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TAX SECTION

ELECTION OF TAX FREE INTERCORPORATE DIVIDENDS UNDER THE REVENUE ACT OF 1964*

SHELDON S. COHEN**

INTRODUCTION

Tax planning for the care and feeding of multiple corporate organizations has taken on a completely new look as a result of the Revenue Act of 1964. To be sure, some problems refuse to die or even fade away—for example, the possible loss of multiple surtax exemptions through the application of tax avoidance sections of the Code and the decision as to whether consolidated returns are desirable. However, the 1964 Act gives these old problems some new “twists” and opens up a veritable Pandora’s box of new alternatives. On the whole, it seems clear that the 1964 multiple corporation package can be used to advantage by multiple groups, but careful tax planning—and a touch of omniscience—will be required to take full advantage of the new opportunities.

The subject of this paper is the 100 percent dividends received deduction for corporations, one of the new alternatives open to businesses operated in the parent-subsidary form of multiple corporate organization. From a theoretical and technical standpoint, this provision is one of the most interesting in the Revenue Act of 1964—although, as a practical matter, it is probable that many, if not most, multiple organizations will find that other alternatives are more advantageous.¹ A significant

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1. See, Dale, *1964 Act: Climate Improved for Multiple Corporations Despite Penalty Tax*, 20 JOURNAL OF TAXATION 264, 267 (1964).

portion of the following discussion is devoted to linking the new statutory provisions with the policy considerations underlying their adoption. This is intended to bring the statutory rules into sharper focus. To complete the picture, certain problems which the new legislation poses for the regulations draftsmen and a few of the more important operating problems will be discussed.

LEGISLATIVE HISTORY OF THE TAX ON INTERCORPORATE DIVIDENDS

The legislative history of the tax on intercorporate dividends indicates a close relationship between the tax and the so-called "multiple surtax exemption" problem. For a number of years before 1935, the dividend income of corporations had been fully deductible in determining taxable income. In 1935, the Congress revised the corporate income tax by substituting a moderately graduated rate structure in lieu of the prior flat uniform rate.² In connection with this rate revision, the administration recommended that the dividend income of corporations be included within the tax base. The following quotation from President Roosevelt's tax message to the Congress in June 1935, is especially pertinent:

Provision should, of course, be made to prevent evasion of such graduated tax on corporate income through the device of numerous subsidiaries or affiliates, each of which might technically qualify as a small concern even though all were in fact operated as a single organization. The most effective method of preventing such evasions would be a tax on dividends received by corporations.³

The Congress responded to this appeal by reducing the intercorporate dividends received deduction from 100 percent to 90 percent.⁴ In the Revenue Act of 1936, the graduated rates on corporate income were increased slightly and the dividends received deduction was reduced to 85 percent.⁵ Since 1936, the dividends received deduction has remained at 85 percent.⁶

2. REVENUE ACT OF 1935, § 102 (a).

3. Address by President Roosevelt to Congress, June 9, 1935, reprinted in 1939 C.B. (Part 2) 642, 644.

4. REVENUE ACT OF 1935, § 102 (h).

5. REVENUE ACT OF 1936, §§ 13, 26 (b). The rate structure and intercorporate dividend tax adopted by the REVENUE ACT OF 1936 actually superseded the corresponding provisions of the REVENUE ACT OF 1935. In both cases the amendments were to be effective for taxable years of corporations beginning after December 31, 1935.

6. There are exceptions to this general rule including, of course, the amendment made

REVENUE ACT OF 1964

President Kennedy's recommendations to Congress in February 1963, included a proposal to reverse the existing normal tax and surtax rates, thus giving small corporations with taxable income of \$25,000 or less the benefit of a substantially greater rate reduction than larger corporations would receive.⁷ However, in order to restrict the benefits of the surtax exemption as well as the rate reversal to the intended beneficiaries (small business), the President recommended that the rate reversal be "accompanied by action designed to eliminate the advantage of the multiple surtax exemptions now available to large enterprises operating through a chain of separately incorporated units."⁸ The Treasury proposed implementing the President's recommendation by allowing only one surtax exemption to groups of corporations under common control. This was to be accomplished over a 5-year transition period. In addition, the Treasury proposal would have imposed similar restrictions on multiple \$100,000 minimum accumulated earnings credits and multiple \$100,000 exemptions from estimated tax.

Other recommendations demonstrated that the Treasury was acutely aware of the interrelationship of the surtax problem and the intercorporate dividend tax. In view of the legislative history of the 85 percent dividends received deduction and the rather complete solution to the surtax problem which the President's recommendations would have achieved, it is not surprising that the Treasury also recommended that the dividends received deduction be increased to 100 percent for intercorporate dividends among parent-subsidary corporations which

by the REVENUE ACT OF 1964 which is the subject of this article. In addition, the consolidated return provisions have always permitted the elimination of otherwise taxable intercorporate dividends among members of an affiliated group filing consolidated returns, and § 57 (b) of the TECHNICAL AMENDMENTS ACT OF 1958 amended § 243 to provide for a 100-percent dividends received deduction in the case of dividends received by a small business investment company operating under the SMALL BUSINESS INVESTMENT ACT OF 1958.

7. Prior to the REVENUE ACT OF 1964, the corporate normal tax rate, which applied to the corporation's entire taxable income, was 30 percent, and the surtax rate, applicable only to corporate taxable income in excess of \$25,000, was 22 percent. The President recommended that the two rates of tax be switched—or "reversed"—so that the normal rate of tax would be the lower of the two rates and the surtax would be the higher. See, President Kennedy's Tax Message to the Congress, January 24, 1963, *Hearings Before the House Ways and Means Committee on the President's 1963 Tax Recommendations, Part I*, 88th Cong., 1st Sess., 5, 14 (1963).

