7Office of Chief Counsel
Internal Revenue Service

memorandum

CC:NER:NED:BOS:TL-N-1018-00
BJLaterman

date: APR 18 2000

to: District Director, New England District
E:PPQMB:S.Winsten

from: District Counsel, New England District, Boston

subject: [redacted]
Tax Years Ending [redacted], [redacted] and [redacted]

Extending the Statute of Limitations
Statute Expiration: [redacted]

This is in response to your memorandum requesting advice regarding extending the statute of limitations for the above-mentioned consolidated group's taxable years ending June 30, [redacted], June 30, [redacted] and December 26, [redacted].

[redacted], a Delaware corporation, and its subsidiary, [redacted] filed consolidated tax returns for the taxable years ending June 30, [redacted], June 30, [redacted] and December 26, [redacted]. Said returns were mailed on [redacted], [redacted] and [redacted] and received on [redacted], [redacted] and [redacted]. [redacted] is the parent corporation of an affiliated group of corporations which filed on a consolidated basis. On [redacted], [redacted] acquired all the issued and outstanding stock of [redacted]. The transaction was effectuated By [redacted], a wholly owned subsidiary of [redacted]. [redacted] purchased for cash [redacted] stock and then merged into [redacted] upon completion of the stock acquisition. [redacted] was the surviving corporation after the merger. [redacted] and its subsidiary were included in the consolidated return of [redacted] for the group's tax year ended [redacted].

[redacted] on its tax return for the year ended December 26, [redacted], reported a loss of $[redacted]. On [redacted], the Service received an Application For Tentative Refund for the taxable years ended June 30, [redacted] through June 30, [redacted]. The Application For Tentative Refund carried back from the

year ended December 26, [redacted], losses in the total amount of $[redacted]. Tentative allowances for the years ended June 30, [redacted], June 30, [redacted] and June 30, [redacted] were paid in the respective amounts of $[redacted], $[redacted] and $[redacted].

[redacted] was merged into [redacted] (a Minnesota corporation, a subsidiary of [redacted], and a member of the [redacted] consolidated group) on [redacted] with [redacted] the surviving entity. On [redacted], [redacted] changed its name to [redacted] by amending its Articles of Incorporation. [redacted] ([redacted]'s subsidiary) was merged into [redacted] effective [redacted], with [redacted] the surviving entity. Sometime during the taxable year ended [redacted], [redacted] changed its name to "[redacted]" and said corporation filed its return for the taxable year ended January 4, [redacted] under its new name.

On [redacted], an extension was secured to extend the statute for [redacted]'s taxable years ended June 30, [redacted], June 30, [redacted] and December 26, [redacted] to June 30, [redacted]. The extension was secured from [redacted] on behalf of [redacted] and was signed by [redacted], V-P Corporate Tax of [redacted]. The E.I.N. used at the top of the extension was [redacted]; i.e., [redacted],'s E.I.N. The caption used on the extension was "Formerly: [redacted]; Currently: [redacted] EIN [redacted]."

On [redacted], [redacted] was merged into [redacted], a Delaware corporation, with [redacted] as the surviving entity. You have inquired as to whether extensions should be secured from [redacted] as successor in interest to the [redacted] in order to further extend for [redacted] group for the taxable years ended June 30, [redacted] June 30, [redacted] and December 26, [redacted].

Generally, the common parent, with certain exceptions not applicable here, is the sole agent for each member of the group, duly authorized to act in its own name in all matters relating to the tax liability for the consolidated return year. Treas. Reg. § 1.1502-77(a). The common parent in its name will give waivers, and any waiver so given, shall be considered as having also been given or executed by each such subsidiary. Treas. Reg. § 1.1502-

77(a). Thus, generally, the common parent is the proper party to sign consents, including the Form 872 waiver to extend the period of limitations, for all members in the group. Treas. Reg. § 1.1502-77(a). Treas. Reg. § 1.1502-77(c) provides that, unless the District Director agrees to the contrary, an agreement entered into by the common parent extending the time within which an assessment may be made in respect of the tax for a consolidated return year, shall be applicable to each corporation which was a member of the group during any part of such taxable year. The common parent and each subsidiary which was a member of the consolidated group during any part of the consolidated return year is severally liable for the tax for such year. Treas. Reg. 1-1502-6(a).

Treas. Reg. § 1.1502-77T provides for alternative agents and applies if the corporation that is the common parent of the group ceases to be the common parent, whether or not the group remains in existence. Temp. Reg. § 1.1502-77T provides that a waiver of the statute of limitations, with respect to the consolidated group, given by any one or more corporations referred to in paragraph (a)(4) of the section is deemed to be given by the agent of the group. Subparagraph (a)(4)(i) lists as an alternative agent the common parent of the group for all or any part of the year to which the notice or waiver applies. In this case, the common parent, [redacted], merged into [redacted], now known as [redacted], and is no longer in existence. Therefore, this subparagraph cannot apply.

