



OFFICE OF  
CHIEF COUNSEL

DEPARTMENT OF THE TREASURY  
INTERNAL REVENUE SERVICE  
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INTERNAL REVENUE SERVICE NATIONAL OFFICE FIELD SERVICE ADVICE

MEMORANDUM FOR

FROM: Deborah A. Butler  
Assistant Chief Counsel (Field Service)  
CC:DOM:FS

SUBJECT:

This Field Service Advice responds to your memorandum dated August 31, 1999. Field Service Advice is not binding on Examination or Appeals and is not a final case determination. This document is not to be cited as precedent.

LEGEND

Corp.1 =

EIN1 =

Date 1 =

Date 6 =

Date 13 =

Date 14 =

Year 1

Year 2 =

Year 3 =

State 1 =

U.S. Possession1 =

Country1 =

U.S. Possession1 Code1 =

U.S. Possession1 Code2 =

U.S. Possession1 Code3 =

Country1 Code1 =

Country1 Code2 =

Law 1 =

### ISSUES

1. What is the proper entity to execute a consent to extend the statute of limitations for assessment for Corp. 3 for the tax periods ending on Date 1 and Date 2?
2. What is the proper entity to execute a consent to extend the statute of limitations for assessment for Corp. 4 for the tax periods ending on Date 1 and Date 2?
3. Should a transferee consent be obtained from Corp. 1, because it received the assets from Corp. 3 which dissolved on Date 6 and Corp. 4 which dissolved on Date 7?
4. What is the proper entity to execute a consent to extend the statute of limitations for assessment for P for the tax period ending on Date 1 and Date 2?

## CONCLUSIONS

1. A corporate officer of Corp. 3 should execute a Form 872 consent for Corp. 3.
2. A corporate officer of Corp. 4 should execute a Form 872 consent for Corp. 4.
3. Form 2045, Transferee Agreement, should be executed by Corp. 1 for Corp. 3 and Form 2045 should be executed by Corp. 1 for Corp. 4. Corp. 1 should execute Form 977, Consent to Extend the Time to Assess Liability Against a Transferee, for Corp. 3 and Form 977 for Corp. 4.
4. LLC1 should execute a Form 872-P consent as a successor-in-interest of P for a tax year prior to the conversion to a limited liability company.

## FACTS

Corp. 2 was incorporated on Date 13 under the laws of State 2. For federal income tax purposes, Corp. 2 has filed timely consolidated U.S. Corporation Income Tax Returns (Forms 1120) for all relevant tax periods. Corp. 1 was incorporated on Date 14 under the laws of State 1. Similarly, Corp. 1 has filed timely consolidated U.S. Corporation Income Tax Returns for all relevant calendar year tax periods.

On or about Date 3, Corp. 1 acquired control of Corp. 2 and its subsidiaries. At that time, Corp. 2 became a wholly-owned subsidiary of Corp. 1.

On or about Date 4, by consent of the Board of Directors, Corp. 1 merged with Corp. 2, with Corp. 1 the surviving entity. Accordingly, Corp. 2 no longer exists and Corp. 1 has assumed all of Corp. 2's liabilities and obligations. A certificate of ownership and merger was filed with the Secretary of State, State 1 on Date 6 and subsequently with State 2.

Corp. 2 included two foreign sales corporations (FSC), required to file Forms 1120-FSC. You have advised us that the FSC entities ceased doing business. Subsequently, Corp. 3 and Corp. 4 were dissolved (not merged) and the respective assets and liabilities were transferred to and reported by Corp. 1 on its balance sheet. Corp. 3 was dissolved on Date 6. Corp. 4 was dissolved on Date 7.

The Corp. 2 group of affiliated entities also reported the distributive results of TEFRA Partnerships, required to file Forms 1065. You have advised us that in Year 3, the P TEFRA partnership converted into a limited liability company (LLC) under the law of State 2.

## LAW AND ANALYSIS

### Issue 1

FSCs are by definition, corporations organized pursuant to the laws of a qualified foreign country or U.S. possession. I.R.C. § 922(a)(1)(A). In general, the corporate existence of a FSC is respected for U.S. tax purposes, including periods of limitation. See generally, Union Carbide Corp. v. Commissioner, 110 T.C. 375 (1998).