8. *Hearings, op. cit. supra* note 7, at 14.

were subject to the new multiple corporation sanctions.⁹ The recommendation did not endorse the total repeal of the intercorporate dividend tax, presumably, for several reasons. First, the definition of a "parent-subsidiary controlled group" contained in the surtax proposal was based upon 80 percent stock ownership of a corporation by other members of the controlled group—thus, multiple organizations based on a lesser degree of control were not subject to the proposed sanctions. As to these non-covered organizations, the intercorporate dividend tax would continue to serve its original purpose. Secondly, the universal repeal of the tax would have resulted in a large revenue loss—estimated at \$200 million by the Treasury.¹⁰

The House Ways and Means Committee was impressed by the President's recommendations in the multiple corporation area and particularly by the effect which the reversal of the corporate normal tax and surtax would have on incentive to multiply. However, rather than fight the many multiple groups whose expansion plans were geared to the availability of additional surtax exemptions, the committee switched to a penalty tax system designed only to prevent multiple groups from increasing their tax advantage as a result of the proposed normal and surtax rate reversal. Under the committee's system, if the multiple group elects to retain the privilege of multiple surtax exemptions, each corporation in the group was to be subject to a 6 percent additional tax on its taxable income not in excess of \$25,000.¹¹

As a result of this action on the part of the Ways and Means Com-

9. Technical Implementation of the President's Recommendations Contained in His Message on Taxation, *Hearings, op. cit. supra* note 7, at 81. The multiple corporation "package" also included the proposed repeal of the additional 2 percent tax imposed on the consolidated taxable income of an affiliated group filing a consolidated return. See, *Hearings, op. cit. supra* note 7, at 81.

10. Two other points are worth noting. Complete elimination of the intercorporate dividend tax would provide an even greater incentive for tax avoidance schemes to avoid the personal holding company rules. Also, consider the abuse which would arise through a combination of the interest deduction and the receipt of tax-free dividend income arising from investment of borrowed monies. Assuming the complete elimination of the intercorporate dividend tax took the form of a 100 percent dividends received deduction, similar to the § 243 (b) approach, § 265, relating to nondeductibility of expenses allocable to tax-exempt income, would not apply because the dividends received would not be "wholly exempt from the taxes imposed by subtitle A of the Code." See Treas. Reg. (hereafter cited Reg.) § 1.265-1 (b).

11. See § 223 of H.R. 8363 as reported by the House Ways and Means Committee, 88th Cong. The Ways and Means Committee's multiple corporation plan was accepted by the House and Senate, subject to several minor technical changes, and became § 235 of the REVENUE ACT OF 1964.

mittee, the Treasury withdrew its support of a 100 percent dividends received deduction for intercorporate dividends. As previously indicated, the principal justification for the intercorporate dividends tax was to prevent the use of multiple corporations. It is obvious that the 6 percent penalty system is not an effective bar to the use of multiples. Under the penalty tax system each additional exemption is worth up to \$5,000 annually (compared to \$5,500 under pre-1964 law) and it will be possible for highly proliferated groups with total earnings in the millions to pay an effective rate of tax of only 28 percent. Since there is still a need to prevent split-ups, the intercorporate dividend tax ought to remain as an impediment. Moreover, the committee did not accept the President's recommendations as to restrictions on multiple accumulated earnings credits and exemptions from estimated tax, two other important advantages accruing to multiple groups.

In the Senate, the Treasury did not renew the original multiple corporation proposal or any of the other reforms jettisoned in the House, but urged the Senate Finance Committee to act—and as swiftly as possible—on the provisions of the House bill.¹²

At this point, a group of taxpayers who were positively delighted at the prospect of exchanging a few multiple surtax exemptions for large amounts of tax free intercorporate dividends in line with President Kennedy's original proposals, entered the picture. Armed with documentary proof that the Treasury supported the proposition that tax free intercorporate dividends made good sense in cases where the advantages of multiple incorporation were withdrawn, these taxpayers called the Treasury's hand by offering to suffer the slings and arrows of the original proposal in return for the tax free dividend privilege. The Treasury at first pointed out that these taxpayers could gain their objective by filing a consolidated return—indeed, a consolidated return without the 2 percent penalty imposed under old law. The taxpayers answered by pointing out that in certain situations the consolidated return alternative was not practical. Once the Treasury was assured that the new system would prevent the taxpayers from obtaining the best of both worlds (*i.e.*, reap a prime consolidated return benefit, but simultaneously retain the benefits of separate filing), the Treasury agreed and the 100 percent dividends received deduction emerged as section 214 of the Revenue Act of 1964.¹³

12. See statement of Secretary Dillon, *Hearings Before the Committee on Finance of the Senate on H.R. 8363, Part I*, 88th Cong., 1st Sess., 131, 143.

13. 78 Stat. 52 (1964).

One might ask why the Treasury did not immediately snap up the offer—after all, those electing would have to give up multiple surtax exemptions, thus furthering the Treasury's essential purpose. However, it is probable that the proponents of the 100 percent dividends received deduction were rather large corporations with a few subsidiaries. The large chains of corporations all earning \$25,000 or thereabouts were not interested in the new proposal. Of course, it *was* the latter type of chain that most interested the Treasury.

STATUTORY FRAMEWORK

The statutory pattern implementing the 100 percent dividends received deduction is relatively simple. The operative provision is section 243 (a) (3) which awards a dividends received deduction of 100 percent in the case of "qualifying dividends". New section 243 (b) is devoted entirely to the definition of qualifying dividends and related matters. In order for dividends to qualify for purposes of section 243 (a) (3), section 243 (b) (1) requires:

(1) On the day the dividends are received, the corporation receiving the dividends and the corporation paying the dividends must be members of the same affiliated group,¹⁴ and

(2) The affiliated group must have made the election provided by section 243 (b) (2) effective for the taxable years of its member corporations which include the day the dividend is received.

These requirements are conditions precedent to qualification for the 100 percent dividends received deduction. However, even if these conditions are satisfied, several other rigorous requirements must be met before a distribution may legitimately bear the noble stamp of "qualifying dividends".

"QUALIFYING" EARNINGS AND PROFITS

The definition of "qualifying dividends" includes only dividends which are distributed out of earnings and profits of taxable years of the distributor corporation which meet each of the following conditions:

(1) On each day of the year the distributing and recipient corporations must have been members of the same affiliated group of which

14. An "affiliated group" is defined by reference to § 1504(a) except that for purposes of § 243 (b) any domestic insurance company subject to taxation under § 802 or 821 is treated as an includible corporation. See § 243 (b) (5).

they are members on the date the dividend is received by the recipient corporation,

(2) An election under section 1562 (relating to election of multiple surtax exemptions) must not be effective for the year, and

(3) The year must end after December 31, 1963.¹⁵

If the year fails any single requirement, the earnings for the year become "tainted", that is, they cannot qualify for the 100 percent deduction, only the 85 percent deduction. The policy considerations underlying the first two conditions seem clear. The condition which requires affiliation can be supported in general terms or in terms of a specific abuse situation. Stripped of the technical niceties of the situation, the profits earned by an 80 percent or more owned subsidiary are more directly the earnings of the parent and no tax should ensue when passed up to the parent.¹⁶ On the other hand, earnings and profits which are attributable to non-affiliation periods will be the result of the independent operations of the distributing corporation rather than the result of its role as an operating cog in the business activity conducted by the affiliated group. Accordingly, the argument can be made that qualification for dividends paid out of these non-affiliated earnings and profits would result in a windfall to the affiliated group.

