

Internal Revenue Service, Treasury

§ 1.1502-91

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[T.D. 8824, 64 FR 36128, July 2, 1999]

§ 1.1502-91 Application of section 382 with respect to a consolidated group.

(a) *Determination and effect of an ownership change*—(1) *In general.* This section and §§ 1.1502-92 and 1.1502-93 set forth the rules for determining an ownership change under section 382 for members of consolidated groups and the section 382 limitations with respect to attributes described in paragraphs (e) and (f) of this section. These rules generally provide that an ownership change and the section 382 limitation are determined with respect to these attributes for the group (or loss subgroup) on a single entity basis and not for its members separately. Following an ownership change of a loss group (or a loss subgroup) under § 1.1502-92, the

amount of consolidated taxable income for any post-change year which may be offset by pre-change consolidated attributes (or pre-change subgroup attributes) shall not exceed the consolidated section 382 limitation (or subgroup section 382 limitation) for such year as determined under § 1.1502-93.

(2) *Special rule for post-change year that includes the change date.* If the post-change year includes the change date, section 382(b)(3)(A) is applied so that the consolidated section 382 limitation (or subgroup section 382 limitation) does not apply to the portion of consolidated taxable income that is allocable to the period in the year on or before the change date. See generally § 1.382-6 (relating to the allocation of income and loss). The allocation of consolidated taxable income for the post-change year that includes the change date must be made before taking into account any consolidated net operating loss deduction (as defined in § 1.1502-21(a)).

(3) *Cross-reference.* See §§ 1.1502-94 and 1.1502-95 for rules that apply section 382 to a corporation that becomes or ceases to be a member of a group or loss subgroup.

(b) *Definitions and nomenclature.* For purposes of this section and §§ 1.1502-92 through 1.1502-99, unless otherwise stated:

(1) The definitions and nomenclature contained in section 382 and the regulations thereunder (including the nomenclature and assumptions relating to the examples in § 1.382-2T(b)) and this section and §§ 1.1502-92 through 1.1502-99 apply.

(2) In all examples, all groups file consolidated returns, all corporations file their income tax returns on a calendar year basis, the only 5-percent shareholder of a corporation is a public group, the facts set forth the only

owner shifts during the testing period, no election is made under paragraph (d)(4) of this section, and each asset of a corporation has a value equal to its adjusted basis.

(3) As the context requires, references to §§ 1.1502-91 through 1.1502-96 include references to corresponding provisions of §§ 1.1502-A through 1.1502-96A. For example, a reference to an ownership change under § 1.1502-92 in § 1.1502-95(b) can include a reference to an ownership change under § 1.1502-92A.

(c) *Loss group—(1) Defined.* A loss group is a consolidated group that—

(i) Is entitled to use a net operating loss carryover to the taxable year that did not arise (and is not treated under § 1.1502-21(c) as arising) in a SRLY;

