Office of Chief Counsel
Internal Revenue Service

memorandum

CC:LM:MCT:CLE:TL-N-2227-01
RSBloom

date: MAY 10 2001

to: LM:FSH:1185
Attn: [redacted]

from: Associate Area Counsel, LM:MCT:CLE

---

subject: **Adv. Opinion: Validity of Form 872**
Taxpayer: [redacted]
Year: [redacted]

This memorandum responds to your request for assistance dated April 3, 2001. This memorandum should not be cited as precedent. As requested, we have reviewed the Forms 872 which were executed with respect to the above-referenced year. This memorandum is subject to 10-day post review by our National Office and, therefore, is subject to modification.

ISSUE

Whether the Forms 872 executed in the pre-merger taxpayer name and EIN are valid to extend the statute of limitations for the year [redacted].

CONCLUSION

The Forms 872 executed in the pre-merger taxpayer name and EIN are defensible and, therefore, can be relied upon for purposes of extending the statute of limitations.

FACTS

On [redacted], [redacted] (EIN: [redacted]), a corporation incorporated under the laws of the State of New York, merged into [redacted] (EIN: [redacted], a corporation incorporated under the laws of the State of Ohio, in a reverse merger. Pursuant to the Agreement and Plan of Merger and the Supplemental Agreement to Agreement and Plan of Merger, both dated [redacted], the merger was to be conducted in accordance to section 907 of the New York Business Corporation Law and section 1701.78 of the Ohio General Corporation Law. [redacted] survived the merger, but changed its name to [redacted].[1] Through the

---

[1]Hereinafter, pre-merger [redacted] will sometimes be referred to as "[redacted]" and post-merger [redacted] (fka [redacted] will sometimes be referred to as "[redacted]."

merger, the former [redacted] shareholders received more than [redacted]% of the fair market value of [redacted]'s stock. Thus, [redacted] ([redacted]), as the legal entity that survived the merger, replaced [redacted] as the common parent of the [redacted] affiliated group.

On or about [redacted], Form 1120 was filed by [redacted] (EIN: [redacted]), as parent of a consolidated group, for the calendar year [redacted]. The taxpayer's name appearing on the Form 1120 was "[redacted]." The return used [redacted]'s EIN ([redacted]) and was signed by [redacted] V.P. and Tax Director, on [redacted]. Form 7004, an application for automatic extension to file, had previously been filed for [redacted]'s [redacted] year requesting an extension to [redacted]. The Form 7004, filed in the name of "[redacted]" and under [redacted]'s EIN, was dated [redacted], and was signed by [redacted], Sr. V.P. and Director of Taxes, [redacted]. The address reflected on both the application and return was [redacted] [redacted]'s address. [redacted] was the V.P. and Director of Taxes for [redacted]; she had also been an employee of [redacted].[2]

For the year [redacted], [redacted] filed two Forms 1120 under EIN [redacted]. The first such return was for the former [redacted] affiliated group for the period January 1 to [redacted], the date of the merger. The second such return was for the entire [redacted] calendar year of the [redacted] group and the last [redacted] months of [redacted] for the former [redacted] group.

Revenue agent [redacted] was assigned the audit of the [redacted] and [redacted] calendar years of [redacted]. During the audit, [redacted] secured three Forms 872, Consent to Extend the Time to Assess Tax, from [redacted] for the taxable year ended [redacted]. A fourth Form 872 was obtained by the Appeals Office for the [redacted] taxable year. These four consents consecutively extended the statute of limitations for assessment to [redacted]. All of the consents are in the name of "[redacted]" with EIN of [redacted] and the [redacted], Ohio address.

The first Form 872 was solicited by revenue agent [redacted] by Form 4564, Information Document Request, [hereinafter

---

[2]Her exact position and title with [redacted] is not known.

[3]The audit of the short taxable year ended [redacted], was conducted by a different revenue agent.