Because a FSC is organized under the laws of a foreign country or a U.S. possession, it cannot be part of its U.S. parent's consolidated group. I.R.C. §§ 922(a)(1)(A); 1504(a)(1), (b)(3). Thus, it is generally not appropriate to obtain a consent to extend the period of limitations for assessment with respect to a FSC from the U.S. parent or from that parent's successor-in-interest.

Corp. 3 was, prior to its dissolution on Date 6, a corporation organized under the laws of U.S. Possession1. U.S. Possession1 Code1, provides that a corporation's existence is deemed to continue for three years from the date of dissolution for the limited purpose of "winding up" its affairs. U.S. Possession1 Code2 provides that the directors of the corporation shall act as trustees during the specified three-year period after dissolution. Finally, U.S. Possession1 Code3 provides that a court of U.S. Possession1, upon the petition by shareholders or creditors, may continue the directors as liquidating trustees, or appoint trustees for the purpose of winding up the corporation business. Based upon the facts given, no trustees have been appointed to wind up the affairs of Corp. 3. Therefore, the directors continue as liquidating trustees.

Delaware law is virtually identical to U.S. Possession1 law. In a case involving Delaware law, the Board of Tax Appeals held that the officer of a dissolved corporation had authority to execute a consent, provided that the consent was executed within the three-year winding-up period. H.D. Walbridge & Co. v. Commissioner, 25 B.T.A. 1109 (1932); compare, Union Shipbuilding Co. v. Commissioner, 43 B.T.A. 1143, 1145 (1941), acq., 1941-1 C.B. 11 (extension executed after expiration of three-year winding-up period specified by Delaware law invalid).

The authority of a corporate officer to act for a dissolved corporation in tax matters derives from the law of the state or territory of incorporation. United States v. Krueger, 121 F.2d 842, 845 (3<sup>rd</sup> Cir.), cert. denied, 314 U.S. 677 (1941). Because the winding-up period of Corp. 3 has not elapsed, the Form 872, Consent to Extend

the Time to Assess Income Tax, should be executed by a corporate officer, such as the president, vice president, treasurer, assistant treasurer, chief accounting officer or any other officer duly authorized to act on behalf of Corp. 3.

Under U.S. Possession<sup>1</sup> law, the Form 872 must be executed prior to the expiration of the winding-up period on Date 9. In addition, under I.R.C. § 6501, Form 872 must be executed prior to the expiration of the statute of limitations for the tax years in question. Assuming Corp. 3's returns for Year 1 were due to be filed (with an extension) on Date 10, the three-year statute of limitations expires on Date 11.

Finally, U.S. Possession<sup>1</sup> Code<sup>1</sup> provides that the corporation will continue to exist beyond the three-year winding-up period to satisfy any judgment against it, but only if the action or proceeding was begun during the winding-up period. Under Delaware law, the execution of a consent does not constitute the commencement of a suit or proceeding. Rather, it is the service of a notice of deficiency that constitutes the commencement of a suit or proceeding. Ross v. Venezuelan-American Independent Oil Producers Ass'n, Inc., 230 F. Supp. 701, 702 (D. Del. 1964). Since U.S. Possession<sup>1</sup> law is virtually identical to Delaware law, we also recommend that any notice of deficiency be mailed within the three-year winding-up period.

The proper wording for the execution of the Form 872 is:

Corp. 3 (EIN3)\*

\*This with respect to the tax liability of Corp. 3 for the tax years ended Date 1 and Date 2.

## Issue 2

Corp. 4 was, prior to its dissolution on Date 7, a corporation organized under the laws of Country 1.

The articles of dissolution indicate that the company was dissolved pursuant to Country<sup>1</sup> Code<sup>1</sup>, on the basis that it had "no property and no liabilities." However, Country<sup>1</sup> Code<sup>2</sup> provides that "notwithstanding the dissolution of a company under the Act . . . a civil, criminal, or administrative action or proceeding may be brought against the company within two years after its dissolution as if the company had not been dissolved" (in this case prior to Date 12).

