Office of Chief Counsel
Internal Revenue Service

memorandum

CC:LM:FSH:LI:TL-N-1251-01
DRMirabito

date: April 18, 2001

to: Dennis Bricker, Manager, Group 1348
Attention: Victoria Hanley, Revenue Agent

from: Jody Tancer, Associate Area Counsel
(Financial Services and Health Care:Long Island)

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subject: [redacted]

This memorandum responds to your request for assistance dated February 13, 2001 as supplemented with additional material received by our office on March 21, 2001 and April 11, 2001. This memorandum should not be cited as precedent.

ISSUES

1. Who is the proper entity to execute a Form 870 for [redacted] and its subsidiaries for a fiscal year prior to a restructuring?

2. What is the proper caption and signature block for a Form 870 for [redacted] and its subsidiaries for a fiscal year prior to a restructuring?

3. Who is the proper party to execute the subject Form 870?

CONCLUSIONS

1. A single Form 870 should be executed by both [redacted] and by [redacted].

2. The caption of the subject Form 870 should reference [redacted] and the signature block should include both [redacted] and [redacted] as agent for [redacted].

3. A current president, vice-president, treasurer, assistant treasurer, or chief accounting officer of [redacted] should execute the Form 870 as agent and a current president,

vice-president, treasurer, assistant treasure, or chief accounting officer of [redacted] should also execute the Form 870 as agent.

FACTS

You have provided us with the following information:

[redacted], hereinafter the "taxpayer", filed a consolidated return listing [redacted] subsidiaries for the fiscal year ended [redacted]. We understand that the agent has completed her audit of this return and thus seeks advice regarding the Form 870 needed to allow the Service to assess the parties' agreement on adjustments for this fiscal year.

The taxpayer's Form 1120 for the fiscal year ended [redacted] was signed by a Senior Vice-President, apparently a [redacted]. The fiscal years [redacted] and [redacted] Forms 1120 were both signed by Senior Vice President-Controller [redacted]. Each Form 1120 is headed, "[redacted]" and bears the taxpayer's EIN [redacted]. We have received only the first pages of each return and thus have considered only the information therein in this response.

You have also provided us with copies of the taxpayer's Form 1120 for the fiscal year ended [redacted] and [redacted]'s Form 1120 for the fiscal year ended [redacted]. The taxpayer's return is headed "[redacted]" and bears its EIN; [redacted]'s return is headed "[redacted]" and bears its EIN [redacted]. Both returns as checked as consolidated returns and Forms 851 are attached to each. The taxpayer's Form 1120 is signed by an officer whose title appears as Senior Vice President-Chief Financial Officer; we cannot read this signature. The copy of [redacted]'s return is not signed.

As noted below, the taxpayer and [redacted] notified the agent that they restructured the taxpayer's consolidated group, with certain of taxpayer's subsidiaries becoming members of a new consolidated group with [redacted] as the common parent and certain subsidiaries remaining in the taxpayer's consolidated group. In addition, the taxpayer claims it and [redacted] became separate, independent entities after the restructuring. However, the taxpayer's Form 1120 for the fiscal year [redacted] lists [redacted] (with its correct EIN) as a subsidiary on Form 851. In addition, all [redacted] subsidiaries listed on [redacted]'s return for the fiscal year [redacted] are also listed as subsidiaries on the taxpayer's return for the same fiscal year.

On [redacted], the organizational structure changed, whereby the consolidated group, as it existed per the Form 1120 filed for the taxpayer's fiscal year [redacted], split into two groups with two parent companies: the taxpayer and [redacted]. According to a chart you provided, the following subsidiaries, which were part of the taxpayer's consolidated group as of [redacted], remained part of the taxpayer's consolidated group after [redacted]: [redacted], [redacted], [redacted], [redacted], [redacted], [redacted], [redacted], [redacted], [redacted], and [redacted].

According to an Information Statement dated [redacted] prepared in connection with the restructuring:

1. Prior to [redacted], [redacted] was a Delaware corporation and a wholly-owned subsidiary of the taxpayer. On [redacted], the taxpayer's Board of Directors decided to establish [redacted] and cause it to acquire [redacted]% of the outstanding capital stock of the taxpayer's subsidiaries engaged in the home health care business.

2. [redacted] was organized for the purpose of effecting the reorganization and operating the taxpayer's home health care business. Moreover, it would own the home health care business previously owned by the taxpayer.

3. [redacted] had no prior operating history as an independent business.

4. Subsequent to the restructuring, [redacted] and the taxpayer would operate as separate, distinct, and independent companies.

5. After the restructuring, [redacted]'s assets would consist solely of its equity interest in its home health care subsidiaries.

6. Commencing on or about [redacted], the following members of [redacted]'s management would hold the noted offices in the taxpayer: [redacted] would remain Chief Executive Officer, [redacted] would serve as Senior Vice President, Financial Strategy, and [redacted] would remain President.

