



DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

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OFFICE OF
CHIEF COUNSEL

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INTERNAL REVENUE SERVICE NATIONAL OFFICE FIELD SERVICE ADVICE

MEMORANDUM FOR Associate Area Counsel -

FROM: Associate Chief Counsel (CORP) CC:CORP:2
SUBJECT: Agent for Consolidated Group - - Form 870 and Refunds

This Chief Counsel Advice responds to your memorandum dated August 22, 2001 concerning the proper party to sign Form 870 on behalf of a consolidated group. In accordance with I.R.C. § 6110(k)(3), this Chief Counsel Advice should not be cited as precedent.

LEGEND

Corporation A	=
Corporation B	=
Corporation C	=
Newco	=
Business A	=
Year 1	=
Year 2	=
X	=
State Z	=

ISSUES

Who is the proper party on behalf of a consolidated group to sign Form 870 and receive any refunds in tax, when after the tax years at issue the common parent of the group had been acquired and later liquidated through merger?

CONCLUSIONS

We suggest that the remaining members of the consolidated group designate another member to act as agent for the group. However, if this is not possible, then

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the Service must deal separately with each member with respect to its liability. With respect to any potential refund, the Service can issue a refund to the agent designated by the remaining members of the group. [REDACTED]

FACTS

For the tax years under review, Corporation A was the common parent of a consolidated group. In Year 1, Corporation A entered into an Agreement and Plan of Merger with Corporation B to have Corporation B acquire all of Business A from Corporation A. To this end, Corporation A transferred all of its non-Business A assets to Newco. Subsequently, the stock of Newco was distributed to the public shareholders of Corporation A.

Corporation B formed a merger subsidiary, Corporation C. Corporation C merged into Corporation A. Corporation A survived the merger, and its shareholders received Corporation B stock. This transaction was not a reverse acquisition under Treas. Reg. § 1.1502-75(d)(3), because Corporation A shareholders did not receive more than 50% ownership of the stock of Corporation B. Consequently, the Corporation A group terminated, but Corporation A remained the agent for its old consolidated group, for taxable years prior to the Year 1 acquisition by Corporation B. Following the merger Corporation A changed its name to X (but will be referred to as "Corporation A" throughout this memorandum).

In Year 2, Corporation A merged into Corporation B pursuant to the laws of State Z. This transaction was treated as a § 332 liquidation for Federal tax purposes. Corporation A did not designate a new agent for the old Corporation A consolidated group prior to its merger into Corporation B.

In connection with the Year 2 reorganization, Corporations A, B and Newco entered into a Tax Allocation Agreement. Under this agreement, the parties designated tax filing duties, tax liability allocations, refund allocations for all pre-merger years, and an officer of Newco was to be designated agent for Corporations A and B for the purpose of signing returns, cashing refund checks and signing powers of attorney, among other duties. Newco and Corporation B take the position that Corporation A remained the agent for the Corporation A group for all taxable periods prior to the Year 1 acquisition of Corporation A. Additionally, Newco and Corporation B take the position that, subsequent to the Corporation A merger in Year 2, Corporation B became the "successor agent" for the Corporation A group with respect to those periods.

Exam and Appeals anticipate a combination of refunds and deficiencies for the open tax years of the Corporation A group.

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LAW AND ANALYSIS

Treas. Reg. § 1.1502-77(a) provides that the common parent for all purposes (with certain exceptions not relevant on these facts) shall be the sole agent for each subsidiary in the group, duly authorized to act in its own name in all matters relating to the tax liability for the consolidated return year. No subsidiary shall have authority to act for or to represent itself in any such matter. In particular, the common parent shall file all extensions of time, file claims for refund, and be the authorized party to which the Service pays refunds and executes closing agreements, offers in compromise, and other documents on behalf of the subsidiaries. Treas. Reg. § 1.1502-77(a).

Under general principles of agency law, an agency is a personal relationship that necessarily ends with the death of either the principal or the agent. See Restatement, Agency 2d, §§ 120-121; cf. Malone & Hyde v. Commissioner, T.C. Memo 1992-661, n. 5 (applying general principles of agency law with respect to a power of attorney). This rule has been applied to corporations which cease to exist. Oklahoma Gas Co. v. Oklahoma, 273 U.S. 257, 259-360 (1927).

On the facts of the instant case, Corporation A was the common parent and agent for the Corporation A consolidated group for taxable periods prior to the Year 1 acquisition by Corporation B. Although the Corporation A group terminated upon Corporation B's acquisition of Corporation A in Year 1, Corporation A continued to be the agent for the group with respect to all pre-acquisition periods. However, when Corporation A merged into Corporation B in Year 2, it ceased to exist. Consequently, at that time its agency authority terminated.

Treas. Reg. § 1.1502-77(d) requires that before the common parent of a consolidated group goes out of existence, it must designate another member to act as agent for the group (substitute agent) with the same limitations and conditions that were applicable to the common parent. If the common parent fails to designate a substitute agent, then the remaining members may designate a substitute agent. Until a substitute agent is approved by the Commissioner,¹ any communication mailed to the former common parent is considered properly mailed to the agent. If the Commissioner has reason to believe that the common parent has ceased to exist, he may deal directly with any member with respect to its liability.

Treas. Reg. § 1.1502-77T designates an alternative agent when the common parent of a consolidated group ceases to be the common parent. The relevant

¹Following the restructuring of the Internal Revenue Service, District Directors no longer exist. The responsibility previously held by the District Directors with respect to Treas. Reg. § 1.1502-77 has been delegated by the Commissioner to various officials of the Large and Mid-Size Business and Small Business/Self-Employed operating divisions.