The authority of an officer to consent to extend the period of limitations for assessment must be determined under Country<sup>1</sup> law. We recommend that the Service obtain a Form 872, Consent to Extend the Time to Assess Tax, executed by a corporate officer of the dissolved FSC.

Because there is a two-year winding-up period under Country1 law, we believe the Form 872 must be executed prior to the expiration of the winding-up period on Date 12. In addition, under the I.R.C. § 6501, the Form 872 must be executed prior to the expiration of the statute of limitations for the tax years in question. Assuming Corp. 4's returns for Year 1 were due to be filed (with an extension) on Date 10, the three-year statute of limitations expires on Date 11.

The proper wording for the execution of the Form 872 is:

Corp. 4 (EIN2)\*

\*This with respect to the tax liability of Corp. 4 for the tax years ended Date 1 and Date 2.

### CASE DEVELOPMENT, HAZARDS AND OTHER CONSIDERATIONS



#### Issue 3

Because Corp. 3 and Corp. 4 have dissolved and no longer exist, we also recommend that consents to extend the statute of limitations for transferee liability and transferee agreements be obtained from the transferee of Corp. 3 and Corp. 4.

Section 6901(a) provides a procedure through which the Service may collect from a transferee of assets unpaid taxes owed by the transferor of the assets if a basis exists under applicable state law or equity for holding the transferee liable. Hagaman v. Commissioner, 100 T.C. 180, 183 (1993). The Service bears the burden of proving that a taxpayer's acts render the taxpayer liable as a transferee. See I.R.C. § 6902; T.C. Rule 142.

A transferee's liability may be established either at law or in equity. Estate of Stein v. Commissioner, 37 T.C. 945 (1962), subsequent proceedings, 40 T.C. 275 (1963). In general, stockholders who receive liquidating distribution from a corporation that subsequently winds up its affairs and dissolves without paying its federal income

tax liability have been held to be transferees under the trust fund doctrine. Dillman v. Commissioner, 64 T.C. 797 (1975); Foster v. Commissioner, T.C. Memo. 1967-224; Neill v. Phinney, 245 F.2d 645 (5<sup>th</sup> Cir. 1957); Commercial Finance Co. v. Commissioner, T.C. Memo. 1968-229.

Thus, we recommend you obtain Form 2045, Transferee Agreement, and Form 977 Consent to Extend the Time to Assess Liability at Law or in Equity for Income, Gift, and Estate Tax against a Transferee or Fiduciary, from Corp. 1. We note that you should not rely on Form 2045 to satisfy the Service's burden of proof with respect to transferee liability. Case law suggests that the execution of Form 2045 merely provides evidence of transferee liability. See Southern Pacific Transportation Corp. v. Commissioner, 84 T.C. 367, 374 n. 6 (1985).

Two Forms 2045 should be executed by Corp. 1 - one for Corp. 3, and a second for Corp. 4. Subsequently, Corp. 1 should execute two Form 977 consents as transferee for both Corp. 3 and Corp. 4. The proper wording for the execution of the Forms 977 is:

Corp. 1 (EIN1), as transferee of Corp. 3 (EIN3).\*

\*This with respect to the tax liability of Corp. 3 for the tax years ended Date 1 and Date 2.

Corp. 1 (EIN1), as transferee of Corp. 4 (EIN2).\*

\*This with respect to the tax liability of Corp. 4 for the tax years ended Date 1 and Date 2.

#### Issue 4

You have also requested advice on the correct entity to execute consents to extend the statute of limitations for assessment for P.

In this case, P was converted to a limited liability company under State 2 law. See Law1. A partnership that converts is for all purposes the same entity that existed before the conversion. Law2. A new employer identification number (EIN) was obtained for the limited liability company, but the partnership EIN could have been retained.

Because P did not terminate, but was converted to a limited liability company, there are no transferees. For this reason, and to avoid confusion due to the EIN change, the appropriate entity to execute the Form 872-P, consent for a partnership, for tax years prior to the conversion is:

LLC1 (EIN4), successor-in-interest to P (EIN5).

Please call if you have any further questions.