Office of Chief Counsel
Internal Revenue Service

memorandum

CC:NER:MAN:TL-N-6291-99
DTonuzi

date:

to: Chief, Examination Division, Manhattan District
Attn: Jim Butler

from: District Counsel, Manhattan District, New York

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subject: [redacted]
EIN: [redacted]
Tax Year: [redacted] through [redacted]
Statute of Limitations Expires: [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 is in response to your request for advice concerning the issue of who is the proper party to sign the Form 872 for [redacted], the common parent of a consolidated group, for the taxable years [redacted] through [redacted]. [redacted] ceased to exist in [redacted], after a merger and the surviving corporation, [redacted], changed its name to [redacted] in [redacted]. We have coordinated this issue with Attorney George Johnson (CC:DOM:FS,CORP). This advise is subject to the 10-day post review procedure. **Therefore, no action should be taken based on this advice until the National Office has had the prescribed 10-day period to review and approve the advice.**

Issue

Who should execute a Consent to Extend the Time to Assess Tax (Form 872) to extend the statute of limitations on assessment for [redacted], a common parent that no longer exists, for the tax years [redacted] through [redacted] and how should the name of the common parent be stated in the Form 872.

Conclusion

[redacted] qualifies as an "alternate agent" under Temp. Reg § 1.1502-77T(a)(4)(ii) for purposes of executing a Form 872 extending the statute of limitations on behalf of [redacted], the common parent that no longer exists, for tax years [redacted] through [redacted].

Facts

We base our opinion on the limited facts provided regarding the corporate structure and ownership of [redacted] the common parent, during the tax years [redacted] through [redacted] that ceased to exist on or about [redacted], after a merger.

[redacted] Merger

[redacted] was incorporated in Delaware on [redacted] and was the common parent of the consolidated group during tax years [redacted] through [redacted]. On or about [redacted], [redacted] merged into [redacted], a Delaware corporation and its wholly owned subsidiary under the provisions of I.R.C. § 368(a)(1)(A). Attached as Exhibit 1 is a certificate of ownership and merger dated [redacted], that establishes that all of the assets and liabilities of [redacted] were transferred to [redacted], the surviving entity. As discussed at page 2 of Exhibit 1, this transactin was intended to be an I.R.C. § 368(a)(1)(A) statutory merger. Thereafter, [redacted] ceased to exist. The plan of merger dated [redacted], specifically authorized the surviving corporation, [redacted], to be served with process for the enforcement of any liability or obligation of [redacted]. A copy of the plan of merger is attached as Exhibit 2. After the [redacted] merger, [redacted] was wholly owned by [redacted]. At that time, [redacted] was owned [redacted]% by [redacted] and [redacted]% by the public.

[redacted] was a Delaware corporation that was not related to [redacted] and that would later merge with [redacted]. [redacted] was owned by [redacted]. [redacted] was owned [redacted]% by [redacted] and [redacted]% by the public. Attached as Exhibit 3 are

organizational charts for [redacted] and [redacted] subsequent to the [redacted] merger and prior to [redacted].

[redacted] **Merger**

On or about [redacted], [redacted], a Delaware corporation, and [redacted] entered into an agreement of merger to merge [redacted] with and into [redacted] under the provisions of I.R.C. § 368(a)(1)(A). The certificate of merger dated [redacted], indicates that the merger became effective [redacted]. Copies of the agreement of merger and certificate of merger are attached as Exhibit 4. After this merger, [redacted] was a wholly owned subsidiary of [redacted]. [redacted] was owned [redacted]% by [redacted], [redacted]% by [redacted] and [redacted]% by the public. Attached as Exhibit 5 is the organizational chart for [redacted], the successor to [redacted], the common parent in this case, after [redacted] and prior to [redacted].

On [redacted], [redacted] changed its name to [redacted] effective [redacted]. Attached as Exhibit 6 is a copy of the certificate reflecting the name change. Consequently, [redacted] became the wholly owned subsidiary of [redacted]. The ownership of [redacted] remained unchanged as a result of this merger. Attached as Exhibit 7 is the organizational chart of [redacted], the successor to [redacted]. and [redacted].

As a result of mergers described above, [redacted] is the successor to [redacted], the common parent that no longer exists.

Analysis

Under I.R.C. § 6501(c)(4), the usual 3-year statute of limitations on assessment may be extended by a written agreement of the parties. Such an extension of the statute of limitations on assessment is effected through the execution of a Consent to Extend the Time to Assess Tax (Form 872). Rev. Proc. 82-6, 1982-1 C.B. 409; Rev. Proc. 72-38, 1972-2 C.B. 813; Rev. Proc. 69-8, 1969-1 C.B. 399.

In the case of a consolidated return, the common parent is generally the appropriate party to extend the statute of limitations. Treasury Regulation § 1.1502-77(a) states, in pertinent part:

(a) The common parent ... shall be 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.... [T]he common parent in its name will give waivers ... and any waiver ... so given ... shall be considered as having also been given ... by each such subsidiary. [Emphasis added].

