Office of Chief Counsel
Internal Revenue Service

memorandum

CC:NER:BRK:TL-N-2478-00
REGole

date: JUN 0 5 2000

to: District Director, Brooklyn District
Attn: Jack Israel, Team Coordinator (Group 1022)

from: District Counsel, Brooklyn

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subject: [redacted]
EIN: [redacted]
UIL: 1502.77-00

EARLIEST STATUTE OF LIMITATIONS: [redacted]

This is in further response to your request for advice as to who is the proper party to execute a Form 872 (Consent to Extend the Time to Assess Tax) for the subject taxpayer for the years [redacted] and [redacted]. Under routine Counsel procedures, we forwarded this case to our National Office for their review of the conclusions rendered in our memorandum dated May 24, 2000.

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

We are enclosing a copy of the Informal Field Assistance dated April 27, 2000 which was drafted by the National Office. The memorandum indicates that the National Office generally concurs with the conclusions reached by our office. However, the National Office has corrected our reference to Treas. Reg. 1.1502-77T. [redacted] continues as the common parent under Treas. Reg. 1.1502-77(a).

In addition, the National Office recommends further questioning the taxpayer as to why they believe that the split-off of [redacted] will result in taxable gain to the shareholders. We note, that this issue does not effect any of the conclusions set forth in this memorandum or the advice rendered on May 24, 2000.

Also, we request that you follow the procedures set forth below to ensure compliance with I.R.C. § 6501(c)(4)(B). Section 6501(c)(4)(B) provides that the Service shall notify the taxpayer of their right: 1) to refuse to extend the period of limitations; or 2) to limit such extension to particular issues; or 3) to limit the extension to a particular period of time.

The required notice must be provided each time an extension is requested. The legislative history of this provision states that Congress believed that taxpayers should be fully informed of their rights with respect to the statute of limitations on assessment. Congress expressed concern that in some cases taxpayers were not fully aware of their rights to refuse to extend the statute of limitations, and have felt that they had no choice but to agree to extend the statute of limitations upon the request of the Service. See H.R. Conf. Rep. No. 105-599 at 286 (1998).

Section 6501(c)(4)(B) can be satisfied by informing taxpayers, either orally or in writing, of their right to refuse to consent to an extension of the statute of limitations, or to limit such an extension to specific issues or to a specific time frame. You should secure consents to extend statutes of limitations by sending Letter 907(DO)(Rev. 2-2000) or Letter 907(SC)(Rev. 12-1999). See IRM 4541.1 and IRM 121.2.22.3. Your actions should be specifically documented in the administrative file.

Service personnel were also previously advised that they could provide the taxpayer with a copy of Publication 1035, Extending the Tax Assessment Period (Rev. 12-1999), each time a statute extension was requested, but the best practice would be to advise taxpayers of their rights by sending Letter 907(DO)(Rev. 2-2000), Letter 907(SC)(Rev. 12-1999), or Letter 967

(Rev. 12-1999). (See IRS RRA 98 National Resource Center Question 203.)

Any questions regarding this opinion should be referred to Rose Gole at (516) 688-1702.

JODY TANCER
Acting District Counsel

By: Rose E. Gole
ROSE E. GOLE
Attorney

Attachment: As stated.

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EARLIEST STATUTE OF LIMITATIONS: [redacted]

This is in response to your request for advice as to who is the proper party to execute a Form 872 (Consent to Extend the Time to Assess Tax) for the subject taxpayer for the years [redacted] and [redacted]. You further requested our assistance in providing the proper language to use on the Form 872. Finally, you have questioned whether there is any transferee liability.

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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.

FACTS:

The facts, as we understand them to be, are as follows:

[redacted] (the taxpayer) was incorporated in Delaware as the successor to a business founded in [redacted]. It operates through subsidiaries in the United States, as well as [redacted] countries worldwide. It is engaged in three businesses: [redacted] services, [redacted] services and [redacted] services.

On [redacted], [redacted] entered into an agreement and plan of merger with [redacted], a Swiss corporation also engaged in the business of providing worldwide [redacted] services. The following transactions effected the merger: [redacted] established [redacted]. (also referred to as [redacted]) as a wholly owned subsidiary of [redacted]. [redacted] merged into [redacted]. [redacted] (New) continued its corporate existence as a Delaware corporation and wholly owned subsidiary of [redacted]. [redacted] ceased to exist. Each share of [redacted] common stock was redeemable for [redacted] shares of [redacted][1], representing [redacted] shares of [redacted] common stock or $[redacted] per share.

As a condition of the merger and prior to the merger, [redacted] transferred its health services businesses to [redacted] (referred to as "[redacted]"), a wholly owned subsidiary of [redacted] incorporated in the state of Delaware. The [redacted] services business was then split off into a separate independent publically-owned company. Upon the consummation of the merger, each share of [redacted] stock was redeemable for [redacted] shares of stock in [redacted] was renamed [redacted].

The shareholders of [redacted] realized capital gain or loss on each separate transaction: the exchange of [redacted] Stock for cash or shares of [redacted] and the exchange of [redacted] Stock for shares of [redacted].

You further provided our office with IDR 30 which indicates that during the years [redacted] and [redacted] several [redacted] subsidiaries reorganized under I.R.C. § 368(a)(1)(A) or had name changes under I.R.C. § 368(a)(1)(F). It is our understanding that [redacted] continued as the common parent.