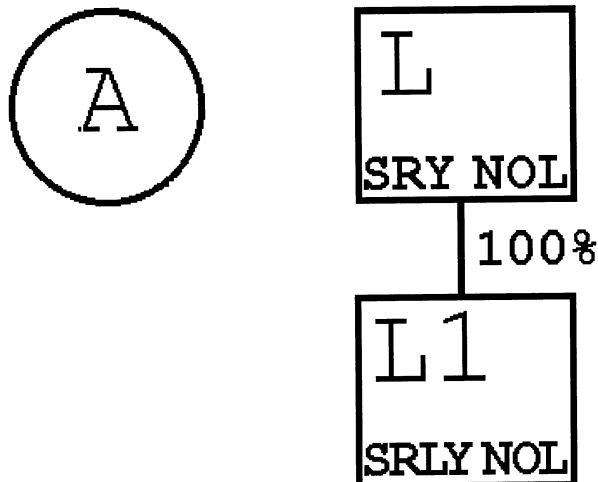
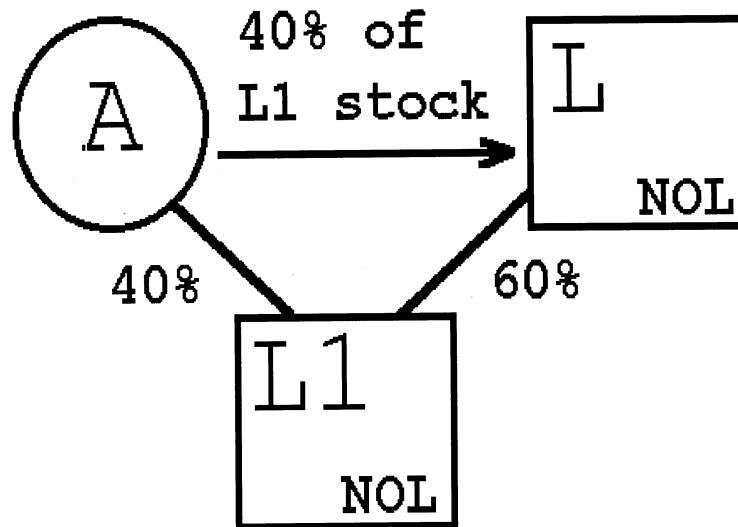
(ii) Has a consolidated net operating loss for the taxable year in which a testing date of the common parent occurs (determined by treating the common parent as a loss corporation); or

(iii) Has a net unrealized built-in loss (determined under paragraph (g) of this section by treating the date on which the determination is made as though it were a change date).

(2) *Coordination with rule that ends separate tracking.* A consolidated group may be a loss group because a member's losses that arose in (or are treated as arising in) a SRLY are treated as described in paragraph (c)(1)(i) of this section. See § 1.1502-96(a).

(3) *Example.* The following example illustrates the principles of this paragraph (c):

Example. Loss group. (i) L and L1 file separate returns and each has a net operating loss carryover arising in Year 1 that is carried over to Year 2. A owns 40 shares and L owns 60 shares of the 100 outstanding shares of L1 stock. At the close of Year 1, L buys the 40 shares of L1 stock from A. For Year 2, L and L1 file a consolidated return. The following is a graphic illustration of these facts:



(ii) L and L1 become a loss group at the beginning of Year 2 because the group is entitled to use the Year 1 net operating loss carryover of L, the common parent, which did

not arise (and is not treated under § 1.1502-21(c) as arising) in a SRLY. See § 1.1502-94 for rules relating to the application of section 382 with respect to L1's net operating loss

carryover from Year 1 which did arise in a SRLY.

(d) *Loss subgroup—(1) Net operating loss carryovers.* Two or more corporations that become members of a consolidated group (the current group) compose a loss subgroup if—

(i) They were affiliated with each other in another group (the former group), whether or not the group was a consolidated group;

(ii) They bear the relationship described in section 1504(a)(1) to each other through a loss subgroup parent immediately after they become members of the current group (or are deemed to bear that relationship as a result of an election described in paragraph (d)(4) of this section); and

(iii) At least one of the members carries over a net operating loss that did not arise (and is not treated under § 1.1502-21(c) as arising) in a SRLY with respect to the former group.

(2) *Net unrealized built-in loss.* Two or more corporations that become members of a consolidated group compose a loss subgroup if they—

(i) Have been continuously affiliated with each other for the 5 consecutive year period ending immediately before they become members of the group;

(ii) Bear the relationship described in section 1504(a)(1) to each other through a loss subgroup parent immediately after they become members of the current group (or are deemed to bear that relationship as a result of an election described in paragraph (d)(4) of this section); and

(iii) Have a net unrealized built-in loss (determined under paragraph (g) of this section on the day they become members of the group by treating that day as though it were a change date).

(3) *Loss subgroup parent.* A loss subgroup parent is the corporation that bears the same relationship to the other members of the loss subgroup as a common parent bears to the members of a group.

