Office of Chief Counsel
Internal Revenue Service

memorandum

CC:LM:FSH:BOS:TL-N-4786-00
MJGormley

date: DEC 21 2000

to: District Director, New England District
Attn: Thomas J. Higgins, LMSB/MCT Team Manager, Group 1653

from: Associate Area Counsel, (LMSB)
Area 1

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subject: [redacted]
UIL# 6501.08-17
Earliest Statute: [redacted]

DISCLOSURE STATEMENT

This advice constitutes return information subject to I.R.C. § 6103. This advice contains confidential information subject to attorney-client and deliberative process privileges and if prepared in contemplation of litigation, subject to the attorney work product privilege. Accordingly, the Examination or Appeals recipient of this document may provide it only to those persons whose official tax administration duties with respect to this case require such disclosure. In no event may this document be provided to Examination, Appeals, or other persons beyond those specifically indicated in this statement. This advice may not be disclosed to taxpayers or their representatives.

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This is in response to your request for advice regarding extending the statute of limitations on assessment for [redacted] s federal income tax returns for the periods ending [redacted], [redacted], [redacted], [redacted] and [redacted], all of which are presently under examination. The statute of limitations was previously extended to [redacted] via Forms 872 for the [redacted], [redacted] and [redacted] years. The statute of limitations on the [redacted] and [redacted] years

were extended via Forms 872 to [redacted] and [redacted], respectively. These consents to extend the statute were obtained by you, relying on advice previously provided by this office regarding the form and content of the consents, in [redacted]. At the time of that request for advice, you also posed a hypothetical question. You asked if [redacted] was in time liquidated, who would be the proper party to authorize additional statute extensions. Since such a liquidation was not imminent, we deferred our answer to that question until a change in the corporate structure occurred. Since our advice was rendered, [redacted] has merged into [redacted] and no longer exists as a separate entity.

The taxpayer's employment tax returns, Forms 941, for the periods ending [redacted] through [redacted] are also under examination. The statute of limitations will expire [redacted] for all quarters beginning with the [redacted] quarter, through the [redacted] quarter. All of these periods were previously extended via Forms SS-10. The statute of limitations on the [redacted] quarters will expire on [redacted].

ISSUE

1. What language should be used on Form 872 to extend the statute of limitations on assessment for [redacted]'s federal income tax liability for the years ending [redacted], [redacted], [redacted], [redacted] and [redacted]?

2. What language should be used on Form SS-10 to extend the statute of limitation on assessment of [redacted]'s employment tax liabilities for the periods ending [redacted] through [redacted]?

CONCLUSION

1. We recommend that you obtain a Form 872 for [redacted]. The Form 872 should be captioned as follows: "[redacted] (EIN [redacted]), as successor to [redacted] (EIN [redacted]), and as alternative agent for [redacted] (EIN [redacted]) consolidated group under Temp. Reg. § 1.1502-77T(a)(4)(ii).*" On the bottom of the Form 872, you should add the following:"*With respect to the consolidated tax liability of [redacted] (EIN [redacted]) consolidated group for the taxable years ending [redacted], [redacted], [redacted], [redacted] and [redacted]."

2. With regard to [redacted]'s employment tax liabilities, we recommend that you obtain a Form SS-10 for [redacted]. The Form SS-10 should be captioned as follows: "[redacted] (EIN [redacted]), as successor to [redacted] (EIN [redacted]).*" On the bottom of the Form SS-10, you should add the following:"*With respect to the employment tax liability of [redacted] (EIN [redacted]) for the taxable periods ending [redacted] through [redacted], inclusive."

FACTS

As noted, your first request for advice centered around an initial consent to extend the statute of limitations on assessment for [redacted] federal income tax liability for the year ending [redacted]. On [redacted], [redacted] ("[redacted]"), a Massachusetts corporation formed on [redacted], was acquired by [redacted] ("[redacted]"), a Delaware corporation formed on [redacted]. [redacted] acquired all of the stock of [redacted] for a combination of cash and stock. Following the acquisition, [redacted] remained in existence, becoming a wholly owned subsidiary of [redacted].

Your concern in your initial request for advice was whether the Form 872, signed on [redacted] by the then vice president, secretary and clerk of [redacted], was properly executed, given that it was signed after the effective date of the acquisition. On the facts provided, we concluded that the Form 872 executed by a then current officer of [redacted] was effective to extend the period for assessment of tax with respect to the [redacted] return of [redacted].[1]

Currently, the taxpayer is under examination for the years [redacted] through [redacted] for income taxes and for the periods ending [redacted] through [redacted] for employment taxes. The taxpayer filed consolidated corporate returns (Forms 1120) for the years at issue in the name of [redacted]. The following description of events is based on various documents, including merger agreements and merger certificates provided by your office, and relies on

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[1] We relied on Temp. Treas. Reg. § 1.1502-77T(a)(4)(i), concluding that [redacted], as the common parent of the consolidated group, had the authority to sign the Form 872 as alternative agent for the group. Additionally, that a current officer of [redacted] in his or her capacity as an officer of the corporation was the proper person to execute the Form 872. Union Oil Company of California v. Commissioner, 101 T.C. 130 (1993).

memorandums from your office dated [redacted] and [redacted].

