Office of Chief Counsel
Internal Revenue Service

memorandum

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GDCurran

date: NOV - 2000

to: Frank J. Bagnato, Jr., Team Manager, Appeals
Philadelphia
Attention: Ed Sigmund, International Specialist

from: James C. Fee, Jr.
Associate Area Counsel (LMSB) Northeast Region CC:NER

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subject: [redacted] and related Forms 872

DISCLOSURE STATEMENT

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INTRODUCTION

We respond to your request for advice, dated [redacted], regarding the correct captions and language for Forms 872, Consent To Extend The Time To Assess Tax, for tax returns concerning the [redacted]. Presently, separate Forms 872 exist for Forms 1120, U.S. Corporation Income Tax Return, for the [redacted] through [redacted] tax years, and the [redacted] and [redacted] tax years. Additionally, separate Forms 1042, Annual

Withholding Tax Return for U.S. Source Income of Foreign Persons, exist for the [redacted] through [redacted] tax years, and the [redacted] and [redacted] tax years.

Concerning the Forms 1120, a transfer pricing issue is in dispute for the [redacted] through [redacted] tax years. Regarding the Forms 1042, the issue involves withholding on a deemed dividend from a first tier U.S. subsidiary to its Swedish foreign parent for the [redacted] through [redacted] tax years. Both issues are currently under Competent Authority's jurisdiction.

FACTS

[redacted] ("[redacted]"), EIN # [redacted], filed Forms 1120 for the [redacted] through [redacted] tax years as the common parent of its consolidated group. [redacted] was also a first tier U.S. subsidiary of its Swedish parent, [redacted]. During [redacted], [redacted] merged into [redacted], another Swedish conglomerate.

[redacted] ("[redacted]"), EIN # [redacted] (incorporated in the state of Delaware) was a first tier U.S. subsidiary of [redacted]. Due to [redacted]'s merger into [redacted], [redacted] became the U.S. consolidated group's new common parent, which included [redacted] for the [redacted] and [redacted] tax years. Regarding [redacted], it changed its name during [redacted] to [redacted] ("[redacted]"). During [redacted], [redacted] changed its name to [redacted] ("[redacted]").

During [redacted], [redacted] ceased to exist when it merged into [redacted], EIN # [redacted] (incorporated in the state of New York). After that merger, [redacted], [redacted], EIN # [redacted], changed its name to [redacted] ("[redacted]"), EIN # [redacted].

[redacted] ceased to exist when it merged into [redacted] on [redacted]. [redacted] acquired [redacted] on [redacted] with the resulting business combination producing [redacted] ("[redacted]"), EIN # [redacted], the new common parent. [redacted] became a subsidiary of [redacted] ("[redacted]"), EIN # [redacted], a subsidiary of [redacted]. Towards the end of [redacted], [redacted] ceased to exist when it merged into [redacted].

Effective [redacted], [redacted] merged into [redacted] (formerly [redacted]), EIN # [redacted].[1] [redacted] remains in existence as a subsidiary of [redacted], the new common parent. Further, [redacted] continues to exist as a subsidiary of [redacted].[2]

Concerning the Forms 1120, Examination and Appeals secured a series of Forms 872 for the [redacted] through [redacted] tax years, and for the [redacted] and [redacted] tax years. Regarding the [redacted] through [redacted] tax years, the most recently secured Form 872 is entitled "[redacted] as successor by merger to [redacted] as successor by merger to [redacted], formerly [redacted], formerly [redacted]". Additionally, the Form 872 was secured under the EIN # [redacted].

Regarding the [redacted] and [redacted] tax years, the most recently secured Form 872 is entitled "[redacted] as successor by merger to [redacted], formerly [redacted]". This Form 872 was secured under the EIN # [redacted].

Concerning the Forms 1042, Examination and Appeals secured a series of Forms 872 for the [redacted] through [redacted] tax years and for the [redacted] and [redacted] tax years. Regarding the [redacted] through [redacted] tax years, the most recently secured Form 872 is entitled "[redacted] as successor by merger to [redacted] as successor by merger to [redacted], formerly [redacted], formerly [redacted]". This Form 872 was secured under the EIN # [redacted].