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alternative agent in this case is the successor of the former common parent under Treas. Reg. § 1.1502-77T(a)(4)(ii). However, the scope of the agency for the alternative agent is limited to being the party to which the Service sends notices of deficiency and the execution of waivers of statute of limitations.

When Corporation A merged out of existence in Year 2, it did not designate another member of the consolidated group to act as substitute agent for the taxable period prior to the Year 1 acquisition by Corporation B. The remaining members of the group, however, may still designate a member of the group as a substitute agent under Treas. Reg. § 1.1502-77(d).

Treas. Reg. § 1.1502-6(a) provides that, the common parent and each subsidiary which was a member of the group during any part of the consolidated return year shall be severally liable for the tax for such year. Furthermore, Treas. Reg. § 1.1502-6(c) provides that no agreements entered into by one or more members of the group with any members of such group or with any other person shall have the affect of reducing the liability. Thus, while the Tax Allocation Agreement entered into by Corporations A, B and Newco determines the rights and obligations of the signing parties among themselves, it has no effect on the several liability of each member of the Corporation A group. Nor does it have any effect on the operation of Treas. Reg. § 1.1502-77 in determining the agent for the group after Corporation A's existence terminated.

Because there is currently no agent for the Corporation A group, we recommend that the Service seek to have the remaining members of the old Corporation A consolidated group designate a substitute agent. There is no specific procedure to follow for designating a substitute agent. However, certain requirements apply. In particular, all eligible subsidiaries must participate in the delegation, and only a member for the years in question may be designated.

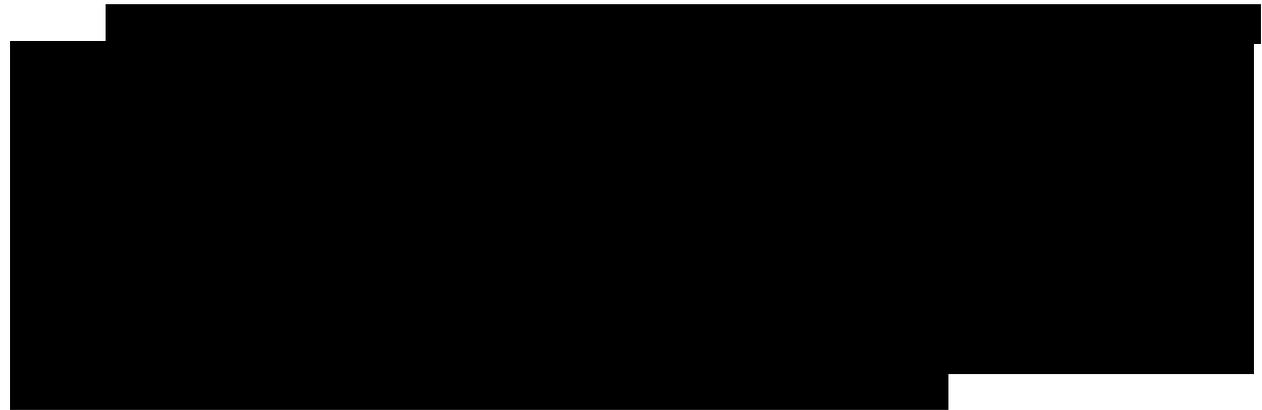
Newco is not eligible to be designated because it was not a member of the Corporation A consolidated group for the tax years under review. Corporation B is not eligible to be the substitute agent, despite being the successor to the common parent and an alternative agent under Treas. Reg. § 1.1502-77T(a)(4)(ii), because the authority of an alternative agent is limited to receiving notices of deficiency and extending the statue of limitation.

Moreover, Corporation B is not a "successor agent" because it was not a member of the Corporation A group for the tax periods in question and thus is not eligible to be designated as a substitute agent under Treas. Reg. § 1.1502-77(d). However, under State Z law, Corporation B assumed Corporation A's liabilities as Corporation A's successor. For this reason, we suggest that, Corporation B either participate in the designation of a substitute agent and appoint that agent as its own or sign the Form 870 in addition to the substitute agent.

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If the remaining members do not designate a substitute agent, the Service can deal directly with any member with regard to its liability pursuant to Treas. Reg. § 1.1502-77(d). We note, however, that in the absence of a substitute agent, a problem may arise if the Service has to issue a refund for pre-Year 1 taxable periods of the old Corporation A consolidated group. Pursuant to § 6402, the Service is required to make refunds to “the person who made the overpayment.” Treas. Reg. § 1.1502-77(a) provides that the common parent files for and receives all refunds and if the Service pays the common parent, the Government’s obligation will be satisfied with respect to all member subsidiaries. However, if there is no agent for the group, it may be unclear who made the overpayment and who should receive the refund. Arguably, any member of the group (or a successor of a member) could claim that it is entitled to at least a portion of the overpayment.

CASE DEVELOPMENT, HAZARDS AND OTHER CONSIDERATIONS



This writing may contain privileged information. Any unauthorized disclosure of this writing may have an adverse effect on privileges, such as the attorney client privilege. If disclosure becomes necessary, please contact this office for our views.

Please call [REDACTED] if you have any further questions.

Sincerely,
William D. Alexander
Acting Associate Chief Counsel (Corporate)
Gerald B. Fleming
Senior Technician Reviewer, Branch 2