Office of Chief Counsel
Internal Revenue Service
Memorandum

Release Number: **20152301F**
Release Date: 6/5/2015

CC:LB&I:RFPH:MAGilbert
POSTF-114514-14

UILC: 6212.07-00, 6501.08-00, 6501.08-04, 6501.08-12, 6501.08-19, 1502.77-01

date: August 11, 2014

to:
Internal Revenue Agent,

from: Marjory A. Gilbert, Senior Counsel
(Large Business & International)

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subject: Service Reliance on a Consent Executed Pursuant to a Defective Power of Attorney and on a Protectively Obtained Transferee Consent

This memorandum responds to your request for assistance. This advice may not be used or cited as precedent.

Legend

Corporation A	=
Corporation B	=
Corporation C	=
Officer One	=
Officer Two	=
Officer Three	=
Officer Four	=
Officer Five	=
Officer Six	=
Officer Seven	=
Agreement A	=

Agreement B =

Former Shareholders of Corporation B and Its Predecessor Corporation =
Tax Liability of Corporation A =
Firm One =

Representative One =

Representative Two =
Representative Three =
POA X =
POA Y =
POA Z =
Consent One =
Consent Two =
Consent Three =
Revenue Agent =
Document One =

Document Two =

Document Three =

Amount 1 =
Amount 2 =
Amount 3 =
Amount 4 =
Amount 5 =
Amount 6 =
Amount 7 =
Amount 8 =
Amount 9 =
Amount 10 =
Address Z =

State A =
State B =

Section 1 =
Section 2 =
Year 1 =
Year 2 =
Year 3 =
Year 4 =
Year 5 =
Year 6 =
Year 7 =
Year 8 =
Year 9 =
Year 10 =
Month A =
Month B =
Month C =
Month D =
Month E =
Date A =
Date B =
Date C =
Date D =
Date E =
Date F =
Date G =
Date H =
Date J =
Date K =
Date L =
Date M =
Date N =
Date P =
Date Q =
Date R =
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ISSUES

1. Whether the Internal Revenue Service ("Service") may rely upon a consent to extend the statute of limitations when a representative signed the consent pursuant to a power of attorney form signed by an individual as president of Taxpayer after Taxpayer merged into its subsidiary.

2.

CONCLUSIONS

Given the facts and circumstances, including the fact that the

, the Service can rely upon the power of attorney form based on the Illinois statute that allows and common law agency. Therefore, the Service can also rely upon the consent signed pursuant to the power of attorney form, applying the principles of reformation.

2. Taxpayer's successor is a transferee in addition to being the successor of Taxpayer, and the consent to extend the transferee statute of limitations signed by the successor in a transferee capacity is valid.

FACTS

LAW AND ANALYSIS

The statute of limitations for assessing an income tax liability generally expires three years after the date the return is filed. I.R.C. § 6501(a); Mecom v. Commissioner, 101 T.C. 374, 381 (Year 2), *aff'd without published opinion*, 40 F. 3d 385 (5th Cir. 1994).

One exception to the general rule that the tax must be assessed within three years states:

> Where before the expiration of the time prescribed in this section for the assessment of any tax imposed by this title ... both the Secretary and the taxpayer have consented in writing to its assessment after such time, the tax may be assessed at any time prior to the expiration of the period agreed upon.

I.R.C. § 6501(c)(4)(A).

While the regulations under § 6501 reiterate that the taxpayer must consent in writing to extend the statute of limitations (Treas. Reg. § 301.6501(c)-1(d)), the regulations do not address whether a taxpayer can empower a representative to sign a consent on behalf of the taxpayer. However, I.R.C. § 6061(a) provides that documents "required to be made under any provision of the internal revenue laws or regulations **shall be signed in accordance with forms** or regulations prescribed by the Secretary." (emphasis added). The Form 2848, Power of Attorney and Declaration of Representatives page 1, item 5, states that, unless otherwise provided on the Form 2848, an appointed representative can sign consents.

When the taxpayer is a corporation, the question of who can sign a Form 2848 for a corporation is addressed in the separate instructions for the Form 2848

Said instructions state the Form 2848 must be signed by "[a]n officer having authority to bind the taxpayer". While neither the code nor the regulations specifically define who has authority to bind a corporation, Rev. Rul. 83-41, 1983-1 C.B. 349, clarified and amplified by Rev. Rul. 84-165, 1984-2 C.B. 305, states that the Service will generally apply the rules governing the signing of original returns to determine who has authority to sign extensions of the period for assessment. By analogy, since we are here concerned with a Form 2848 that was relied upon as authority to sign a consent, the rulings would also apply to determine who has authority to sign the Form 2848 for a corporate taxpayer.

