Office of Chief Counsel
Internal Revenue Service

memorandum

CC:MSR:AOK:OKL:TL-N-7247-99
ALDarnold

date: MAY 1 1 2000

to: Chief, Examination Division, Arkansas-Oklahoma District
Attn: Chief, Examination Branch II

from: District Counsel, Arkansas-Oklahoma District

subject: Request for Advisory Opinion

Taxpayers: [redacted]

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 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 other persons beyond those specifically indicated in this statement. This advice may not be disclosed to taxpayers or their representatives.

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FACTS

By memorandum dated December 7, 1999, you requested our views as to the filing requirements of the entities involved in a series of reorganization events in [redacted].

Prior to [redacted], [redacted], [redacted], (Old [redacted]), was the common parent to [redacted] and many other subsidiaries. In [redacted] Old [redacted] established New [redacted], (New [redacted]). Subsequently, Old [redacted] contributed the stock of all its subsidiaries, other than [redacted], to New [redacted]. Old [redacted] then spun-off New [redacted] and subsidiaries to the Old [redacted] shareholders.

On [redacted], Old [redacted] was then merged with [redacted], with [redacted] being the survivor. [redacted] exchanged its stock for the Old [redacted] stock and the shareholders of Old [redacted] held in excess of 50 percent of the new [redacted] group stock. Therefore, the transaction qualified as a reverse acquisition under Treas. Reg. §1.1502-75(d)(3) for consolidated tax return purposes and [redacted] became the new common parent of the Old [redacted] consolidated group.

Following this series of transactions, New [redacted] changed its name to [redacted], and [redacted] changed its name to [redacted]. The exact date of the name change is not known.

For [redacted], [redacted] filed a short period return for the period ended [redacted], ([redacted] months and [redacted] days), using TIN [redacted]. That return was posted as a [redacted] tax period return. The same entity, under the name [redacted], then filed a 12-month return, also using TIN [redacted]. That return included [redacted] days of the old [redacted]'s (post merger) income, New [redacted]'s income for the first [redacted] months and [redacted] days of [redacted] and Old [redacted]'s income for the full 12 months of [redacted]. The Service posted this return as a duplicate return since a return was already posted for the [redacted] tax period.

DISCUSSION

Treas. Reg. §1.1502-75(d)(3), which addressed reverse acquisitions, provides in pertinent part that if a corporation (hereinafter referred to as the first corporation) acquires either stock or substantially all the assets of a second

corporation in exchange for stock of the first corporation, and the stockholders (immediately before the acquisition) of the second corporation, as a result of owning stock of the second corporation, own (immediately after the acquisition) more than 50 percent of the fair market value of the outstanding stock of the first corporation, then any group of which the first corporation was the common parent immediately before the acquisition shall cease to exist as of the date of acquisition, and any group of which the second corporation was the common parent immediately before the acquisition shall be treated as remaining in existence with the first corporation becoming the common parent of the group.

Treas. Reg. §1.1502-76(b)(5), Ex. 2(c) provides an example where X acquires all of P's assets in exchange for more than 50 percent of X's stock in a reorganization constituting a reverse acquisition under Treas. Reg. § § 1.1502-75(d)(3), with the X group terminating and the P group surviving with X as its common parent. The example goes on to explain that P's items for the portion of Year 1 ending with the acquisition are treated as the items of the common parent that must be included in the P group's return for Year 1, and X's items are treated as the items of a subsidiary included in the P group's return for the portion of Year 1 for which X is a member.

In the instant case, Old [redacted] merged into [redacted], with the Old [redacted] shareholders owning [redacted] percent of the new [redacted] stock. Under the regulations cited above, the Old [redacted] group is treated as remaining in existence but [redacted] is the new common parent.

You inquired as to the following:

1. Should [redacted] and [redacted] both have filed federal income tax returns for the same tax year ([redacted]?

2. If yes, wouldn't [redacted] be required to obtain a new separate TIN?

3. Should [redacted]'s, [redacted], (New [redacted]) first [redacted] months and [redacted] days of [redacted] income have been reported on [redacted]'s federal income tax return for [redacted]?