Regarding the [redacted] and [redacted] tax years, the most recently secured Form 872 is entitled "[redacted] as successor by merger to [redacted], formerly [redacted]". This Form 872 was secured under the EIN # [redacted].[3]

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[1] Based upon the facts presented to us, none of the business combinations discussed above involved a liquidation, reverse acquisition or downstream merger. If any of the business combinations did involve a liquidation, reverse acquisition or downstream merger our advice does not apply.

[2] See attached diagrams which depicts the above-fact pattern.

[3] Concerning the Forms 1042, the issue involved a deemed dividend paid by the first tier U.S. subsidiary and common parent to its Swedish parent. The deemed dividend occurred through a second tier U.S. subsidiary's transactions with its Swedish

Analysis

Regarding a consolidated income tax return, generally, the common parent, in its own name, is the proper party to extend the statute of limitations on behalf of itself and the consolidated group. The common parent is the highest tier domestic corporation. The common parent remains the agent for the consolidated group for the years during which it was the common parent as long as it remains in existence. When the common parent goes out of existence, the common parent can designate another member of the group as agent for the members of the group for tax years ending prior to its dissolution, or if the common parent goes out of existence without making a designation, the remaining members may designate a new agent for the members of the group. If no designation is made the Service may deal with each member of the group individually.

Due to some uncertainty concerning the common parent as an agent for the consolidated group regarding reverse acquisitions and downstream mergers, the Service issued Temp. Treas. Reg. § 1.1502-77T in 1988. Under this temporary regulation, the Service can secure statute of limitations extensions from, or issue notices of deficiency to, any one of several "alternative agents." As provided for in the temporary regulation, a successor to a former common parent that has ceased to exist can generally act as an alternative agent for the old consolidated group. However, this temporary regulation applies for tax years which the due date (without extension) of the consolidated return falls after September 7, 1988.

In our case, Temp. Treas. Reg. § 1.1502-77T does not apply to the [redacted] tax year since it precedes the September 7, 1988 effective date prescribed in the temporary regulation. Concerning the [redacted] tax year, [redacted] (formerly [redacted], formerly [redacted]) as the former common parent for the [redacted] tax year remained the proper party to execute the Form 872 for the old consolidated group for that year until it ceased to exist in [redacted].[4] At that time, since Temp. Treas. Reg. § 1.1502-77T did not apply, the Service, to ensure the joint and several tax liability of [redacted] and each member of its former consolidated group, should have secured separate Forms 872 for [redacted] and each member of its former consolidated group for the

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parent. While the first tier U.S. subsidiary filed Forms 1042 for the [redacted] through [redacted] tax years, the second tier U.S. subsidiary did not file any Forms 1042 for these years.

[4] Based upon the facts as presented, we assume no designation was made.

[redacted] tax year. However, since this did not occur, the most recently executed Form 872 for the [redacted] tax year remains valid in that it binds only [redacted] (formerly [redacted], formerly [redacted]) and its successors for [redacted]'s consolidated tax liability for the [redacted] tax year.

Concerning the [redacted] through [redacted] tax years, the Service properly secured Forms 872 under the alternative agent rules, therefore the most recently executed Forms 872 for the [redacted] through [redacted] tax years do not present an issue concerning the joint and several tax liability for the common parent and its consolidated group for each of those years.

Regarding the Forms 1042, the consolidated return rules do not apply to the requirement to report the income tax withheld on foreign persons under I.R.C. §§ 1441 and 1442, as reported on Form 1042. Since the first tier U.S. subsidiary for the [redacted] through [redacted] tax years did file Forms 872 and was the entity responsible for paying any dividend to the foreign parent, the Service secured Forms 872 in the name of the first tier U.S. subsidiary and its successors for each of the [redacted] through [redacted] tax years.[5]

Conclusion

Concerning the Forms 872 for any Federal income tax liability due from the Forms 1120, we recommend the following:

Prepare a separate Form 872 for the [redacted] tax year entitled "[redacted] as successor by merger to [redacted], [redacted] as successor by merger to [redacted], formerly [redacted].*". Additionally, at the bottom of the first page of the Form 872 add the following language: "*[redacted]'s, EIN # [redacted], several tax liability for [redacted] consolidated group for the tax year ended [redacted]."