On [redacted], pursuant to Massachusetts General Laws, Chapter 156B, Section 82, [redacted], the subsidiary corporation, merged into [redacted], the parent corporation, and [redacted] ceased to exist as a separate entity. The parties filed Articles of Merger of Parent and Subsidiary Corporations with the Massachusetts Secretary of State's Office. These Articles state the following: the subsidiary corporation, [redacted], was to be merged into the parent corporation, [redacted]. That the parent corporation at the date of the vote owned not less than [redacted]% of the outstanding shares of each class of stock of the subsidiary corporation with which it has voted to merge; that in the case of each corporation the laws of the state of its organization permit the merger and all action required under the laws of each state has been taken; that at a meeting of the directors of the parent corporation by unanimous vote of the Board of Directors, the Board deemed it advisable to merge [redacted], a wholly owned subsidiary into the parent, the merger was approved, and the parent assumed all of the liabilities and obligations of and merge into itself, [redacted]. The merger was to become effective at midnight on [redacted].

In addition to the Articles of Merger described above, filed with the Massachusetts Secretary of State's Office, you have also provided us with a copy of a Certificate from the Delaware Secretary of State's Office, to which is attached a copy of a Certificate of Ownership and Merger, dated [redacted], merging the subsidiary corporation, [redacted], into the parent, [redacted]. The Certificate of Ownership and Merger states the following: [redacted] owns all of the outstanding shares of each class of stock of [redacted]; [redacted], by resolution of its Board of Directors duly adopted at a meeting on [redacted] determined to and did merge into itself [redacted]; it was resolved that the merger of [redacted] into [redacted] was approved and [redacted] assumed all of the liabilities and obligations of [redacted].

Through Information Document requests (IDRs) you have requested the taxpayer provide you with a written plan of liquidation of [redacted] and meeting minutes of the Board of Directors of [redacted] addressing the corporate plan of liquidation of [redacted]. You have since met with the [redacted] accountant handling this case for the taxpayer and he has stated there was no plan of liquidation and that under state law, the company was not required to have one.[2] Based on all of the information

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[2] M.G.L. c 156B § 82 establishes independent procedures for a so-called "short form" merger of subsidiary corporations into parent and does not require approval of stockholders. See

available, you believe this merger was an I.R.C. § 332 transaction and you question how the Forms 872 and SS-10 should be drafted and executed, since [redacted] no longer exists as a separate entity.

With regard to the employment tax liabilities, you have provided us with a memorandum dated [redacted] in which you state [redacted] ([redacted]) is the main operating entity and the entity which incurred the payroll tax liabilities. Your conclusion is based on your review of [redacted]'s income tax returns, including affiliations' schedules and consolidated P&Ls and consolidated balance sheets for tax years ended [redacted] through [redacted].

LEGAL ANALYSIS

I.R.C. § 6501(c)(4)(A) provides, in general, that the taxpayer may consent to extend the time to assess tax in an agreement in writing executed by both the Secretary and the taxpayer. I.R.C. § 6501(c)(4)(B) provides, with respect to requests to extend the period of limitations made after December 31, 1999, that the Secretary shall notify the taxpayer of the taxpayer's right to refuse to extend the period of limitations, or to limit such extension to particular issues or to a particular period of time, on each occasion when the taxpayer is requested to provide such consent. The Chief Counsel's guidance on this issue provides that the Service personnel may notify taxpayers of their rights under I.R.C. § 6501(c)(4)(B) either orally or in writing. The preferred method of notification is by sending taxpayers Letter 907(DO)(Rev. 2-2000), Letter 907(SC)(Rev. 12-1999), Letter 967(Rev. 12-1999), or Publication 1035, Extending the Tax Assessment Period (Rev. 12-1999).

If an affiliated group of corporations makes a consolidated return pursuant to I.R.C. § 1501, the common parent and each subsidiary that was a member of the affiliated group during any part of the consolidated return year is severally liable for the tax for such year. Treas. Reg. § 1.1502-6(a). The common parent, with certain exceptions, is the sole agent for each member of the group, duly authorized to act in its own name for all matters relating to the tax liability for the consolidated return year. Treas. Reg. § 1.1502-77(a). The common parent in its own name is the proper party to sign consents to extend the time to assess the tax for all members in the group. Treas. Reg. 1.1502-77(a). Treasury Regulation § 1.1502-77(c) provides that, unless the District Director agrees to the contrary, an agreement

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Horizon-Microwave, Inc. v. Bazzy, 21 Mass. App. 190, 486 N.E.2d 70 (1985).

entered into by the common parent extending the time within which an assessment may be made in respect of the tax for a consolidated return year, shall be applicable to each corporation which was a member of the group during any part of such taxable year.

