

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

Release Number: 20193001F  
Release Date: 7/26/2019

CC:LB:5:LN:JSO'Brien  
POSTF-105125-19

UIL: 6501.08-10

date: May 3, 2019

to: Steven Xing  
Team Manager  
(Large Business & International)

from: Joseph S. O'Brien  
Attorney  
(Large Business & International)

---

subject: - Consent to Extend Time to Assess Tax for Tax Years Ending  
and

**ISSUES**

In \_\_\_\_\_, ("\_\_\_\_\_"), a \_\_\_\_\_ limited liability company, acquired \_\_\_\_\_ ("\_\_\_\_\_ " or "Taxpayer"), an \_\_\_\_\_ corporation. Later, in \_\_\_\_\_, as part of a debt-for-equity agreement with various lenders, \_\_\_\_\_ merged into \_\_\_\_\_ and dissolved, generating a capital loss in the amount of \$ \_\_\_\_\_ and a bad debt loss in the amount of \$ \_\_\_\_\_ for that tax year. The Service now seeks to extend the time to assess tax for \_\_\_\_\_ taxable years ending \_\_\_\_\_ ("\_\_\_\_\_ tax year") and \_\_\_\_\_ ("\_\_\_\_\_ tax year") using Forms 872 ("the Consent"). \_\_\_\_\_, the surviving entity after the merger, claims that \_\_\_\_\_ ("\_\_\_\_\_"), the current tax matters partner ("TMP") of \_\_\_\_\_, has sufficient legal authority to execute the Consents in question. With respect to the Consents to be used for this purpose, the Revenue Agent asks the following questions:

1. How should the Taxpayer's name be listed on the Form 872?
2. Who is authorized to sign the Form 872 on behalf of \_\_\_\_\_ ?
3. Is \_\_\_\_\_ authorized to sign the Form 872 on behalf of \_\_\_\_\_ ?

4. If \_\_\_\_\_ is authorized to sign the Form 872, what should his title be?

**CONCLUSIONS**

1. Because \_\_\_\_\_ is the entity that survived the merger between \_\_\_\_\_ and \_\_\_\_\_, the caption of the Form 872 listing the Taxpayer should be worded as follows:

\_\_\_\_\_ (EIN: \_\_\_\_\_), Successor in  
interest to \_\_\_\_\_ (EIN: \_\_\_\_\_)

2. Given the limitations of \_\_\_\_\_ Operating Agreement, it is unclear who currently holds explicit authority to execute the Forms 872 on behalf of \_\_\_\_\_. To correct this, the Service will need to obtain additional information. See Conclusion 3 for what is to be done and what documents must be procured.

3. No. In order for \_\_\_\_\_ to be authorized to sign the Forms 872 on behalf of \_\_\_\_\_, \_\_\_\_\_ must either submit a signed certificate by a majority of the Board of Managers explicitly vesting \_\_\_\_\_ with authority to sign said Forms 872, or execute a Form 2848, *Power of Attorney and Declaration of Representative*, listing \_\_\_\_\_ as either an officer or full-time employee of CLP.

4. If \_\_\_\_\_ executes either a board resolution or Form 2848 authorizing \_\_\_\_\_ to sign the Forms 872, \_\_\_\_\_ title should be listed as one of the following depending on the method \_\_\_\_\_ uses for authorization:

Authorized Agent for \_\_\_\_\_, Successor in  
interest to \_\_\_\_\_

Officer of \_\_\_\_\_, Successor in interest to \_\_\_\_\_

Employee of \_\_\_\_\_, Successor in interest to \_\_\_\_\_

**FACTS**

On \_\_\_\_\_, \_\_\_\_\_ ("\_\_\_\_\_"), a \_\_\_\_\_ limited liability company and TEFRA entity, acquired \_\_\_\_\_ ("\_\_\_\_\_"), an \_\_\_\_\_ corporation. At that time, \_\_\_\_\_ was not engaged in an active trade or business and the only asset it held was a \_\_\_\_\_ % ownership interest in \_\_\_\_\_ ("\_\_\_\_\_"), an \_\_\_\_\_ limited liability company, that was engaged in the trade or business of \_\_\_\_\_. The remaining \_\_\_\_\_ % of \_\_\_\_\_ was \_\_\_\_\_

directly owned by . Thus, after the acquisition, became the sole parent of and the sole, % owner of .

On , as part of a debt-for-equity agreement between and various lenders, merged into and dissolved leaving as the surviving company.<sup>1</sup> The result of this transaction was a change in ownership of , and claiming capital losses in the amount of \$ and , a member of , claiming a bad debt loss in the amount of \$ for the taxable year ending .