"IDR"] dated [redacted]. The IDR was to "[redacted]" it was submitted to [redacted], who was an employee in the tax department of [redacted]. The description of the documents requested on the IDR was as follows:

> **SUBSIDIARY:** [redacted]
> Attached are copies of form 872 "Consent to Extend Time to Assess Tax" for [redacted] for [redacted]. The form extends the Statute of Limitations for [redacted] to [redacted]. Please sign and return both copies to us.

The consent was signed under the corporate name "[redacted]" by [redacted], VP/Tax Director, on [redacted]. It was signed on behalf of the District Director on [redacted].

The second Form 872 was also solicited by revenue agent [redacted] by an undated IDR. The IDR was to "[redacted]" it was submitted to [redacted] Assistant V.P., Corporate Tax Department of [redacted]. The description of the documents requested on the IDR was as follows:

> **Entity:** [redacted]
> Attached are forms 872 "Consent to Eextend [sic] the Time to Assess Tax" for [redacted] for the periods ending [redacted] and [redacted]. The consents extend the statute until [redacted]. Please sign both copies for each year and return to us. We will return copies to you upon execution by the case manager.

The consent with respect to the year [redacted] was executed under the corporate name "[redacted]" by [redacted] VP/Tax Director, on [redacted]. It was signed on behalf of the District Director on [redacted].

The third consent was obtained by memorandum dated [redacted] from revenue agent [redacted] to [redacted]. The memorandum provided the following:

> SUBJECT: **Statute of limitations**
> [redacted]
> **EIN** [redacted]
> **EIN** [redacted]
>
> Attached are copies of forms 872 that will extend the statute of limitations to [redacted] for [redacted]'s [redacted] and [redacted] tax returns. Please execute the consents and return them to me as soon as possible.

The consent with respect to the year [redacted] was executed under the corporate name "[redacted]" by [redacted], VP and Tax Director, on [redacted]. It was executed on behalf of the District Director on [redacted].

On [redacted], a protest was filed on behalf of [redacted] EIN [redacted], with respect to the years [redacted] and [redacted]. The protest was filed in response to the Examination Report prepared by revenue agent [redacted] for the calendar years [redacted] and [redacted]. The latest Form 872 obtained with respect to the [redacted] taxable year extends the time to assess tax to [redacted]. This consent was obtained by Appeals Officer [redacted]. By letter dated [redacted], [redacted] sent Forms 872 to [redacted]'s attorney, [redacted] for the years [redacted] and [redacted]. The consent with respect to the year [redacted] was executed on [redacted] under the corporate name "[redacted]" by [redacted], VP-Tax Director, [redacted]. It was executed on behalf of the Director, Appeals LMSB, on [redacted].

The taxpayer has not raised this issue regarding the validity of the Forms 872 for the year [redacted]. Rather, it was raised by the [redacted] Appeals Office, which has the case under its jurisdiction. Presently, the amount at issue in Appeals for the year [redacted] is $[redacted] in tax. Under a partial agreement executed on [redacted], $[redacted] in tax and $[redacted] in interest was assessed and paid with respect to the year [redacted].

LAW and ANALYSIS

Under the laws of the State of Ohio, a foreign corporation may be merged into a domestic surviving corporation. Ohio Rev. Code § 1701.78(A). The effects of a merger under Ohio law are:

1) the separate existence of each constituent entity other than the surviving entity ceases, except to transfer property to the surviving entity;

2) the surviving entity possesses all assets, property, rights and authority of each constituent entity; and

3) the surviving entity is liable for all obligations of each constituent entity.

Ohio Rev. Code § 1701.82(A)(1), (3) & (4). Also, any claim existing or any action or proceeding pending by or against any constituent entity may be prosecuted to judgment, with right of appeal, as if the merger had not taken place, or the surviving entity may be substituted in its place. Ohio Rev. Code § 1701.82(A)(4). In the case of a merger with a foreign constituent entity, section 1701.82 is subject to the laws of the state under the laws of which the entity exists or in which it has property. Ohio Rev. Code § 1701.82(E).