For corporate taxpayers the rules governing the signing of original returns are in I.R.C. § 6062, which provides authority for a corporation's "president, vice-president, treasurer, assistant treasurer, chief accounting officer or any other officer duly authorized so to act" to sign a tax return. For consolidated groups (with exceptions not here relevant based on the provided facts)

> **the common parent . . . . for a consolidated return year is the sole agent** (agent for the group) that is authorized to act in its own name with respect to all matters relating to the tax liability for that consolidated return year, for –
>
> (A) Each member in the group; and
>
> (B) Any successor

Treas. Reg. § 1.1502-77(a)(1)(emphasis added).

When a consolidated group ceases to exist, the regulations provide:

> If the common parent fails to designate a substitute agent for the group before its existence terminates and **if the common parent has a single successor that is a domestic corporation, such successor becomes the substitute agent** for the group upon termination of the common parent's existence.

Treas. Reg. § 1.1502-77(d)(2).[1]

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[1] Based on the provided facts, we assume

The term "successor" as used in Reg. § 1.1502-77(a)(1) is defined as

> an individual or entity (including a disregarded entity) that is primarily liable, pursuant to applicable law (including, for example, by operation of a state or Federal merger statute), for the tax liability of a member of the group.

Treas. Reg. § 1.1502-77(a)(2)(iii).

The information provided to the Service confirms that As concluded in § 1. B. Illinois and State B law Re: Merged Corporations, below, Corporation B meets the definition of successor. Accordingly, since

, Corporation B is the substitute agent that should sign the Form 2848.[2] The fact that there was

, does not alter Corporation B's status as successor. Since

. Corporation B continues as Corporation A's successor, and Corporation B, not Corporation C, is the proper party to sign.

Hence, Corporation B should have signed the Form 2848 – just as its predecessor (Corporation A) would have had to sign the consent to extend the statute of limitations for the Year 3 year if the predecessor had not merged into Corporation B. See Pleasanton Gravel Co. v. Commissioner, 85 T.C. 839, 853 (1985) ("It has been held that taxes are debts or liabilities. It follows that [an acquiring corporation], who became primarily liable for the tax liabilities of [a target corporation] after the merger under [State] law, had the power under State law to extend the period of limitation for its own direct liability, just as its predecessor, [target], would have had.") (citations omitted).

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[2] If Corporation A had other subsidiaries, the group would have continued in existence with Corporation B as the new common parent of the group and Corporation B would sign the form as such. However, if at least 80% of the vote and value of the stock of Corporation B had since been acquired by another corporation (or if Corporation B has been liquidated into such corporation), then it would no longer be the common parent of the group and the group likely would have terminated.

Previously,

Treas. Reg. § 1.6062-1(c) provides that "[a]n individual's signature on a return, statement, or other document made by or for a corporation shall be prima facie evidence that such individual is authorized to sign such return, statement, or other document." Thus,

1. State Law

Once a corporation ceases to exist, the result "can not be distinguished from the death of a natural person in its effect." Oklahoma Natural Gas Co. v. Oklahoma, 273 U.S. 257, 259 (1927).[3] As a result, a corporation that no longer exists is, in effect, legally

[3] The corporation in Oklahoma Gas Company ceased to exist by reason of dissolution, not merger.

dead. However, unlike when a natural person is dead, since a state has control over the creation and termination of a corporation's existence, a state can enact statutes that provide a corporate entity that ceased to exist continues to survive as stated in the statute. See Oklahoma Natural Gas Co., 273 U.S. at 259-60 ("[C]orporations exist for specific purposes, and only by legislative act, so that **if the life of the corporation is to continue . . . it is necessary that there should be some statutory authority for the prolongation.** The matter is really not procedural . . . . It concerns the fundamental law of the corporation enacted by the State which brought the corporation into being.") (emphasis added).