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[5] For each of the [redacted] through [redacted] tax years, the second tier U.S. subsidiary engaging in the transaction with the foreign parent did not file Forms 1042. Therefore, if the second tier U.S. subsidiary is deemed the proper party to file a Form 1042 no statute of limitations issue exists since no returns were ever filed.

Prepare a Form 872 for the [redacted] through [redacted] tax years, inclusive, entitled "[redacted] as successor by merger to [redacted] as successor by merger to [redacted], formerly [redacted], formerly [redacted], and as an alternative agent to the [redacted] consolidated group under Temp. Treas. Reg. § 1.1502-77T*". Additionally, at the bottom of the first page of the Form 872, add the following language: "*Concerning the tax liability of [redacted], EIN # [redacted] 1655608, [redacted] consolidated group for the tax years ended [redacted], [redacted] and [redacted], inclusive."

Prepare a Form 872 for the [redacted] and [redacted] tax years, inclusive, entitled "[redacted] as successor by merger to [redacted], formerly [redacted] (EIN # [redacted]) as successor by merger to [redacted] (EIN # [redacted]), and as an alternative agent to [redacted], EIN # [redacted], [redacted] consolidated group under Temp. Treas. Reg. § 1.1502-77*". Additionally, at the bottom of the first page of the Form 872, add the following language: "*Concerning the tax liability of [redacted], EIN # [redacted], [redacted] consolidated group, for the tax years ended [redacted] and [redacted], inclusive."

Also, use [redacted]'s EIN # [redacted] rather than [redacted]'s EIN # of [redacted] for the [redacted] and [redacted] through [redacted] tax years. For the [redacted] and [redacted] tax years, use [redacted]'s EIN # [redacted] rather than [redacted]'s EIN # of [redacted].

Concerning the Forms 872 for the Federal withholding tax due on the Forms 1042, we recommend the following:

Prepare a Form 872 for the [redacted] through [redacted] tax years entitled "[redacted] as successor by merger to [redacted] as successor by merger to [redacted], formerly [redacted], formerly [redacted]*". Additionally, at the bottom of the first page of the Form 872 add the following language: "*[redacted]'s, EIN # [redacted], withholding for U.S. source income of foreign persons for the tax years ended [redacted], [redacted] and [redacted], inclusive."

Prepare a Form 872 for the [redacted] and [redacted] tax years entitled "[redacted] as successor by merger to [redacted], formerly [redacted] (EIN # [redacted]) as successor by merger to [redacted] (EIN # [redacted])*". Additionally, at the bottom of the first page of the Form 872 add

the following language: "*[redacted]'s, EIN # [redacted], **withholding for U.S. source income of foreign persons for the tax years ended** [redacted] **and** [redacted], **inclusive."**

For the [redacted] through [redacted] tax years, use [redacted]'s EIN # [redacted] rather than [redacted]'s EIN # of [redacted]. For the [redacted] and [redacted] tax years, use [redacted]'s EIN # [redacted] rather than [redacted]'s EIN # of [redacted].

Also, we recommend that for both Forms 872 you identify the type of tax as **"Form 1042, Annual Withholding Tax Return for U.S. Source Income of Foreign Persons"**.

Finally, the taxpayer's letter, dated [redacted], identifies [redacted]'s, [redacted], Corporate Vice President-Taxes as the authorized party to sign for [redacted] for all the Forms 872.

Our advice is subject to the Office of Chief Counsel's ten day post-review procedures. If the Office of Chief Counsel alters or revises our advice they will contact us within ten working days from their receipt of our advice. We recommend that before issuing the Forms 872 to the taxpayer, you wait until the ten day period expires and we confirm that no alterations or revisions were made to our proposed advice. Please contact attorney George Curran if you have any additional questions regarding this memorandum.

JAMES C. FEE, JR.
Associate Area Counsel (LMSB)

Enclosure:
as stated.