

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

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to:
(Large Business & International)

from: Richard M. Heinecke, Branch Chief, CC:CORP:B05

subject : Agent for the Group for Purposes of Executing Form 872 (Consent to Extend the
Time to Assess Tax)

This Chief Counsel Advice responds to your request for assistance. This advice may not be used or cited as precedent.

LEGEND

Corporation A =

Corporation B =

Corporation C =

Corporation D =

Corporation E =

State X =

State Y =

Date M =

Date N =

Date O =

H%	=
Year 1	=
Year 2	=
Year 3	=
Year 4	=
Short-Year 2	=

The facts and representations set forth in this memo are those that were provided in connection with your request and have not been verified for accuracy or completeness. All section references are to the Internal Revenue Code of 1986. All references to the regulations under Treas. Reg. § 1.1502-77 are to the regulations in effect for consolidated return years beginning on or after April 1, 2015.

ISSUE

1. Is Corporation A the default successor and agent for the Corporation B and Subsidiaries consolidated group for the Year 1 and Short-Year 2 tax years?
2. Is Corporation A the proper party to execute and submit Form 872 (*Consent to Extend the Time to Assess Tax*) as the agent for the Corporation B and Subsidiaries consolidated group for the Year 1 and Short-Year 2 tax years?

CONCLUSIONS

1. Corporation A is the default successor and agent for the Corporation B and Subsidiaries consolidated group for the Year 1 and Short-Year 2 tax years.
2. As the default successor and agent for the Corporation B and Subsidiaries consolidated group for the Year 1 and Short-Year 2 tax years, Corporation A is the proper party to execute and submit the Form 872 for each of those years.

FACTS

Corporation B, a State X corporation, was the common parent of the Corporation B and Subsidiaries consolidated group, an affiliated group of corporations that filed consolidated federal income tax returns on a calendar year basis, including for Year 1. Corporation C, a State Y corporation, was the common parent of the Corporation C and Subsidiaries consolidated group.

Date M Transaction

Corporation C sought to acquire Corporation B and entered into an agreement including a plan comprised of two steps that were executed on Date M (a date within the Year 2 calendar year) (collectively the "Date M Transaction"). In anticipation of the Date M Transaction, Corporation C formed two wholly owned State Y subsidiary corporations, Corporation A and Corporation D. The two transaction steps occurring on Date M were as follows:

1. First, Corporation D merged under state law into Corporation B with the latter surviving as a wholly owned subsidiary of Corporation C. The former shareholders of Corporation B received cash consideration and newly issued shares of Corporation C common stock amounting to approximately H% of Corporation C's outstanding shares of common stock ("Step 1"); and
2. Second, Corporation B merged under state law into Corporation A with the latter surviving as a wholly owned subsidiary of Corporation C ("Step 2"). The Date M Transaction, comprised of Steps 1 and 2, was not a reverse acquisition within the meaning of Treas. Reg. § 1.1502-75(d)(3), and the Corporation B and Subsidiaries consolidated group terminated under Treas. Reg. § 1.1502-75(d)(1).

In connection with the Date M Transaction, a final federal income tax return for the Corporation B and Subsidiaries consolidated group for the Short-Year 2 tax year was filed on Date N (a date within the Year 3 calendar year).

In Year 4, Corporation C engaged in a corporate separation of Corporation A (the "Distribution"). On Date O (a date within the Year 4 calendar year), Corporation C contributed the stock of Corporation A to Corporation E in exchange for the Corporation E stock, which was distributed by Corporation C to its shareholders.

State X's and State Y's corporate merger statutes provide that a surviving entity in a merger succeeds to all of the liabilities of the merged corporation (including tax liabilities) and the Date M Transaction did not limit Corporation A as being the successor and primarily liable for Corporation B's liabilities, including its federal tax liabilities.

Corporation A remains a juridical entity in existence as of the date of this memo and has not merged into any other entity, dissolved or ceased to exist under state law, and has not converted to another type of entity, elected to change its entity classification, or liquidated for federal income tax purposes.

With respect to the Corporation B and Subsidiaries consolidated group Year 1 and Short-Year 2 tax years: i) the Commissioner, pursuant to Treas. Reg. § 1.1502-77(f)(2)(i), has never dealt separately with any member of the Corporation B and Subsidiaries consolidated group; ii) no other entity has been designated as the agent under Treas. Reg. § 1.1502-77(c)(5) and (6) with respect to the Corporation B and Subsidiaries consolidated group; and iii) Corporation A has not resigned as the agent

for the Corporation B and Subsidiaries consolidated group pursuant to Treas. Reg. § 1.1502-77(c)(7).