A. Illinois Law Re: Dissolved Corporations

Illinois law provides that a corporation whose existence terminates by dissolution may continue to perform such "acts as are necessary to wind up and liquidate its business and affairs." Illinois Business Corporation Act of 1983, 805 ILL COMP. STAT. 5/12.30(a)(5) (2014).[4] Dissolution powers are not applicable, however, if a corporation ceases to exist via a merger rather than dissolution. See Lawrence v. Williams Ford, Inc., 13 Ill. App. 3d 880, 887, 300 N.E. 2d 636 (Ill. App. Crt., 2nd Dist. 1973) (repudiating a Federal district court case that erroneously applied Illinois law relative to dissolutions to a merger transaction).

this memorandum does not address whether, under Illinois dissolution law, .[5]

B. Illinois and State B Law Re: Merged Corporations

The Illinois Business Corporation Act of 1983 allows a parent corporation to merge into a subsidiary corporation (805 ILL COMP. STAT. 5/11.30 (2014)) and allows mergers of Illinois corporations with other states' corporations (805 ILL COMP. STAT. 5/11.37 (2014)).

Illinois law specifically addresses the effect of a merger as follows:

> (1) The several corporations parties to the plan of merger or consolidation shall be a single corporation, which, in the case of a merger, is that corporation designated in the plan of merger as the surviving corporation . . .
>
> (2) The separate existence of all corporations parties to the plan of

[4] Effective July 1, 1984, amended by Illinois P.A. 85-1344, § 4 eff. Aug. 31, 1988, , formerly cited as Ill. Rev. Stat. Ch. 32, ¶ 12.30.

[5] See Joseph Bassano, Laura Hunter Dietz, Alan J. Jacobs, Michele Meyer McCarthy and Thomas Muskus, Effect of Dissolution; Winding Up Corporate Affairs, § XV.B, 13 Illinois Law and Practice, Corporations § 359 (May 2014) (summarizing power to act after dissolution).

merger . . . , except the surviving . . . corporation, shall cease.

* * *

(4) Such surviving or new corporation shall thereupon and thereafter possess all the rights, privileges, immunities, and franchises, as of a public or a private nature, of each of the merging or consolidating corporations; and all property, real, personal, and mixed, and all debts due on whatever account, including subscriptions to shares, and all other choses in action, and all and every other interest, of or belonging to or due to each of the corporations so merged or consolidated, shall be taken and deemed to be transferred to and vested in such single corporation without further act or deed; and the title to any real estate, or any interest therein, vested in any of such corporations shall not revert or be in any way impaired by reason of such merger or consolidation.

(5) **Such surviving . . . corporation shall thenceforth be** responsible and **liable for all the liabilities and obligations of each of the corporations so merged** or consolidated; **and <u>any claim existing</u>** or action or proceeding pending by or against any of such corporations **may be prosecuted to judgment as if such merger or consolidation had not taken place**, or such surviving or new corporation may be substituted in its place. **Neither the rights of creditors nor any liens upon the property of any such corporations shall be impaired by such merger or consolidation.**

805 ILL COMP. STAT. 5/11.50(a)(1), (2), (4) and (5) (2014) (emphasis added).

<u>See Knoll Pharmaceutical Co. v. Automobile Insurance Co. of Hartford</u>, 152 F. Supp. 2d 1026, 1039 (N.D. IL 2001) ("In Illinois, a corporation which merges with another corporation assumes the obligations and liabilities of the latter corporation.") (citation omitted).

The relevant State B provisions appear in the State B Code. Section provides that, *inter alia,* "**all debts, liabilities and duties attach to said surviving corporation, and may be enforced against it** it." State B § (emphasis added).[6] Section provides, *inter alia,* that "**<u>[a]ny action or</u>**

[6] State B , §

proceeding,

shall be prosecuted as if such merger or consolidation had not taken place,

." State B § (emphasis added).[7]

For example, it states that "

" Agreement A,

Under Illinois and State B law, the result is the same; Corporation B is the successor as defined in Treas. Reg. § 1.1502-77(a)(1), *i.e.,* primarily liable. See Coulter Corp. v. Leinert, 869 F. Supp. 732, 3734 (E.D. Mo. 1994) ("[t]he court need not address which body of law actually applies to this issue because the result would be the same under the laws of Delaware ... , Illinois ... and Florida ...: the rights and liabilities of merging corporations are retained by the surviving corporation.") (citations omitted). Accordingly, Corporation B is the successor to Corporation A.

