Office of Chief Counsel
Internal Revenue Service

memorandum

CC:NER:NED:BOS:TL-N-2079-00
BJLaterman

date:

to: Martin S. Cuniffe, Team Chief
New England Appeals, Boston

from: District Counsel, New England District, Boston

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subject: [redacted]
Forms 872
Taxable Years [redacted] and [redacted]

Earliest Statute Expiration: [redacted]

This is in response to your request that we provide advice regarding extending the statute of limitations for the above-mentioned consolidated group's taxable years [redacted] and [redacted].

In a previous memo of April 28, 1999 to the Examination Division, we advised regarding extending the statute for the above-mentioned consolidated group's taxable years ended [redacted] through [redacted] and [redacted]. In a memo of February 2, 2000, we advised the Examination Division as the impact of the transaction in which [redacted] consolidated group was acquired by [redacted].

[redacted], a Massachusetts corporation, was the parent corporation of an affiliated group of corporations which filed a consolidated return for the above-mentioned taxable years. [redacted] was a [redacted] holding company with [redacted] affiliated corporations during the taxable years involved herein. [redacted], and [redacted] were subsidiary [redacted] which operated in Massachusetts and New Hampshire, respectively. [redacted] is the principal subsidiary of [redacted].

[redacted], a Massachusetts corporation, is a [redacted] holding company which is the parent corporation of an affiliated group. Said company had subsidiary [redacted] in [redacted], [redacted], [redacted] and [redacted]. The [redacted], a [redacted], all of

whose voting securities are owned indirectly by [redacted], is the principal subsidiary of [redacted].

[redacted] was acquired by [redacted] in a tax free reorganization on [redacted]. Pursuant to the Agreement and Plan of Merger dated [redacted], [redacted] formed a merger subsidiary which merged into [redacted] with [redacted] as the surviving corporation. [redacted] continued its corporate existence under the laws of the Commonwealth of Massachusetts until it was dissolved on [redacted] under the provisions of the General Laws of the Commonwealth of Massachusetts, Chapter 156(b), Section 100.

The Agreement and Plan of Merger dated [redacted] provided for subsidiary [redacted] mergers with the object of establishing one [redacted] subsidiary for each state in New England in which the parties to the agreement currently had [redacted] subsidiaries. Pursuant to said plan and subsequent to the consummation of the agreement between [redacted] and [redacted], [redacted] was merged into [redacted] with [redacted] as the surviving entity. The Plan of Reorganization and Agreement to Merger provided that [redacted] shall be responsible for all of the liabilities of every kind and description of each merging [redacted]. Both [redacted] and [redacted] were [redacted] duly organized and existing under the laws of the United States of America.

In our memo of April 29, 1999, we concluded:

> "We strongly recommend, however, that you not deal with the officers of the former common parent while it is in its three-year winding up period. Although this option may work, we can find little or no statutory or case law that would support the Service here. Because of this and because of a practical consideration (i.e., even if you sent the statutory notice of deficiency within the three-year winding up period, you could not collect from [redacted], because by then it may have distributed its assets), we do not think that this option is viable.

. . . .

Since we have concluded that the subparagraphs of Temp. Reg. § 1.1502-77T(4) do not apply or that we may not be able to rely on them in this case, there is no alternative agent for the [redacted] consolidated group. Accordingly, pursuant to Treas. Reg. § 1.1502-77(d), the Service could obtain consents individually from the remaining members of the [redacted] consolidated group. Treas. Reg. § 1.1502-77(d) provides that if the common parent corporation and/or the remaining members of the consolidated group do not designate another member of the group to act as agent, then the District Director may deal directly with any member in respect of its liability. Therefore, in this case, the Service can rely on Treas. Reg. § 1.1502-77(d) as support for obtaining consents from remaining members of the [redacted] consolidated group and the theory of successor liability (discussed below) as support for obtaining consents from successors of former members of the [redacted] consolidated group.

Principal subsidiaries of the respective [redacted] consolidated group and [redacted] consolidated group were [redacted] and [redacted] was merged into [redacted], under the terms of a merger agreement which provided that [redacted] shall be responsible for all of the liabilities of every kind and description of [redacted] Consequently, [redacted] is primarily liable by virtue of the merger agreements. Therefore, you can obtain a Form 872 from [redacted] as successor in interest to [redacted]. It is noted that [redacted] has been renamed [redacted] as of [redacted]. Therefore, the caption of the Form 872 should read: [redacted] formerly known as [redacted] successor by merger

to [redacted]. * On the bottom of the form, you should add the following: *[redacted] formerly known as [redacted] is the successor in interest by merger to [redacted] with respect to [redacted]'s several liability under Treas. Reg. § 1.1502-6 for the tax due for the consolidated return years [redacted], [redacted], [redacted], and the year ended [redacted] of the [redacted] consolidated group. The Form 872 should be executed by an authorized officer of [redacted]. Rev. Rul. 83-41, 1983-1 C.B. 399 clarified and amplified, Rev. Rul. 84-165, 1984-2 C.B. 305.