(4) *Election to treat loss subgroup parent requirement as satisfied—(i) In general.* Solely for purposes of paragraphs (d)(1)(i) and (2)(ii) of this section, two or more corporations that become members of a consolidated group at the same time and that were affiliated with each other immediately before be-

coming members of the group are deemed to bear a section 1504(a)(1) relationship to each other immediately after they become members of the group if the common parent of that group makes an election under this paragraph (d)(4) with respect to those members. See § 1.1502-96(e) for the time and manner of making the election.

(ii) *Members included.* An election under this paragraph (d)(4) includes all corporations that become members of the current group at the same time and that were affiliated with each other immediately before they become members of the current group.

(iii) *Each member included treated as loss subgroup parent.* If the members to which this election applies are a loss subgroup described in paragraph (d)(1) or (2) of this section, then each member is treated as a loss subgroup parent. See § 1.1502-92(b)(1)(iii) for special rules relating to an ownership change of a loss subgroup if the election under this paragraph (d)(4) is made.

(5) *Principal purpose of avoiding a limitation.* The corporations described in paragraphs (d)(1) or (2) of this section do not compose a loss subgroup if any one of them is formed, acquired, or availed of with a principal purpose of avoiding the application of, or increasing any limitation under, section 382. Instead, § 1.1502-94 applies with respect to the attributes of each such corporation. Any member excluded from a loss subgroup, if excluded with a principal purpose of so avoiding or increasing any section 382 limitation, is treated as included in the loss subgroup. This paragraph (d)(5) does not apply solely because, in connection with becoming members of the group, the members of a group (or loss subgroup) are rearranged (or, in the case of the preceding sentence, are not rearranged) to bear a relationship to the other members described in section 1504(a)(1).

(6) *Special rules.* See § 1.1502-95(d) for rules concerning when a corporation ceases to be a member of a loss subgroup, and for certain exceptions that may apply if a member does not continue to satisfy the loss subgroup parent requirement within the current group. See also § 1.1502-96(a) for a special rule regarding the end of separate tracking of SRLY losses of a member

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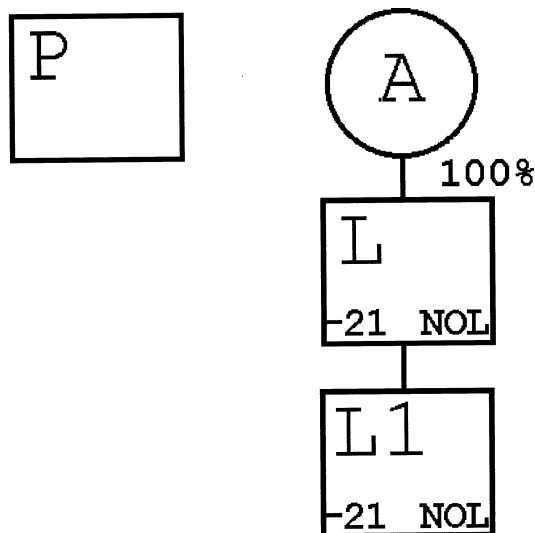
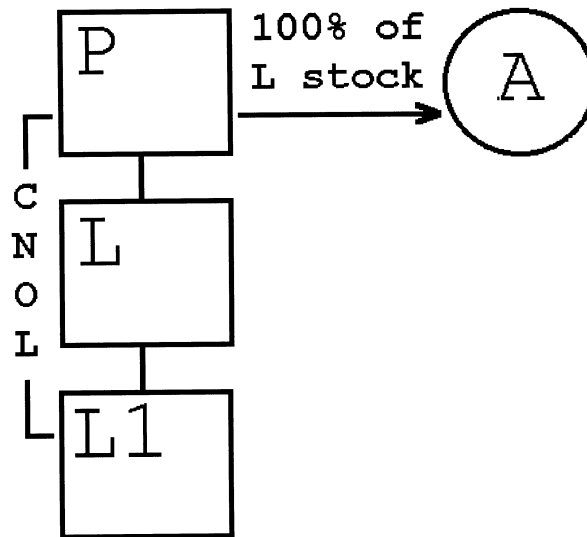
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that has an ownership change or that has been a member of a group for at least 5 consecutive years.

