Office of Chief Counsel
Internal Revenue Service

memorandum

CC:NER:NED:BOS:TL-[redacted]
BJLaterman

date: AUG 09 1999

to: Charlie Marcou, Team Coordinator
Attn: Theresa Gorey, Case Manager, Group 1102

from: District Counsel, New England District, Boston

subject: [redacted]
Taxable Year Ended [redacted]
Statute Expires: [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 year ended [redacted].

[redacted] is a Delaware corporation. It filed as the parent of a consolidated group for the taxable year ended [redacted]. The [redacted] is a Delaware corporation which filed its federal income tax returns as the parent of a consolidated group. [redacted] and its subsidiaries were acquired by [redacted] on [redacted] pursuant to a tax-free reorganization whereby [redacted] exchanged its shares for all of the stock of [redacted]. After the acquisition, the [redacted] group filed as a member of the [redacted] consolidated group.

On [redacted], pursuant to the General Corporation Law of the State of Delaware, [redacted] merged [redacted], its wholly owned subsidiary, into itself. Pursuant to the merger, [redacted] agreed to assume all of [redacted]'s liabilities and obligations.

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 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).

Temp. Reg. § 1.1502-77T provides exceptions to the general rule. Temp. Reg. § 1.1502-77T provides for alternative agents in certain circumstances and applies to waivers of the statute of limitations for taxable years for which the due date (without extensions) of the consolidated return is after September 7, 1988. Therefore, Temp. Reg. § 1.1502-77T is applicable in this case.

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.

Subparagraph (a)(4)(ii) lists as an alternative agent a successor to the former common parent in a transaction in which I.R.C. § 381(a) applies. Section 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 non-recognition 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 a valid "A" reoganization (a statutory merger or consolidation) I.R.C. 381 will apply to the merger. If so, pursuant to Temp. Reg. § 1.1502-77T(4)(ii), [redacted] would be an alternative agent for the [redacted] group for the tax year ended [redacted]. Any waiver given by [redacted] as successor to the former common parent, [redacted], with respect to that pre-acquisition tax year of the [redacted] consolidated group would be deemed to be given by the agent of the group.

Subparagraph (a)(4)(iii) lists as an alternative agent the agent designated by the group under Treas. Reg. § 1.1502-77(d). Treas. Reg. § 1.1502-77(d) provides that if the common parent corporation dissolves, the common parent and/or the remaining members of the consolidated group may designate another member of the group to act as an agent, subject to the approval of the District Director. In this case, we assume that [redacted], the common parent of the [redacted] consolidated group, did not designate another member of the group to act as an agent. Accordingly, subparagraph (a)(4)(iii) does not apply.

Subparagraph (a)(4)(iv) lists as an alternative agent the common parent of the group at the time the waiver is given if the group remains in existence under Treas. Reg. § 1.1502-75(d)(2) or (3). In this case, there is no "F" reorganization or downstream transfer as described in Treas. Reg. § 1.1502-75(d)(2) or reverse acquisition within the meaning of Treas. Reg. § 1.1502-75(d)(3). Accordingly, subparagraph (a)(4)(iv) does not apply.

Therefore, as previously mentioned, pursuant to Temp. Reg. § 1.1502-77T(4)(ii), the Service could obtain a Form 872 from [redacted] if the merger constituted a valid reorganization. We have no information, however, to make that determination. Consequently we do not recommend that you solely rely upon Temp. Reg. § 1.1502-77T.

Another basis for obtaining the Form 872 from [redacted] is that [redacted] is a successor in interest by merger to [redacted], and thus succeeds to [redacted]'s several liability for the consolidated tax of the [redacted] consolidated group under state law and pursuant to the terms of the merger.

Both [redacted] and [redacted] are Delaware corporations. Since the merger was effected under Delaware law, [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 (1988). 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 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 and duties had been incurred or contracted by it.

DEL. CODE ANN. tit. 8, § 259 (1991).

The caption of the Form 872 should read as follows: (Top of Form 872) [redacted] as successor in interest to [redacted] (E.I.N. XX-XXXXXXX) and as agent for the [redacted] consolidated group*. The E.I.N. box on the front page of the Form 872 should have the E.I.N. of [redacted]. On the bottom of the front page of the Form 872 the asterisk should refer to the following: *This is with respect to the [redacted] consolidated group for the taxable year ended [redacted]. The signature block on the Form 872 should indicate the following: [redacted].

The regulations under I.R.C. § 6501(c)(4) do not specify who may sign consents executed pursuant to that section. Accordingly, the Service will apply the rules applicable to the execution of the original returns to the execution of consents to extend the time to make an assessment. Rev. Rul. 83-41, 1983-1 C.B. 399, clarified and amplified, Rev. Rul. 84-165, 1984-2 C.B. 305.

In the case of corporate returns, I.R.C. § 6062 provides that a corporation's income tax returns must be signed by the president, vice-president, treasurer, assistant treasurer, chief accounting officer or any other officer duly authorized to act. The fact that an individual's name is signed on the return is prima facie evidence that the individual is authorized to sign the return. I.R.C. § 6064. However, any officer listed above may sign a consent, whether or not that person was the same individual who signed the return. Rev. Rul. 84-165, 1984-2 C.B. 305. Consequently, the Form 872 should be signed by an officer of [redacted].

If we can be of any further assistance, please feel free to call the undersigned at 617-565-7838.

BARRY J. LATERMAN
Special Litigation Assistant