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Stradley Ronon Stevens & Young, LLP
2005 Market Street
Suite 2600
Philadelphia, PA 19103-7018
215.564.8000 Telephone
215.564.8120 Facsimile
www.stradley.com

With other offices in:
Washington, D.C.
New York
New Jersey
Illinois
Delaware

www.meritas.org

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IRS Determines that NOL Carryback Waiver Does Not Include Product Liability Losses

The IRS, in TAM 202120015, has determined that a taxpayer who elected to waive its right to carryback the entire net operating loss (NOL) under Section 172(b)(3) and Treas. Reg. Section 1.1502-21(b)(3)(i) may not make a separate election to carryback specified liability losses not composed of product liability losses 10 years under Section 172(b)(1)(C). The taxpayer, a parent corporation of an affiliated group that files a consolidated federal income tax return, made valid elections to waive its consolidated NOLs on two separate federal income tax returns. Subsequently, the taxpayer discovered that it had specified liability losses (SLL) and filed amended returns to carryback such losses to years prior to the tax years on which it made such Section 172(b)(3) elections, stating that it only intended to waive the 2-year carryback period not the 10-year carryback period for SLLs. (All Section references are to the Internal Revenue Code of 1986, as amended and the Treasury Regulations thereunder.)

Section 172 allows a taxpayer to take a deduction for its NOL carryovers and carrybacks in a given tax year. An NOL can be carried back to each of the two taxable years preceding the taxable year of such loss and carried forward to each of the 20 taxable years following the loss. Whereas an SLL, which includes certain product liability losses (PLLs), can be carried back to each of the10 taxable years preceding the taxable year of such loss. A taxpayer entitled to a carryback loss may make an election to relinquish the entire carryback period—however, Treas. Reg. Section 1.172-13(c)(4) provides that if a taxpayer sustains during the taxable year both an NOL not attributable to product liability and a PLL, an election to relinquish the entire carryback period does not preclude the PLL from being carried back 10 years.

Despite the taxpayer's arguments, the IRS found that a taxpayer, who makes an election under Section 172(b)(3) to waive the entire carryback period for a taxable year may not carry back any portion of the taxpayer's NOL not attributable to PLLs, including any portion of the NOL that is attributable to an SLL not composed of PLLs. Section 172(c) defines an NOL as encompassing all allowable deductions for the taxable year, including deductions that generate SLLs, and thus only one NOL exists in any given taxable year. As such, an election to relinquish the entire carryback period with respect to an NOL applies to the entire NOL for the taxable year and includes all carryback periods, except the 10-year carryback period for PLLs as set forth in Treas. Reg. Section 1.172-13(c)(4). A taxpayer making the election is not required to specify which carryback period it is waiving because the language of Section 172(b)(3) states that it is waiving the entire carryback period. Consequently, a taxpayer making an election under Section 172(b)(3) is prohibited from carrying back any portion of the NOL not attributable to PLLs, including any portion of the NOL attributable to an SLL not composed of PLLs.

IRS Announced Nonacquiescence in Sixth Circuit Split-Dollar Insurance Case

The IRS has announced, in an action on decision (AOD 2021-02, 2021-21 IRB 1156), that it will not acquiesce to the Sixth Circuit holding in *Machacek v. Commissioner*, 906 F.3d 429 (6th Cir. 2018), *rev'g* T.C. Memo. 2016-55. *Machacek* held that the economic benefits of a compensatory split-dollar life insurance arrangement may be treated as a distribution with respect to stock under Section 301.

In T.C. Memo 2016-55, the IRS found that an S Corporation's benefit plan came under the split-dollar life insurance arrangement regulations and that it was a compensatory split-dollar arrangement (not a shareholder split-dollar arrangement). As such, the IRS held that the

distributions to the shareholder-employee from the compensatory split-dollar arrangement should be treated as income to the individual. However, the Sixth Circuit reversed the IRS's holding in T.C. Memo 2016-55 after concluding that Treas. Reg. Section 1.301-1(g)(1)(i), which was not referenced in T.C. Memo 2016-55, "treats economic benefits provided to a shareholder pursuant to any split-dollar arrangement as a distribution of property within the ambit of Section 301".

Per the IRS, "nonacquiescence" signifies that, although no further review was sought, the IRS does not agree with the holding of the court and, generally, will not follow the decision in disposing of cases involving other taxpayers. In reference to an opinion of a circuit court of appeals, a "nonacquiescence" indicates that the IRS will not follow the holding on a nationwide basis. However, the IRS will recognize the precedential impact of the opinion on cases arising within the venue of the deciding circuit.

IRS Corrects Instructions for Reporting Section 1231 Gain on Form 8949

The IRS has announced corrections to the 2020 instructions for Form 8949, Sales and Other Dispositions of Capital Assets, for reporting the deferral and inclusion of Section 1231 gains that are rolled into a qualified opportunity fund under Section 1400Z-2 (enacted as part of the 2017 Tax Cuts and Jobs Act). Section 1231 gain is gain from the sale of real or depreciable property that was used in a trade or business and held for more than one year. A taxpayer can elect to roll such gain into a qualified opportunity fund and uses Form 8949 to do so. The corrections address the specific instructions for reporting the deferral or inclusion on two separate rows and other non-substantive changes.

Christopher C. Scarpa

Jacquelyn Gordon

For more information, contact Christopher C. Scarpa at 215.564.8106 or cscarpa@stradley.com or Jacquelyn Gordon at 215.564.8176 or jgordon@stradley.com.

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