Office of Chief Counsel
Internal Revenue Service

memorandum

CC:WR:SCA:LN:TL-N-3928-99
MDFriedman

date: AUG 19 1999

to: Eric Nakahara, Case Manager, Examination Division CE:1115, and Patsy Vasquez, Team Coordinator, CE 1115 714-836-2339

from: MILES D. FRIEDMAN
Attorney

---

subject: [redacted]
Tax Years [redacted], [redacted], and [redacted] (short year)
EIN: unknown
Request for Advisory Opinion concerning Extension of the Statute of Limitations for [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 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.

This responds to your June 8, 1999, memorandum, received in this office on June 18, 1999. You asked for our advice concerning the proper language to be incorporated into a Form 872, Consent to Extend the Time to Assess Tax. During a discussion of this matter Miles Friedman had with Team Coordinator Patsy Vasquez, on July 7, 1999, we suggested that in order to protect the Government's interest, it might be provident to obtain several extension requests. We did this because it was

not completely clear what entity was the current successor in interest to the taxpayer you are examining.

Also, in accordance with our procedures, we have coordinated this matter with the National Office.

CONCLUSION AND RECOMMENDATIONS

We recommend:

1. If [redacted] (not [redacted]) still exists, you obtain the Form 872 from it and use the language specified in the body of this memorandum at para 1. in the Discussion.

2. If [redacted] became the new common parent, please follow item 2. (as factually appropriate) in the body of this memorandum at para 2. in the Discussion. This also applies if [redacted] changed its name in an F reorganization. You can tell that by ascertaining whether [redacted]'s EIN is the same as the EIN for [redacted].

3. If [redacted] became the common parent through a reverse acquisition, follow item 3 in the body of this memorandum at para 3. in the Discussion. Also, trace the EIN's for any name change, i.e., if [redacted] changed its name to [redacted].

4. You should follow item 4 in the body of this memorandum at para 4. in the Discussion, if [redacted] merged out of existence.

5. Item 5. would apply under the scenario of [redacted] ceasing to exist and its successor also no longer existing if there was no reverse acquisition.

6. Item 6 would apply if [redacted] dissolved.

7. Item 7 might apply if [redacted]'s subsidiary went out of existence and a successor was responsible for just the subsidiary's tax liability and not also [redacted]'s tax liability.

If after reviewing this memorandum you are unsure of a course to take, please contact us and we will be glad to assist you.

Although there are some facts that need to be clarified for a definitive answer, we recommend that if [redacted]

still exists, you should obtain a Form 872 from it. However, if [redacted] no longer exists, barring clarification of the facts, we think it would be prudent to obtain Forms 872 from [redacted], and [redacted] (assuming these corporations still exist). Please make sure that an authorized officer signs each extension form. Suggested language for each extension form is set forth below.

FACTS

The Service is currently examining [redacted] for its [redacted], [redacted], and [redacted] (short year) taxable years. According to your memorandum, the statute of limitations expires on [redacted] for the [redacted] year. We will assume this is true, since we did not receive a copy of the tax return with your submission.

We believe it is your understanding that: (a) [redacted] was acquired on [redacted], by [redacted], (b) [redacted], acquired and then merged into [redacted] (c) [redacted], acquired other entities, and (d) on [redacted], all the [redacted] in the group merged into [redacted].

Form 851, Affiliations Schedule, for an undated tax year, executed on [redacted], by an individual who is "CFO or EVP," states that [redacted], is the common parent corporation of the consolidated group. [redacted] is listed as a subsidiary of [redacted], on the Form 851 at the beginning of the year. According to the information on the Form 851, all the shares of [redacted] (as well as its subsidiary) were disposed of before year-end. By telephone on July 7, 1999, we asked you to verify that [redacted] is no longer in existence.

You have provided us with an unsigned copy of an Agreement and Plan of Reorganization between [redacted], and [redacted], dated, "[redacted] ___, [redacted]." It appears under this agreement, that a newly formed corporation, [redacted], became the owner of all the shares of [redacted]. By telephone on July 7, 1999, we asked you to clarify whether [redacted] became [redacted].

Pursuant to an Agreement and Plan of Merger, dated as of [redacted], [redacted] was to be acquired by [redacted], in a merger. This [redacted] agreement was amended several times. The amendment you provided to us is an Amended and Restated Securities Purchase Agreement,

dated [redacted], which incorporates the terms (restated) of an agreement [redacted], had with certain limited partnership purchasers. It appears the purchasers were going to acquire certain common stock of [redacted]. We do not know if there are any other agreements in which [redacted], is involved that could affect the question who is the current parent corporation of the controlled group. We advised the Team Coordinator by telephone on July 7, 1999, to obtain the most current Form 851, Affiliations Schedule. We suggest you obtain the Forms 966, Corporate Dissolution or Liquidation, for [redacted] and [redacted], if these entities no longer exist. Together, these documents should inform you whether either or both entities actually exist today. That information will help in determining what Forms 872 should and can be obtained.