(7) *Examples.* The following examples illustrate the principles of this paragraph (d):

Example 1. Loss subgroup. (i) P owns all the L stock and L owns all the L1 stock. The P

group has a consolidated net operating loss arising in Year 1 that is carried to Year 2. On May 2, Year 2, P sells all the stock of L to A, and L and L1 thereafter file consolidated returns. A portion of the Year 1 consolidated net operating loss is apportioned under §1.1502-21(b) to each of L and L1, which they carry over to Year 2. The following is a graphic illustration of these facts:



(ii) (a) L and L1 compose a loss subgroup within the meaning of paragraph (d)(1) of this section because—

- (A) They were affiliated with each other in the P group (the former group);
- (B) They bear a relationship described in section 1504(a)(1) to each other through a

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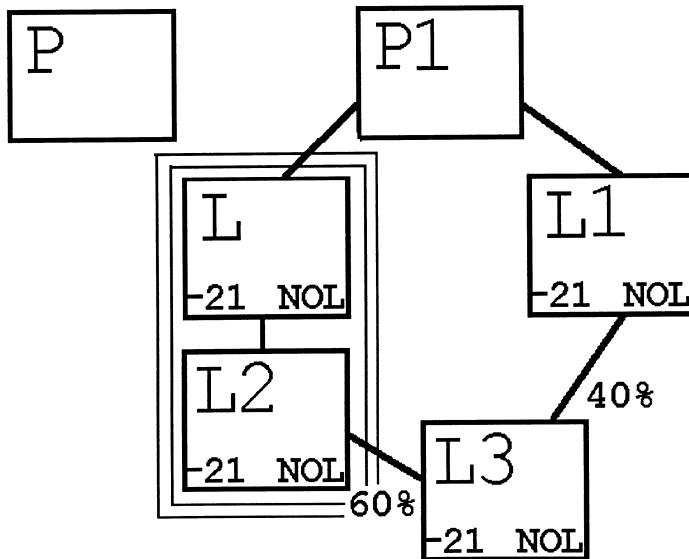
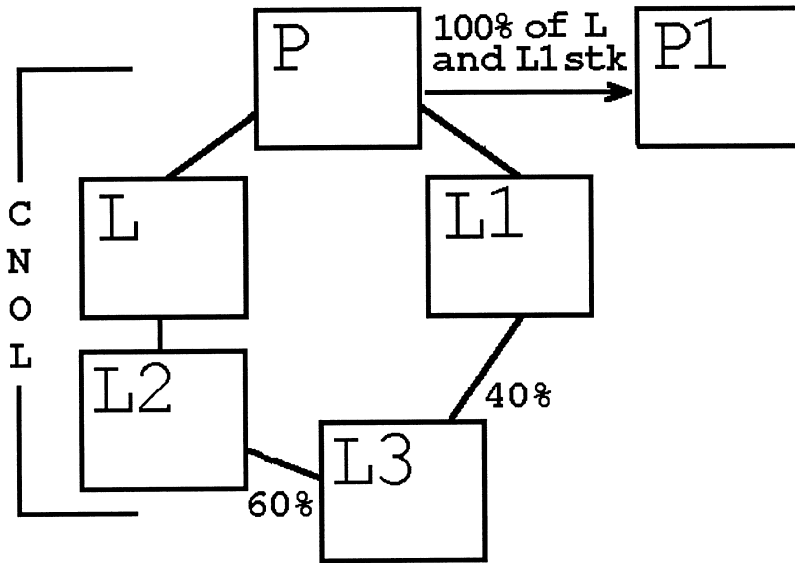
loss subgroup parent (L) immediately after they became members of the L group; and

(C) At least one of the members (here, both L and L1) carries over a net operating loss to the L group (the current group) that did not arise in a SRLY with respect to the P group.

(b) Under paragraph (d)(3) of this section, L is the loss subgroup parent of the L loss subgroup.