According to a Form 10-K dated [redacted] for [redacted]'s fiscal year ended [redacted], pursuant to the taxpayer's self-described reverse spinoff for financial reporting purposes under GAAP, [redacted] acquired [redacted]% of the outstanding capital stock of the taxpayer's subsidiaries engaged in the home health care business.

A pro rata distribution was made to the taxpayer's shareholders of all the shares of [redacted] common stock previously owned by the taxpayer. This distribution was made by issuing one share of [redacted] common stock for every 2 shares of the taxpayer's Class A and Class B common stock outstanding as of [redacted]; after the restructuring, the taxpayer no longer owned any shares of [redacted]. Accordingly, as a result of this transaction, a greater proportion of the taxpayer's assets and operations were held by [redacted]. The Form 10-K further states that since [redacted], the taxpayer and [redacted] have been separate companies with [redacted] operating the home health care business segment and the taxpayer operating the supplemental staffing business segment. In addition, this Form 10-K repeats that as of [redacted], [redacted] continued to serve as the taxpayer's Chief Executive Officer, [redacted] served as the taxpayer's Senior Vice President, Financial Strategy, and [redacted] served as the taxpayer's President.

Please note that for purposes of this memorandum, we make the following assumptions. However, if any of our assumptions are incorrect, please contact this office as our advice may change. We assume:

1. The taxpayer continues to exist and continues to serve as the common parent of a consolidated group.

2. The three gentlemen listed above are still serving as officers of the taxpayer.

3. A Form 851, Affiliations Schedule, for the taxpayer's fiscal year ended [redacted] does not list these entities as subsidiaries of the taxpayer: [redacted] and [redacted]. Please note that we assume the chart you provided is correct and these two entities remained members of the taxpayer's consolidated group after [redacted].

4. The Form 851 for the [redacted] fiscal year lists as the taxpayer's subsidiaries the following entities which are not included in the chart you provided: [redacted] and [redacted]. According to a Form 851 for the taxpayer's [redacted] fiscal year, [redacted] merged into [redacted] on [redacted]; [redacted] was transferred to [redacted] as of [redacted]. Therefore, we again assume that [redacted] remained in the taxpayer's consolidated group.

ANALYSIS

1. Issue 1.: Who is the proper entity to execute the Form 870?

Treas. Reg. § 1.1502-77(a) provides that the common parent, with exceptions which we understand do not apply here, shall be for all purposes "the sole agent for each subsidiary in the group, duly authorized to act in its own name in all matters relating to the tax liability for the consolidated return year." In addition, that regulation states that "the common parent in its name will give waivers ... and ... execute ... all other documents, and any waiver ... agreement ... or any other document so executed, shall be considered as having also been given or executed by each subsidiary." Third, according to this regulation, its provisions "shall apply whether or not a consolidated return is made for any subsequent year, and whether or not one or more subsidiaries have become or have ceased to be members of the group at any time."[1] See Letter Ruling 199946010 (dated November 24, 1999)and Field Service Advice 199917015 (dated January 15, 1999).

This regulation was authorized by the legislative mandate contained in Internal Revenue Code § 1502, is legislative in character, and thus has the force and effect of law. First Chicago Corporation v. Commissioner, 96 T.C. 421, 439 (1991).

In light of the provisions of the pertinent regulation, we take the position that the taxpayer should execute the subject Form 870.

As noted above, the taxpayer characterized the [redacted] transaction as a reverse spinoff but we express no opinion on whether you should accept that characterization. The Tax Court has held that if the old common parent in a reverse acquisition as specified in Treas. Reg. section 1.1502-75(d)(3)(i), continues to exist after the reorganization, both the old common parent and

[1] The regulation further provides that, upon giving notice to the common parent, the district director may deal directly with any member of the group; please contact this office for further assistance if you intend to utilize this section of the regulation. Please note that the current proposed regulations substitute the Commissioner for the district director.

the new common parent are agents for the affiliated group for purposes of the issuance of a statutory notice of deficiency for years prior to the reverse acquisition. Union Oil Company of California v. Commissioner, 101 T.C. 130 (1993).

However, the Union Oil Company decision was distinguished by the Tax Court in Interlake Corporation, Successor in Interest to Interlake, Inc. and Consolidated Subsidiaries v. Commissioner, 112 T.C. 103 (1999). According to the Interlake Court, Union Oil Company was not dispositive because in the earlier case the Court did not have occasion to consider whether a former common parent that is no longer affiliated with the group is an authorized representative of the group for purposes of receiving tentative refunds relating to years during which it controlled the group where the group has a new common parent. Rather, the Interlake Court found that the Union Oil Company Court held only that if the old common parent in a reverse acquisition, as specified in Treas. Reg. § 1.1502-75 (d)(3)(i), continues to exist after the reorganization, both the old common parent and the new common parent are agents for the affiliated group for purposes of issuing notices of deficiency for years before the reverse acquisition. Thus, Union Oil Company was distinguishable because the old common parent remained affiliated with the group after the reorganization. Using this rationale, the Interlake Court held that the old common parent's authority to act for the group, at least with respect to the issuance and receipt of tentative refunds, terminated when its affiliation with the group terminated. Accordingly, with respect to the group, it was as though the old common parent ceased to exist.