Under Treas. Reg. § 1.1502-(a)(4)(ii), the alternative agents for the group include "a successor to the former common parent in a transaction to which I.R.C. § 381(a) applies." I.R.C. § 381(a) applies, in part, to an acquisition of assets of a corporation by another corporation in a transfer to which I.R.C. § 361 (relating to nonrecognition of gain or loss to corporations) 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). On [redacted] [redacted] merged into [redacted], now known as [redacted], with [redacted] surviving. If the merger is an "A" reorganization, I.R.C. § 381 will apply. If so, pursuant to Temp. Reg. § 1502-77T(4)(ii), [redacted] ([redacted]) and not [redacted] would be an alternative agent for [redacted] consolidated group for the taxable years ended June 30, [redacted], June 30, [redacted] and December 26, [redacted]. Any waiver given by [redacted] ([redacted]) with respect to the pre-merger taxable years of [redacted] consolidated group would be deemed to be given by the agent of the group.

The merger of [redacted] into [redacted] ([redacted]) was pursuant to state law. This is one of the requirements for an "A" reorganization. However, it is not sufficient alone to ensure the application of I.R.C. § 368(a)(1)(A). There are certain requirements which must be met in order for the statutory merger to qualify as an "A" reorganization. We do not know whether all these requirements have been met, but for purposes of this advice, we will assume that the facts as developed will most likely indicate that the above-noted requirements are met and that the merger constitutes a tax-free "A" reorganization under I.R.C. 368(a). Therefore, I.R.C. § 381 would apply to this reorganization. Consequently, [redacted] ([redacted]) is an alternative agent for [redacted] consolidated group and is the proper party to execute a Form 872 with respect to the taxable years ended June 30, [redacted], June 30, [redacted] and December 26, [redacted] of [redacted] consolidated group. If the merger does not constitute a tax-free reorganization, then Temp. Reg. § 1.1502-77T would not apply and under Treas. Reg. § 1.1502-77T, [redacted] ([redacted]) would not be an alternative agent for [redacted] consolidated group for the taxable years involved herein.

Another basis for obtaining a Form 872 from [redacted] ([redacted]) is that said corporation is a successor in interest by merger to [redacted]. A surviving or resulting corporation in a merger or consolidation under state law may validly sign an extension agreement on behalf of the transferor (predecessor) corporation for a period before the transfer. Rev. Rul. 59-399, 1959-2 C.B. 448.

Successor liability can be established in this case, if, as it appears, the merger of [redacted] into [redacted] ([redacted]) was effected under Minnesota law. If that is the case, [redacted] ([redacted]) is primarily liable for [redacted]'s debts, including taxes due. Southern Pacific Transportation Co. v. Commissioner, 84 T.C. 387 (1985), later proceeding, 90 T.C. 771 (1998). Section 300.15 of the Minnesota Statutes, Corporations, provides:

> When the agreement is signed, acknowledged, filed for record, and published as required by section 300.14, the separate existence of the constituent corporations ceases and they become a single corporation in accordance with the agreement, possessing all the rights, privileges, powers, franchises, and immunities and subject to all the liabilities and duties of each of the consolidating corporations. The rights, privileges, powers,

franchises, and immunities of each of the corporations and all property, and all debts owing on whatever account, and all other things in action of or belonging to each of the corporations are vested in the consolidated corporation, and all property, rights, privileges, powers, franchises, immunities, and other interests are thereafter as effectually the property of the consolidated corporation as they were of the several and respective constituent corporations. All rights of creditors and all liens upon the property of either of the constituent corporations are preserved unimpaired, and are limited in lien to the property affected by the lien at the time of the consolidation. All debts, liabilities, and duties of the constituent corporations attach to the consolidated corporation and may be enforced against it to the same extent as if the debts, liabilities, and duties had been incurred or contracted by it. Minn. Stat. § 300.15 (1999)

In addition, under I.R.C. § 6901, [redacted] ([redacted]) is a transferee at law of [redacted] because there was a statutory merger by which [redacted] assumed the liabilities of [redacted] A determination against the surviving corporation for tax due by the merged corporation for a period prior to the merger is not generally handled as a transferee case. Rather it should generally be handled by asserting primary liability against the surviving corporation. There is an exception if the statutory period for assessing a deficiency has expired under primary liability; the Service would then argue that the surviving corporation should be liable as a transferee. See generally CCDM (35)(10)61.

Therefore, it is preferable to assert primary instead of transferee liability against the surviving corporation, [redacted] ([redacted]), if the statutory period for assessing a deficiency has not expired under primary liability. The transferee liability approach should be reserved for the situation where time for asserting primary liability has expired. In this case, since statute extensions were not solicited from [redacted] ([redacted]) for [redacted]'s taxable years ended June 30, [redacted], June 30, [redacted] and December 26, [redacted], the time for asserting primary liability against [redacted] ([redacted]), the surviving corporation, has expired; i.e., the 3-year statutes for [redacted]'s taxable years ended June 30, [redacted], June 30, [redacted] and December 26, [redacted] have expired. Therefore, utilization of the transferee liability approach is warranted in this case.