Example 2. Loss subgroup—section 1504(a)(1) relationship. (i) P owns all the stock of L and L1. L owns all the stock of L2. L1 and L2 own

40 percent and 60 percent of the stock of L3, respectively. The P group has a consolidated net operating loss arising in Year 1 that is carried over to Year 2. On May 22, Year 2, P sells all the stock of L and L1 to P1, the common parent of another consolidated group. The Year 1 consolidated net operating loss is apportioned under §1.1502-21(b), and each of L, L1, L2, and L3 carries over a portion of such loss to the first consolidated return year of the P1 group ending after the acquisition. The following is a graphic illustration of these facts:



(ii) L and L2 compose a loss subgroup within the meaning of paragraph(d)(1) of this section. Neither L1 nor L3 is included in a loss subgroup because neither bears a relation-

ship described in section 1504(a)(1) through a loss subgroup parent to any other member of the former group immediately after becoming members of the P1 group.

Example 3. Loss subgroup—section 1504(a)(1) relationship. The facts are the same as in *Example 2*, except that the stock of L1 is transferred to L in connection with the sale of the L stock to P1. L, L1, L2, and L3 compose a loss subgroup within the meaning of paragraph (d)(1) of this section because—

- (i) They were affiliated with each other in the P group (the former group);
- (ii) They bear a relationship described in section 1504(a)(1) to each other through a loss subgroup parent (L) immediately after they become members of the P1 group; and
- (iii) At least one of the members (here, each of L, L1, L2, and L3) carries over a net operating loss to the P1 group (the current group).

Example 4. Loss subgroup—elective section 1504(a)(1) relationship. The facts are the same as in *Example 2*, except that P1 makes the election under paragraph (d)(4) of this section. The election includes L, L1, L2, and L3 (even though L and L2 would compose a loss subgroup without regard to the election) because they become members of the current group (the P1 group) at the same time and were affiliated with each other in the P group immediately before they became members of the P1 group. As a result of the election, L, L1, L2, and L3 are treated as satisfying the requirement that they bear the relationship described in section 1504(a)(1) to each other through a loss subgroup parent immediately after they become members of the P1 group. L, L1, L2, and L3 compose a loss subgroup within the meaning of paragraph (d)(1) of this section.

(e) *Pre-change consolidated attribute—*
(1) *Defined.* A pre-change consolidated attribute of a loss group is—

(i) Any loss described in paragraph (c)(1)(i) or (ii) of this section (relating to the definition of loss group) that is allocable to the period ending on or before the change date; and

(ii) Any recognized built-in loss of the loss group.

(2) *Example.* The following example illustrates the principle of this paragraph (e):

Example. Pre-change consolidated attribute.
(i) The L group has a consolidated net operating loss arising in Year 1 that is carried over to Year 2. The L loss group has an ownership change at the beginning of Year 2.

(ii) The net operating loss carryover of the L loss group from Year 1 is a pre-change consolidated attribute because the L group was entitled to use the loss in Year 2 and therefore the loss was described in paragraph (c)(1)(i) of this section. Under paragraph (a)(2)(i) of this section, the amount of consolidated taxable income of the L group for Year 2 that may be offset by this loss carryover may not exceed the consolidated change

section 382 limitation of the L group for that year. See §1.1502-93 for rules relating to the computation of the consolidated section 382 limitation.

(f) *Pre-change subgroup attribute—*
(1) *Defined.* A pre-change subgroup attribute of a loss subgroup is—

(i) Any net operating loss carryover described in paragraph (d)(1)(iii) of this section (relating to the definition of loss subgroup); and

(ii) Any recognized built-in loss of the loss subgroup.

(2) *Example.* The following example illustrates the principle of this paragraph (f):

Pre-change subgroup attribute. (i) P is the common parent of a consolidated group. P owns all the stock of L, and L owns all the stock of L1. L2 is not a member of an affiliated group, and has a net operating loss arising in Year 1 that is carried over to Year 2. On December 11, Year 2, L1 acquires all the stock of L2, causing an ownership change of L2. During Year 2, the P group has a consolidated net operating loss that is carried over to Year 3. On November 2, Year 3, M acquires all the L stock from P. M, L, L1, and L2 thereafter file consolidated returns. All of the P group Year 2 consolidated net operating loss is apportioned under §1.1502-21(b) to L and L2, which they carry over to the M group.