The abuse situation referred to is the familiar "milking" of the earnings and profits of a subsidiary by the affiliated group followed by a sale of the subsidiary's stock. The price of the stock of a subsidiary acquired by a member of an affiliated group will be determined, in part at least, by the assets representing the accumulated earnings and profits of the subsidiary on the date of the acquisition of the stock. Later distributions out of pre-affiliation earnings and profits to the subsidiary's parent at no tax cost will cause the fair market value of the stock of the subsidiary to fall below the level it would have been had there been no such distribution. The stage is then set for a sale of the stock at the deflated fair market value and a tax loss (or a decrease in the tax gain). This loss (or decrease in gain) would be directly attributable to the tax free withdrawal of pre-affiliation earnings and profits of the subsidiary. The selling shareholders which are members of the affiliated group would enjoy the luxury of a loss, or reduction in gain, for tax purposes without economic deprivation. This problem has been raised in connection with consolidated returns. Thus, section 1.1502-36 (a) (2) of the consolidated return regulations provides that no loss is allowed upon the sale or other

15. § 243 (b) (1) (B).

16. See *Hearings, op. cit. supra* note 7, at 81.

disposition of the stock of a member or former member of an affiliated group to the extent that the loss is attributable to a distribution of earnings and profits of the member which were accumulated before it became a member of the group.¹⁷ Observe that the consolidated return rule is triggered only in cases where the sale of the stock of the subsidiary would produce a tax *loss* in the absence of the protective provision. The solution there is to deny that portion of the loss which is attributable to post-affiliation dividends. Thus, the scope of the consolidated return rule is mild in the face of section 243 (b)'s outright denial of the 100 percent deduction with respect to any distributions out of pre-affiliation earnings and profits.¹⁸

The "tainting" of earnings and profits accumulated by the distributing corporation in taxable years for which a multiple surtax exemption election under section 1562 is effective,¹⁹ of course, is the statutory expression of the underlying policy previously discussed. Since the effective date of section 1562 is for taxable years ending after December 31, 1963, at this point there is nothing which would deny the 100 percent deduction for dividends out of earnings of a pre-1963 year in which multiple surtax exemptions were claimed. However, the third condition for dividend qualification is a flat denial of the 100 percent dividends received deduction in respect to dividends distributed out of earnings and profits of taxable years ending on or before December 31, 1963. Since there are circumstances under which the members of an affiliated group might not have had the benefit of multiple surtax exemptions in taxable years ending on or before December 31, 1963—for example, a consolidated return might have been filed—this last requirement represents more than an extension of the policy against permitting the 100 percent deduction with respect to distributions out of earn-

17. The consolidated return rule is also applicable in the case of a loss on the disposition of bonds or obligations of a member (or former member) of the affiliated group.

18. Although the scope of the two rules is different, the consolidated return rule is actually harsher if, in fact, the stock of the subsidiary is sold at a loss. Thus, under § 243 (b) a 7.2 percent tax is paid with respect to the dividends received whereas under the consolidated return rule this tax is not paid but a deduction worth 25 percent of the dividends is lost.

19. Presumably, the multiple surtax exemption election under section 1562 may be "effective" with respect to a taxable year of a corporation even though the 6 percent additional tax is not applicable for the taxable year by reason of the application of § 1562 (b) (1) (A) or (B). Cf. H. Rept. 749, 88th Cong., A-191. ("However, the application . . . [of an exception to the imposition of the 6-percent tax] does not constitute a termination of an election and, therefore, an election by a controlled group would continue in effect for any succeeding year unless terminated under § 1562 (c).")

ings and profits of "multiple surtax exemption" years. As a practical matter, the December 31, 1963 cut-off provision probably results from the simplicity of using a fixed cut-off date.

For purposes of determining whether any portion of a dividend distribution is out of "tainted" earnings and profits, it will be necessary to allocate distributions to earnings and profits of *particular* taxable years. In determining whether a corporate distribution is a dividend or a return of capital, of course, there are basically only two classifications of earnings and profits—current and accumulated.²⁰ Thus, the specific earmarking of distributions as out of the earnings and profits of a particular year of a distributing domestic corporation has heretofore been unnecessary.²¹ Fortunately, the Senate Finance Committee Report does contain expressions of congressional intent with respect to this issue, although it leaves one with the impression that the Congress was not aware that the allocation of the distribution to earnings and profits of a particular year is a unique problem. The general explanation portion of the Senate Report states:

The determination as to what earnings and profits a dividend is considered as being distributed out of will be made under the rules applicable elsewhere in the Code for this purpose; *i.e.*, they will be considered as paid first out of the current year's earnings and profits and then, to the extent of any excess, out of the prior year's earnings and profits, then, to the extent of any excess, out of the second prior year's earnings and profits, etc.²²

ELECTION

Section 243 (b) (2) provides that the 100 percent dividends received election is to be made by the electing affiliated group's *common parent* corporation with respect to a particular taxable year of the common parent. The election must be consented to²³ by the subsidiary corpora-

20. See § 316 (a).

21. See § 902 (c) which, for purposes of the foreign tax credit, gives "the Secretary or his delegate—full power to determine from the accumulated profits of what year or years . . . dividends where paid . . .". Cf., however, the necessity of allocating distributions to earnings and profits of a specific *period* or *periods* for purposes of §§ 243 (d) and 245 and Reg. § 1.1502-36 (a) (2) of the consolidated return regulations.