LAW

Treas. Reg. § 1.1502-77(a)(1) sets forth the following basic rule:

Except as provided in paragraphs (e) and (f)(2) of this section, one entity (the agent) is the sole agent that is authorized to act in its own name regarding all matters relating to the federal income tax liability for the consolidated return year for each member of the group and any successor or transferee of a member (and any subsequent successors and transferees thereof). The identity of that agent is determined under the rules of paragraph (c) of this section.

Treas. Reg. § 1.1502-77(a)(2) explains that the agent is established for each consolidated return year:

Agency for the group is established for each consolidated return year and is not affected by the status or membership of the group in later years. Thus, subject to the rules of paragraph (c) of this section, the agent will generally remain agent for that consolidated return year regardless of whether one or more subsidiaries later cease to be members of the group, whether the group files a consolidated return for any subsequent year, whether the agent ceases to be the agent or a member of the group in any subsequent year, or whether the group continues pursuant to § 1.1502-75(d) with a new common parent in any subsequent year.

Treas. Reg. § 1.1502-77(b)(1) provides the definition of a “successor” as follows:

A successor is an individual or entity (including a disregarded entity as defined in paragraph (b)(3) of this section) that is primarily liable, pursuant to applicable law (including, for example, by operation of a state or federal merger statute), for the tax liability of a corporation that was a member of the group but is no longer in existence under applicable law. The determination of tax liability is made without regard to § 1.1502-1(f)(4) or § 1.1502-6(a). (For inclusion of a successor in references to a subsidiary or member, see paragraph (b)(5)(iii) of this section.)

Treas. Reg. § 1.1502-77(b)(2) describes the term “entity” in the following manner:

The term entity includes any corporation, limited liability company, or partnership formed under any state, federal or foreign jurisdiction. The term entity includes a disregarded entity (as defined in paragraph (b)(3) of this section). The term entity does not include an entity that has terminated even if it is in a winding up period under the law under which it is organized.

Treas. Reg. § 1.1502-77(b)(4) provides the definition of a “default successor” as follows:

A successor to the agent is the default successor if it is an entity (whether domestic or foreign) that is the sole successor to the agent. A partnership is treated as a sole successor with primary liability notwithstanding that one or more partners may also be primarily liable by virtue of being partners.

Treas. Reg. § 1.1502-77(c)(1) explains the identity of the agent as follows:

Except as otherwise provided in this section, the agent for a current year is the common parent and the agent for a completed year is the common parent at the close of the completed year or its default successor, if any. Except as specifically provided otherwise in this paragraph (c), any entity that is an agent pursuant to paragraph (c)(3) of this section (agent following group structure change), paragraph (c)(5) of this section (agent designated by agent terminating without default successor), paragraph (c)(6) of this section (agent designated by Commissioner), or paragraph (c)(7) of this section (agent designated by resigning agent), or any entity subsequently serving as agent following such agent, acts as an agent for and under the same terms and conditions that apply to a common parent. For example, such an agent would generally be able to designate an agent if it terminates without a default successor; however, an entity that became agent pursuant to a designation by the Commissioner under paragraphs (c)(6)(i)(A)(2), (3), or (4) of this section is not permitted to designate an agent if it terminates without a default successor. Other special rules described in this paragraph (c) apply.

Treas. Reg. § 1.1502-77(c)(3) describes the new common parent after a “group structure change.” This is described in Treas. Reg. § 1.1502-77(c)(3), in part, as follows:

If the group continues in existence after a group structure change (as described in § 1.1502-33(f)(1)), the former common parent is the agent until the group structure change, and the new common parent becomes the agent after the group structure change. Following the group structure change, the new common parent is the agent with respect to the entire current year (including the period before the group structure change) and the former common parent is no longer the agent for that year.

Treas. Reg. § 1.1502-75(d)(3)(i) contains the rule for a “reverse acquisition,” which is a type of group structure change mentioned in § 1.1502-33(f)(1)). As stated in Treas. Reg. § 1.1502-75(d)(3)(i), in part, a reverse acquisition is described as follows:

If a corporation (hereinafter referred to as the “first corporation”) or any member of a group of which the first corporation is the common parent acquires after October 1, 1965:

- (a) Stock of another corporation (hereinafter referred to as the second corporation), and as a result the second corporation becomes (or would

become but for the application of this subparagraph) a member of a group of which the first corporation is the common parent, or

(b) Substantially all the assets of the second corporation,

in exchange (in whole or in part) for stock of the first corporation, and the stockholders (immediately before the acquisition) of the second corporation, as a result of owning stock of the second corporation, own (immediately after the acquisition) more than 50 percent of the fair market value of the outstanding stock of the first corporation, then any group of which the first corporation was the common parent immediately before the acquisition shall cease to exist as of the date of acquisition, and any group of which the second corporation was the common parent immediately before the acquisition shall be treated as remaining in existence (with the first corporation becoming the common parent of the group).