The consolidated return regulations have provisions for execution of consents when a corporation is dissolved. Treas. Reg. § 1.1502-77(d) provides that if a common parent contemplates dissolution, or is about to dissolve or for any other reason is about to terminate its existence, it shall notify the District director of such facts, and designate, subject to the approval of such District Director, another member to act as its agent. If the notice is not given, or the designation is not approved, the remaining members may designate another member to act as agent. Based on the facts provided, no such designation of agent was made by [redacted].

Temp. Reg. § 1.1502-77T(a)(4) provides for alternative agents for the affiliated group if the common parent ceases to be the common parent of the group, whether or not the group remains in existence.[3] Pursuant to Temporary Regulation § 1.1502-77T(a)(4), the alternative agent for the affiliated group is:

(i) The common parent of the group for all or any part of the year to which the notice or waiver applies;

(ii) A successor to the former common parent in a transaction to which I.R.C. § 381(a) applies;

(iii) The agent designated by the group under Treas. Reg. § 1.1502-77(d); or

(iv) If the group remains in existence under Treas. Reg. § 1.1502-75(d)(2) or (3), the common parent of the group at the time the notice is mailed or the waiver given.

I.R.C. § 381(a) provides that an acquiring corporation succeeds to and takes into account the certain items of the distributing or transferor corporation if the distributing corporation's assets are acquired in a transfer to which I.R.C. § 332 or 361 apply. You have indicated that [redacted] liquidated under I.R.C. § 332. Accordingly, because this qualifies as a section 381(a)(1)(A) transaction, Temp. Reg. § 1.1502-77T(a)(4)(ii)

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[3] Temp. Reg. § 1.1502-77T(a)(4) is applicable to waivers of the statute of limitations for taxable years for which the due date without extensions of the consolidated return is after September 7, 1988. Temp. Reg. § 1.1502-77T(a)(3).

applies, and [redacted] is a successor to [redacted] and therefore, is an alternative agent for the [redacted] affiliated group. Temp. Reg. I.R.C. §1.1502-77T(a)(4)(ii). Therefore, [redacted] is authorized to execute, in its own name, a Form 872, extending the period of limitations on assessment for [redacted]'s affiliated group.

Additionally, we note [redacted] would be primarily liable as a successor under Massachusetts merger law for the debts of [redacted]. M.G.L. Ch. 156B, § 82. [redacted] is severally liable under Treas. Reg. § 1.1502-6 for the entire amount of [redacted]'s consolidated group's tax liability for those periods in which it was a member of the group. Thus, [redacted] is primarily liable for [redacted]'s several liability for the entire amount of [redacted]'s consolidated group's tax liabilities for the taxable years at issue.

As set forth above, we are relying on Temp. Treas. Reg. § 1.1502-77T, which treats [redacted] as the alternative agent in this case, as a basis for obtaining a Form 872 from [redacted]. However, another reason for obtaining a Form 872 from [redacted] is that [redacted] is the successor in interest to [redacted]. The surviving or resulting corporation in a merger or consolidation under state law may validly sign an extension agreement on behalf of the predecessor corporation for a period before the transfer. Rev. Rul. 59-399, 1959-2 C.B. 448. Successor liability may be established in this case.

We recommend that you obtain a Form 872 for [redacted]. The Form 872 should be captioned as follows: "[redacted] (EIN [redacted]), as successor to [redacted] (EIN [redacted]), and as alternative agent for [redacted] (EIN [redacted]) consolidated group under Temp. Reg. § 1.1502-77T(a)(4)(ii).*" On the bottom of the Form 872, you should add the following:"*With respect to the consolidated tax liability of [redacted] (EIN [redacted]) consolidated group for the taxable years ending [redacted], [redacted], [redacted] [redacted] and [redacted]."

With regard to [redacted]'s employment tax liabilities, we recommend that you obtain a Form SS-10 for [redacted]. The Form SS-10 should be captioned as follows: "[redacted] (EIN [redacted]), as successor to [redacted] (EIN [redacted]).*" On the bottom of the Form SS-10, you should add the following:"*With respect to the employment tax liability of [redacted] (EIN [redacted] for the taxable periods ending [redacted] through [redacted], inclusive." These Forms 872 and SS-10 should be signed by an authorized current officer or director of [redacted]. Rev. Rul. 83-41, 1983 C.B. 399, clarified and amplified, Rev. Rul. 84-165,

1984-2 C.B. 305.

If you need further assistance, please contact the undersigned at 617/565-7858.

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