

Office of Chief Counsel
Internal Revenue Service
Memorandum

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to: _____, Revenue Agent, LB&I
_____, Revenue Agent, LB&I

from: Halvor N. Adams, III
Senior Counsel (Long Island)
(Large Business & International)

subject: Identification of Taxpayer on Form 872

This memorandum responds to your December 1, 2016 request for assistance with respect to the _____ and _____ years of _____ & Subsidiaries. This opinion is based on the facts set forth herein. This opinion might change if the facts it is based on are incorrect. If the facts are incorrect, this opinion should not be relied upon. This advice may not be used or cited as precedent.

ISSUE

How should the taxpayer be identified on a Form 872 to further extend the statute of limitations for the _____ & Subsidiaries _____ and _____ taxable years?¹

CONCLUSION

Compliance needs to designate a substitute agent for the _____ & Subsidiaries _____ and _____ taxable years to execute a Form 872 to further extend the statute of limitations for those years. This memorandum explains the need to designate a substitute agent, identifies an entity that can be designated as such, explains how to make the designation, and answers your question of how the taxpayer should be identified on a

¹ _____ & Subsidiaries and the IRS have signed a standard Form 872 (Rev. July 2014) that extends the assessment statute until _____.

Form 872 to further extend the statute of limitations for the &
Subsidiaries and taxable years.

FACTS

& Subsidiaries filed consolidated returns for its &
taxable years. The common parent of that consolidated group,
, merged with and into a Delaware LLC named LLC effective
on LLC changed its name to
LLC at on . The Amended and
Restated LLC Agreement of LLC identifies
appointed LLC, which is a Delaware LLC, as its sole member, and
(formerly known as) as its manager.²
LLC is disregarded for Federal tax purposes.

merger into the Delaware LLC which is now named
LLC was one of the steps in a plan of mergers
pursuant to which and (a different
entity than the current entity with the same name) merged. The steps of the plan of
mergers were as follows:

1. On (" ") formed LLC, a Delaware limited liability company that was disregarded as separate from for Federal income tax purposes. LLC obtained an employer identification number ("EIN") from the Service.
2. On formed LLC ("Merger Subsidiary Two"), a Delaware limited liability company that is disregarded as separate from for Federal income tax purposes.
3. On , LLC converted to a Delaware corporation and changed its name to (" ").

² Section of the Amended and Restated LLC Agreement of LLC provides as follows with respect to the authority of its manager:

Except as otherwise required by applicable law and as provided below with respect to the Manager's board of directors (the "Board"), the powers of the Company shall at all times be exercised by or under the authority of, and the business, property and affairs of the Company shall be managed by, or under the direction of, the Manager. The Manager is a "manager" of the Company within the meaning of the [Delaware Limited Liability Company] Act.

4. On _____, _____ merged with and into _____ LLC with _____ LLC as the surviving entity and _____ ceasing to exist (the "_____ Merger"). As part of the _____ Merger, the shareholders of _____ received shares of _____ stock in exchange for their outstanding shares of _____ stock and the _____ stock owned by _____ was canceled. This step was intended to qualify as a tax-free reorganization of _____ under Internal Revenue Code section 368(a)(1)(F).
5. On _____, _____ merged into a lower tier subsidiary of Merger Subsidiary Two ("Merger Subsidiary Three"). _____ shareholders received _____ shares in the merger and _____ became the parent company of the consolidated group.

_____ did not designate a substitute agent before it merged with _____ and into the Delaware LLC that is now named _____ LLC. No corporation that was a member of the _____ consolidated group for its _____ and _____ years remains in existence as a C corporation. One entity that was a C corporation and was a member of the _____ consolidated group for _____ and _____ remains in existence as a Delaware LLC. That entity is _____ LLC. It converted from a Delaware corporation named _____ to a Delaware LLC named _____ LLC on _____ pursuant to section 18-214 of the Delaware Limited Liability Company Act (6 Del. C. § 18-214). _____ LLC is managed by its manager, and its manager is _____ (formerly known as _____).³