Although, as stated above, we think it is your understanding that on [redacted], all the [redacted] in the group merged into [redacted], that is not clear from the agreements you provided to us. It appears to us that [redacted] may have continued to be the common parent of the new controlled group. This needs to be clarified. It could be that a reverse acquisition occurred.[1] We do not know, but will assume for purposes of this memorandum that all reorganizations that were statutory mergers occurred in accordance with proper State law, and that [redacted], (and if applicable, [redacted] was a "successor" under State law.

You have not indicated that the Service has notified the common parent of the consolidated group that it was going to deal directly with [redacted].[2] Also, you have provided us with no indication that the common parent corporation of the consolidated return group [redacted] has informed the Service that it was going to terminate and appoint another member to act as the group's agent in its stead.[3] Therefore, we will act on the assumption neither notification has occurred and will presume those portions of the regulations cited to in footnotes 2 and 3 of this memorandum are inapplicable to this matter. Please advise us if our assumption is not correct. Please also advise us if any Form 966, Corporate Dissolution or Liquidation, you obtained indicates to the Service that another

---

[1] See Treas. Reg. § 1.1502-75(d)(3).

[2] See Treas. Reg. § 1.1502-77(a), final sentence.

[3] See Treas. Reg. § 1.1502-77(d).

member is to act for [redacted].

DISCUSSION

We have suggested above in the Facts portion of this memorandum that you obtain clarifying information. Nevertheless, due to the impending statutory deadline, we provide advice, based on the facts as they appear to be. If you receive clarification in the future and there is still time on the statute, we would be happy to provide further assistance to you.

I.R.C. § 1502 provides that the consolidated return regulations promulgated by the Service shall govern the determination, computation, and assessment of tax of an affiliated group of corporations making a consolidated return and its constituent corporations. Treas. Reg. §§ 1.1502-77 and -77T provide the basis rules for determining how a statute is extended by agreement. Generally, the common parent of an affiliated group is the agent for the group in just about all tax procedural matters, including signing a statutory extension for the tax year involved. Treas. Reg. § 1.1502-77(a).

We previously faxed to you a draft of our response before the National Office reviewed it. The advice in this memorandum supercedes the advice in the draft we faxed to you.

Please carefully check the EINs for each corporation. For example, we saw [redacted] (EIN: [redacted], on the unsigned affiliations schedule, while you had, "[redacted], EIN [redacted]." We obtained the EIN from the Form 851, Affiliations Schedule, you provided to us. It appears from that schedule that [redacted], has an EIN of [redacted].

As previously suggested, please trace the EIN's and note when any two named corporations have the same EIN. This could mean an F reorganization has occurred. For instance, if [redacted] became [redacted], the EIN of the two may be the same. You can also check the records of the Secretary of State (Corporations Division) in Los Angeles or on Lexis to determine if there were any mergers or dissolutions of any of the corporations.

Specific paragraphs referred to in Conclusions and Recommendations portion of this memorandum.

1. If [redacted] Exists:

If [redacted] exists and assuming that

[redacted] was the common parent of the consolidated group for each of the years [redacted], [redacted] and short tax year ended [redacted], then only one Form 872 need be obtained. If this is the case, you should have it execute the Form 872, regardless of whether it is or is not currently the common parent of the consolidated group. A Form 872 executed by [redacted] would extend the statute of limitations for all surviving members of the [redacted] consolidated group for the tax years under audit.

The caption of the Form 872 should read as follows:

[redacted] (EIN: XX-XXXXXXX)*

Place an asterisk on the bottom of the front page of the Form 872, and type in:

*this is with respect to the consolidated return liability of the [redacted] consolidated group for tax years [redacted], [redacted] and short tax year ended [redacted].

The signature block on the Form 872 should read:

[name of officer]
[title of officer]
[redacted]

2. <u>If [redacted] Became New Common Parent of the Group in a Transaction describe in Treas. Reg. § 1.1502-75(d) and [redacted] No Longer Exists</u>:

If [redacted] was originally a subsidiary of [redacted] and later, through either a downstream transfer or a reverse acquisition transaction described in Treas. Reg. § 1.1502-75(d), became the parent of the group, you should obtain a Form 872 from [redacted], if still in existence. A Form 872 executed by [redacted] would extend the statute of limitations for: (1) [redacted] with regard to its own liability as a successor in interest to [redacted]'s debts, including its several liability for the entire consolidated tax for all years under audit; and (2) [redacted]'s subsidiary.

