

Office of Chief Counsel  
Internal Revenue Service  
**Memorandum**

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to: \_\_\_\_\_, Revenue Agent, LB&I  
\_\_\_\_\_, Revenue Agent, LB&I

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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?<sup>1</sup>

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

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<sup>1</sup> \_\_\_\_\_ & 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.<sup>2</sup>  
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 (" ").

<sup>2</sup> 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 \_\_\_\_\_).<sup>3</sup>

### 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

<sup>3</sup> 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,<sup>4</sup> 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

<sup>4</sup> 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.<sup>5</sup>

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.<sup>6</sup> Before the common parent's existence terminates, it may designate a substitute agent for the group.<sup>7</sup> \_\_\_\_\_ did not do so.

<sup>5</sup> The taxpayer represented the same in its \_\_\_\_\_ response to question 1 of IDR DOM- \_\_\_\_\_ -28.

<sup>6</sup> 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.

<sup>7</sup> 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