The members of have now filed amended tax returns seeking refunds in connection with the aforementioned transactions. Thus, the Service has opened and tax years for examination . As part of the Service's examination of and its related entities, the Revenue Agent seeks to extend the statute of limitations for for both the and tax years.

Currently, has held out (" ") as the person having sufficient authority to sign the Forms 872 on behalf of . However, it is not entirely clear whether is vested with such authority. The LLC Agreement qualifies the authority vested in members under (the applicable law to LLC Agreement). The relevant provisions LLC Agreement state that no single member has the authority or power to take actions or make decisions which would bind . See LLC Agreement at § . Instead, "

. " Id. at § . The "Board of Managers" of has the " " which will bind the company. Id. No single manager of the board has the power to bind , however, except where acting "

. " Id.

According to the LLC Agreement, the Board of Managers is comprised of three people designated as follows: (1) two persons designated by the holders of a majority of the units of , and (2) one person who acts as an independent manager. Id. at § . As of , the date of execution of the LLC Agreement, the first two managers appointed by the majority-holder of the units were and , while the independent manager was . Id.

The LLC Agreement also authorizes all managers, members, officers, or other

<sup>1</sup> See Contribution and Subscription Agreement, TC-006; Agreement and Plan of Merger of (an corporation) with and into (a limited liability company) (hereinafter the "Merger Agreement").

persons to execute documents affecting the business and affairs of \_\_\_\_\_ only upon a signed certificate by a majority of the Board of Managers stating any of the following:

(1) the identity of the Manager or Officer so to act,

(2) “

”

(3) the person or persons authorized to execute and deliver the document on behalf of \_\_\_\_\_, or

(4) “

”

See Id. at § \_\_\_\_\_.

Finally, § \_\_\_\_\_ enables the Board of Managers to designate officers of \_\_\_\_\_ and delegate these officers with “

\_\_\_\_\_.” In addition, should these titles be “

\_\_\_\_\_.” Id. at § \_\_\_\_\_.

The Service now seeks advice concerning the proper caption and signing party for the Forms 872 in question.

## LAW & ANALYSIS

### I. Statutes of Limitation and Consents to Extend, Generally

In general, § 6501(a) provides a three-year period of limitations for the Service to assess an income tax liability. The three-year period generally begins to run after the return is filed, or deemed filed. I.R.C. §§ 6501(a) and (b)(1). Under § 6229(a), however, the statute of limitations to assess partnership items of entities to which the TEFRA provisions is three years after the later of either (1) “the date on which the partnership return for such taxable year was filed, or” (2) “the last day for filing such return (determined without regards to extensions).” I.R.C. § 6229(a). But, because the Consents here are technically being sought to extend the statute of limitations for a corporation ( ) that no longer exists after merging into a limited liability company ( ), the TEFRA provisions do not apply. See I.R.C. § 6231.

However, where the Service and a taxpayer consent in writing, using Form 872, before

the expiration of the period under § 6501(a), the period may be extended in accordance with § 6501(c)(4). This extension acts as a waiver by the taxpayer for the Service to assess tax following the expiration of the period to assess under § 6501(a). Becker Holding Corp. v. Commissioner, T.C. Memo. 2004-58. “The extension shall become effective when the agreement has been executed by both parties.” Treas. Reg. § 301.6501(c)-1(d).

But, this waiver does not constitute a contract, even though it requires the Commissioner’s signature, Strange v. United States, 282 U.S. 270, 276-77 (1931), though contract principles are useful in assessing mutual assent between the taxpayer and the Service. Feldman v. Commissioner, 20 F. 3d 1128, 1132 (11th Cir. 1994). Instead, the consent to extend the time to assess tax (“consent to extend time”) is essentially a voluntary, unilateral waiver of a defense by the taxpayer. Id.

When the Service begins preparing a consent to extend time using Form 872, the Internal Revenue Manual advises that “every effort should be made to ensure the following information is clear” in the extension form:

- (1) The terms of the agreement
- (2) Who is the taxpayer
- (3) What years are involved
- (4) Which individuals are authorized to sign the consent
- (5) Whether or not there are any conditions and/or restrictions posed by the taxpayer or the Service.

IRM 25.6.22.5(2) (08-26-2011). Because only the second and fourth factors are at issue here, this memorandum only addresses the law and facts pertaining to these factors below. In determining the identity of the taxpayer and who is authorized to sign the consent to extend time on behalf of the Taxpayer, it is necessary to examine the type of entity or entities involved given that the procedures vary.