(ii)(a) L, L1, and L2 compose a loss subgroup because—

(1) They were affiliated with each other in the P group (the former group);

(2) They bear a relationship described in section 1504(a)(1) to each other through a loss subgroup parent (L) immediately after they became members of the L group; and

(3) At least one of the members (here, both L and L2) carries over a net operating loss to the M group (the current group) that is described in paragraph (d)(1)(iii) of this section.

(b) For this purpose, L2's loss from Year 1 that was a SRLY loss with respect to the P group (the former group) is described in paragraph (d)(1)(iii) of this section because L2 had an ownership change on becoming a member of the P group (see §1.1502-96(a)) on December 11, Year 2. Starting on December 12, Year 2, the P group no longer separately tracked owner shifts of the stock of L1 with respect to the Year 1 loss. M's acquisition results in an ownership change of L, and therefore the L loss subgroup under §1.1502-92(a)(2). See §1.1502-93 for rules governing the computation of the subgroup section 382 limitation.

(iii) In the M group, L2's Year 1 loss continues to be subject to a section 382 limitation resulting from the ownership change

that occurred on December 11, Year 2. See §1.1502-96(c).

(g) *Net unrealized built-in gain and loss*—(1) *In general.* The determination whether a consolidated group (or loss subgroup) has a net unrealized built-in gain or loss under section 382(h)(3) is based on the aggregate amount of the separately computed net unrealized built-in gains or losses of each member that is included in the group (or loss subgroup) under paragraph (g)(2) of this section, including items of built-in income and deduction described in section 382(h)(6). Thus, for example, amounts deferred under section 267, or under §1.1502-13 (other than amounts deferred with respect to the stock of a member (or an intercompany obligation) included in the group (or loss subgroup) under paragraph (g)(2) of this section) are built-in items. The threshold requirement under section 382(h)(3)(B) applies on an aggregate basis and not on a member-by-member basis. The separately computed amount of a member included in a group or loss subgroup does not include any unrealized built-in gain or loss on stock (including stock described in section 1504(a)(4) and §1.382-2T(f)(18)(ii) and (iii)) of another member included in the group or loss subgroup (or an intercompany obligation). However, a member of a group or loss subgroup includes in its separately computed amount the unrealized built-in gain or loss on stock (but not on an intercompany obligation) of another member not included in the group or loss subgroup. If a member is not included in the determination whether a group (or subgroup) has a net unrealized built-in loss under paragraph (g)(2)(ii) or (iv) of this section, that member is not included in the loss group or loss subgroup. See §1.1502-94(c) (relating to built-in gain or loss of a new loss member) and §1.1502-96(a) (relating to the end of separate tracking of certain losses).

(2) *Members included*—(i) *Consolidated group with a net operating loss.* The members included in the determination whether a consolidated group described in paragraph (c)(1)(i) or (ii) of this section (relating to loss groups with net operating losses) has a net unrealized built-in gain are all members of the

consolidated group on the day that the determination is made.

(ii) *Determination whether a consolidated group has a net unrealized built-in loss.* The members included in the determination whether a consolidated group is a loss group described in paragraph (c)(1)(iii) of this section are—

(A) The common parent and all other members that have been affiliated with the common parent for the 5 consecutive year period ending on the day that the determination is made;

(B) Any other member that has a net unrealized built-in loss determined under paragraph (g)(1) of this section on the date that the determination is made, and that is neither a new loss member described in §1.1502-94(a)(1)(ii) nor a member of a loss subgroup described in paragraph (d)(2) of this section;

(C) Any new loss member described in §1.1502-94(a)(1)(ii) that has a net unrealized built-in gain determined under paragraph (g)(1) of this section on the day that the determination is made; and

(D) The members of a loss subgroup described in paragraph (d)(2) of this section if the members of the subgroup have, in the aggregate, a net unrealized built-in gain on the day that the determination is made.