LAW AND ANALYSIS

To decide how the taxpayer should be identified on a Form 872 to further extend the statute of limitations for the _____ & Subsidiaries _____ and _____ taxable years, the first step is to identify the parent of that group. The original common parent of the group for those years, _____, merged with and into a Delaware LLC (which is now named _____ LLC) on _____ in connection with an agreement and plan of mergers among _____, and other entities. The certificate of merger states that the Delaware LLC which is now named _____ LLC was the surviving entity of the merger. _____ LLC is an entity that is disregarded from its owner for Federal tax purposes. See Treas. Reg. § 301.7701-3(b)(1)(ii); § _____ of _____'s _____ Amended and Restated LLC Agreement. _____ LLC's sole member is _____ LLC, which is a Delaware LLC that is treated as a partnership for Federal tax

³ See Section _____ of Amended and Restated Limited Liability Company Agreement of _____ entered into as of _____.

purposes, and its manager is known as

(“ ”) formerly

Treasury Regulation section 1.1502-77B provides rules for consolidated return years beginning on or after June 28, 2002 and before April 1, 2015. That regulation provides, among other things, that:

(a) *Scope of agency -- (1) In general -- (i) Common parent.* Except as provided in paragraphs (a)(3) and (6) of this section, the common parent (or a substitute agent described in paragraph (a)(1)(ii) of this section) 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 (see paragraph (a)(1)(iii) of this section) of a member.

Treas. Reg. § 1.1502-77B(a)(1)(i). One of the examples it provides of matters that are subject to the common parent's agency is waivers. See Treas. Reg. § 1.1502-77B(a)(2)(iv) (stating that “[t]he common parent gives waivers, * * * and any waiver * * * so given, * * * is considered as having also been given or executed by each member.”) It provides, with one exception not relevant here,⁴ that:

the common parent for the consolidated return year remains the agent for the group with respect to that year until the common parent's existence terminates, regardless of whether one or more subsidiaries in that year cease to be members of the group, whether the group files a consolidated return for any subsequent year, whether the common parent ceases to be the common parent or a member of the group in any subsequent year, or whether the group continues pursuant to § 1.1502-75(d) with a new common parent in any subsequent year.

Treas. Reg. § 1.1502-77B(a)(4)(i)(emphasis added.) For this purpose:

the existence of a corporation is deemed to terminate if --

(i) Its existence terminates under applicable law; or

⁴ The exception is for a situation in which a group continues in existence with a new common parent pursuant to Treasury Regulation section 1.1502-75(d) during a consolidated return year. See Treas. Reg. § 1.1502-77B(a)(4)(iii). The & Subsidiaries consolidated group did not so continue during either of the years and

(ii) Except as provided in paragraph (e)(3) of this section, it becomes, for Federal tax purposes, either --

(A) An entity that is disregarded as an entity separate from its owner; or

(B) An entity that is reclassified as a partnership.

Here, the existence of _____ is deemed to have terminated because its existence terminated under Delaware law when it merged with and into the Delaware LLC which is now named _____ LLC with such LLC being the surviving entity.⁵

When a common parent's existence terminates, Treasury Regulation section 1.1502-77B(d) provides rules for designating the substitute agent of the common parent.⁶ Before the common parent's existence terminates, it may designate a substitute agent for the group.⁷ _____ did not do so.

⁵ The taxpayer represented the same in its _____ response to question 1 of IDR DOM- _____-28.

⁶ Treasury Regulation section 1.1502-77B(a)(1)(ii) explains the status of a substitute agent as follows:

For purposes of this section, any corporation designated as a substitute agent pursuant to paragraph (d) of this section to replace the common parent or a previously designated substitute agent acts as agent for the group to the same extent and subject to the same limitations as are applicable to the common parent, and any reference in this section to the common parent includes any such substitute agent.

⁷ Treasury Regulation section 1.1502-77B(d)(1)(i) authorizes the common parent to designate a substitute agent for the group as follows:

(i) If the common parent's existence terminates, it may designate a substitute agent for the group and notify the Commissioner, as provided in this paragraph (d)(1).