ANALYSIS

1. Issue 1

a. Corporation A is the default successor and agent for the Corporation B and Subsidiaries consolidated group for the Year 1 and Short-Year 2 federal income tax years.

Treas. Reg. § 1.1502-77(c)(1) provides that the agent of a consolidated group for a current year is the common parent and the agent for a completed year is the common parent at the close of the completed year or its default successor, if any. Based on the facts, Corporation B was the original common parent of the Corporation B and Subsidiaries consolidated group for the Year 1 and Short-Year 2 tax years and therefore was the original agent of the group.

In order to be the default successor to Corporation B for the Year 1 and Short-Year 2 consolidated group tax years, Corporation A must be an entity that is the sole successor to Corporation B for the Year 1 and Short-Year 2 consolidated group tax years. Therefore, the threshold question is whether Corporation A is a successor to Corporation B under Treas. Reg. § 1.1502-77(b)(1).

Pursuant to Treas. Reg. § 1.1502-77(b)(1), “[a] successor is an individual or entity (including a disregarded entity as defined in paragraph (b)(3) of this section) that is primarily liable, pursuant to applicable law (including, for example, by operation of a state or federal merger statute), for the tax liability of a corporation that was a member of the group but is no longer in existence under applicable law.” Under the corporate merger statutes of State X and State Y, the surviving entity in a merger succeeds to all liabilities of the merged corporation (including federal tax liabilities). Therefore, as a result of Step 2 of the Date M Transaction above, Corporation A ultimately succeeds to and has primary liability for the federal tax liabilities of Corporation B as a matter of

State X and State Y corporate merger laws. Corporation A should be treated as the default successor within the meaning of Treas. Reg. § 1.1502-77(b)(4) as it is an entity that is the sole successor to the former agent (i.e., Corporation B) with respect to the Corporation B and Subsidiaries consolidated group for the Year 1 and Short-Year 2 tax years.

According to the facts, the Date M Transaction did not result in a group structure change, within the meaning of Treas. Reg. § 1.1502-77(c)(3), and the Corporation B and Subsidiaries consolidated group terminated its existence on Date M. Corporation A continues to exist as a juridical entity (it has not merged out of existence or dissolved). Corporation A has not resigned and no other agent has been designated the agent for the Corporation B and Subsidiaries consolidated group for the Year 1 and Short-Year 2 tax years. Furthermore, the Commissioner has never dealt separately with any member of the Corporation B and Subsidiaries consolidated return with respect to the Year 1 and Short-Year 2 consolidated group tax years pursuant to Treas. Reg. § 1.1502-77(f)(2)(i). Therefore, Corporation A is the default successor and agent for the group for the Corporation B and Subsidiaries consolidated group's Year 1 and Short-Year 2 tax years.

2. Issue 2

- a. *As the default successor, and therefore the agent for the Corporation B and Subsidiaries consolidated group for the Year 1 and Short-Year 2 tax years, Corporation A is the proper party to execute and submit the Forms 872 for those years.*

Corporation A is the default successor, and therefore agent, for the Corporation B and Subsidiaries consolidated group for the Year 1 and Short-Year 2 tax years. Therefore, as the agent for the Corporation B and Subsidiaries consolidated group for those years, Corporation A is the correct entity to execute the Forms 872, *Consent to Extend the Time to Assess Tax*.

With respect to completing the Forms 872 for the Year 1 and Short-Year 2 consolidated group tax years, we recommend the following:

The name at the top of the first page of the Form 872 should read as follows:

“Corporation A (EIN: ##-#####), successor by merger to Corporation B (EIN ##-#####), and as agent for the Corporation B (EIN ##-#####) and Subsidiaries consolidated group*”

At the bottom of the consent, state the following: “*This is with respect to the consolidated tax of the Corporation B (EIN ##-#####) and Subsidiaries consolidated group.”

In the signature block on page 2 of the Form 872, Corporation A (EIN: ##-#####), the name of the corporation that is the agent, must be typed on the "Corporate Name" line, followed by the signature, date and title of a current officer of Corporation A who can bind Corporation A.

This writing may contain privileged information. Any unauthorized disclosure of this writing may undermine our ability to protect the privileged information. If disclosure is determined to be necessary, please contact this office for our views.

Please call _____ if you have any further questions.

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(Corporate)

By: _____
Richard M. Heinecke
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