#### A. Consents for Merged Corporations

It has long been held that a corporation acquiring a predecessor corporation pursuant to state law may execute a valid consent to extend the time of the dissolved entity. See Helvering v. Newport Co., 291 U.S. 485 (1934); Union Bleachery v. Commissioner, 97 F. 2d 226 (4th Cir. 1938); Rev. Rul. 59-399 (IRS RRU), 19959-2 C.B. 488 (1959).

Where the corporate taxpayer has merged, “[a]s a matter of state law, the successor (acquiring) corporation in a merger or consolidation becomes primarily liable for the debts of the predecessor (acquired) corporation.” IRM 25.6.22.6.2.5(1) (08-26-2011). A

successor corporation to a merger is not a transferee; instead, the successor assumes the primary liability for the debts of the merged corporation as a successor to the merged corporation by operation of law. E & J Gallo Winery v. Commissioner, 227 F. 2d 699, 702-704 (9th Cir. 1955); Stanton Brewery, Inc. v. Commissioner, 176 F. 2d 573, 575-576 (2d Cir. 1949); Commissioner v. Oswego Falls Corp., 71 F. 2d 673, 676 (2d Cir. 1934). See also IRM 4.10.13.3.3.4(1) (03-16-2015); IRM 4.11.52.4.1(3) (11-01-2004).

Furthermore, "It has been held that taxes are debts or liabilities." Pleasanton Gravel Co. v. Commissioner, 85 T.C. 839, 853 (1985) (citing United States v. Scott, 167 F. 2d 301 (8th Cir. 1948)). It thus follows that a successor entity, that becomes primarily liable for the merged entity's tax liabilities under state law, has the power to extend the period of limitations for its own direct liability. Pleasanton Gravel Co., 85 T.C. at 835. See also IRS CCA 200204001, 2002 WL 93292 (July 20, 2001).

## II. How Should the Taxpayer's Name be Listed on the Form 872?

2  
,

For corporations, "[g]enerally, the name of the taxpayer shown on the return can be used on the consent, unless it is known that the name is not correct" in which case the Service should view the corporate charter and use the name listed therein. IRM 25.6.22.6.2 (08-26-2011). See also IRS NSAR 0135, 2003 WL 25873157 (Jan. 2, 2003).

As stated above, when executing a consent to extend time (Form 872) for a corporation that has been merged out of existence, the laws of the state of incorporation will govern who and/or which entity has the ability to execute the consent on behalf of the merged corporation.

Here, the Merger Agreement between \_\_\_\_\_ and \_\_\_\_\_ states the following with regards to the state law applicable to such agreement:

See Merger Agreement at § ( \_\_\_\_\_ ).

<sup>2</sup> "Cross-species mergers" occur where two or more entities taxed differently under the Internal Revenue Code merge together. For example, a corporation merging into a partnership, and vice versa.

Thus, when determining which company is responsible for tax liability following the merger, state law will govern. Under state law, following a merger,

Because such debts include the tax liabilities of the predecessor corporation (Pleasanton Gravel Co., 85 T.C. at 835), as the surviving entity of the merger that took place in 2016, is liable for tax liabilities and is authorized to execute the consent on behalf of

Under IRM 25.6.22.6.2.5(2), in the case of a merger or consolidation, the taxpayer is named as shown in the following examples:

Caption Name: 'XYZ Corporation (XYZ's EIN), Successor in interest to ABC Corporation (ABC's EIN)'  
Signed by: 'An officer of XYZ Corporation'

or

Caption Name: 'XYZ Corporation (XYZ's EIN), Successor by merger to ABC Corporation (ABC's EIN)'  
Signed by: 'An officer of XYZ Corporation'

Because ceased to exist after the merger and only survived, is treated as the successor by merger, or the successor in interest, to , and, under state law, is responsible for all tax liabilities of following the merger. As such, the caption on the Form 872 should read as follows using the guidance provided by the IRM:

to (EIN: ) , Successor in interest  
(EIN: )



**III. Who can Sign the Form 872 for the Entity Which has Authority to Sign for ?**

Who can sign a consent to extend time (Form 872) is governed by state law as well. See Sanderling, Inc. v. Commissioner, 66 T.C. 743, 750 (1976), aff'd, 571 F. 2d 174 (3d Cir. 1978) (the validity of a consent to extend time for a dissolved corporation is based upon state law); Lesser v. Commissioner, 47 T.C. 564, 591 (1967) (the validity of a waiver must be determined under the laws of the state where it was executed). Thus, the question of whether an officer of a corporation has the authority to execute consents to extend time to assess taxes is determined by the laws of the company's state of

incorporation. See Associates Investment Company v. Commissioner, 59 T.C. 441 (1972). However, it is important to note that even where a Form 872 is signed incorrectly, the Tax Court may exercise the principle of contract reformation to reform the consent to the parties' intention. See Kunkel v. Commissioner, 821 F. 3d 908 (7th Cir. 2016).