(A) Subject to the Commissioner's approval under paragraph (d)(1)(ii) of this section, before the common parent's existence terminates, the common parent may designate, for each consolidated return year for which it is the common parent and for which the period of limitations either for assessment, for collection after assessment, or for claiming a credit or refund has not expired, one of the following to act as substitute agent in its place—

(1) Any corporation that was a member of the group during any part of the consolidated return year and, except as provided in paragraph (e)(3)(ii) of this section, has not subsequently been disregarded as an entity separate from its

If, as is the situation here, the common parent does not designate a substitute agent before its existence terminates, Treasury Regulation section 1.1502-77B(d)(2) provides for a default substitute agent under certain circumstances:

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. However, see paragraph (d)(4) of this section regarding the consequences of the successor's failure to notify the Commissioner of its status as default substitute agent in accordance with procedures established by the Commissioner.^[8]

owner or reclassified as a partnership for Federal tax purposes; or

(2) Any successor (as defined in paragraph (a)(1)(iii) of this section) of such a corporation or of the common parent that is a domestic corporation (and, except as provided in paragraph (e)(3)(ii) of this section, is not disregarded as an entity separate from its owner or classified as a partnership for Federal tax purposes), including a corporation that will become a successor at the time that the common parent's existence terminates.

(B) The common parent must notify the Commissioner in writing (under procedures prescribed by the Commissioner) of the designation and provide the following—

(1) An agreement executed by the designated corporation agreeing to serve as the group's substitute agent; and

(2) If the designated corporation was not itself a member of the group during the consolidated return year (because the designated corporation is a successor of a member of the group for the consolidated return year), a statement by the designated corporation acknowledging that it is or will be primarily liable for the consolidated tax as a successor of a member.

Treasury Regulation section 1.1502-77B(d)(1)(ii) provides that a designation under paragraph (d)(1)(i)(A) does not apply unless and until it is approved by the Commissioner. The Commissioner's approval of such a designation is not effective before the existence of the common parent terminates.

⁸ Rev. Proc. 2002-43, 2002-2 C.B. 99 (Determination of Substitute Agent for a Consolidated Group When the Common Parent Ceases to Exist) provides instructions with regard to communicating with the Commissioner with respect to determining the agent for the group for consolidated return years beginning on or after June 28, 2002 and before April 1, 2015. Section 9 of Rev. Proc. 2002-43 provides instructions with respect to notification by the default substitute agent under Treasury Regulation section 1.1502-77B(d)(2). Section 9.01 of Rev. Proc. 2002-43 states that:

Treasury Regulation section 1.1502-77B(a)(1)(iii) defines the term "successor" in the following manner:

For purposes of this section only, the term successor means 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. Such determination is made without regard to § 1.1502-1(f)(4) or 1.1502-6(a). (For inclusion of a successor in references to a subsidiary or member, see paragraph (c)(2) of this section.)

Under that definition, the successor of _____ is _____ LLC. See 6 Del. C. § 18-209(g) (stating in relevant part that "all debts, liabilities, and duties" of corporations that merge into LLCs "shall thenceforth attach to the surviving or resulting domestic limited liability company or other business entity, and may be enforced against it to the same extent as if said debts, liabilities and duties had been incurred or contracted by it.")

_____ LLC is not the default substitute agent pursuant to Treasury Regulation section 1.1502-77B(d)(2) because it is not a domestic corporation.

If the common parent fails to designate an agent before its existence terminates and there is no default substitute agent, Treasury Regulation section 1.1502-77B(d)(3)(i) provides that the Commissioner may designate a substitute agent:

.01 In general. If a terminating common parent that does not designate a substitute agent pursuant to § 1.1502-77B(d)(1) has a qualifying successor (as defined in section 6.02 of this revenue procedure), such qualifying successor is the default substitute agent under § 1.1502-77B(d)(2) for consolidated return years beginning on or after June 28, 2002. Such default substitute agent must provide notification to the IRS pursuant to the filing requirements set forth in this section 9 to insure that it will receive communications from the IRS to the group and to insure that the IRS will act on its communications to the IRS on behalf of the group.

Section 9.03(8) of Rev. Proc. 2002-43 requires a default substitute agent to attach a statement in which the default substitute agent:

- (a) Agrees to serve as the group's substitute agent; and
- (b) If it was not a member of the group during the consolidated return year(s) for which it is the default substitute agent, acknowledges that it is primarily liable as a successor of the former common parent of the group for the consolidated tax liability for such consolidated return year(s).

