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Tax Account Analysis and Recovery Services Client Alert: Wells Fargo Victory Broadens Interest Netting for Merged Corporations

The United States Court of Federal Claims recently granted partial-summary judgment to Wells Fargo & Company in a significant interest netting case addressing the application of Section 6621(d) of the Internal Revenue Code to companies that have combined in a statutory merger. In a case of first impression, the Court held that companies that were unrelated before a merger became the “same taxpayer” for purposes of Section 6621(d) when one company acquired another and the latter was merged out of existence in a reorganization described in Code Sections 368(a)(1)(A) and (a)(2)(D). Accordingly, the combined-surviving company is entitled to the benefits of interest netting, even with respect to interest on underpayments of tax and overpayments of tax paid attributable to pre-merger periods during which the companies were unrelated.

For companies that have acquired other companies under Code Section 368(a)(1)(A) or (a)(2)(D) reorganizations, consideration should be given to the opportunities for achieving zero rate interest now recognized by the Court of Claims in the following situations:

- netting pre-merger interest of the acquired company with pre-merger interest of the acquiring company, or
- netting pre-merger interest of the acquired or acquiring company[ies] with post-merger interest of the surviving company.

The basis for the Court’s holding was the general principle that in the case of a statutory merger, the acquired corporation[s] ceases to exist, becoming one and the same by operation of law with the surviving corporation. The surviving corporation is both liable retroactively for the tax payments of its predecessor[s] even if such payments were made pre-merger, and entitled to any refund due from tax overpayments made by the corporation if the government has not yet paid the refund. The Court concluded that “an acquired corporation is the ‘same taxpayer’ as the surviving corporation following a statutory merger.”

The Court considered and rejected a number of arguments successfully asserted by the government in prior cases (albeit in cases not involving a statutory merger), including that (i) only corporations with the same EIN/TIN [when both the tax underpayments and tax overpayments were made] could avail themselves of interest netting; and (ii) Code Section 6621(d) was a waiver of the government's sovereign immunity and accordingly was to be construed strictly in favor of the government.

If your company is the product of a statutory merger and it:

- received a refund within the last six years, or
- paid a deficiency within the last two years, or
- has been assessed tax and interest with respect to a tax year open under waiver,

it may be able to benefit from the Wells Fargo decision.

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Please feel free to discuss any aspects of this Client Alert with your regular Milbank contacts or any of the members of our Tax Account Analysis and Recovery Services group.

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