Because \_\_\_\_\_, the company that survived the merger with \_\_\_\_\_, is a \_\_\_\_\_ limited liability company, one must look to \_\_\_\_\_ state law concerning the power and authority of members of limited liability companies in trying to determine who can sign the Form 872 on behalf of \_\_\_\_\_.

A. Authority of LLC Members and Managers under \_\_\_\_\_ State Law

With regards to the authority and power of members of limited liability companies, state law holds the following:

\_\_\_\_\_. However, a limited liability company may elect to have a manager manage the company rather than the members, and may have more than one manager. Id. Finally, the \_\_\_\_\_ statute also holds that “

The \_\_\_\_\_ LLC Agreement qualifies the authority vested in \_\_\_\_\_ members under the \_\_\_\_\_ statute. Under this agreement, no single member has the authority or power to take actions or make decisions which would bind \_\_\_\_\_. See \_\_\_\_\_ LLC Agreement at § \_\_\_\_\_. Instead, “

\_\_\_\_\_.” Id. at § \_\_\_\_\_. The “Board of Managers” of \_\_\_\_\_ has the “

\_\_\_\_\_” which will bind the company. Id. No single manager of the board has the power to bind \_\_\_\_\_, however, except where acting “

\_\_\_\_\_.” Id.

According to the \_\_\_\_\_ LLC Agreement, the Board of Managers is comprised of three people designated as follows: (1) two persons designated by the holders of a majority of the units of \_\_\_\_\_, and (2) one person who acts as an independent manager. Id. at § \_\_\_\_\_. As of \_\_\_\_\_, the date of execution of the \_\_\_\_\_ LLC Agreement, the first two managers appointed by the majority-holder of the \_\_\_\_\_ units were \_\_\_\_\_ and \_\_\_\_\_



, while the independent manager was . Id.

The LLC Agreement also authorizes all managers, members, officers, or other persons to execute documents affecting the business and affairs of only upon a signed certificate by a majority of the Board of Managers stating any of the following:

(1) the identity of the Manager or Officer so to act,

(2) “

”

(3) the person or persons authorized to execute and deliver the document on behalf of , or

(4) “

”

See Id. at § .

Finally, § enables the Board of Managers to designate officers of and delegate these officers with “

.” In addition, should these titles be “

.” Id. at § .

Thus, given the limitations set forth in § above, in order for any member of , including , to possess the required authority to sign the Forms 872, a signed certificate by a majority of ’s Board of Managers is required explicitly stating the name of the individual and the capacity under which that individual is authorized to act.

#### B. Authority of LLC Members Under the Code

Because the regulations under § 6501(c)(4) do not specify who may sign consents to extend time, the Service generally applies the rules applicable to the signing of original returns. Rev. Rul. 83-41 (March 7, 1983). See I.R.C. §§ 6061(a) (individuals), 6062 (corporations), and 6063 (partnerships).

Under I.R.C. § 6062, the Federal income tax returns of corporations may be signed by “the president, vice-president, treasurer, assistant treasurer, chief accounting officer or any other officer duly authorized so to act.” In addition, an individual’s signature on the

corporation's return is considered, "prima facie evidence that such individual is authorized to sign the return on behalf of the corporation." I.R.C. § 6062.

Under I.R.C. § 6063, partnership returns must be signed by any one of the partners. In fact, and, similar to § 6062, a partner's signature on the return is "prima facie evidence that such partner is authorized to sign the return on behalf of the partnership." I.R.C. § 6063.

In addition, under Treas. Reg. § 601.504(a)(3) authorizes a taxpayer's authorized representative to execute consents to extend the statutory period for assessment or collection of tax on behalf of the taxpayer. See Balkissoon v. Commissioner, T.C. Memo. 1992-223 ("we long have held, a general power of attorney gives petitioners' representative the power to extend the statute of limitations") (citing Estate of Sam Maceo v. Commissioner, T.C. Memo. 1964-46). Such authority is expressed where the taxpayer executes a Form 2848, *Power of Attorney and Declaration of Representative*, listing the authorized representative to act in such a capacity.