22. S. REP. 830, 88th Cong., 76. See also, S. REP. 830, Part 2, 88th Cong., 221 (examples (1) and (2)).

23. The third sentence of § 243 (b) (2) requires that "[E]ach corporation which is a member of . . . [the electing affiliated group] at any time during its taxable year which includes the last day of . . . [the taxable year of the common parent corporation for which the election is made] must consent to such election . . ." (emphasis added).

tions in the group. On April 10, 1964, the Service published temporary regulations²⁴ which provided the procedure to be followed in making the election and giving the required consents. The temporary regulations state that an election under section 243 (b) must be filed no later than the due date (including extensions of time) for the filing of the common parent's income tax return for the first taxable year for which the election is to be effective.²⁵ This is important to remember. The section 243 (b) election, as well as the election to file consolidated returns, are alternatives to the election of multiple surtax exemptions under section 1562 and both must be exercised with the filing of the common parent's return.²⁶ It is true that section 1562 (e) permits the multiple surtax election to be made within a 3-year period after the first year for which the election is to be effective.²⁷ However, taxpayers who postpone consideration of the choices available to them until the expiration of the 3-year period prescribed in section 1562 (e) will find they have no real choice. In essence, the benefits of the 3-year look-back are somewhat illusory.²⁸

With respect to the required consents of all the subsidiaries, the temporary regulations realistically provide that a corporation whose stock is wholly-owned by a member or members of the electing affiliated group is "deemed" to consent to the election.²⁹ This provision recognizes

24. T. D. 6721, 29 F.R. 4997 (1964).

25. Reg. Sec. 19.4-1 (b) (1).

26. The consolidated return regulations require that "the privilege of making a consolidated return under § 1502 for any taxable year of an affiliated group must be exercised at the time of making the return of the common parent for such year." Reg. Sec. 1.1502-10 (a).

27. § 1562 (e) (1) provides that the election shall be made at any time before the expiration of 3 years after "... the date when the income tax return for the taxable year of the component member of the controlled group which has the taxable year ending first on or after the specified December 31 is required to be filed (without regard to any extensions of time)."

28. The 3-year look-back is of some help insofar as the choice between § 1561 (apportionment of a single surtax exemption) and § 1562 is concerned. In deciding whether to apportion a single surtax exemption under § 1561 or elect multiple surtax exemptions under § 1562, the look-back permits controlled groups to take into account adjustments made to the taxable incomes of its members before the running of the 3-year statute of limitations on the assessment of deficiencies.

29. Reg. § 19.4-1 (b) (2) (ii). The Service has also adopted a "deemed consent" procedure for purposes of consents to the apportionment of the single \$100,000 exemption from estimated tax available to electing affiliated groups under § 243 (b) (3) (C) (v) (Reg. § 19.4-1 (c) (2) (iii) and (3) (iii)). See also Reg. § 1.46-1 (f) (2) (i) (relating to consents to the apportionment of the \$25,000 limitation on the allowable investment credit among members of an affiliated group) and Reg. § 19.5-1 (b) (1) and

that the requirement of consent from wholly-owned subsidiaries would be no more than a pure formality. The presumed consent should relieve, to some extent, the problems of "overlooking" dormant subsidiaries which, for example, are kept "alive" solely for the purposes of reserving the corporate name under state law.

In contrast to the consolidated return rules, corporations which are members of the electing affiliated group are not required to use the same taxable years. Consequently, for purposes of determining the taxable years which are affected by the election the statute "matches" the taxable years of the members by using the last day of the common parent's year as a "peg."³⁰ For example, assume the common parent corporation uses a calendar year, and its subsidiary uses a fiscal year ending November 30. If the group makes an election with respect to the taxable year of the common parent ending on December 31, 1965, the election will be effective for that taxable year and the taxable year of the subsidiary ending on November 30, 1966. (The taxable year which includes the last day of the common parent's taxable year.) Once a valid election has been made, it has a continuing effect until the affiliated group affects a termination.

TERMINATION

Section 243 (b) (4) provides two methods of terminating the 100 percent dividends received election. As a practical matter, the termination of the election will only occur when the controlling interests of the affiliated group find it advantageous to terminate. Thus, under one method, the mutual consent of all the corporations which are members of the affiliated group will work a termination³¹ and, under the second method, a corporation which is a new member of the group may file a refusal to consent to an election previously made by the group.³² Since, by definition, 80 percent of the stock of any new member of the group will be owned by a member or members of the group, the second method is no less a "voluntary" termination than the first method.

(2) (relating to consents to the apportionment of the single \$25,000 surtax exemption available under section 1561 (a) to members of a controlled group of corporations).

30. Cf. the use of "December 31" as a peg for purposes of the new multiple surtax exemption provisions. See §§ 1561 (a) and 1562 (a). The difference is probably due to the fact that a "controlled group of corporations" as defined in § 1563 includes, *inter alia*, brother-sister related corporations which are determined by reference to an individual, estate, or trust, rather than a common parent corporation.

31. § 243 (b) (4) (A).

32. § 243 (b) (4) (B).

There would also appear to be a third method of termination which, although not specifically stated in the statute, is implicit in the statutory plan. If the electing affiliated group goes out of existence, for example, as a result of the common parent selling the stock of the subsidiaries, presumably the election will also expire.³³ Moreover, the statutory provisions specifically relating to termination deal only with situations where the election is terminated for the affiliated group as a whole. What about the "termination" of an election with respect to an individual corporation which ceases to be a member of an electing affiliated group as a result of a decrease in the percentage of its stock owned by the continuing members of the electing group? Since the corporation is no longer a member of the affiliated group, and the election can be effective only with respect to a taxable year of a "member of the affiliated group",³⁴ the termination of the election with respect to the departing member is clearly implicit in the statute.

The temporary regulations provide that a section 243 (b) election, once filed, is irrevocable and is not subject to termination under section 243 (b) (4) with respect to the taxable year of the common parent corporation for which the election is made.³⁵ Thus, once an election is perfected with respect to a particular taxable year of the common parent corporation, it will necessarily be effective for at least that taxable year (and the taxable years of the subsidiaries which include the last day of that year). However, there are no restrictions on the termination of the election with respect to subsequent taxable years comparable to the provisions of the consolidated return regulations which permit the members of the affiliated group which once file consolidated returns to return to separate filing only under certain circumstances.³⁶ The restrictions of the consolidated return regulations undoubtedly reflect, to some extent, the Treasury's conviction that the consolidated method of reporting produces a conceptually correct measure of the operations of the affiliated group as a whole, and once adopted, should be continued in the absence of special circumstances. Moreover, the transition from consolidated returns to separate returns present some difficult administrative problems. As respects the 100 percent dividends received election, transition is apparently no problem and the advantages

33. For purposes of the multiple surtax exemption provisions, there is a specific statutory provision for termination in cases where the "controlled group of corporations" goes out of existence. See § 1562 (c) (4).

