Office of Chief Counsel
Internal Revenue Service

memorandum

CC:NER:NED:BOS:TL-N-2672-00
BJLaterman

date: AUG 3 0 2000

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

from: District Counsel, New England District, Boston

subject: [redacted]
Tax Year Ended [redacted]
Form 872

This is in response to your memorandum requesting advice regarding extending the statute of limitations for the above-mentioned consolidated group's taxable years ended [redacted].

[redacted] is the parent corporation of an affiliated group of corporations which filed on a consolidated basis for it's taxable year ended [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 extend for [redacted] group for the taxable year ended [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] 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] 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] would be an alternative agent for [redacted] consolidated group for the taxable year ended [redacted]. Any waiver given by [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] was pursuant to state law (Delaware 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, such as whether the shareholders of [redacted] maintained a continuing interest in the surviving corporation. 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] is an alternative agent for [redacted] consolidated group and is the proper party to execute a Form 872 with respect to the taxable year ended [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] would not be an alternative agent for [redacted] consolidated group for the taxable year involved herein.

Another basis for obtaining a Form 872 from [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] was effected under Delaware law. If that is the case, [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 259 of the Delaware General Corporation Law, provides in part:

> (a) When any merger or consolidation shall become effective under this chapter,...all rights of creditors and all liens upon any property of any of said constituent corporations shall be preserved unimpaired, and all debts, liabilities and duties of the respective constituent corporations shall thenceforth attach to said surviving or resulting corporation and may be enforced against it to the same extent as if said debts, liabilities of and duties had been incurred or contracted by it.

In addition, under I.R.C. § 6901, [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] 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, the time for asserting primary liability against [redacted], the surviving corporation, has not expired and, therefore, utilization of the transferee liability approach is not warranted in this case.

Accordingly, you should obtain a Form 872 from [redacted] for [redacted]'s taxable year ended [redacted]. The Form 872 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. Since [redacted] is such an authorized officer or director of [redacted], he can execute the Form 872.

The caption of the Form 872 should read "[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 year ended [redacted]. The name "[redacted]" should be placed on the signature block of the Form 872 as well as the name and title of the current officer of [redacted].

New I.R.C. § 6501(c)(4)(B) provides that the Service shall notify the taxpayer of their right: 1) to refuse to extend the period of limitations; 2) to limit such extension to particular issues; or 3) to limit the extension to a particular period of time. This notice must be provided to the Taxpayer by field personnel each time an extension is requested. The legislative history of the provision states that Congress believed that taxpayers should be fully informed of their rights with respect to the statute of limitations on assessment.

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

BARRY J. LATERMAN
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