% threshold elected by Taxpayer.

With regard to Question 2, Taxpayer, by electing to exclude foreign entities, can only use that provision to exclude foreign entities from the consolidated elected taxpayer group. The election to exclude foreign entities cannot be used to exclude entities for purposes of determining common ownership. Therefore, all U.S. entities that meet the common ownership requirements, even those entities that may be fully or partially owned via a foreign entity, must still be included in the consolidated elected taxpayer group if assuming the entities meet the common ownership threshold percentage chosen by the consolidated elected taxpayer group. Based on the facts provided by Taxpayer, Taxpayer must still include Domestic 2 in its consolidated elected taxpayer group because, as a U.S. entity, the

common owner in the consolidated elected taxpayer group effectively has 100% common ownership with that entity (52% from Domestic 1 and 48% via Foreign).

With regard to Question 3, Taxpayer's election was made with its registration in September, 2005, and, therefore, was binding on February 10, 2006 – the due date of the first return. Taxpayer must elect to cancel its designation as a consolidated elected taxpayer group by June 30, 2007 in order to prevent a continuation of its current election for another eight calendar quarters.

CLOSING

This opinion applies only to Taxpayer. It may not be transferred or assigned. In addition, the tax consequences stated in this Opinion are subject to change for any of the reasons provided for in R.C. 5703.53(C). It is the duty of Taxpayer to be aware of such changes pursuant to R.C. 5703.53(E).

William W. Wilkins
Tax Commissioner