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Milbank Tax Lawyer Michael J. Grace Comments on IRS Chief Counsel Advice 201222001 (Released June 1, 2012)

Declining to treat them as the "same taxpayer" under Section 6621(d) of the Internal Revenue Code, the IRS denied "interest netting" between a parent corporation and a subsidiary. The IRS rejected the claimed benefit because it was unconvinced that the parent and subsidiary had merged for tax purposes. However, the pronouncement noteworthily acknowledges that a corporation surviving a statutory merger and the acquired corporation may be the "same taxpayer" for purposes of interest netting.

Section 6621(d) basically allows taxpayers to "net" interest payable to the IRS and interest receivable from the IRS on overlapping tax underpayments and overpayments. Interest "netting" mitigates the Code's general requirement that corporations pay the IRS interest on tax underpayments at a higher rate than the rate at which the IRS pays interest on tax overpayments. But for interest netting, a corporation sometimes would owe the IRS interest even though the corporation owes the IRS no underlying tax.

In *Federal Tax Weekly* for June 7, 2012, published by CCH, a Wolters Kluwer business, Grace commented:

"In CCA 201222001, the IRS again has declined to treat a parent corporation and a subsidiary as the 'same taxpayer' under Section 6621(d). However, the CCA helpfully acknowledges that under some circumstances, a corporation surviving a statutory merger and the acquired corporation are the 'same taxpayer' for purposes of interest netting. The CCA also implies that the IRS in examining tax returns considers the surviving corporation the 'same taxpayer' only if it could be both liable for tax the acquired corporation had underpaid and entitled to credit or refund of tax the acquired corporation had overpaid."

Grace also observed that the IRS in CCA 201222001 had not discussed or even cited two significant cases exploring the scope of "same taxpayer" under Section 6621(d) in different factual contexts and with different results: *Energy East Corporation v. United States*, 645 F. 3d 1358, 2011-1 USTC 50,460 (Fed. Cir. 2011), aff'g 92 Fed. Cl. 29, 2010-1 USTC 50,291 (Fed. Cl. 2010) (disallowing interest netting between parent corporation and acquired subsidiaries for periods preceding their consolidation), and *Magma Power Company v. United States*, 101 Fed. Cl. 562, 2011-2 USTC 50,694 (Fed. Cl. 2011) (allowing interest netting between acquired corporation and consolidated group of corporations it joined as a result of the acquisition).

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