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[7] State B §

For purpose of post-merger actions of a merged corporation, Illinois law continues the corporate life for "**any claim existing**". State B law limits the continued life of a merged corporation to pre-existent **actions or proceedings**. See 805 ILL COMP. STAT. 5/11.50(a)(5) vis-à-vis State B § (both statutes are quoted above, with double emphasis added for the key phrases). This difference in statutory law is critical to the question of whether post merger Corporation A continued to exist so that POA Y could be captioned in the name of, and executed on behalf of, Corporation A.

It has already been established that the phrase "claim existing" encompasses potential tax deficiencies prior to the issuance of a notice of deficiency.

> **[T]he tax years involved had ended over a year prior to the merger, and until the statute of limitations ran on assessment and collection, potential tax liability existed.** Although it is true that no final determination of a deficiency had been made prior to the merger, nor had a 30-day letter been issued, we see no conceptual difference between this situation and a contractual situation in which the aggrieved party does not discover the breach until subsequent to the merger. Surely a "claim existed" against the breaching party prior to merger and **surely a claim exists here.** The same analogy can be drawn to tort cases as well. **A claim in the broad sense exists, at least as to potential tax liability, without regard to whether the respondent** [the Service] **has officially claimed it against the taxpayer.**

Brannon's of Shawnee, Inc. v. Commissioner, 71 T.C. 108, 115-16 (1978) (interpreting "claims existing" as used in an Oklahoma statute)(citations omitted; emphasis added). [8]

Brannon's of Shawnee found that the Oklahoma merger statute was modeled on the Illinois merger statute, and opined on the intent and purpose of the Illinois legislature in extending the law to claims existing at the time of the merger as follows:

> **The Illinois statute had been amended in 1933 to permit "claims existing" in addition to "actions or proceeding pending" to provide a basis for litigation in the name of the merged corporation.** This amendment, we think, evinces **a legislative effort to expand the number**

[8] In Brannon's of Shawnee the ultimate issue was whether the Tax Court lacked jurisdiction because the merged corporation filed the petition, thus lacked capacity to petition the court. The resolution of the capacity issue turned on whether the deficiency was within the phrase "claims existing" or there was a pending action before the merger. While the audit giving rise to the asserted deficiency in Brannon's of Shawnee had been initiated prior to the merger, , the Tax Court discussion evidences the commencement of the audit was not necessary to be an existing claim, as the language quoted above evidences.

of situations in which a merged corporation may sue or be sued.

Brannon's of Shawnee, 71 T.C. at 117 (emphasis added).

Brannon's of Shawnee distinguished Paramount Warrior, Inc. v. Commissioner, T.C. Memo. 1976-400, *aff'd without published opinion*, 608 F.2d 522 (5th Cir. 1979),[9] which involved a merger under Nevada law, stating:

> [i]n holding the consents invalid, this court grounded its opinion [in Paramount Warrior, Inc.,] on its finding under Nevada law that the merged corporation had no continued validity for purposes of litigation after the merger because "no action or proceeding" was pending at the time of the merger. **No provision in Nevada's merger statutes provided for continued viability, however, on the basis of "claim existing."**

Brannon's of Shawnee, 71 T.C. at 117 (emphasis added).

Illinois courts interpret the language relative to claims existing in the Illinois merger statute broadly as did Brannon's of Shawnee. For example, in Lawrence v. Williamson Ford, Inc., 300 N.E. 2d 636 (Ill. 1973), suit was brought against a merged corporation for personal injuries sustained nineteen years earlier when the plaintiff was a minor. The surviving corporation of the merger was misidentified and the defendant (actual successor) sought to have the case dismissed because it was served after the statute ran, albeit the complaint was filed before the statute ran when the minor became of age. The court interpreted § 69(e) of the Business Corporation Act (Ill. Rev. Stat. 1971, ch. 32, par. 157.69(e),[10] which had the same text as in 805 ILL COMP. STAT. 5/11.50(a)(5). The court declined to dismiss the suit because the statute allowed the merged corporation to be sued in the merged corporation's name even after the merger, and permitted the successor corporation to be substituted later. The court stated "a plaintiff has the choice of describing the defendant by its old or its new corporate name in commencing suit against it," with qualifier "so long as the claim upon which suit is based existed against the merged corporation before the merger." Lawrence, 300 N.E. 2d at 640.

