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Cc:

Subject: Consent to extend 6901 s/l by potential successor.

Where the common parent of a consolidated group is merged out of existence into a successor, you ask whether it is necessary to obtain the consents shown on Forms 977, 2045 or 4016, each of which is a consent of a transferee. You point out the cautionary language of IRM 25.6.22.6.2.5(4), which indicates that to minimize the risk of relying on an invalid consent action should be taken to protect the s/l of the transferee and transferor.

State law varies as to whether a successor is treated as primarily liable (steps into the shoes of the taxpayer) or secondarily liable (specialized form of transferee). Under primary successor liability, we can either use the taxpayer's s/l in respect to assessment and collection against the successor, or use the 6901 s/l. Under secondary successor liability, it may vary as to whether we get the s/l applicable to the taxpayer or the s/l applicable to a transferee in respect of a successor who is secondarily liable, but in any event we can use the 6901 s/l. If the successor does not execute a consent extending the 6901 period, however, the additional time for assessment against a transferee (including a successor) will expire at the regular time provided in 6901, and that remedy will not longer be available.

Apart from clear statutory mergers in a state which imposes primary liability on the successor, the facts can sometimes be less than a sure thing. Also, the transaction may be staged as an asset sale, in which an important factor is whether the acquiring corporation paid adequate consideration for the assets. If so, we may be attempting to prove successor liability resulting from de facto merger or mere continuation as an exception to the general rule that a purchaser who pays full value does not become liable for the debts of the seller.

Because of the variance in state law, and potential unreliability of facts, consents provide protection of the 6901 and other transferee s/l while not hurting our ability to prove primary successor liability.