The caption of the Form 872 should read as follows:

[The present name of [redacted]] (EIN: XX-XXXXXXX), as successor in interest to [redacted] and as agent for the [redacted]'s consolidated group*

Place an asterisk on the bottom of the front page of the Form 872, and type in:

*this is with respect to the consolidated return liability of the [redacted] consolidated group for the group's taxable years [redacted], [redacted] and short tax year ended [redacted].

The signature block on the Form 872 should read:

[name of officer]
[title of officer]
[the present name of [redacted]]

3. <u>If [redacted] Became New Common Parent of the Group in a Transaction Describe in Treas. Reg. § 1.1502-75(d) but Ceased to be the Common Parent as a Result of a Reverse Acquisition Transaction</u>:

If [redacted] became the parent of the group by downstream transfer or reverse acquisition, and ceased being the new common parent as a result of a subsequent reverse acquisition, you should obtain a Form 872 from either [redacted] (if it still exists) or the new common parent of the group. A Form 872 obtained from either [redacted] or the new common parent would extend the statute of limitations with regard to the subsidiary. It would also extend the statute of limitations for: (1) [redacted] (if it still exists) with regard to [redacted]'s own liability as a successor in interest to [redacted]'s debts, including [redacted]'s several liability for the entire tax of the consolidated group for all years under audit; and (2) the new common parent (if [redacted] no longer exists) with regard to the new common parent's own liability as a successor to [redacted], the successor to [redacted]. The new common parent would be liable as a successor to the successor to [redacted]'s debts, including [redacted]'s several liability for the entire consolidated tax for all years under audit.

A. If [redacted] still exists, the caption of the Form 872 should read as follows:

[the present name of [redacted]] (EIN: XX-XXXXXXX), as successor in interest to [redacted] and as agent for the [redacted]'s consolidated group*

Place an asterisk on the bottom of the front page of the

Form 872, and type in:

*this is with respect to the consolidated return liability of the [redacted] consolidated group for tax years [redacted], [redacted] and short tax year ended [redacted].

The signature block on the Form 872 should read:

[name of officer]
[title of officer]
[the present name of [redacted]]

B. If [redacted] no longer exists, the caption of the Form 872 should read as follows:

[Name of new common parent] (EIN: XX-XXXXXXX), as successor to [redacted], successor to [redacted] (EIN: XX-XXXXXXX), and as agent for the [redacted] consolidated group*

Place an asterisk on the bottom of the front page of the Form 872, and type in:

*this is with respect to the consolidated return liability of the [redacted] consolidated group for tax years [redacted], [redacted] and short tax year ended [redacted].

The signature block on the Form 872 should read:

[name of officer]
[title of officer]
[Name of new common parent]

4. <u>If [redacted] Merged out of Existence</u>:

If [redacted] merged out of existence, you should obtain a Form 872 from the corporation which survived the merger. [redacted], because it was the common parent and a member of the former [redacted] consolidated group, was severally liable under Treas. Reg. § 1.1502-6 for the entire amount of the consolidated tax owed by the consolidated group for the years under audit. Most likely, state law will make the successor corporation (<u>i.e.</u>, the corporation surviving the merger with [redacted] liable for all the debts, liabilities and duties of [redacted]. You must review state law to ensure that it provides for successor liability (<u>e.g.</u>, Del. Code Ann. tit. 8, § 259 provides that the

corporation that survives a merger with another corporation becomes liable for the debts, liabilities and duties of that other corporation "to the same extent as if said debts, liabilities and duties had been incurred or contracted by it").

Note, however, a Form 872 executed by a successor corporation in this situation may or may not extend the statute of limitations with regard to [redacted]'s subsidiary. The binding effect of a consent agreement executed by a successor of [redacted] depends on whether or not the successor corporation meets the alternative agent requirement of Temp. Reg. § 1.1502-77T(a)(4)(ii). We believe that more than likely it would constitute an alternative agent under Temp. Reg. § 1.1502-77T(a)(4)(ii). Nevertheless, to be safe, you should caption the Form 872 as follows:

> [Name of successor corporation] (EIN: XX-XXXXXXX), as successor in interest to [redacted] (EIN: XX:XXXXXXX) and as agent for the [redacted] consolidated group*

Place an asterisk on the bottom of the front page of the Form 872, and type in:

> *This is with respect to the consolidated return liability of the [redacted] consolidated group for tax years [redacted], [redacted] and short tax year ended [redacted].

The signature block on the Form 872 should read:

> [name of officer]
> [title of officer]
> [Name of successor corporation]

5. <u>If [redacted] Merged out of Existence and the Successor Corporation's Existence Terminated</u>:

If the corporation which succeeds [redacted] is no longer in existence, either because it has dissolved or has merged into another corporation, we recommend that you deal with the subsidiary directly with regard to its several tax liability for the entire tax of the [redacted] consolidated group for the tax years under audit. If the successor corporation merged out of existence, we recommend that you also obtain a Form 872 from the successor to the successor corporation with regard to the [redacted]'s several liability for the entire tax of the [redacted] consolidated group for all years under audit. You must review state law to ensure

that it provides for successor liability in merger situations.