34. See § 243 (b) (2) (A) and (B).

35. See the last sentence of Reg. § 19.4-1 (b) (1).

36. See Reg. § 1.1502-11 (a).

to be gained from a "locking in" policy are not nearly as great. Thus, this "free exit" policy plus the absence of any statutory restrictions on reelection³⁷ means that the 100 percent dividends received deduction is available on a year-by-year basis. But note that if the group elects multiple surtax exemption for the "out" year, any earnings accruing in such year are not eligible for the 100 percent deduction.

The statutory provision relating to the termination of the 100 percent election by mutual consent of the members of the affiliated group provides that the termination shall be perfected in the same general manner that the election is initially perfected—that is, by the filing of a termination and consents to the termination.

EFFECT OF ELECTION

In return for the tax free intercorporate dividend privilege, the members of an electing affiliated group are required to forego certain tax advantages which they ordinarily would enjoy as corporations filing separate returns. Aside from the surtax exemption limitations, and the limitation relating to exemptions from estimated tax and minimum accumulated earnings credits, the limitations and restrictions imposed on electing affiliated groups by section 243 (b) (3) affect some rather esoteric phases of the determination of corporate tax liability. It is true that in the case of affiliated groups engaged in certain specialized kinds of business activity, the restrictions may be real deterrents to the section 243 (b) election. Nevertheless, it may be that the precedent value of these limitations on related corporations will prove to be more important than the revenue involved.

The restrictions and limitations imposed on electing affiliated groups by section 243 (b) (3) are:

(1) No member of the group may consent to an election under section 1562.

(2) The members of the group must make the same choices respecting the foreign tax credit versus the deduction of foreign taxes and, in the event the foreign tax credit is chosen, all must choose either the per-country or the over-all limitation, and

(3) The members of the electing group are limited in the aggregate, to one \$100,000 minimum accumulated earnings credit,³⁸ one \$100,000³⁹

37. Cf. the 5-year prohibition against reelection of multiple surtax exemptions contained in § 1562 (d).

38. See § 535 (c) (2) and (3).

39. See § 615 (a) and (b).

and \$400,000⁴⁰ limitation for exploration expenditures, one \$25,000 limitation on small business deduction of life insurance companies,⁴¹ and one \$100,000 exemption for purposes of estimated tax filing.⁴²

These particular items were selected as the result of a canvass of the consolidated return regulations. Generally, the limitations included in section 243 (b) (3) are applicable to an affiliated group of corporations filing a consolidated return, albeit in the case of the provision relating to exemptions from estimated tax the consolidated return regulations give the group the option to file on the basis of multiple exemptions.⁴³ As to this latter discrepancy, the Internal Revenue Service consolidated return experts are presently examining the background of this option to determine whether the rule is justifiable in the light of the general theory of consolidated filing.

Notice that for purposes of applying the limitations, it will *not* be necessary to compute an "aggregate taxable income" for the electing affiliated group as a whole. This is significant because several of the limitations applicable to affiliated groups filing consolidated returns are computed by reference to the consolidated taxable income of the group. For example, an affiliated group's consolidated charitable contribution deduction is limited to 5 percent of the aggregate taxable income of the group computed with certain modifications.⁴⁴ One reason for avoiding limitations of this nature for purposes of section 243 (b) is that the members of an electing affiliated group are permitted to use different taxable years. If the computation of an "aggregate taxable income" for an electing section 243 group was a necessary step in determining the amount of a deduction to be taken by a member of such group on its separate tax return, extremely difficult filing problems would emerge. For example, how could a calendar year taxpayer appropriately file its return until it received the results of the "matching year" of another member of the group whose matching year ends November 30.

The Senate Finance Committee report explains the manner of apportioning these fixed amounts. It states that, "except for the \$100,000

40. See § 615 (c) (1).

41. See §§ 804 (a) (4) and 809 (d) (10).

42. See §§ 6016 and 6655.

43. Reg. § 1.1502-10 (c). The Senate Finance Committee apparently overlooked this consolidated return provision. See S. REP. 830, 88th Cong., 76. ("Where an affiliated group elects the 100 percent dividend paid treatment, the members of the group must forego certain advantages which they otherwise would have as separate corporations. These rights are withdrawn since they are not available to a group filing a consolidated return. . . .")

44. Reg. § 1.1502-31 (a) (1) (i) (c).

minimum accumulated earnings credit, it is anticipated that the members of the affiliated group will be permitted to apportion the \$100,000 exemptions, limitations, or the \$400,000 limitation in any manner they see fit.”⁴⁵ Since the affiliated group is not permitted to elect multiple surtax exemptions under section 1562, the group will necessarily be subject to the provisions of section 1561 which specifically permits the allocation of a single \$25,000 surtax exemption in accordance with an apportionment plan.⁴⁶ The reason for the Senate Finance Committee’s reservation with respect to an unequal apportionment of the \$100,000 minimum accumulated earnings credit is based upon the Committee’s fear that the shifting of the \$100,000 credit could produce results which are inconsistent with the purposes of the accumulated earnings tax.⁴⁷

As to the actual mechanics of effecting an apportionment of the various restrictions and limitations, we must await publication of the proposed regulations on this subject. The temporary regulations issued last April do, however, contain interim rules respecting the apportionment of a single \$100,000 exemption from estimated tax.⁴⁸ Two aspects of these rules are of particular interest. First, the temporary regulations are quite clear that the affiliated group as a whole will be permitted a single \$100,000 exemption from estimated tax for the taxable years of its members which include the last day of the taxable year of the common parent corporation for which the election is initially made. This means that if the members of an affiliated group file declarations of estimated

45. S. REP. 830, 88th Cong., 77.

46. See § 1561 (a) (2) and Reg. § 19.5-1 (b) (temporary regulations relating to the apportionment of the \$25,000 surtax exemption for taxable years including December 31, 1963).

47. A proposed statutory draft dealing with the limitation of minimum accumulated earnings credits in the case of multiple corporate groups was developed in 1958 by a joint study group of the American Law Institute and the American Bar Association in connection with a proposed solution to the multiple corporation problem. In rejecting the possibility of a “consent” apportionment of a single \$100,000 minimum accumulated earnings credit among the members of the multiple corporate group, the study group observed: “It is proposed that this minimum credit be allocated equally among members of the group at the close of the taxable year of a member if a consolidated return is not filed. Such a provision is analogous to the general rule provided for the allocation of the surtax exemption among members of an affiliated group. It is recognized that such an allocation may be somewhat arbitrary, but it does not appear to be feasible to allow an election among the group as is provided as an alternative in the surtax exemption area. Such an election here could lead to tax avoidance.” ALI, FEDERAL INCOME, ESTATE AND GIFT TAX PROJECT, *Income Tax Problems of Corporations and Shareholders, Report of Working Views of a Study by the ALI Staff and ABA Section of Taxation Liaison Committee*, October 31, 1958, Part Six, *Multiple Corporations*, 391.

