Office of Chief Counsel
Internal Revenue Service

memorandum

CC:NER:NJD:NEW:TL-N-3821-00
RABaxer

date:

to: Compliance Territory Manager LMSB Group 1565
Marilyn Walter

from: District Counsel, New Jersey District, Newark

---

subject: [redacted]
Form 872
Tax Periods: [redacted], [redacted], and [redacted]

This memorandum has been prepared in response to your request for assistance and guidance from our office with respect to the effects of the merger with [redacted] on securing of a Form 872 for the above taxpayer. The memorandum is based upon the facts outlined below. If the factual statement is incorrect, please notify this office so that we may determine the effect, if any, on the advice rendered.

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.

This advice is not binding on Examination or Appeals and is not a final case determination. Such advice is advisory and does not resolve Service position on an issue or provide the basis for closing a case. The determination of the Service in the case is to be made through the exercise of the independent judgment of the office with jurisdiction over the case.

ISSUE

Does the audit team have to be concerned with transferee/transferor liability and what corporate name should appear on a Form 872 or, if needed, Form 977.

FACTS

The facts as we understand them are as follows:

There is a proposed merger of the [redacted] with [redacted] and you have sent us a copy of the merger proposal for review.

The Plan of Merger involves three companies, [redacted] and [redacted]. [redacted] is a wholly-owned subsidiary of [redacted].

Article 1.1 of the merger agreement states as follows:

> **The Merger.** Upon the terms and subject to the conditions set forth in this Agreement, and in accordance with the Delaware General Corporation Law (the "DGCL"), [redacted] shall be merged with and into [redacted] at the Effective Time. Following the Merger, the separate corporate existence of the [redacted] shall cease and [redacted] shall continue as the surviving corporation (the "Surviving Corporation").

Article 1.4 of the merger agreement states as follows:

> **Effects of the Merger.** At and after the Effective Time, the Merger will have the effects set forth in the DGCL. Without limiting the generality of the foregoing, and subject thereto, at the Effective Time all property, rights, privileges, powers and franchises of [redacted] and [redacted] shall be vested in the Surviving Corporation, and all debts, liabilities and duties of [redacted] and [redacted] shall become debts, liabilities and duties of the Surviving Corporation.

You currently have a Form 872 for the years [redacted], [redacted], and [redacted] executed on [redacted] by an authorized officer of [redacted] that keeps the statute of limitation for those three years open until [redacted].

The Effective Time of the merger is described in Article 1.3 of the merger agreement and will be a date subsequent to [redacted].

After the merger the shareholders of [redacted] will own approximately [redacted]% of the combined companies and the shareholders of [redacted] will own approximately [redacted]% of the combined companies. The merger is not a reverse acquisition as described in Treas. Reg. § 1.1502-75(d)(3)(i).

DISCUSSION

Pursuant to the merger agreement Article 1.1, [redacted] is the surviving corporation after the merger and does not go out of existence.

The merger in this case is governed by the laws of Delaware. Delaware General Corporation Law, 8 Del. C. § 259, provides that the surviving corporation in a merger shall be subject to all debts and liabilities of the transferor in the same manner as if the surviving corporation had itself incurred them. In addition, the merger agreement in Article 1.4 provides "...all debts, liabilities and duties of [redacted] and [redacted] shall become debts, liabilities and duties of the Surviving Corporation."

Thus, under Delaware law **and** the terms of the merger agreement [redacted] remains primarily liable for any tax liabilities incurred prior to the merger. Since primary liability is established by state law and the merger agreement, it is unnecessary to secure Forms 977 or 2045 which would impose secondary liability on the surviving corporation.

The Form 872 secured on [redacted] remains in effect and keeps the statute of limitation open until [redacted]. If subsequent Forms 872 are required, they can be executed by any authorized officer of the [redacted]. 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 years in which it was the common parent of the group. See, Treas. Reg. §§ 1.1502-77(a); 1.1502-77T(a)(4)(i).

If you have any questions or need further information, please contact Robert A. Baxer at (973) 645-2598.

/s/
PATRICK E. WHELAN
Assistant District Counsel

NOTED:

/s/
MATTHEW MAGNONE
District Counsel

cc: Willie Graham - LMSB Group 1565