Under the laws of the State of New York, a domestic corporation can be merged into a foreign corporation. NY CLS Bus Corp § 907(a). If the surviving corporation is incorporated under the law of any jurisdiction other than New York, the effect of such merger shall be the same as in the case of the merger of domestic corporations, except in so far as the law of such other jurisdiction provides otherwise. NY CLS Bus Corp § 907(h). Upon a merger being effected, New York law provides the following:

1) the surviving corporation possesses all the rights, privileges, immunities, powers and purposes of the constituent corporations;

2) all the property of the constituent entities vests in the surviving corporation; and

3) the surviving corporation assumes and is liable for all the liabilities, obligations and penalties of the constituent corporations.

NY CLS Bus Corp § 906(b)((1)-(3). However, no action or proceeding pending at the time the merger is effected shall abate or be discontinued by such merger, but may be enforced, prosecuted, settled or compromised as if such merger had not occurred, or such surviving corporation may be substituted in place of the constituent entity. NY CLS Bus Corp § 906(b)(3).

"Authority to act on behalf of a corporation in tax matters is determined by state law." Paramount Warrior, Inc. v. Commissioner, T.C. Memo. 1976-400, 35 T.C.M. (CCH) 1805, 1808 (1976). Under the laws of both New York and Ohio, [redacted]'s separate existence ceased after the merger was effected.[4] Its only possible purpose after merger was to continue any pending action or proceeding. There was no pending action or proceeding with regard to [redacted]'s [redacted] tax year; the return for the year was neither due nor filed at the time of the merger. However, the surviving corporation of the merger, [redacted] fka [redacted], is liable for the obligations, including the [redacted] tax liability, of old [redacted] See Pleasanton Gravel Co. v. Commissioner, 85 T.C. 839 (1985). The surviving corporation also retains the non-survivor's power to extend the period of

---

[4]In applying earlier New York merger laws (N.Y. Stock Corp. Law section 85 and its predecessor section 15), the Tax Court and the Board of Tax Appeals held that the merged corporation's corporate existence was retained for the purpose of carrying out the reservation in the statute of the rights of its creditors. Popular Library, Inc. v. Commissioner, 39 T.C. 1092 (1963); and Wire Wheel Corp. v. Commissioner, 16 B.T.A. 737 (1929). Under the law applicable at the time of the merger in question, the surviving corporation of the merger not only took all the assets and rights of the merged corporation but also assumed its obligations.

limitations. Id. at 853.

I.R.C. § 6062 provides that corporate returns with respect to income can be signed by any officer authorized to act in such capacity. Officers who are explicitly listed with signing authority under section 6062 include the president, vice-president, treasurer, assistant treasurer and chief accounting officer. Any such officer may also sign a consent to extend the time to assess tax, Form 872, whether or not that person was the same individual who signed the return. Rev. Rul. 83-41, 1983-1 C.B. 349.

Treas. Reg. § 1.1502-75(d)(3)(i) provides that, after a reverse acquisition, the acquiring corporation is to be treated as the common parent of the group that is deemed to survive the acquisition. [redacted] shareholders received more than [redacted] of the fair market value of [redacted]'s stock nka [redacted] thus, the merger constituted a reverse acquisition. After the merger in question, [redacted] nka [redacted] is to be treated as the common parent of the [redacted] group, which is the group that survived the merger. As common parent, [redacted] is the agent for the [redacted] affiliated group with respect to years both before and after the reverse acquisition. See Southern Pacific Co. v. Commissioner, 84 T.C. 395, 404 (1985). Under Treas. Reg. § 1.1502-77(a), the common parent shall be the sole agent for each subsidiary in the group, duly authorized to act in its own name in all matters, including the signing of a consent to extend the time to assess tax, relating to the tax liability for the consolidated return year. An agreement 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. Treas. Reg. § 1.1502-77(c).