In the event the common parent's existence terminates and no designation is made and approved under paragraph (d)(1) of this section and the Commissioner believes or has reason to believe that there is no successor of the common parent that satisfies the requirements of paragraph (d)(2) of this section (or the Commissioner believes or has reason to believe there is such a successor but has no last known address on file for such successor), the Commissioner may, at any time, with or without a request from any member of the group, designate a corporation described in paragraph (d)(1)(i)(A) of this section [a corporation that was a member of the group during the years] to act as the substitute agent. The Commissioner will notify the designated substitute agent in writing of its designation, and the designation is effective upon receipt by the designated substitute agent of such notice. The designated substitute agent must give notice of the designation to each corporation that was a member of the group during any part of the consolidated return year, but a failure by the designated substitute agent to notify any such member of the group does not invalidate the designation.

The Commissioner cannot designate a substitute agent under that provision because no corporation that was a member of the _____ consolidated group during _____ and _____ remains in existence.

In these circumstances, Treasury Regulation section 1.1502-77B(e)(3)(ii) provides an exception that allows the Commissioner to designate as the substitute agent for the _____ consolidated group "an entity that is either disregarded as an entity separate from its owner or reclassified as a partnership for Federal tax purposes." It provides in full that:

(3) *Exceptions where no eligible corporation exists.--*

* * *

(ii) Similarly, for purposes of paragraph (d) of this section, an entity that is either disregarded as an entity separate from its owner or reclassified as a partnership for Federal tax purposes is not precluded from designation as a substitute agent merely because of such classification if the effect of the inability to make such designation would be that no corporation remains eligible to serve as the substitute agent for the group's consolidated return year.

_____, LLC, which was a member of the _____ consolidated group during _____ and _____, became an entity that is disregarded as an entity separate from its owner when it converted to a LLC on _____. The effect of the inability to designate _____ LLC would be that no corporation remains eligible to serve as the substitute agent for the _____ & Subsidiaries consolidated group for _____ and _____. As a result, _____ LLC qualifies to be designated as the substitute agent of the group

for those years, and we recommend that the Commissioner designate LLC as such.

IRM part 1.2.43.39 Delegation Order 4-45 delegates authority to designate a substitute agent for a consolidated group to LB&I Team Managers as to their respective cases. To make the designation, we recommend that the Team Manager use the sample letter at Appendix A of Revenue Procedure 2015-26 modified as follows: replace the references to "Treasury Regulation § 1.1502-77(c)(6)" and "Treasury Regulation § 1.1502-77(c)(6)(ii)" with "Treasury Regulation § 1.1502-77B(d)(3)".

IRM part 25.6.22.6.2.1(6)(i) provides an example of the proper method for identifying the consolidated taxpayer in the caption of Form 872 when the IRS designates a member of the group as substitute agent for taxable years beginning on or after June 28, 2002 and on who should execute the consent. Based on that guidance, we recommend that the consent caption read:

LLC (EIN: [Insert EIN of
 LLC]), as agent for the members of the (EIN: [Insert EIN
 of]) and Subsidiaries consolidated group.*

At the bottom of the Form 872, indicate: "*this is with respect to the consolidated tax of the and Subsidiaries consolidated group."

Further based on the guidance contained in IRM part 25.6.22.6.2.1(6)(i), we recommend that the consent be signed by LLC as designated substitute agent for the year to be extended. The signer may be identified on the corporate name section of the signature block as follows: " LLC, as agent for the members of the and subsidiaries consolidated group, by , manager". The Form 872 should be signed by an authorized officer of such as its president, vice-president, treasurer, assistant treasurer, or chief accounting officer. See Rev. Rul. 83-41, 1983-1 C.B. 349; I.R.C. § 6062.

CASE DEVELOPMENT, HAZARDS AND OTHER CONSIDERATIONS

This writing may contain privileged information. Any unauthorized disclosure of this writing may undermine our ability to protect the privileged information. If disclosure is determined to be necessary, please contact this office for our views.

Please call (516) 688-1737 if you have any further questions.

PETER J. GRAZIANO
Area Counsel, LB&I
Financial Services

By: _____
HALVOR N. ADAMS III
Senior Counsel (Long Island)
(Large Business & International)