It is noted that I.R.C. § 6501(h) provides a longer period of limitations with respect to deficiencies in the years ended June 30, [redacted] through June 30, [redacted] that are attributable to the disallowance of the tentative carryback refunds. To the extent of those deficiencies, the statute for the carryback years will not expire any sooner than the statute for the loss year (i.e., the short-period ended December 26, [redacted]).

Under I.R.C. § 6501(a), the assessment period generally expires three years after the return was filed. A late filed return is considered filed on the date of receipt. United States v. Shildmyer, 79 AFTR2d 97-2628 (9th Cir. 1997); Mitchell v. Commissioner, 103 T.C. 520 (1994). Also, a return that is received prior to the extended due date is considered filed on the date it is actually received. Moody v. Commissioner, T.C. Memo. 1991-596.

In this case, the original due date for the short-period ending on [redacted] should have been [redacted] and , if the taxpayer received a six month extension, the extended due date should have been [redacted]. See generally, I.R.C. § 6072(b); Treas. Reg. §§ 1.6071-1(b) and 1.6081-3. The return was mailed on [redacted] but not received until [redacted]. Accordingly, the filing date was [redacted] whether or not there was an extension. Therefore, the assessment period for the year ended [redacted] ended on [redacted].

Under the provisions of I.R.C. 6901(c)(1), the period of limitations for assessment of transferee liability is extended by one year after the expiration of the period of limitation for assessment against the transferor. Therefore, in this case, the period of limitation of assessment of transferee liability is [redacted] for any deficiency in the taxable period ended December 26, [redacted]. Additionally, because that period was the loss year and it was open until [redacted] with respect to the transferor, the transferor's period of limitations also expires no earlier that [redacted] for deficiencies in the years ended June 30, [redacted] through June 30, [redacted] that are attributable to disallowance of the tentative carryback refunds. Accordingly, the period of limitation for assessment of transferee liability is [redacted] for deficiencies in the years ended June 30, [redacted] through June 30, [redacted] that are attributable to disallowance of the tentative carryback refunds.

With respect to deficiencies in the years ended June 30, [redacted] through June 30, [redacted] that are attributable to items other than disallowance of the tentative refunds, there is a possible argument that the Form 872 signed on [redacted] may be valid under a reformation or estoppel theory. [redacted], who

signed the [redacted] extension, was also an officer of [redacted] at the time he signed on behalf of [redacted]. If the [redacted] Form 872 is valid, any new Form 872 signed by [redacted], as agent, would bind the former members of [redacted] consolidated group.

Accordingly, you should obtain: (1) a Form 872 from [redacted] for [redacted]'s taxable years ended June 30, [redacted], June 30, [redacted] and December 26, [redacted]; and (2) Forms 977 (Consent to Extend The Time to Assess Liability at Law or in Equity for Income, Gift and Estate Tax Against a Transferee or Fiduciary) and Forms 2045 (Transferee Agreement) from [redacted] ([redacted]) for [redacted]'s taxable years ended June 30, [redacted], June 30, [redacted], June 30, [redacted] and December 26, [redacted]. These forms should be signed by an authorized officer or director of [redacted] Rev. Rul. 83-41, 1983 C.B. 399, clarified and amplified, Rev. Rul. 84-165, 1984-2 C.B. 305.

Please note that any Forms 977 or 2045 executed by [redacted] will bind only [redacted] and not the former subsidiary members of the consolidated group. The scope of the agency authority under either Treas. Reg. § 1.1502-77(a) or Temp. Reg. § 1.1502-77T does not extend to transferees. Therefore, neither the common parent, the designated agent under Treas. Reg. § 1.1502-77(d), nor the alternative agent under Temp. reg. § 1.1502-77T, can sign a Form 977 or 2045 **in its capacity as agent**. This matter is of no concern here, however. The facts indicate that the common parent and its subsidiary, [redacted], both transferred assets to [redacted]. Thus, there does not appear to be a need to bind anyone other than [redacted]. It is noted, however, that transferee forms for both [redacted] and [redacted] should be obtained from [redacted] as transferee of both [redacted] and [redacted].

The caption of the Form 872 should read "[redacted] formerly known as [redacted], as successor to [redacted] and as alternative agent to [redacted]".* On the bottom of the form, you should add the following: *This is with respect to the consolidated tax liability of [redacted] for the taxable years ended June 30, [redacted], June 30, [redacted] and December 26, [redacted].

With respect to the Forms 977 and 2045, we believe it is important to emphasize that each of the periods ended June 30,

[redacted], June 30, [redacted] and December 26, [redacted] should be separately identified on the Forms 977 and 2045 to be signed by [redacted], formerly known as [redacted]. Since a tentative refund was also made for the year ended June 30, [redacted], you should also obtain forms for this year.

If we can be of any further assistance, please feel free to call the undersigned at 617/565-7855.

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Special Litigation Assistant