48. Reg. § 19.4-1 (c) (2) and (3).

tax on the basis of separate \$100,000 exemptions and make estimated tax payments on that basis, and later make a 100 percent dividends received election which is initially effective with respect to these taxable years, the members will probably incur additions to tax under section 6655 resulting from the underpayments. This is so, according to the temporary regulations, whether or not the affiliated group anticipated making the 100 percent election at the time the declarations of estimated tax were filed or the payments on the declarations were made.⁴⁹ If the group does anticipate making an election which will be initially effective with respect to the current taxable years of its members, these additions to tax can be avoided by filing declarations for those years and making payments on the basis of a single exemption. If the group eventually decides against making the election, however, it is not compensated (in the form of interest) for having paid too much tax in advance. The temporary regulations do not require the formal apportionment of the single \$100,000 exemption available to the electing group at the time the declarations of estimated tax are actually filed, but provide that the apportionment plan (and the consents of the subsidiaries to the plan) is to be filed with the final income tax return of the common parent. This liberal rule is simply a reflection of the fact that the Internal Revenue Service is not really interested in how the \$100,000 is split up until the tax returns are filed and the additions to tax are determined.

REGULATIONS PROBLEMS

The new section 243 (b) raises several interesting problems of statutory interpretation. The following issues have been selected for discussion because the considerations involved in their resolution illustrate the approach the Internal Revenue Service takes in developing proposed regulations under a new statutory provision.

Section 243 (b) (1) (B) restricts the concept of "qualifying dividends" to dividends "distributed out of earnings and profits of a taxable year of the distributing corporation" which satisfies each of the conditions previously described. The statute is precise in its reference to *a taxable year of the distributing corporation*. But what if the distributing corporation succeeds to the earnings and profits of a predecessor corporation as a result of a reorganization. To complete the hypothetical, assume that if the predecessor corporation had remained in existence and made the

49. See Reg. § 19.4-1 (c) (6), example (2).

distribution itself, the distribution would have qualified under section 243 (b). In other words, the issue is whether the phrase used in section 243 (b) (1) (B)—“a taxable year of the *distributing* corporation”—should be interpreted to qualify dividends distributed out of earnings and profits of a taxable year of a corporation the earnings and profits of which the distributing corporation succeeds to under section 381. It would appear that the Service could justify adopting a strict position here on the grounds that section 243 (b) is in the nature of a relief provision and, under a well accepted canon of statutory interpretation, relief provisions are subject to a strict construction. On the other hand, the strict position would seem to create an unnecessary tax barrier in the road of corporate reorganizations and liquidations which would otherwise be undertaken as a result of sound business judgment. These are the types of factors the regulations draftsmen must weigh in reaching a final decision.

A second interesting regulatory problem may be illustrated by the following example: Suppose a calendar-year corporation first becomes a member of an electing section 243 (b) affiliated group during the month of December. Assume that the common parent of this group (which has several other subsidiaries) is also a calendar-year taxpayer. Under section 243 (b) (1) (B) (i), the parent and the subsidiary must be members of the same affiliated group on each day of the taxable year of the subsidiary if dividends paid out of the earnings and profits of such year by the subsidiary are to qualify for the 100 percent deduction. In this example, then, any dividends paid by the subsidiary out of the earnings and profits of the year it became a member of the group will not qualify. Nevertheless, under section 243 (b) (2), the election is effective for this taxable year. Since the election is effective, does this mean that the various limitations and restrictions contained in section 243 (b) (3) (the disadvantageous effects of the election) apply? If so, the rather odd result is that this later-acquired subsidiary must suffer the detriments associated with the election but cannot distribute a qualifying dividend. The Service will consider this apparent anomaly carefully in exercising the broad regulatory authority granted under section 243 (b) (3).

Finally, consider the following problem which arises as a result of including certain insurance companies as members of an “affiliated group” for section 243 (b) purposes.⁵⁰ For consolidated return pur-

50. § 243 (b) (5). Note the gyrations the draftsmen had to go through in § 243 (b) (6) to achieve the desired correlation between the multiple surtax exemption provisions and the 100-percent dividends received deduction insofar as insurance companies are con-

poses, life insurance companies are not considered "includible" corporations, that is, they cannot join in the filing of a consolidated return unless the affiliated group consists solely of life insurance companies. Assume a life insurance company owns all the stock of a non-insurance corporation which, in turn, owns all the stock of another non-insurance corporation. All three of these corporations would be members of an affiliated group for purposes of the 100 percent dividends received election. Suppose that the two non-insurance corporations join in the filing of a consolidated return. Can the section 243 (b) affiliated group (including all *three* corporations) elect the 100 percent dividends received provision and, thus, pass tax-free dividends from the non-insurance corporations to the insurance company? The statute and accompanying committee reports do not specifically address themselves to the possibility of a simultaneous section 243 *and* consolidated return election but, in view of the fact that the 100 percent dividends received election was conceived as an alternative to consolidated returns, a strong argument can be made to the effect that mutual exclusivity was intended. At the present time, the Service is studying this factual pattern carefully to determine if there are any tax avoidance possibilities created by permitting the 100 percent dividends received election under these circumstances.

