Internal Revenue Service

memorandum

CC:LM:HCT:NEW:2:TL-N-3613-01
LRStLaurent

date: JUL 12 2001

to: Team Manager, Group 1566

from: Associate Area Counsel (LMSB)
New Jersey

subject: [redacted]
TIN: [redacted]

ISSUE

What corporate name should appear on a Form 872, Consent to Extend the Time to Assess Tax, and who should sign the document?

SUMMARY OF FACTS

For its [redacted] tax year, [redacted] (hereafter "[redacted]") filed a federal income tax return as the parent for itself and its subsidiaries as a consolidated group. Consolidated returns were similarly filed for [redacted]'s [redacted] and [redacted] tax years. [redacted] is currently under examination for its [redacted] and [redacted] tax years. A Form 872 is sought to be secured from [redacted] for those years.

According to the examiners, [redacted] "merged" with a subsidiary of [redacted], in [redacted]. [redacted] was the surviving corporation after the merger. The examiners have described [redacted]'s business activity subsequent to the merger as reduced, but still active.

A short-year consolidated return was filed by [redacted] for part of [redacted]. For the remainder of its [redacted] tax year, and for the [redacted] tax year, [redacted] reported any federal income taxes as part of a new consolidated group with [redacted], ("[redacted]") as the common parent.

Before its name change to [redacted], that corporation was known as [redacted]. By amendment to its Certificate of Incorporation, [redacted], changed its name to [redacted], as of [redacted]. We understand that [redacted] is currently owned [redacted]% by [redacted] and has been so owned since [redacted].

Pursuant to his authority as Chief Operating Officer for [redacted], [redacted], signed a Consent of the Sole Shareholder to Action Taken Without a Meeting appointing a [redacted] ([redacted]) member board of directors for [redacted] on [redacted]. By Consent of the newly named [redacted] directors, signed [redacted].

the [redacted] board named [redacted], President and Chief Executive Officer and [redacted], Executive Vice President and COO.[1]

Subsequently, by unanimous written consent, the [redacted] board ratified and approved the resignation, effective [redacted] of [redacted] as its Chief Financial Officer and, effective the same date, appointed [redacted] as [redacted]s CFO. [redacted] has written a letter to the Service, dated [redacted], wherein he advised that he is the CFO of [redacted], authorized to sign all relevant tax returns and forms for [redacted].

An earlier Form 872 for [redacted]s [redacted] tax year was signed by [redacted] and was the subject of New Jersey District Counsel review in [redacted] (TL-N-4315-00).[2] Copies of two (2) new Forms 872, executed by [redacted] as CFO, have recently been received by the Service. The first Form 872, signed on [redacted], seeks to extend the statute of limitation dates applicable to [redacted]s [redacted] and [redacted] tax years to [redacted]. This copy fails to list in the signature block the corporate name under which [redacted] has authority as CFO to execute the form. The second copy, signed on [redacted], indicates [redacted] is signing for [redacted] and its subsidiaries as CFO for [redacted].

DISCUSSION

Internal Revenue Code, Section 6501(c)(4), generally directs that the Service and a taxpayer may enter agreements to extend the statutory period for the assessment of taxes, provided such period has not already expired.

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[1] Two differing photocopies of the signature page of the Consent have been obtained. Although [redacted] ([redacted]) members comprise the board, the copy dated [redacted], bears signatures for only [redacted] and [redacted]. The other copy, bearing the date, "[redacted]," is signed by [redacted] and [redacted]. Neither copy bears a signature for the remaining board members [redacted] and [redacted].

[2] For purposes of the previous advisory, we accepted the Service's representation that the corporate merger between [redacted] and the former [redacted] subsidiary did not constitute a "reverse acquisition" as described in Treasury Regulation § 1.1502-75(d)(3). We have attempted to make an independent determination as to whether the merger qualified as a reverse acquisition. However, we have been unable to do so based upon the information provided. This would not affect our conclusion as to the proper party to execute the 872 for the [redacted] and [redacted] tax years of [redacted].

[redacted] has remained an active corporation, filing its [redacted] tax return as part of the [redacted] consolidated group. We assume for purposes of this analysis that no notice of impending dissolution of [redacted] has been received by the Service, nor a designation by the remaining group members of another member as agent in place of [redacted]. Treas. Reg. § 1.1502-77(d).

