

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

Number: **201136020**

Release Date: 9/9/2011

CC:PA:04:DWSkinner

POSTF-113988-11

UILC: 6901.03-01

date: May 17, 2011

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subject: Consent to extend statute of limitation on assessment

This memorandum responds to your request for advice based on the following facts.

Pursuant to an Agreement and Plan of Merger, three Delaware LLCs (the merged LLCs) merged into a fourth Delaware LLC (the surviving LLC). Each elected to be taxed as a corporation. One or more of the merged LLCs is under examination for a period preceding the merger, and the surviving LLC wishes to extend the assessment statute expiration date (ASED).

ISSUE

In order to extend the ASED, should the surviving LLC execute Form 872, Consent to Extend the Time to Assess Tax, or 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?

CONCLUSION

The surviving LLC should execute Form 872 in the manner specified in IRM 4.10.13.3.3.4(1). It is not a transferee and should not execute Form 977.

DISCUSSION

The Agreement and Plan of Merger states that sec. 18-209 of the Delaware LLC Act (DLLCA) controls the effects of the merger. It does not otherwise discuss the assumption of the merged LLCs' liabilities. DLLCA provides that the surviving LLC is primarily liable for the merged LLCs' debts; the debts "attach to the surviving or resulting domestic limited liability company or other business entity, and may be enforced against it to the same extent as if said debts, liabilities and duties had been incurred by it." 6 Del. C. sec. 18-209(g). A successor corporation to a merger is not a transferee; rather it assumes 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, 703-704 (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), IRM 4.11.52.4.1(3) ("a merger or consolidation, where the successor corporation is primarily liable for the debts of the merged corporation, does NOT result in a transferee situation."). Thus, the surviving LLC is primarily liable for the merged LLCs' tax debts, and the consent Form 872 should be used.

Section 6901(h) defines the term transferee to include a distributee, and Treas. Reg. § 301.6901-1(b) provides that the shareholder of a dissolved corporation, the successor of a corporation, a party to a section 368 reorganization, and all other classes of distributees are transferees. The surviving LLC in this case received the assets of the merged LLCs as a result of the merger, which suggests that it is a transferee. However, section 6901 is strictly a procedural statute, and it does not impose substantive liability on a transferee; applicable Federal and State law determines the transferee's liability. Commissioner v. Stern, 357 U.S. 39, 42-44 (1958); see also IRM 5.17.14.5.1(2). In this case, the surviving LLC is not liable as a transferee of the merged LLCs' property. Instead, it succeeded to the property and debts by operation of the DLLCA, not by purchase or assignment or contractual assumption. Commissioner v. Oswego Falls Corp., 71 F.2d 673, 676 (2d Cir. 1934) (further providing that secondary liability arises only after exhaustion of remedies against the primary obligor, which suggests that primary and transferee liability cannot coexist in a single surviving entity); see also IRM 4.10.13.3.3.4(1), 4.11.52.4.1(3), 5.17.14.5.5(3)(b), 5.17.14.5.7(1), and 5.17.14.5.10.

Thus the surviving LLC's liability is primary but not secondary (as a transferee). The original ASED is close to running out, so a Form 872 should be executed. Although section 6901(c) provides a longer ASED for a transferee, this option should not be considered so long as the Form 872 is timely executed. ¹

¹ IRM 25.6.22.6.2.5(1) explains that state law generally renders the successor corporation of a merger primarily liable for the debts of the predecessor corporation but then states that the merger agreement may provide that the successor will be liable for the predecessor's tax debts, "in which case the successor is liable as a transferee." As discussed above, we question whether the successor can be subject to both primary and transferee liability. In this case, aside from the reference discussed above to Delaware law,

Accordingly, the surviving LLC should execute Form 872 to extend the ASED.

If you have any further questions or require further assistance, please contact David Skinner at (202) 622-3630.

the merger agreement is entirely silent on the assumption or allocation of tax liabilities. Accordingly, the argument for transferee liability on this contractual basis is exceedingly weak.