(iii) *Loss subgroup with net operating loss carryovers.* The members included in the determination whether a loss subgroup described in paragraph (d)(1) of this section (relating to loss subgroups with net operating loss carryovers) has a net unrealized built-in gain are all members of the loss subgroup on the day that the determination is made.

(iv) *Determination whether subgroup has a net unrealized built-in loss.* The members included in the determination whether a subgroup has a net unrealized built-in loss are those members described in paragraphs (d)(2)(i) and (ii) of this section.

(v) *Separate determination of section 382 limitation for recognized built-in losses and net operating losses.* In determining

whether a loss group described in paragraph (c)(1)(i) or (ii) of this section (relating to loss groups that have net operating loss carryovers) has a net unrealized built-in gain which, if recognized, increases the consolidated section 382 limitation, the group includes, under paragraph (g)(2)(i) of this section, all of its members on the day the determination is made. Under paragraph (g)(2)(ii) of this section, however, for purposes of determining whether a group has a net unrealized built-in loss described in paragraph (c)(1)(iii) of this section, not all members of the consolidated group may be included. Thus, a consolidated group may have recognized built-in gains that increase the amount of consolidated taxable income that may be offset by its pre-change net operating loss carryovers that did not arise (and are not treated as arising) in a SRLY, and also may have recognized built-in losses the absorption of which is limited. Similar results may obtain for loss subgroups under paragraphs (g)(2)(iii) and (iv) of this section. See §1.1502-93(c)(2) for rules prohibiting the use of recognized built-in gains to increase the amount of consolidated taxable income that can be offset by recognized built-in losses.

(3) *Coordination with rule that ends separate tracking.* See §1.1502-96(a) for special rules relating to members (or loss subgroups) that have an ownership change within six months before, on, or after becoming a member of the group.

(4) *Acquisitions of built-in gain or loss assets.* A member of a consolidated group (or loss subgroup) may not, in determining its separately computed net unrealized built-in gain or loss, include any gain or loss with respect to assets acquired with a principal purpose to affect the amount of its net unrealized built-in gain or loss. A group (or loss subgroup) may not, in determining its net unrealized built-in gain or loss, include any gain or loss of a member acquired with a principal purpose to affect the amount of its net unrealized built-in gain or loss.

(5) *Indirect ownership.* A member's separately computed net unrealized built-in gain or loss is adjusted to the extent necessary to prevent any duplication of unrealized gain or loss attributable to the member's indirect owner-

ship interest in another member through a nonmember if the member has a 5-percent or greater ownership interest in the nonmember.

(6) *Common parent not common parent for five years.* If the common parent has become the common parent of an existing group within the previous 5 year period in a transaction described in §1.1502-75(d)(2)(ii) or (3), appropriate adjustments must be made in applying paragraph (g)(2)(ii)(A) of this section so that corporations that have not been members of the group for five years are not included. In such a case, references to the common parent in paragraph (g)(2)(ii)(A) of this section are to the former common parent. Thus, members of the group remaining in existence (including the new common parent) that have not been affiliated with the former common parent (or that have not been members of that group) for the five consecutive year period ending on the day that the determination is made are not included under paragraph (g)(2)(ii)(A) of this section. See, however, §1.1502-96(a)(2) for special rules relating to members (or loss subgroups) that have an ownership change within six months before, on, or after the time that the member becomes a member of the group.

(h) *Recognized built-in gain or loss—(1) In general.* [Reserved]

(2) *Disposition of stock or an intercompany obligation of a member.* Gain or loss recognized by a member on the disposition of stock (including stock described in section 1504(a)(4) and §1.382-2T(f)(18)(ii) and (iii)) of another member is treated as a recognized gain or loss for purposes of section 382(h)(2) (unless disallowed under §1.337(d)-2T, §1.1502-35T, or otherwise), even though gain or loss on such stock was not included in the determination of a net unrealized built-in gain or loss under paragraph (g)(1) of this section. Gain or loss recognized by a member with respect to an intercompany obligation is treated as recognized gain or loss only to the extent (if any) the transaction gives rise to aggregate income or loss within the consolidated group.