. . . .

In any case, the statute extension secured from [redacted] as successor to [redacted] should be sufficient to protect the government's interest inasmuch as we have extended for the principal entity of the group.

We further note that Treas. Reg. § 1.1502-77(a) requires that before dealing with individual members of a consolidated group, the District Director must notify the common parent of its intention to deal directly. In view of the three year winding up period and to counter any possible argument that [redacted] is the successor to [redacted], an agency breaking letter should be sent to both [redacted] the former (dissolved) common parent and [redacted]. If you need assistance in drafting such a letter, please feel free to contact the undersigned for assistance.

It appears, although we do not definitively conclude here, that the [redacted] (the holding company) is a transferee with regard to the assets of [redacted] According to the facts contained in the file, [redacted] dissolved. As a general matter, anytime a corporation dissolves, it liquidates. Where a corporation disposes of all of its assets and then distributes the proceeds from the sale to its stockholders in liquidation or dissolution, the stockholder-distributees are "transferees". Vendig v. Commissioner, 229 F.2d 93 (2d. Cir. 1956), rev'g T.C. 1127 (1954); Fairless v. Commissioner, 67 F.2d 475 (6th Cir. 1933), aff'g 19 B.T.A. 304 (1930); Caire v. Commissioner, 101 F.2d 992 (5th Cir. 1932), aff'g 36 B.T.A. 1328 (1937); Foster v. Commissioner, 26 T.C.M. 1143 (1967), appeal dism'd (3d. Cir. 1969). See also Troy State University v. Commissioner, 62 T.C. 493 (1974). Stockholders who receive liquidating distributions from a corporation that subsequently winds up its affairs and dissolves without making adequate provisions for taxes are liable as transferees.

Accordingly, if it is determined that [redacted] is a transferee, you should obtain 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 Form 2045 (Transferee Agreement) from that corporation. However, since the file lacks details regarding transferee liability, we do not conclude here that the [redacted] is in fact a transferee. We leave that decision up to you.

Finally, if you do determine that the [redacted] is, or should be treated as, a transferee, we recommend that you wait until it is certain that [redacted], has distributed its assets before obtaining Forms 977 and 2045 from the [redacted]."

Pursuant to our advice of April 29, 1999 Exam obtained a consent from [redacted] and solicited Forms 977 and 2045 from [redacted]. Said transferee forms were not executed by [redacted].

[redacted] a Rhode Island corporation, is a bank holding company. [redacted] is engaged in a general [redacted] and [redacted] business through its [redacted] subsidiaries located in [redacted], [redacted], [redacted], [redacted], [redacted], [redacted] and [redacted].

On [redacted], [redacted] and [redacted] entered into an Agreement and Plan of Merger subject to their respective shareholder's consent. This Agreement and Plan of Merger provided that [redacted] shall merge with and into [redacted] with [redacted] as the surviving corporation. [redacted] shareholders received the right to obtain [redacted] stock in exchange for their [redacted] stock. After said exchange, the pre-merger shareholders of [redacted] controlled the combined entity. It was further provided that the name of the surviving corporation be changed from [redacted] to "[redacted]." It was intended by the parties that for U.S. tax purposes that the merger constitute a tax free reorganization.

Subject to the terms and conditions of the Agreement and Plan of Merger and in accordance with the provisions of the Massachusetts Business Corporation Law (General Laws, Chapter 156 B, Section 79) and the Rhode Island Business Corporation Act, [redacted] was merged into [redacted] on [redacted]. General Laws, Chapter 16 B, Section 79 (Massachusetts Business Corporation Law) provides:

> (a) Any one or more corporations may consolidate or merge with one or more other corporations organized under the laws of any other state or states of the United States, if the laws of such other state or states permit. ...
>
> (b) Such corporations as desire to consolidate or merge shall enter into an agreement of consolidation or merger which shall specify the state under the laws of which the resulting or surviving corporation is organized... if the resulting or surviving corporation is to be governed by the laws of another state, the resulting or surviving corporation shall

> agree that it may be sued in this commonwealth for any prior obligation of any constituent domestic corporation...