A. If you deal directly with the subsidiary with regard to its own liability, the caption of the Form 872 should read as follows:

[Name of [redacted]'s subsidiary] (EIN: XX-XXXXXXX)*

Place an asterisk on the bottom of the front page of the Form 872, and type in:

*this is with respect to its own several liability for the consolidated tax of the [redacted] consolidated group for tax years [redacted], [redacted] and short tax year ended [redacted].

The signature block on the Form 872 should read:

[name of officer]
[title of officer]
[Name of the subsidiary]

B. If you obtain a Form 872 from the successor to the successor corporation, the caption of the Form 872 should read as follows:

[Name of successor to the successor corporation] (EIN: XX-XXXXXXX) as successor to [Name of successor corporation] (EIN: XX-XXXXXXX), successor to [redacted] (EIN: XX-XXXXXXX)*

Place an asterisk on the bottom of the front page of the Form 872, and type in:

*this is with respect to the several liability of [redacted] for the consolidated tax of the [redacted] consolidated group for tax years [redacted], [redacted] and short tax year ended [redacted].

The signature block on the Form 872 should read:

[name of officer]
[title of officer]
[Name of successor to the successor corporation]

Note that if the successor corporation to [redacted] dissolved, we recommend that you consider imposing transferee liability on the shareholders of the successor corporation.

6. <u>If [redacted] Dissolved</u>:

If [redacted] dissolved, we recommend that you determine whether [redacted]'s dissolution constitutes a liquidation under I.R.C. § 332. If so, and, if under state law, the transferee corporation is considered a "successor" to [redacted], then you should obtain a Form 872 from the transferee corporation. Such a Form 872 would extend the statute of limitations not only with regard to the transferee corporation for its successor liability, but also with regard to the subsidiary with regard to the subsidiary's several liability.

The caption of the Form 872 should read as follows:

[Name of successor corporation] (EIN: XX-XXXXXXX), as successor in interest to [redacted] (EIN: XX:XXXXXXX), and as agent for the [redacted] consolidated group*

Place an asterisk on the bottom of the front page of the Form 872, and type in:

*This is with respect to the consolidated tax liability of the [redacted] consolidated group for tax years [redacted], [redacted] and short tax year ended [redacted].

The signature block on the Form 872 should read:

[name of officer]
[title of officer]
[Name of successor corporation]

If, however, [redacted]'s dissolution either does not constitute a liquidation under I.R.C. § 332 or, if under state law, the transferee corporation is not considered a "successor" to [redacted], we recommend that you deal directly with the subsidiary and obtain a Form 872 from it extending the statute of limitations with regard to its several liability for the entire tax of the consolidate group for the tax years under audit. We also recommend that you consider imposing transferee liability on the shareholders of [redacted].

7. If the Subsidiary No Longer Exists:

Additionally, it is important to determine whether the subsidiary still exists. If the subsidiary has merged out of existence, most likely state law will make the successor corporation (i.e., the corporation surviving the merger with the subsidiary) liable for all the debts, liabilities and duties of the merged corporation, including the subsidiary's several liability for the entire consolidated tax liability of the group for all years under audit. You must review state law to ensure that it provides for successor liability. If it does, you should obtain a Form 872 from the surviving corporation. However, if the subsidiary dissolved, we recommend that you consider imposing transferee liability on the shareholders of the successor corporation.

If the corporation which survived the merger, if any, with the subsidiary still exists and is liable under state law as a successor, the caption of the Form 872 should read as follows:

> [Name of successor corporation] (EIN: XX-XXXXXXX), as successor in interest to [name of [redacted] [redacted]'s subsidiary] (EIN: XX:XXXXXXX).*

Place an asterisk on the bottom of the front page of the Form 872, and type in:

> *This is with respect to the several liability of [name of [redacted]'s subsidiary] for the consolidated tax of the [redacted] [redacted] consolidated group for taxable years [redacted], [redacted] and short tax year ended [redacted].

The signature block on the Form 872 should read:

> [name of officer]
> [title of officer]
> [Name of successor corporation]

Please write back if the factual variations of this case are not specifically covered in the above guidance. Also, with regard to each situation listed above wherein we indicate from which corporation(s) you should obtain a Form 872, our advice assumes that the corporation(s) is still in existence. Obviously, if the corporation is not in existence, then you should not attempt to obtain the signature of a (former) officer of that corporation.

Please contact the undersigned at (949) 360-3430 if you have any questions.

MS

MILES D. FRIEDMAN
Attorney