As we earlier advised, the regulations provide that where the common parent of a consolidated group remains in existence, even if it no longer is the common parent, it remains the agent for the group with regard to the years for which it was the common parent for the group. Treas. Reg. §§ 1.1502-77(a) and 1.1502-77(a)(4)(i)(proposed Sept. 26, 2000).

Under these circumstances, [redacted] remains the agent of the consolidated group for the [redacted] tax year, whether or not a consolidated return was made for any year subsequent to [redacted], and whether or not one or more of the subsidiaries ceased to be members of the group. Treas. Reg. § 1.1502-75(a). In fact, we are advised that one or more of [redacted]'s [redacted] subsidiaries remain as current subsidiaries of [redacted]. In such case, even the group would be considered to remain in existence. Treas. Reg. § 1.1502-75(d)(1).

By its language, Treasury Regulation § 1.1502-77 is addressed to the issue, "Who is the agent for the consolidated group?" Our research has determined that since [redacted] has continued to exist, with respect to the adjustments for the [redacted] tax year wherein it filed as common parent for the consolidated group, it remains the agent for those companies. In contrast, Treasury Regulation § 1.1502-75 answers the question, "Who can file consolidated tax returns?" Subsection "d" of that provision focuses on whether a consolidated group remains in existence after a merger. Specifically, Treasury Regulation § 1.1502-75(d)(3) discusses who becomes the common parent of a new consolidated group formed by the merger of two parents. Thus, even if a reverse merger had occurred whereby [redacted] survived the merger, but was no longer the common parent of the new group, this circumstance would not alter [redacted]'s agency for the [redacted] consolidated group.

In [redacted], the [redacted] board appointed [redacted] its COO. Documentation to that fact has been provided.[3] At that time, [redacted] was apparently also COO of [redacted]. We have been provided with the written consent of [redacted]'s board of directors removing [redacted] as [redacted]'s CFO and appointing [redacted] as his replacement. No similar replacement consent has been provided by [redacted]'s board regarding [redacted]'s COO position with [redacted]. Since [redacted] is the

[3] But see footnote 1.

taxpayer at issue, we hesitate to recommend relying solely on [redacted]'s letter to the Service as CFO of [redacted] claiming he has authority to extend [redacted]'s statute.

Admittedly, [redacted] is the sole shareholder of [redacted], and [redacted] probably replaced [redacted] as an officer of [redacted], just as he had for [redacted]. However, since the boards of directors of both [redacted] and [redacted] seem otherwise to have observed the corporate forms, we recommend that the Service not rely upon the Form 872 signed by [redacted] on [redacted] unless an appropriately signed consent of [redacted]'s board is obtained which names [redacted] as [redacted]'s CFO, and which appointment was effective prior to [redacted]. If, as seems likely, [redacted] replaced [redacted] as an officer of [redacted], but the written consent of the board is non-existent or otherwise unobtainable, a writing from an officer of [redacted], other than [redacted], should be obtained which relates both the fact of [redacted]'s authority to act as an officer of [redacted] as a result of the actions of [redacted]'s board and the reason no written authorization from the [redacted] board could be furnished.

Finally, we note that with the adoption of the IRS Restructuring and Reform Act of 1998 (RRA 98), § 6501 was modified to apprise taxpayers of their rights regarding statute extensions. Consequently, the Service is required to notify taxpayers whenever a statute extension is requested that they have a right (1) to refuse to extend the statute; (2) to limit the extension to particular issues[4]; and (3) to limit the extension to a particular period of time. These notices must be provided "on each occasion when the taxpayer is requested to provide such consent." I.R.C. § 6501(c)(4)(B)

CONCLUSION

Based upon the above, we have concluded that [redacted], is and remains the agent for the [redacted] consolidated group. For the same reasons regarding [redacted]'s agency for the [redacted] taxable year, [redacted] would also be the agent of the group for the [redacted] tax year. While the Form 872 executed by [redacted] on [redacted] is facially appropriate, we do not recommend reliance upon such form absent official documentation supporting [redacted]'s authority to execute said form on behalf of [redacted]. A signed Consent by [redacted]'s board naming [redacted] as [redacted]'s

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[4] For consents restricted to particular issues, the Internal Revenue Manual directs that a footnote be added to the consent stating, "The provisions of section 6511(c) of the Internal Revenue Code are limited to any refund or credit resulting from adjustment for which the period for assessment is extended under this agreement." IRM §§ 8.2.1.3.3.12.

CFO, and which appointment was effective prior to [redacted], should be obtained.

If you have any questions, please contact attorney Leon St. Laurent at (973) 645-3594.

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