The [redacted] return and the Forms 872 in question were in the name of [redacted] with the EIN of [redacted]. The issue being raised is whether the consents are valid to extend the time to assess tax for the year [redacted] since the consents were not in the name and EIN, and signed under the name of, [redacted] as successor to [redacted]. The return and Forms 872 were all signed by the V.P. and Tax Director of [redacted] the signature on the Forms 872 was under the corporate name [redacted]. Therefore, the question must be whether the consents were executed by and for the proper corporation.

Since [redacted] was merged out of existence prior to the execution of the consents and [redacted] became liable for old

[redacted]'s obligations, the consents to be valid must have been executed for and by [redacted]. The forms 872 were, in fact, executed by the V.P. and Tax Director of [redacted]. The V.P. and Tax Director is a proper officer to execute such documents. The fact that the V.P. and Tax Director did not sign under the corporate name "[redacted] Successor in Merger to [redacted]" is immaterial. The consents were signed under the corporate name of [redacted], and at the time of signing only one [redacted] existed, which was the successor in merger.

The consents in question were in the name of [redacted] with [redacted]'s EIN. Due to the name and EIN of the old taxpayer[5] being listed on the consents, it is possible that an argument can be made that the consents are invalid because they were executed for a nonexistent corporation.[6] If made, we do not believe this argument will be successful.

As was stated by the Tax Court in Woods v. Commissioner, 92 T.C. 776 (1989),

> A consent extending respondent's time to assess taxes is not a contract. However, contract principles are significant because section 6501(c)(4) requires that the parties reach a written agreement as to the extension. Piarulle v. Commissioner, 80 T.C. 1035, 1042 (1983). The term agreement means a manifestation of mutual assent. Piarulle v. Commissioner, supra at 1042. It is the objective manifestation of mutual assent as evidenced by the parties' overt acts that determines whether the parties have made an agreement. Kronish v. Commissioner, 90 T.C. 684, 693 (1988).

Woods, 92 T.C. at 780. Where the written agreement mistakenly

---

[5]It is also the name of the new (successor) corporation.

[6]The taxpayer has never raised any issue or concern with the consents, so it is difficult to determine what, if any, argument would be made. However, it is doubtful that the taxpayer will make this argument. The [redacted] tax return was, like the consents, filed after the merger. The taxpayer name and EIN appearing on the return are the same as that shown on the consents. Thus, if the consents are invalid because they were executed for a nonexistent corporation; arguably, the return would likewise be invalid. If the return is invalid, the statute of limitations under I.R.C. § 6501 has not begun to run and the consents are not necessary. See Popular Library, Inc. v. Commissioner, 39 T.C. 1092, 1100 (1963).

fails to express the mutual intent of the parties, the court may reform the writing to conform to the parties' intent if established by clear and convincing evidence.[7] Id.

In San Francisco Wesco Polymers, Inc. v. Commissioner, T.C. Memo. 1999-146, the Tax Court reformed a Form 872 consent to conform to the parties' intent in a situation where the consent in question contained the wrong taxpayer name and EIN and was signed by an individual in his capacity as president of a different corporation. The taxpayer was a dissolved corporation; it had been liquidated on December 31, 1994. Another corporation was formed to take over the taxpayer's operations. This other corporation's first corporate tax return was for the taxable year ended June 30, 1994. The Service mailed a letter to the taxpayer's president, who was also the president of the other corporation, with an attached Form 872 extending the statute of limitations with respect to the year ended June 30, 1993. The letter stated that the Form 872 related to the taxpayer's taxable year ended June 30, 1993. The Form 872 listed the other corporation's name [Other corporation Successor in interest to Taxpayer (with taxpayer's EIN)] and used the other corporation's EIN in upper right hand corner of the form, but listed the year ended June 30, 1993, as the period to be extended. The Form 872 was signed by the president in his capacity as president of the other corporation. The Tax Court found that the president signed the Form 872 with the intent to extend the limitations period with respect to the taxpayer's taxable year ended June 30, 1993. As support of this finding, the Court relied upon the following: 1) it assumed that the president read the letter forwarding the consent which stated that the consent applied to the taxpayer; 2) the consent referred to the year ended June 30, 1993, and such year could only apply to the taxpayer; the other corporation's first tax return was for the period ended June 30, 1994; and 3) the person that signed the consent was the president of both the taxpayer and the other corporation.