Lawrence specifically emphasized the breadth and scope of the Illinois merger law when it rejected a Federal district court decision that erroneously tried to limit the Illinois merger statute, which became 805 ILL COMP. STAT. 5/11.50, as follows:

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[9] While not precedent, IRS CCA 200204001, 2002 WL 93292 (IRS CCA) states that Counsel does not view Paramount Warrior as controlling precedent in light of the later decided Woods v. Commissioner, 92 T.C. 776 (1989), with Woods discussed below, Law and Analysis, but in § 4, Reliance on the Year 6 Consent, rather than this § 1.B Illinois and State B Law Re: Merged Corporations.

[10] See Lawrence, 300 N.E. 2d at 639, n. 2 (quoting § 69(e) in its entirety).

> Although not cited by either party, we would add that we reject the approach taken in the case of J.W.T.Inc. v. Joseph E. Seagram & Sons, Inc. (N.D.Ill. 1972), 347 F.Supp. 965, which dismissed a suit commenced against a corporation in its premerger name because the merger had taken place over two years earlier. While perhaps reaching a practical result, the court **erroneously applied** the two year limitation [now a five year limitation] of section 94 of the Business Corporation Act (Ill. Rev. Stat. 1971, ch. 32, par. 157.94), **pertaining to dissolutions**, to section 69(b) (Ill. Rev. Stat. 1971, ch. 32, par. 157.69(b)), providing that the separate existence of all pre-merger corporations except the survivor, shall cease. **In doing so the court not only overlooked the fact that section 94 pertains only to situations involving a winding up of the business in which no successor is contemplated, but also ignored the language of section 69(e) and the Herzog case which allow suit against the original corporation as if the merger had not taken place.**

Lawrence, 300 N.E. 2d at 641.

The Lawrence court stated with respect to the belated service of the successor corporation that "[p]ossibly the problem of giving notice to a nonexistent corporation was overlooked in the statute when it was amended in 1933." Lawrence, 300 N.E. 2d at 641, n. 3. The Court then solved the notice problem by looking to state law that allowed dismissal for failure to exercise reasonable diligence to serve when the statute expired after filing the complaint but prior to service. The appellate court then reversed the lower court dismissal in Lawrence and the case was remanded to ascertain if the plaintiff exercised the reasonable diligence necessary if service occurs after the statute runs when the suit was filed before it ran.

In a prior Illinois case, a school district and contractor agreed the contractor would reimburse the school district a portion of the costs after the school under construction was built, but the contractor merged with another corporation prior to payment. The school district sued the merged corporation for non-payment. The merged corporation moved to dismiss asserting the school district could not sue it post-merger since the claim had not been reduced to judgment. Relying on the predecessor statute to 805 ILL COMP. STAT. 5/11.50(a)(5), which is identical in wording, the court stated:

> **[I]t would be a travesty on justice and pervert the intent of the statute if a corporation could rid itself of its obligation by merging** with another corporation just before suit was filed against the absorbed corporation.

Board of Education of Community School District No. 59 of Cook County v. Herzog

Building Corporation, 190 N.E.2d 152, 154 (IL 1963) (emphasis added) ("Herzog").

The court also opined

> Under the present statute plaintiff had the choice of describing defendant by either its old or its new name; **in fact the proceeding is actually against the surviving corporation regardless of the name under which defendant is sued.**

Id. (emphasis added).

. Oklahoma Natural Gas Co., 273 U.S. at 259-60.

The forum state's conflict of law rules are applicable to determine which state's substantive law applies. Knoll Pharmaceuticals Co. 152 F. Supp. 2d 1026, 1032 (N.D. IL 2001). In that case, the court found that since "suit was filed in Illinois, Illinois' choice of law rules will govern." 152 F. Supp. 2d at 1032. When there is not an applicable express choice of law clause for determining the issue (as here for the continued corporate-existence issue), Illinois law considers factors such as the location and domicile of the parties, where the contract was executed, place of performance, where the corporate entities were licensed to do business and other nexus-like factors. Knoll Pharmaceuticals Co. 152 F. Supp. 2d 1026, 1033-34.

In a situation where an Illinois corporation had merged into a Delaware Corporation, the court applied Illinois merger law, not Delaware law. Lawrence, 300 N.E. 2d at 638. Here we have the

. So Illinois law would be the applicable law. Looking to the modern approach to choice of law questions confirms that Illinois law should be applied.[11] Applying Illinois law,

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[11] When the resolution of an issue turns on which state's law applies, a choice of law question is present.