MASS. ANN. LAWS Ch. 156 B,§ 79 (Law. Co-op. 1979).

[redacted] the foreign surviving corporation, so agreed to be sued in Massachusetts in both the Agreement and Plan of Merger and in the Articles of Merger filed with the Commonwealth of Massachusetts. Furthermore, General Laws, Chapter 156 B, Section 80 (b) (Massachusetts Business Corporation Law) which deals with the effect of consolidation or merger provides:

> (b) The rights of creditors of any constituent corporation shall not in any manner be impaired, nor shall any liability or obligation, including taxes due or to become due, or any claim or demand in any cause existing against such corporation... be released or impaired by any such consolidation or merger, but such resulting or surviving corporation shall be deemed to have assumed, and shall be liable for, all liabilities and obligations of each of the constituent corporations in the same manner and to the same extent as if such resulting or surviving corporation had itself incurred such liabilities or obligations.

MASS. ANN. LAWS Ch. 156 B. § 80 (Law. Co-op 1979).

Therefore under the laws of Massachusetts, [redacted] assumed all the liabilities including taxes due or to become due of [redacted] Accordingly [redacted] is a successor in interest to [redacted]. Southern Pacific Transportation Co. v. Commissioner, 84 T.C. 387 (1985), later proceeding, 90 T.C. 771 (1988).

As of [redacted] (subsequent to the merger of [redacted] into [redacted], now known as [redacted], there had been no changes in the corporate structure of the former [redacted] group. [redacted] the entity from whom Exam had obtained prior Forms 872 to extend the statute for the [redacted] consolidated group was still in existence as of [redacted]. Consequently, we advised Exam that as of [redacted], [redacted]

[redacted] was still the appropriate entity to extend the statute with regard to [redacted]'s several liability for the [redacted] consolidated group under the reasoning set forth in the previous memo of April 28, 1999, ie., it cannot extend the statute as agent for the remaining members of the group. The implication of going after [redacted], only as successor and not as agent for each of the members of the group is that we can only make an assessment against [redacted]; ie., we cannot assess or collect against any other member of the group or its successor, except as transferee.

On [redacted], [redacted], a subsidiary corporation of the [redacted] and of the combined entity ([redacted]) merged into [redacted] with [redacted] as the surviving entity. The name of [redacted], the surviving entity, was changed to [redacted].

The statute of limitations for the [redacted] consolidated group's [redacted] and [redacted] taxable years expires on [redacted] pursuant to the terms of an extension secured prior to [redacted]. In [redacted], Appeals secured an Extension until [redacted] without following the notice provisions of I.R.C. § 6501(c)(4)(B). You have inquired as to the validity of the [redacted] extension; as to whether a new extension should be solicited and; if so, from whom the extension should be solicited.

In a Notice dated March 30, 2000 from Assistant Chief Counsel (Field Service), we were advised that for extensions secured after [redacted] that if Service personnel did not follow I.R.C. § 6501(c)(4)(B) and the period of limitations would remain open on those cases absent the extensions, Service personnel are to request new extensions following the proper procedures. Therefore, since the statute is open until [redacted], we recommend that you not rely on the [redacted] extension and secure a new extension to extend to [redacted].

Inasmuch as [redacted], with a new name [redacted] is still in existence, it is still the appropriate entity to extend the statute with regard to [redacted]'s several liability for the [redacted] consolidated group. You should utilize the same

form for the new extension that you have previously utilized but the new extension should reflect the name change. Therefore, the caption of the Form 872 should read: [redacted] formerly known as [redacted] formerly known as [redacted] successor by merger to [redacted]*. On the bottom of the form, you should add the following: *[redacted] formerly known as [redacted] formerly known as [redacted] is the successor in interest by merger to [redacted] with respect to [redacted]'s several liability under Treas. Reg. § 1.1502-6, for the tax due for the consolidated return years ended [redacted] and [redacted] of the [redacted] consolidated group. The Form 872 should be executed by an authorized officer of [redacted]. Rev. Rul. 83-41, 1983-1 C.B. 399 clarified and amplified, Rev. Rul. 84-165, 1984-2 C.B. 305. Furthermore, when soliciting the extension, the notice provisions of I.R.C. § 6501(c)(4)(B) should be followed.

If we can be of any further assistance, the undersigned can be reached at 617-565-7838.

BARRY J. LATERMAN
Special Litigation Assistant