MINORITY INTERESTS

An interesting problem which the new 100 percent dividends received deduction election raises is the effect of the election on the rights

cerned. Briefly, the problem was this: § 1563 (a), which defines "controlled group of corporations" for purposes of the multiple corporation provisions, "carves out" insurance companies subject to taxation under § 802 or 821 from controlled groups described in § 1563 (a) (1), (2), or (3), and treats the companies as members of a separate insurance group under § 1563 (a) (4). Thus, these "carved out" insurance groups are entitled to share a single \$25,000 surtax exemption under § 1561, while the non-insurance company members of the controlled group described in § 1563 (a) (1), (2), or (3) share another \$25,000 surtax exemption pursuant to § 1561. § 243 (b) (6) (A), in effect, reverses this "carving out" process and treats the insurance companies and non-insurance companies as members of the same group for purposes of applying § 1561 to an affiliated group electing § 243 (b). Thus, an electing affiliated group which includes insurance companies will be entitled to a single surtax exemption instead of two. § 243 (b) (6) (B), in effect, disqualifies dividends of insurance company members of an electing affiliated group which includes insurance and non-insurance companies (or a mixture of § 802 and 821 companies) unless the dividend is distributed out of earnings and profits of a taxable year for which an election under § 243 (b) is effective,—in other words, a taxable year which is subject to the § 243 (b) (6) (A) rules. For an example, see S. REP. 830, Part 2, 88th Cong., 224.

of minority shareholders of a subsidiary member of the electing affiliated group. If the subsidiary owns no stock in other corporations which are members of the group, the single tax benefit flowing from the election, the 100 percent deduction for dividends received, will inure *entirely* to the other members of the group who receive dividends from the subsidiary, and any minority shareholders in the subsidiary will receive no tax benefit whatsoever. On the other hand, its minority shareholders will suffer a proportionate share of the detriments flowing from the election since the restrictions and limitations contained in section 243 (b) (3) will adversely affect all shareholders of the subsidiary. Under these circumstances, it seems doubtful that the minority shareholders will permit this situation to continue very long without insisting upon some participation in the tax benefits flowing from the election. At the very minimum, the minority may attempt, on behalf of his subsidiary, to secure compensation for the tax advantages it gave up as a result of the election. Moreover, it appears that if the minority cannot achieve their goal peaceably, they have an excellent chance of satisfaction by taking the majority shareholders into court. As a Federal court has said, majority shareholders:

Owe to the minority the duty to exercise good faith, care, and diligence to make the property of the corporation in his charge produce the largest possible amount, to protect the interest of the holders of the minority of the stock and to secure and deliver to them their just portion of income and of the proceeds of the property.⁵¹

Perhaps if the "good faith" element of this standard is emphasized, majority shareholders could be considered as not in violation of their duty to the minority so long as the election permitted by the statute is made without a conscious desire on the part of the majority to "freeze out" the minority, or with any like sinister motives.⁵² However, most of the recent decisions in this area of the law of corporate-stockholder relationships seem to impose a duty on the majority shareholders to act in the best interest of *all* the shareholders. These cases recognize a cause of action on behalf of the minority if the actions of the majority favor themselves or some other group, regardless of a "good faith" motive for

51. *Jones v. Missouri-Edison Elec. Co.*, 144 Fed. 765, 771 (CCA 8th, 1906).

52. See *Barrett v. Denner Tramway Corp.*, 53 F. Supp. 198 (D. Del.), *aff'd* 146 F.2d 701 (CCA 3d, 1944); *McNulty v. W. & J. Sloane*, 184 Misc. 835, 54 N.Y.S. 2d 253, 262 (Sup. Ct. 1945); *BALLANTINE, CORPORATIONS* 278 (1946).

doing so.⁵³ In other words, the recent decisions require equality of treatment or fairness to the minority in a very strict sense.

For the most part, tax legislation has left these problems of stockholder relationships to the controlling state law. This is so even though many provisions of the Code sorely tempt majority shareholders to act in disregard of the best interest of the minority.⁵⁴ Since the problem raised here is not essentially a tax problem, only one additional observation would seem to be appropriate. Assuming that the controlling corporate shareholders of the subsidiary desire to make the 100 percent dividends received election and, in order to meet the standard of fairness to the minority shareholders decide to allocate a portion of the total tax savings resulting from the election to the subsidiary, what allocation is likely to be considered to be fair by the courts? It would appear logical that the minimum amount which could be allocated to the subsidiary and still meet the fairness standard would be the amount determined by allocating to each member of the affiliated group that portion of the total tax savings which equals the tax detriment which the member suffered by consenting to the election. As a practical matter, the exact measurement of the tax detriment suffered may be extremely difficult. For example, should the calculation assume that in the absence of a section 243 (b) election a multiple surtax exemption election would have been effective or a consolidated return would have been filed?

Since the election would not have been made by the affiliated group unless the total tax savings to the entire group were greater than the total tax detriment incurred, the suggested allocation will leave a surplus of tax savings. As to this surplus, it has been argued that the full amount should be allocated to the parent.⁵⁵ After all, the argument goes, the parent by maintaining its investment in the subsidiary made possible the tax saving election and, as a result of receiving the dividends, did actually "realize" the savings in the tax sense. On the other hand, it can be argued that the subsidiary holds the "key" to the tax savings "lock". That is, the tax savings could never be realized unless the sub-

53. *Case v. N.Y. Central Railroad Company*, 243 N.Y.S. 2d 620 (1963), *Bennett v. Brueil Petroleum Corp.*, 99 A.2d 236 (Del. Ch. 1953), *Mendelson v. Leather Mfg. Co.*, 326 Mass. 226, 93 N.E. 2d 537 (1950).

54. See, the new amendment to the collapsible corporation provisions, § 341 (f), added by § 1 of P.L. 88-484. But *cf.* the concern for minority shareholders expressed by § 337 (d).

55. *Cf.* the argument made in *Case v. N.Y. Central Railroad Company*, *op. cit. supra* note 53, at 624.

sidiary has earnings and profits to distribute and, accordingly, a portion of the surplus tax savings should be allocated to the subsidiary.

OPERATING PROBLEMS

In most cases, the 100 percent dividends received deduction election is only one of four possibilities open to parent-subsidiary related corporations as a result of the Revenue Act of 1964. The other three alternatives are:

- (1) Multiple surtax exemption election under section 1562.
- (2) Consolidated returns.
- (3) Apportion a single surtax exemption under section 1561.

Now that the 1964 legislation has been on the books for almost a year, corporate tax advisors—particularly the accountants—have developed, or are in the process of developing, mathematical formulas for use in determining which of the four alternatives will provide the maximum tax advantage under various circumstances. Thus, a multiple organization, which for reasons to be mentioned shortly decides against filing a consolidated return, will be vitally interested in the level of intercorporate dividends which must be generated by the group in order to make the 100 percent dividends received alternative as attractive as the election of multiple surtax exemptions under section 1562. This “break-even” level of dividend flow can be determined by dividing the net tax savings resulting from the multiple surtax exemption election by the effective tax rate on intercorporate dividends in the absence of the 100-percent dividends received election. The first element of this formula, the total tax savings from multiple exemptions, is determined by multiplying the number of corporations in the group less 1 by \$5,000 and reducing the result by \$1,500.⁵⁶ The second factor, the effective tax rate on intercorporate dividends, will be 7.2 percent in the case of post-1964 taxable years.⁵⁷ For example, assume a multiple organization consisting of 10 corporations each of which has taxable income in excess of \$25,000. In this case, the total tax savings per year resulting from a

56. This calculation assumes that each corporation in the group has taxable income of at least \$25,000. It also assumes that each corporation's surtax exemption can withstand an attack by the Commissioner under the tax avoidance provisions of the Code. See, especially, § 1551 as amended by § 235 (b) of the REVENUE ACT OF 1964.