> The modern approach to choice-of-law questions places the greatest importance on the forum's public policy. The public policy of a state, for purposes of making a choice of law analysis, may be sought in its Constitution, legislative enactments, and judicial decisions. . . . Under Restatement (Second) of Conflict of Laws, when two or more jurisdictions have an interest in applying their law to a case, relevant factors in choosing which rule of law to apply are:

Since (Brannon's of Shawnee, 71 T.C. at 115) and Illinois law provides that (71 T.C. at 117),

805 ILCS 5/11.50(5). Cf. Asbury v. Commissioner, T.C. Memo. 2007-53, at *5-*6 (allowing officer of a dissolved corporation to file a petition and commence suit in reliance on Florida dissolution law on wind-up powers).

Thus, POA Y could be captioned in, and executed in, Corporation A's name.

- the needs of the interstate and international systems
- the relevant polices of the forum
- the relevant polices of the other interested states and the relative interests of those states in the determinations of the particular issues
- the protection of justified expectations
- the basic policies underlying the particular field of law
- certainty, predictability, and uniformity of result
- ease in the determination and application of the law to be applied.

Under the Restatement (Second) of Conflict of Laws, a court employs an interest-analysis approach in determining each factor's degree of significance for choice-of-law purposes. This approach is based on the conclusion that contacts obtain significance only to the extent that they relate to the polices and purposes sought to be vindicated by the conflicting laws, and instead of a mere counting of such contacts, what is required is a consideration of the interests and public polices of the potentially concerned statutes, and regard as to the manner and extent of such policies as they relate to the transaction in issue.

Eric C. Surette, Illinois Law and Practice, Conflict of Laws, Volume 11, § 2, Choice of Law Analysis, pp. 174-75.

Considering the Illinois legislative intent as stated in Brannon's of Shawnee, Inc., 71 T.C. at 117, the express language of the Illinois statute,

See Herzog 190 N.E. 2d 152 at 154 (Ill. 1963) (even when sued in the name of the merged corporation, the successor is liable).

Malone & Hyde, Inc., v. Commissioner, T.C. Memo 1992-661, 1992 Tax Ct. Memo. LEXIS 703, at *22-*23, rejected the continuing validity of a pre-merger power of attorney under Delaware law[12] (as opposed to a post-merger power of attorney).

Malone & Hyde is also distinguishable because it was applying Delaware law, not Illinois law. In addition, when Malone & Hyde applied § 259 of the Delaware statute in reliance on the parties' stipulation that Delaware law applied,[13] the Court specifically stated "it is difficult to understand how the Delaware statute could come into play . . . ." 1992 Tax Ct. Memo. LEXIS 703, at *23. Furthermore, Malone & Hyde noted that "[t]he comparable Tennessee statutes contain the phrase "existing claim" which, if it were applicable, might bring this case within the ambit of Brannon's of Shawnee, Inc. v. Commissioner, 71 T.C. 108 (1978). 1992 Tax Ct. Memo. LEXIS 703, at *29, n. 8 (other citations omitted).

In Lone Star Life Insurance Co. v. Commissioner, T.C. Memo. 1997-465, where the Court addressed the issue of whether the statute of limitations had expired when the consent to extend the statute had been executed pursuant to a power of attorney, the Court rejected the taxpayer's reliance on Malone & Hyde. The taxpayer in Lone Star Life Insurance Co. alleged the power of attorney could not be relied upon because the Service had dealt directly with the subsidiary (the petitioner in the case) and that direct dealing had terminated the agency relationship between the parent and subsidiary based on Treas. Reg. §1.1502-77(a), thus rendering the power of attorney and the consents signed pursuant to the power of attorney invalid. The taxpayer further argued that neither intent nor ratification could create an agency power in the parent to bind the subsidiary, citing Malone & Hyde.

Lone Star Life Insurance Company opined that the fatal flaw in the taxpayer's argument was the assumption that the parent lacked the legal capacity. Because Treas. Reg. § 1.1502-77(a) did not actually terminate the parent's authority to act as agent for its subsidiary (it allowed the subsidiary to act on its own in certain circumstances) the

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[12] Malone & Hyde, Inc. found that the usual rule that a power of attorney terminates upon death is not altered for a corporation that went out of existence by merger based on Delaware corporate law.