4. If no, then should [redacted], [redacted], (New [redacted]) have filed a short period return for [redacted] months and [redacted] days of [redacted] income related to the non-[redacted] entities?

5. Should [redacted], (Old [redacted]) have filed a short period federal income tax return for [redacted] prior to the merger with [redacted]?

First, we believe that the [redacted] consolidated group, [redacted], was correct to file a short year return for the pre-merger portion of [redacted]. You should, however, be aware that Treas. Reg. §1.1502-76(b)(ii) applies an "end of the day" rule in determining the day that a corporation becomes or ceases to become a member of a consolidated group. Under this provision, the pre-merger portion of [redacted] would be from [redacted], through [redacted], since the merger is deemed to have occurred at the end of the day on the merger date of [redacted]. The short period return should have included only [redacted] days' income, that earned from [redacted], through [redacted].

Treas. Reg. §1.1502-75(a)(2) states that a group which filed (or was required to file) a consolidated return for the immediately preceding taxable year is required to file a consolidated return for the taxable year unless it has an election to discontinue filing consolidated returns under paragraph (c) of this section.

We also believe that [redacted], as the new common parent, was correct to file the full-year [redacted] return for the Old [redacted] consolidated group. Under Treas. Reg. §1.1502-76(b)(5)Ex. 2(c), the [redacted] income for the last [redacted] days of [redacted], (the post-merger period) should be reported on that return and treated as the income from a subsidiary included in the Old [redacted] group for the portion of the year that [redacted] was a member of the group.

The group's return was properly filed under the TIN of the new common parent, [redacted], as the TIN previously used by Old [redacted], [redacted] should have been "retired" when that entity ceased to exist as a result of the merger into [redacted].

Rev. Rul. 73-526, 1973-2 C.B. 404, provides that the previously assigned identifying number should be used by the surviving corporation in a statutory merger and in a reincorporation qualifying as reorganization under I.R.C. § 368(a)(1)(F). [redacted] was the surviving corporation in the merger with Old [redacted], thus under the revenue ruling, [redacted] would continue to use its same TIN, regardless of the subsequent name change. A name change in the corporate context is governed by I.R.C. § 368(a)(1)(F).

[redacted], formerly [redacted], is the proper agent for the group for purposes of executing consents and that entity is also liable for the entire consolidated tax of the Old [redacted] group soley because it is the successor of the former common parent. See, Treas. Reg. §1.1502-6. It is appropriate for the TIN used on the consolidated return to be that of the entity which is primarily liable for the consolidated tax of the group. Since [redacted], the new common parent, is liable as the successor to Old [redacted], we believe that its TIN should be reported on the group's full-year return.

You inquired as to whether [redacted] (New [redacted]) should have reported its income for the pre-merger portion of [redacted] on [redacted]'s full-year return. Assuming that the spin-off of New [redacted] occurred on the same day as the merger of Old [redacted] and [redacted], this income, as part of the Old [redacted] group's pre-merger income, would be included on the 12-month return filed by the group. If the spin-off of New [redacted] occurred prior to the merger, New [redacted]'s income, as well as the income of the subsidiaries which New [redacted] "received" from Old [redacted], is includable in the Old [redacted] group's [redacted] consolidated return for the period from [redacted], only until and including the date of the spin-off.

New [redacted], [redacted], may elect to file its own consolidated return for the remaining [redacted] days of [redacted], but a consolidated return would not be required. See, Treas. Reg. §1.1502-75(a)(2), discussed above.

Your final inquiry was whether [redacted], (Old [redacted]), should have filed a short period return for the pre-merger portion of [redacted]. As stated above, the full 12 months of income for the Old [redacted] group would be reported on the group's consolidated return, filed using the new common parent's TIN, [redacted].

With this memorandum, we are closing our file. However, if you have any questions, or need further information, please feel free to contact Attorney Ann L. Darnold at (405) 297-4810.

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Assistant District Counsel

cc: Assistant Regional Counsel (TL), Midstates Region