Thus, §§ 6062 and 6063 statutorily designates the persons authorized to sign on behalf of a corporation and partnership, respectively, while Treas. Reg. § 601.504(a)(3) authorizes any taxpayer to designate a representative authorized to sign a Form 872 on behalf of a taxpayer.

**IV. Is [redacted] Authorized to Sign the Form 872 on Behalf of [redacted] for the [redacted] ?**

Due to the intricacies of [redacted]'s LLC Agreement, and the significant limitations extended over the members of [redacted] in the LLC Agreement, it is unclear whether [redacted] possesses the adequate authority necessary to execute the Consents on behalf of [redacted]. Therefore, we recommend the Service request a more clear designation of authority from [redacted]. This can be accomplished by a majority of [redacted]'s Board of Managers executing a board certificate indicating that either [redacted] (or any another individual of their choosing) has the authority to sign the Consents at issue.

Ideally, the certificate issued by the majority of the Board of Managers should include the following language:

[redacted] has the authority to consent to extend the statute of limitations on tax assessment for [redacted] income tax returns for the period beginning [redacted] and ending [redacted], and for the period beginning [redacted] and ending [redacted]. [redacted] is authorized to enter into such consents for [redacted] (EIN: [redacted]), in [redacted] capacity as successor in interest to [redacted] (EIN: [redacted]), and in his capacity as agent for [redacted].

This language comports with the limitations under \_\_\_\_\_ Operating Agreement while giving explicit notice to the Service of \_\_\_\_\_ authority to act on behalf of \_\_\_\_\_ in signing the Consents.

As an alternative to \_\_\_\_\_ executing a board resolution, we believe \_\_\_\_\_ may execute a Form 2848 listing \_\_\_\_\_ as either an officer or full-time employee of \_\_\_\_\_. This will give the Service explicit authorization that \_\_\_\_\_ has the authority to execute the Consents in accordance with Treas. Reg. § 601.504(a)(4).

**V. How Should \_\_\_\_\_ Title Be Listed Next to His Signature on the Form 872?**

Where an entity undergoes a name change during the period of time elapsing between the end of the taxable year at issue and the date upon which the consent to extend time is to be executed, the Service has previously advised that the former names of all entities be listed in the title line next to the signor of the consent. See IRM 25.6.22.6.2(2) ("When a corporation changes its name only, continuing to operate under the old charter, the consent should be prepared in both names and the signature should reflect both names"); 2002 IRS NSAR 20051, 2002 WL 32167776 (March 1, 2002); 2001 IRS NSAR 11396, 2001 WL 34629759 (Sept. 12, 2001).

\_\_\_\_\_, signature must accurately represent his capacity while listing the name of both entities. \_\_\_\_\_ authority to sign the Consents, his title should be listed as one of the following:

Board Certificate: Authorized Agent of \_\_\_\_\_,

Successor in interest to \_\_\_\_\_,

Form 2848 as Officer: Officer of \_\_\_\_\_,  
Successor in interest to \_\_\_\_\_,

Form 2848 as Full-Time Employee: Employee of \_\_\_\_\_,  
Successor in interest to \_\_\_\_\_,

Any of the above titles will adequately express \_\_\_\_\_ capacity and authority to sign the Consents on behalf of \_\_\_\_\_.

**CONCLUSION**

In accordance with \_\_\_\_\_ state law, the Merger Agreement, the Internal Revenue Manual, and the Code, the Taxpayer's name should appear on the caption of the Consents as follows:

\_\_\_\_\_ (EIN: \_\_\_\_\_), Successor in interest  
to \_\_\_\_\_ (EIN: \_\_\_\_\_)

In addition, because it is currently unclear who is authorized to sign on behalf of (specifically, whether \_\_\_\_\_ possesses adequate authority to sign on behalf of \_\_\_\_\_), we believe it imperative that \_\_\_\_\_ must either execute a board certificate or a Form 2848 explicitly identifying the individual authorized to sign on \_\_\_\_\_ behalf.

If \_\_\_\_\_ is the person \_\_\_\_\_ wishes to designate with the authority to sign the Consents, depending on the type of document used to establish such authority, \_\_\_\_\_ title must be listed as one of the following:

Authorized Agent for \_\_\_\_\_, Successor in interest to \_\_\_\_\_

Officer of \_\_\_\_\_, Successor in interest to \_\_\_\_\_

Employee of \_\_\_\_\_, Successor in interest to \_\_\_\_\_

Please call (949) 575-6049 if you have any further questions.

EWAN D. PURKISS  
Area Counsel  
(Communications, Technology & Media: Oakland)

By: \_\_\_\_\_  
Joseph S. O'Brien  
Attorney  
(Large Business & International)