[13] Section 259 of the Delaware merger statute (DEL. CODE tit. 8, § 1) provides that a surviving company possesses "all the rights, privileges, powers and franchises as well of a public as of a private nature, and being subject to all the restrictions, disabilities and duties" as being limited to substantive matters, such as collective bargaining agreements, not powers of attorneys. While the Illinois merger law has similar language, that language was being applied in Malone & Hyde to determine if a pre-merger power of attorney survived, not to determine if a merged corporation continued to exist for purposes of being sued or bringing suit relative to pre-merger existing claims.

agency was not terminated. Thus, the Court relied upon theories of mutual assent and ratification to validate the consent based on the close nexus between the parent and the subsidiary, such as the common corporate officers, use of the same address and the intent to extend the statutes

citing to cases holding petitions could be ratified after filing. Here, since Illinois law did not terminate Corporation A's authority to sue and be sued

(just as in Lone Star Life Insurance Co. the regulation did not terminate the parent's authority), the power of attorney can be relied upon to extend the statute of limitations since the nexus between Corporation A and Corporation B is just as close, if not closer, than the nexus in Lone Star Life Insurance Co.

C. Conclusion Re: State Law

Based on the Illinois merger statute and cases addressed above, which provide that a

and

applying choice of law principles, Officer One, as prior president of Corporation A and current president of Corporation A's Successor, *i.e.* Corporation B, had the authority under Illinois law to extend the statute of limitations for Corporation A's Year 3 Tax Return in the name of Corporation A, signing as Corporation A's President. Accordingly, the Service can rely upon POA Y captioned in the name of Corporation A and signed by Officer One as Corporation A's President after the Year 4 merger of Corporation A into Corporation B. See Lefebvre v. Commissioner, T.C. Memo. 1984-202, 1984 Tax Ct. Memo. LEXIS 475, at *13, aff'd 758 F.2d 1340 (9th Cir. 1985) (validating a consent signed pursuant to a power of attorney that the taxpayer alleged to be defective, relying on case law that rejected placing the government in a strait-jacket and found that I.R.C. § 276(b) [predecessor to, and identical to § 6501(c)(4)] regulations are advisory.)

2. Agency Law Re: Powers of Attorney

Assuming, *arguendo,* that Illinois law does not authorize Corporation A to execute POA Y in its own name with the signature of Corporation B's current president as Corporation A's president, Corporation B is still bound by the consent under common law agency principles. See Asbury v. Commissioner, T.C. Memo 2007-53, 2007 Tax Ct. Memo. LEXIS 53, at *14 ("Questions about the authority of an officer of a corporation to act for and to bind the corporation are questions of fact to be decided under the common law of agency.") (citation omitted); Lone Star Life Insurance Company v. Commissioner, T.C. Memo. 1997-465 (agency and ratification principles applied in upholding a consent signed pursuant to a power of attorney).

Generally, "[i]n order to bind the principal, the agent must either have actual or apparent authority, or the principal must ratify the agent's acts." Trans World Travel v. Commissioner, T.C. Memo 2001-6, 2001 Tax Ct. Memo. LEXIS 7, at *20.

> Actual agency or actual authority is defined as the authority which a principal expressly or implicitly grants to an agent. Apparent agency or apparent authority "arises when the principal creates by its words or conduct the reasonable impression in a third party that the agent has authority to act." If apparent agency or apparent authority is established, and it is shown that a third party relying on the apparent authority did so rely in good faith and was justified in so relying, the principal is bound to the same extent as with actual authority.

Alumax v. Commissioner, 109 T.C. 133, at 197 (1997) aff'd 165 F.3d 822 (11th Cir. 1999) (citations omitted).

A. Apparent Authority

Apparent agency authority exists when "**a third party reasonably believes** the actor has authority to act on behalf of the principal **and that belief is traceable to the principal's manifestations**." Restatement (Third) of Agency, § 2.03 (2006) (emphasis added).

As to the reasonableness of the Service's reliance on these repeated manifestations of authority from the principal (Corporation B), the facts, as a whole, establish the Service's reliance was reasonable even though the Service knew that Corporation A had merged into Corporation

These extenuating facts evidencing Representative One's authority to act for, and bind, Corporation B after the merger, based on manifestations of the principal, make it reasonable for the revenue agent to rely upon Representative One as the apparent agent that could act for, and bind, Corporation B relative to Corporation A's Year 3 and Year 4 Tax Returns notwithstanding the revenue agent's actual knowledge of the merger. The revenue agent's reliance was a good faith reliance, and was justified, given Corporation B's pattern of actions representing Corporation A had authority to act in its own name. This case does not present the question of whether there was a termination of a power; the manifestations of authority listed above were all after the

merger of Corporation A into Corporation B.