(3) *Intercompany transactions.* Gain or loss that is deferred under provisions such as section 267 and §1.1502-13 is treated as recognized built-in gain or

loss only to the extent taken into account by the group during the recognition period. See also §1.1502-13(c)(7) *Example 10*.

(4) *Exchanged basis property*. If the adjusted basis of any asset is determined, directly or indirectly, in whole or in part, by reference to the adjusted basis of another asset held by the member at the beginning of the recognition period, the asset is treated, with appropriate adjustments, as held by the member at the beginning of the recognition period.

(i) [Reserved]

(j) *Predecessor and successor corporations*. A reference in this section and §§1.1502-92 through 1.1502-99 to a corporation, member, common parent, loss subgroup parent, or subsidiary includes, as the context may require, a reference to a predecessor or successor corporation as defined in §1.1502-1(f)(4). For example, the determination whether a successor satisfies the continuous affiliation requirement of paragraph (d)(2)(i) or (g)(2)(ii) of this section is made by reference to its predecessor.

[T.D. 8824, 64 FR 36129, July 2, 1999, as amended by T.D. 9048, 68 FR 12291, Mar. 14, 2003]

EFFECTIVE DATE NOTE: By T.D. 9187, 70 FR 10326, Mar. 3, 2005, §1.1502-91(h)(2) was amended by revising “§1.337(d)-2T” to read “§1.337(d)-2”, effective Apr. 4, 2005.

§ 1.1502-92 Ownership change of a loss group or a loss subgroup.

(a) *Scope*. This section provides rules for determining if there is an ownership change for purposes of section 382 with respect to a loss group or a loss subgroup. See §1.1502-94 for special rules for determining if there is an ownership change with respect to a new loss member and §1.1502-96(b) for special rules for determining if there is an ownership change of a subsidiary.

(b) *Determination of an ownership change—(1) Parent change method—(i) Loss group*. A loss group has an ownership change if the loss group’s common parent has an ownership change under section 382 and the regulations thereunder. Solely for purposes of determining whether the common parent has an ownership change—

(A) The losses described in §1.1502-91(c) are treated as net operating losses

(or a net unrealized built-in loss) of the common parent; and

(B) The common parent determines the earliest day that its testing period can begin by reference to only the attributes that make the group a loss group under §1.1502-91(c).

(ii) *Loss subgroup*. A loss subgroup has an ownership change if the loss subgroup parent has an ownership change under section 382 and the regulations thereunder. The principles of §1.1502-95(b) (relating to ceasing to be a member of a consolidated group) apply in determining whether the loss subgroup parent has an ownership change. Solely for purposes of determining whether the loss subgroup parent has an ownership change—

(A) The losses described in §1.1502-91(d) are treated as net operating losses (or a net unrealized built-in loss) of the loss subgroup parent;

(B) The day that the members of the loss subgroup become members of the group (or a loss subgroup) is treated as a testing date within the meaning of §1.382-2(a)(4); and

(C) The loss subgroup parent determines the earliest day that its testing period can begin under §1.382-2T(d)(3) by reference to only the attributes that make the members a loss subgroup under §1.1502-91(d).

(iii) *Special rule if election regarding section 1504(a)(1) relationship is made—*

(A) *Ownership change of deemed loss subgroup parent is an ownership change of loss subgroup*. If the common parent makes an election under §1.1502-91(d)(4), each of the members in the loss subgroup is treated as the loss subgroup parent for purposes of determining whether the loss subgroup has an ownership change under section 382 and the regulations thereunder on or after the day the members become members of the group.

(B) *Exception*. Paragraph (b)(1)(iii)(A) of this section does not apply to cause an ownership change of a loss subgroup if a deemed loss subgroup parent has an ownership change upon (or after) ceasing to be a member of the current group.

(2) *Examples*. The following examples illustrate the principles of this paragraph (b):