When the common parent ceases to exist, Treasury Regulation § 1.1502-77(d) provides for the designation of a new agent to act for the group. It requires the terminating common parent to designate another member to act as the sole agent of the group with the approval of the District Director. Id. If the common parent fails to do so, then the remaining members may designate one of the members to act as the sole agent of the group with the approval of the District Director. Id. If the remaining members fail to designate a sole agent, the Service is granted authority to deal with each member separately with respect to its separate tax liability. Id.

Temporary Regulation § 1.1502-77T, which was promulgated in 1988, modified the "sole agency" rule for the purposes of issuing notices of deficiency and extending the statutes of limitations. Where the common parent ceases to be a common parent, this regulation allows the following "alternative agents" to act on behalf of the group: (i) the common parent of the group for all or part of the year to which the notice or waiver applies; (ii) a successor to the former common parent in a transaction to which section 381(a) applies; (iii) the agent designated by the group under Treasury Regulation § 1.1502-77(d); or (iv) if the group remains in existence under Treasury Regulation §§ 1.1502-75(d)(2) or (3), the common parent of the group at the time the notice is mailed or the waiver given. Treas. Reg. § 1.1502-77T(a)(4).

Under Treasury Regulation § 1.1502-77T(a)(4)(ii), "a successor to the former common parent in a transaction to which I.R.C. § 381(a) applies" is an alternate agent. I.R.C. 381(a) applies in the case of an acquisition of assets of a corporation by another corporation in a transfer to which section 361 applies, but only if the transfer is in connection with a reorganization described in subparagraph (A), (C), (D), (F), or (G) of I.R.C. § 368(a)(1). I.R.C. § 361(a) provides for nonrecognition of gain or loss in a reorganization solely for stock. The taxpayer has claimed tax-free treatment of this reorganization. However, the tax year of the reorganization has not yet been examined and the Service has not made any determination as to the tax-free nature of the reorganization.

In the present case, [redacted], the common parent for the tax years in issue, merged into [redacted] the surviving corporation. As set forth in Exhibit 2, [redacted] adopted a plan of merger whereby its shares were transferred to

[redacted] under I.R.C. § 368(a)(1)(A). A reorganization under § 368(a)(1)(A) is a transaction referred to in I.R.C. 381(a). Therefore, because [redacted] (now known as [redacted]) is the acquiring corporation in a merger to which I.R.C. § 381(a) applies, it is the "successor to the former common parent ([redacted]) in a transaction to which section 381 applies," and can act as the alternative agent of [redacted] consolidated group for the tax years at issue, under Temporary Regulation § 1.1502-77T(a)(4)(ii). Therefore, [redacted] (formerly [redacted]) is a proper party to sign the Form 872 for [redacted] consolidated group, for the tax years [redacted] through [redacted].

If [redacted] signs the Form 872, as an alternative agent under Treasury Regulation § 1.1502-77T(a)(4)(ii), it will bind itself and any remaining members of [redacted] consolidated group for the consolidated tax liabilities of [redacted] for tax years [redacted] through [redacted]. Therefore, [redacted] is the proper party to sign the Form 872 for the tax years in question.

The Form 872 should read as follows: (Top of the Form 872) [redacted] (EIN) (formerly [redacted] (EIN) as successor in interest to [redacted] (EIN) and as alternative agent for [redacted] consolidated group. *

We recommend that on the front of the Form 872 the asterisk should refer to the following: *This is respect to the consolidated tax of [redacted] Consolidated return group for the taxable years [redacted] through [redacted].

In addition, the signature block on page 2 of the Form 872 should be signed as follows: [redacted], formerly [redacted], as successor in interest to [redacted]. The block should be signed by a current officer of [redacted].

General Matters

As a final matter, we recommend that you pay strict attention to the rules set forth in the Internal Revenue Manual ("IRM"). Specifically, IRM 4541.1(2) requires use of Letter 907(DO) to solicit the extension, and IRM 4541.1(8) requires use of Letter 929(DO) to return the signed extension to the taxpayer. Dated copies of both letters should be retained in the case file as directed. When the signed extension is received from the

taxpayer, the responsible manager should promptly sign and date it in accordance with Treas. Reg. § 301.6501(c)-1(d) and IRM 4541.5(2). The manager must also update the statute of limitations in the continuous case management statute control file and properly annotate Form 895 or equivalent. See IRM 4531.2 and 4534. This includes Form 5348. In the event an extension becomes separated from the file or lost, these other documents would become invaluable to establish the agreement.

Furthermore, please note that § 3461 of the Restructuring and Reform Act of 1998, codified in I.R.C. § 6501(c)(4)(B), requires the Internal Revenue Service to advise taxpayers of their right to refuse to extend the statute of limitations on assessment, or in the alternative to limit an extension to particular issues or for specific periods of time, each time that the Internal Revenue Service requests that the taxpayer extend the limitations period. To satisfy this requirement, you may provide Publication 1035, "Extending the Tax Assessment Period," to the taxpayer when you solicit the statute extension. Alternatively, you may advise the taxpayer orally or in some other written form of the provisions of I.R.C. § 6501(c)(4)(B). In any event, you should document your actions in this regard in the case file.

We again remind you that this advice is subject to review by the National Office. As discussed on page one, we will contact you within two weeks of the date of this memorandum to discuss any comments the National Office may have regarding this advice.

If you have any questions, please contact Attorney Drita Tonuzi (212) 264-5473, extension 244.

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