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[1] [redacted] is an [redacted] issued by [redacted], and represents [redacted] of [redacted] common share deposited with [redacted].

You are currently examining the consolidated returns for the years [redacted] and [redacted]. The earliest statute of limitations expires on [redacted].

DISCUSSION:

1. [redacted] is the "alternative agent" authorized to execute the Form 872.

The common parent is the highest tier domestic corporation. I.R.C. § 1504(a). Generally, the common parent, in its own name, is the sole agent for each subsidiary in the group, duly authorized to act in all matters relating to the tax liability for the consolidated return year. Treas. Reg. § 1.1502-77(a); Craigie, Inc. v. Commissioner, 84 T.C. 466 (1985). The common parent in its name may execute waivers which are binding upon each of its subsidiaries. Generally the common parent is the proper party to execute consents including Forms 872 on behalf of all members of the consolidated group. Where the common parent remains in existence, even if it is no longer the common parent, it remains the agent for the group with regard to years in which it was the common parent of the group. Southern Pacific Co. v. Commissioner, 84 T.C. 395, 401 (1985). [redacted] was the common parent of the former consolidated group, until its merger with [redacted]. After the merger with [redacted], [redacted] survived as a wholly owned subsidiary of [redacted]. Therefore, [redacted] remains the agent for the consolidated group.

Temp. Reg. § 1.1502-77T provides "alternative agents" for the affiliated group for the purpose of mailing notices of deficiency and executing waivers of the statute of limitations. It provides in pertinent part that "The common parent of the group for all or part of the year to which the notice or waiver applies" may act as an alternative agent. Temp. Reg. § 1.1502-77T(a)(4)(i). [redacted] was the common parent of the affiliated group for the years under audit, [redacted] and [redacted]. It remains in existence. Finally, the years involved are after the effective date of the regulations. Temp. Treas. Reg. § 1.1502-77T(b). Therefore, [redacted] is the proper party to act as an alternative agent for the group for the years under audit.

2. [redacted] continued as common parent irrespective of the merger of various [redacted] subsidiaries in [redacted] and [redacted].

You further provided our office with IDR 30 which shows the merger pursuant to I.R.C. § 368(a)(1) of several of the [redacted] subsidiaries during the years [redacted] and [redacted]. Treas. Reg. § 1.1502-75(d)(1) provides generally:

> A group remains in existence for a tax year if the common parent remains as the common parent and at least one

subsidiary that was affiliated with it at the end of the prior year remains affiliated with it at the beginning of the year, whether or not one or more corporations have ceased to be subsidiaries at any time after the group was formed.

The common parent is the agent for the subsidiaries in the group for all purposes, exclusive of those specifically set forth in Treas. Reg. § 1.1502-77(a), including executing a consent to extend the statute of limitations. The provisions of Treas. Reg. § 1.1502-77(a) "shall apply whether or not a consolidated return is made for any subsequent year, and whether or not one or more of the subsidiaries have become or have ceased to be members of the group at any time." Therefore, the merger of several of the [redacted] subsidiaries do not affect [redacted]'s status as common parent. Likewise the group remains in existence because at least one subsidiary remained in existence notwithstanding the merger of several of the subsidiaries.

3. Drafting and Executing the Form 872.

A corporation's income tax return must be signed by a duly authorized officer, including the president, vice-president, treasurer, assistant treasurer, or chief accounting officer. I.R.C. § 6062. The signature of an officer on a return is prima facie evidence that he is authorized to sign the return. I.R.C. § 6062. The Service applies these rules to the execution of consents. Rev. Rul. 83-41; Rev. Rul. 84-165. An authorized officer should execute the Form 872 by signing his name and his official title at [redacted].

The caption on the Form 872 should read "[redacted]." In addition, you should insert the following statement at the bottom of the Form 872 by placing an asterisk (*) after the word subsidiaries in the caption:

> This is with respect to the consolidated return liability of [redacted] for the consolidated group's [redacted] and [redacted] years.

4. [redacted] and [redacted] are severally liable for the consolidated tax.

The common parent and each subsidiary which was a member of the consolidated group during any part of the consolidated return year shall be severally liable for the entire consolidated tax for such year. Treas. Reg. § 1.1502-6(a).

[redacted] and [redacted] entered into a tax sharing agreement at the time of [redacted]'s split off. Under the terms of the agreement, [redacted] assumed liability for all tax liabilities, excluding those health related liabilities specifically allocated to [redacted]. While the tax sharing agreement sets forth the rights of [redacted] and [redacted] with respect to each other, the agreement does not alter the statutory obligation of both companies with respect to the consolidated liabilities.

You should be aware that, under routine procedures which have been established for opinions of this type, we have referred this opinion to the National Office for review. That review might result in modifications of the conclusions herein. You should not solicit Forms 872 based on this advice until you receive a supplemental memorandum wherein we finalize our opinion. We will inform you in writing of the result of the review as soon as we hear from the National Office. In the meantime, the conclusions reached in this opinion should be considered to be only preliminary.

Any questions regarding this opinion should be referred to Rose Gole at (516) 832-2401.

JODY TANCER
Acting District Counsel

By: _____
ROSE E. GOLE
Attorney