Based on the information provided to us, we do not think that the decision in Interlake applies here. However, since the parties have reached at least a basis of agreement on issues raised in the audit, it does not appear that the agent has had an opportunity to explore why the taxpayer considers the [redacted] transaction to be a reverse spinoff. Further, she may not have been provided with all the facts and documents of that transaction. Having additional facts regarding the transaction might change our opinion on whether Interlake applies to the [redacted] restructuring. In addition, the situation here may have changed since [redacted] as the taxpayer's Form 1120 for the fiscal year ended [redacted] now includes [redacted] as a subsidiary and lists as subsidiaries all the subsidiaries listed on [redacted]'s return for the fiscal year ended [redacted]. Accordingly, and taking into account the Union Oil Company opinion, we suggest that the Form 870 be captioned and signed as indicated in section 2. below.

2. Issue 2.: How should the Form 870 be captioned?

a. The CAPTION of the Form 870 should read as follows:

"[redacted] and put an asterisk (*) after it.

The * should read as follows:

"* With respect to the consolidated tax liability of [redacted] consolidated group for taxable period (insert fiscal year in issue)."

If the Form 870 is more than one page in length, the * section should be placed on the bottom of the first page. If the Form 870 is only one page in length, the * section should be included in the caption and should immediately follow "[redacted]".

b. The SIGNATURE BLOCK should read as follows:

[Name of current officer of [redacted]]

[Title of officer]

[redacted]**

The ** should read as follows:

"** As agent for [redacted] consolidated group for taxable period (insert fiscal year in issue)."

The ** section should be on the line immediately following "[redacted]."

[Name of current officer of [redacted]]

[Title of officer]

[redacted]***

The *** should read as follows:

"*** As agent for [redacted] consolidated group for taxable period (insert fiscal year in issue)."

The *** section should be placed on the line immediately following "[redacted]."

3. Issue 3: Who Should Execute the Form 870?

The Form 870 should be executed as indicated in section 2. above. Under Internal Revenue Code § 6213(d), a taxpayer may consent to waive the restrictions on the assessment and collection of the whole or any part of a tax deficiency. Internal Revenue Code § 6061 provides that any return, statement or other document made under any internal revenue law must be signed in accordance with the applicable forms or regulations. However, Treas. Reg. § 301.6213-1(d) does not specify who may sign such agreements. Accordingly, the Service will apply the rules applicable to the execution of the original returns to the execution of agreements waiving the limits on assessment and collection under Internal Revenue Code § 6501. Rev. Rul. 83-41, 1983-1 C.B. 399, clarified and amplified, Rev. Rul. 84-165, 1984-2 C.B. 305. Internal Revenue Code § 6062 provides that a corporation's income tax returns must be signed by the president, vice-president, treasurer, assistant treasurer, chief accounting officer or any other officer duly authorized to act. Further, any such officer may sign a waiver, whether that person was the same individual who signed the return. Although we recognize that Rev. Rul. 83-41 does not address the execution of a Form 870, we think its provisions apply here. See also Rev. Rul. 74-30, 1974-1 C.B. 330 (Form 870 with accompanying schedules is a return under Internal Revenue Code § 6020(a)).

Accordingly, we strongly suggest that you have either [redacted] (Senior Vice President, Financial Strategy) or [redacted] (President) sign the Form 870 to be executed by both the taxpayer and [redacted]. However, you must be sure they still hold either those positions (or any of the other positions noted in § 6062) with the taxpayer and with [redacted]. Our suggestion is based on the information noted above that these gentlemen hold positions with both the taxpayer and [redacted].

Alternatively, you may have the taxpayer's and [redacted]'s current president, vice-president, treasurer, assistant treasurer, or chief accounting officer sign the form. Lastly, you may have any other officer duly authorized by the taxpayer and by [redacted] execute the Form 870; if such person is going to sign the Form 870 and you have a question regarding whether they have been duly

authorized to take such action, please contact this office for further assistance.

Should it be necessary to issue a notice of deficiency to the taxpayer, please contact this office for further assistance.

This opinion is based upon the facts set forth herein. It might change if the facts are determined to be different. If the facts change, this opinion should not be relied upon. Please note that under routing procedures which have been established for opinions of this type, we have referred this memorandum to the Office of Chief Counsel for review. That review might result in modifications to the conclusions herein. We will inform you of the result of the review as soon as we hear from that office, which should be in approximately 10 days. In the meantime, the conclusions reached in this memorandum should be considered to be only preliminary.

DISCLOSURE STATEMENT

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.

JODY TANCER
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(Large and Mid-Size Business)

By:_____
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