The facts favoring reformation in the present case are even stronger than those in San Francisco Wesco Polymers, Inc. The consents use the same name and EIN as shown on the return to which they apply. The return, like the consents, was prepared and filed post-merger. The consents were signed by appropriate officers of the successor corporation ([redacted]. The consents, by their clear terms, relate to the taxable year ended [redacted]. In fact the use of the old EIN at the top

---

[7]Also, if a written consent is ambiguous, the court will allow extrinsic evidence to clarify the ambiguity and to determine the parties' true intent. Constitutional Publishing Co. v. Commissioner, 22 B.T.A. 426 (1931).

right hand corner of the Forms 872 aids in identifying the return to which they relate. After the merger, any consent for [redacted]'s taxable year ended [redacted], could have been obtained using the taxpayer name [redacted] with [redacted]'s ([redacted]'s) EIN.[8] The correspondence forwarding the consents to [redacted] clearly indicate that they were for [redacted]'s consolidated return. [redacted] calendar years [redacted] and [redacted] were being audited together and the correspondence forwarding the consents clearly indicated that the consents related to such audit. Officers of [redacted] continually executed the consents during the audit, and [redacted]'s representative filed a protest to Appeals from the examination report for the years [redacted] and [redacted]. Even during Appeals consideration of the matter, a further consent, similarly drafted, was executed by the taxpayer.

In sum, should the taxpayer ever raise this issue, we believe the consents were signed by appropriate officers who had the actual authority to bind the surviving corporation and the [redacted] affiliated group[9] even though the Forms 872 do not refer to [redacted] as the successor in interest and they use the [redacted]'s EIN. It is clear that both the taxpayer, through its corporate officers, and the Service, through its agents, intended to extend the period of limitations for the liability relating to the taxable year ended [redacted] of [redacted]. Therefore, the Service can rely upon the consents to extend the statute of limitations to [redacted]. Should a further consent be necessary, the appropriate language for the taxpayer is as follows:

> [redacted] (EIN: [redacted]), formerly [redacted] as successor to [redacted] (EIN: [redacted]

For sake of clarity, the foregoing name should be asterisked, as indicated, and at the bottom of the consent the following

---

[8]In the unlikely event this issue relating to the validity of these consents is ever seriously raised by the taxpayer, the tax return and related Forms 872 of [redacted] for the year ended [redacted], should be obtained. Depending upon the taxpayer name used on the "[redacted]" consents and the specific officer(s) who signed the consents, there may be additional factors supporting the parties' actual intent.

[9][redacted], as common parent for the [redacted]'s affiliated group, is authorized under the regulations to act in its own name as the agent for the entire group with respect to consents to extend the time to assess tax for the consolidated return year.

language should be inserted:

* With respect to the consolidated tax liability of the [redacted] (EIN: [redacted]) [redacted] consolidated return group for the group's taxable year ended [redacted].

The consent should be signed by an appropriate officer of [redacted] under the corporate name "[redacted] (formerly [redacted] [redacted] successor to [redacted]."

This writing may contain privileged information. Any unauthorized disclosure of this writing may have an adverse effect on privileges, such as the attorney client privilege. If disclosure becomes necessary, please contact this office for our views. Also, if you have any questions regarding the above, please feel free to contact the undersigned at 216-522-3380 (ext. 3108).

JOSEPH F. MASELLI
Area Counsel
(Heavy Manufacturing, Construction and Transportation)

By: _____
RICHARD S. BLOOM
Associate Area Counsel
(Large and Mid-Size Business)