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DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[TD 9700]

RINs 1545-BK73; 1545-BL80

Allocation of Earnings and Profits in Tax-Free Transfers from One Corporation to Another; Acquiring Corporation for Purposes of Section 381

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations.

SUMMARY: This document contains final regulations under section 312 of the Internal Revenue Code (Code) that clarify the regulations under section 312 regarding the allocation of earnings and profits in tax-free transfers from one corporation to another. These regulations affect corporations involved in these transfers and their shareholders. This document also contains final regulations under section 381 of the Code that modify the definition of an acquiring corporation for purposes of section 381 with regard to certain acquisitions of assets. These regulations affect corporations that acquire the assets of other corporations in corporate reorganizations.

DATES: Effective Date: These regulations are effective on **[INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

Applicability Date: These regulations apply to transactions occurring on or after **[INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

FOR FURTHER INFORMATION CONTACT: Stephanie D. Floyd at (202) 317-6848 or Isaac W. Zimbalist at (202) 317-6847 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background

This document contains amendments to 26 CFR part 1 under section 312 and section 381 of the Code. On April 16, 2012, the IRS and the Treasury Department published a notice of proposed rulemaking (REG-141268-11) in the **Federal Register** (77 FR 22515) containing proposed regulations under section 312 (proposed section 312 regulations) to clarify §1.312-11 regarding the allocation of earnings and profits in nonrecognition transfers of property from one corporation to another. The proposed section 312 regulations provided that, in a transfer described in section 381(a) (section 381 transaction), the acquiring corporation, as defined in §1.381(a)-1(b)(2), would succeed to the earnings and profits of the distributor or transferor corporation. For example, in a reorganization under section 368(a)(1) by reason of section 368(a)(2)(C), if the transferee corporation that directly acquires a transferor corporation's assets transferred some, but not all, of the acquired assets to a controlled subsidiary, the transferee corporation (the acquiring corporation under §1.381(a)-1(b)(2)) would succeed to the transferor corporation's earnings and profits. However, if the transferee corporation instead transferred all of the acquired assets to a controlled subsidiary, then the controlled subsidiary (the acquiring corporation under §1.381(a)-1(b)(2)) would succeed to the transferor corporation's earnings and profits.

Comments responding to the proposed section 312 regulations were received, but no public hearing was requested or held. In response to the comments received on the proposed section 312 regulations, on May 7, 2014, the IRS and the Treasury Department published a notice of proposed rulemaking (REG-131239-13) in the

Federal Register (79 FR 26190) containing proposed regulations under section 381 (proposed section 381 regulations) to modify the definition of an acquiring corporation for purposes of section 381 with regard to certain acquisitions of assets. As discussed in the preamble to the proposed section 381 regulations, commenters generally welcomed the apparent certainty provided by the proposed section 312 regulations regarding the location of the transferor corporation's earnings and profits. However, commenters suggested that this certainty was illusory because the existing definition of "acquiring corporation" under §1.381(a)-1(b)(2) focused on whether the direct transferee corporation in a reorganization further transferred all of the assets it received in the section 381 transaction. Thus, commenters suggested that the existing regulations under section 381 should be revised to limit the degree of electivity regarding the identity of the acquiring corporation, as well as the uncertainty regarding whether all of the assets transferred in the section 381 transaction were further transferred to a single controlled corporation.

The proposed section 381 regulations provided greater certainty regarding the identity of the acquiring corporation by providing that, in a transaction described in section 381(a)(2), the term acquiring corporation means the corporation that directly acquired the assets transferred by the transferor corporation, even if the direct transferee corporation ultimately retained none of the assets so transferred. As discussed in the preamble to the proposed section 381 regulations, the IRS and the Treasury Department believe that this rule is appropriate with respect to determining the location of the earnings and profits (as well as other tax attributes) of a transferor corporation because it generally maintains such earnings and profits at the corporation

closest to the transferor corporation's former shareholders in a manner that minimizes electivity and administrative burden. No comments were received in response to the proposed section 381 regulations, and no public hearing was requested or held.