Accordingly, the Service can rely upon POA Y since Representative One had apparent authority to perform the acts set forth in POA Y and the revenue agent's belief that Representative One had such authority was reasonable

Cf. Lefebvre v. Commissioner, T.C. Memo. 1984-202 (1984) aff'd 758 F.2d 1340 (9th Cir. 1985) (estopping a taxpayer from denying the authority of a representative named in a power or attorney to execute a consent on the taxpayer's behalf when the taxpayer signed the power of attorney form and submitted the form to the representative to deliver to the Service, where the taxpayer set in motion the sequence of events that led to the Service's reliance on the power of attorney form); Alumax v. Commissioner, 109 T.C. 133 (1997) aff'd 165 F.3d 822 (11th Cir. 1999) (applying an agent of an agent theory to validate a consent).

B. Ratification

Assuming, *arguendo,* that Illinois law did not allow Corporation A to sign POA Y in its own name and assuming, *arguendo,* that the Service's knowledge of the merger negates the reasonableness of the Service's belief so there is no apparent authority, Corporation B is nevertheless bound by POA Y based on ratification. See Lone Star Life Insurance Company v. Commissioner, T.C. Memo. 1997-465 (agency and ratification principles applied in upholding a consent signed pursuant to a power of attorney).

It is clear that Illinois law allows ratification of an agent's acts, especially where the ratification protects a creditor. See 805 ILL COMP. STAT. 5/11.50(a)(5), last sentence (evidencing legislative intent to protect creditors of merged corporations). When deciding whether a corporation had ratified a petition filed by an accountant, the Tax Court summarized Illinois law relative to ratification, citing multiple Illinois cases as support of allowing ratification, as follows:

> A finding of ratification under Illinois agency law is a complex, fact-intensive inquiry. A wholly unauthorized act may nevertheless be made valid by a subsequent ratification, in that such subsequent assent would confirm what was originally an unauthorized and illegal act. As applicable herein, ratification means retroactive adoption of an unauthorized signature by the person whose name is signed.
>
> Ratification may be found from express statements or it may be inferred from the surrounding circumstances, for example, where the principal takes a position inconsistent with nonaffirmation of the transaction, or fails to repudiate the agent's acts, or retains the benefits of the unauthorized transaction. In contrast, ratification will not be implied from acts or conduct that clearly evidences an intent not to ratify.

Trans World Travel, T.C. Memo 2001-6, 2001 Tax Ct. memo. LEXIS 7, at *30 (citations omitted).

In Trans World Travel, the Tax Court found ratification of a pending Tax Court proceeding under Illinois law because the taxpayer knew or should have known that a petition had been filed in its name.

Thus, while the primary position is that POA Y signed by Officer One is valid (see § 1.B., above), with the alternative position that Representative One had apparent authority to perform the acts set forth in POA Y (see § 2.A., above), if a court were to disagree with these positions, then POA Y was "made valid by the subsequent ratification, in that such subsequent assent would confirm what was originally an unauthorized and illegal act." Trans World Travel, T.C. Memo 2001-6, 2001 Tax Ct. Memo. LEXIS 7, at *30 (citations omitted). The ratification constitutes a "retroactive adoption of an unauthorized signature by the person whose name is signed." Id.

3. Equitable Estoppel Re: Power of Attorney

"Equitable estoppel is a judicial doctrine that precludes a party from denying that party's own acts or representations that induce another to act to his or her detriment." McCorkle v. Commissioner, 124 T.C. 56, 68 (2005). Union Texas International Corporation v. Commissioner, 110 T.C. 321, 327 (1998) lists four elements that must be established for equitable estoppel:

1. "There must be a false representation or wrongful misleading silence by the party against whom the estoppel is claimed;

2. "[T]he error must originate in a statement of fact, not in opinion or a statement of law;

3. "[T]he party claiming the benefits of the estoppel must have actually and reasonably relied on the acts or statement of the party against whom the estoppel is claimed, and as a consequence of that reliance must be adversely affected by the acts or statements of the one against whom an estoppel is claimed; and