57. This calculation assumes that the recipient corporation has taxable income of at least \$25,000. The 7.2 percent figure is arrived at by multiplying the percentage of intercorporate dividends subject to tax, or 15 percent, by the overall corporate tax rate, 48 percent.

multiple surtax exemption election is \$43,500, determined by multiplying 9 times \$5,000 (\$45,000) and subtracting \$1,500 from the result (\$45,000 — \$1,500 = \$43,500). The "break-even" point, then, is \$604,166, or \$43,500 divided by 7.2 percent ($\frac{\$43,500}{.072} = \$604,166$).

The calculation of the "break-even" point of dividend flow is essential, but is only a preliminary step in the complete analysis. First, the break-even figure does not take into account the disadvantages involved in the 100 percent election other than the sacrifice of multiple surtax exemptions. In many cases, the only other disadvantage which will be applicable will be the payment of estimated taxes on the basis of a single \$100,000 exemption rather than multiple exemptions. The sacrifice here, of course, is not in terms of increased tax liability but the interest lost due to the necessity of accelerated payments. As the current payment provisions of the Revenue Act of 1964 phase in, the loss of multiple exemptions from estimated tax will become more and more costly.⁵⁸ In the case of multiple organizations which include corporations engaged in improperly accumulating surplus, foreign operations, exploration activities, or the life insurance business, still other limitations are applicable and should be taken into consideration.

Another point which should be considered in using the "break-even" figure is that the failure to pay dividends equal to, or greater than, the indicated level in each year the election is in effect does not necessarily foreclose the possibility that the 100 percent election is most advantageous. Since distributions of *accumulated* earnings and profits, provided the earnings and profits are not "tainted", will qualify for the 100 percent deduction, large distributions of earnings and profits which were earned in prior years will tend to make up for the failure to distribute such accumulations in prior years. Thus, the break-even point represents an average level of distributions which must be maintained over a period of time, rather than a year-by-year test.

CONSOLIDATED RETURNS

Since the 100 percent dividends received election only bestows upon a multiple organization one of the several advantages of consolidated returns and, conversely, extracts from the organization several important disadvantages of consolidated filing, why would a group of corporations ever elect the 100 percent dividends received deduction in preference to

58. See § 6154, as amended by § 122 (a) of the REVENUE ACT OF 1964.

consolidated returns? This question is particularly appropriate as a result of the repeal of the 2 percent additional tax on consolidated returns by the Revenue Act of 1964. Except in unusual circumstances, it is likely that the multiple organization which is willing to forego multiple surtax exemptions will elect consolidated returns rather than the 100 percent dividends received deduction. Even the elimination of tax on intercorporate dividends, the single consolidated return advantage which is available to groups electing the 100 percent deduction, is a limited version of the consolidated return treatment of intercorporate dividends due to the "tainting" of earnings and profits previously described. Notwithstanding the fact that consolidated returns have the potential for far greater tax savings, there are certain aspects of consolidated filing which may, in special cases, cause a multiple group to elect the 100 percent deduction. For example:

(1) As previously indicated, each corporation joining in the filing of a consolidated return must use the same accounting period.⁵⁹ In fact, in arguing the case for a 100 percent dividends received election before the Senate Finance Committee, it was this particular aspect of consolidated filing which the proponents of the election found to be the most onerous. The cost and inconvenience involved in conforming fiscal years as required by the consolidated return regulations may indeed be a problem—particularly in situations where the members of the multiple group are engaged in different businesses and their natural business years do not correspond.

(2) For affiliated groups which have been filing separate returns, the inventory adjustments required by the regulations for the first consolidated return year may be a tough pill to swallow.⁶⁰ Although the double tax which results from the required adjustment is theoretically balanced by a compensating adjustment to opening inventories for the first year when the members of the group return to separate filing, in practice it is far from certain that this *quid pro quo* will be sufficient to fully compensate for the initial adjustment.

(3) Apparently, the filing of consolidated returns, for Federal income tax purposes, can increase the possibility of disputes over allocation of income to the states for multiple organizations engaged in multi-state operations with resulting increases in aggregate state income tax liabilities.

59. Reg. § 1.1502-14.

60. Reg. § 1.1502-39.

In some cases, other disadvantages of consolidated returns may make the 100 percent dividends received deduction an attractive alternative.⁶¹

One additional comment on consolidated returns. The Internal Revenue Service has recently undertaken the awesome task of revising the consolidated return regulations. The primary purpose of the revision is to make the regulations more intelligible. The essential implementing tool will be the liberal use of examples.⁶² In some of the abuse areas,⁶³ substantive changes will be made, but the main focus is on clarifying the existing rules. If the Service is successful in its efforts, this factor alone should cause many groups of multiple corporations to take another long look at the advantages of consolidated filing.

CONCLUSION

Needless to say, this discussion is only intended to serve as an introduction to the new 100 percent dividends received deduction. The purpose is to provide the tax practitioner with a "feel" for the new provision. This should be of some help in appraising the utility of the provisions against the background of the needs of corporate clients. Of course, more definitive help is on the way—in the form of the proposed regulations on this subject. Obviously, the Revenue Act of 1964 coming on the heels of the 1962 Act has placed a certain amount of stress on the regulatory process, but the entire Treasury Department is taking its responsibilities in this process quite seriously. The 100 percent dividends received deduction regulations have been assigned a high priority and their publication can be expected, in proposed form, in the near future.

61. For example, the netting of § 1231 gains and losses which occurs as a result of filing consolidated returns. For a complete discussion of the disadvantages of consolidated filing, see TAX MANAGEMENT PORTFOLIO, *Consolidated Returns—Elections and Filing*, No. 21 (1963) at 21 and PEEL, *CONSOLIDATED TAX RETURNS* 16 (1959).

62. The entire consolidated return regulations now contain only two examples. See Reg. § 1.1502-13 (h) (2).

63. See, *Henry C. Beck Builders, Inc., et al.* 41 T.C. 616 (1964).