Explanation of Provisions

The proposed section 381 regulations are adopted without substantive change by this Treasury decision. Because the proposed section 312 regulations merely cross-reference the section 381 regulations, this Treasury decision also adopts the proposed section 312 regulations without substantive change.

However, these final regulations make a clarifying, non-substantive change to the proposed section 312 regulations. The proposed section 312 regulations provided that “[e]xcept as provided in §1.312-10, in all other cases in which property is transferred from one corporation to another and no gain or loss is recognized (or is recognized only to the extent of the property received other than that permitted to be received without the recognition of gain), no allocation of the earnings and profits of the transferor is made to the transferee.” These final regulations remove the language “and no gain or loss is recognized (or is recognized only to the extent of the property received other than that permitted to be received without the recognition of gain).” The IRS and the Treasury Department believe this language may inappropriately imply that allocation of earnings and profits may be permitted in cases in which gain not expressly described is recognized on the transfer of property between corporations (for example, gain required to be recognized under section 367 or 1001). This clarifying, non-substantive change confirms that except as provided in §1.312-10, in all other cases in which property is

transferred from one corporation to another, no allocation of earnings and profits is made.

Special Analyses

It has been determined that this Treasury decision is not a significant regulatory action as defined in Executive Order 12866, as supplemented by Executive Order 13563. Therefore, a regulatory assessment is not required. It has also been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations, and because these regulations do not impose a collection of information on small entities, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Pursuant to section 7805(f) of the Code, the notices of proposed rulemaking that preceded these regulations were submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on their impact on small business, and no comments were received.

Drafting Information

The principal author of these regulations is Stephanie D. Floyd of the Office of Associate Chief Counsel (Corporate). Other personnel from the IRS and the Treasury Department participated in their development.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Adoption of Amendments to the Regulations

Accordingly, 26 CFR part 1 is amended as follows:

PART 1--INCOME TAXES

Paragraph 1. The authority citation for part 1 continues to read in part as follows:

Authority: 26 U.S.C. 7805 * * *

Par. 2. Section 1.312-11 is amended by revising paragraph (a) and adding paragraph (e) to read as follows:

§1.312-11 Effect on earnings and profits of certain other tax-free exchanges, tax-free distributions, and tax-free transfers from one corporation to another.

(a) In a transfer described in section 381(a), the acquiring corporation, as defined in §1.381(a)-1(b)(2), and only that corporation, succeeds to the earnings and profits of the distributor or transferor corporation (within the meaning of §1.381(a)-1(a)). Except as provided in §1.312-10, in all other cases in which property is transferred from one corporation to another, no allocation of the earnings and profits of the transferor is made to the transferee.

* * * * *

(e) Effective/applicability date. Paragraph (a) of this section applies to transactions occurring on or after **[INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

Par. 3. Section 1.381(a)-1 is amended by:

- a. Removing the third, fourth, and fifth sentences of paragraph (b)(2)(i) and adding one sentence in their place.
- b. Removing from the last sentence of paragraph (b)(2)(ii) Example 2 “Y” and adding “X” in its place.
- c. Redesignating paragraph (b)(3)(i) as paragraph (b)(3).
- d. Removing paragraph (b)(3)(ii).
- e. Adding a sentence at the end of paragraph (e).

The additions read as follows:

§1.381(a)-1 General rule relating to carryovers in certain corporate acquisitions.

* * * * *

(b) * * *

(2) * * * (i) * * * In a transaction to which section 381(a)(2) applies, the acquiring corporation is the corporation that, pursuant to the plan of reorganization, directly acquires the assets transferred by the transferor corporation, even if that corporation ultimately retains none of the assets so transferred.

* * * * *

(e) * * * The last sentence of paragraph (b)(2)(i) of this section and Example 2 of paragraph (b)(2)(ii) of this section apply to transactions occurring on or after **[INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

§1.381(c)(2)-1 [Amended]

Par. 4. Section 1.381(c)(2)-1 is amended by removing paragraph (d).

John Dalrymple,

Deputy Commissioner for Services and Enforcement.

Approved: October 17, 2014.

Mark J. Mazur,

Assistant Secretary of the Treasury (Tax Policy).

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