

Office of Chief Counsel
Internal Revenue Service
memorandum

CC:NER:NED:BOS:TL-N-3743-00
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date:

to: Martin J. Cuniffe, Team Chief
New England Appeals, Boston

from: District Counsel, New England District, Boston

subject:

Forms 872
Taxable Years ended [REDACTED] and
and [REDACTED]
Earliest Statute Expiration: [REDACTED]

This is in response to your request that we provide advice regarding extending the statute of limitations for the above-mentioned consolidated group's taxable years ended [REDACTED] and [REDACTED].

[REDACTED] a Massachusetts corporation, is a bank holding company which is the parent corporation of an affiliated group. Said company had subsidiary banks in [REDACTED], [REDACTED], [REDACTED] and [REDACTED]. The [REDACTED] [REDACTED] a national banking association, all of whose voting securities are owned indirectly by [REDACTED]. [REDACTED] is the principal subsidiary of [REDACTED]. [REDACTED] and its subsidiaries filed consolidated federal income tax returns for their [REDACTED] and [REDACTED] taxable years. Subsequent to [REDACTED] and [REDACTED], [REDACTED] changed its name to [REDACTED].

[REDACTED] a Rhode Island corporation, is a bank holding company. [REDACTED] is engaged in a general commercial banking and investment management business through its banking subsidiaries located in [REDACTED], [REDACTED] and [REDACTED].

On [REDACTED] and [REDACTED] formerly known as [REDACTED] entered into an Agreement and Plan of Merger subject to their respective shareholder's consent. This Agreement and Plan of Merger

provided that [REDACTED] shall merge with and into [REDACTED] with [REDACTED] as the surviving corporation. [REDACTED] shareholders received the right to obtain [REDACTED] stock in exchange for their [REDACTED] stock. After said exchange, the pre-merger shareholders of [REDACTED] controlled the combined entity. It was further provided that the name of the surviving corporation be changed from [REDACTED] to "[REDACTED]." It was intended by the parties that for U.S. tax purposes that the merger constitute a tax free reorganization.

Subject to the terms and conditions of the Agreement and Plan of Merger and in accordance with the provisions of the Massachusetts Business Corporation Law (General Laws, Chapter 156 B, Section 79) and the Rhode Island Business Corporation Act, [REDACTED] was merged into [REDACTED] on [REDACTED]. On [REDACTED] the articles of incorporation of the combined entity were amended to change the name of [REDACTED] to [REDACTED]. You have inquired as to whom is the proper party to extend on behalf of [REDACTED] consolidated group for the [REDACTED] and [REDACTED] taxable years.

Generally, the common parent, with certain exceptions not applicable here, is the sole agent for each member of the group, duly authorized to act in its own name in all matters relating to the tax liability for the consolidated return year. Treas. Reg. § 1.1502-77(a). The common parent in its name will give waivers, and any waiver so given, shall be considered as having also been given or executed by each such subsidiary. Treas. Reg. § 1.1502-77(a). Thus, generally, the common parent is the proper party to sign consents, including the Form 872 waiver to extend the period of limitations, for all members in the group. Treas. Reg. § 1.1502-77(a). Treas. Reg. § 1.1502-77(c) provides that, unless the District Director agrees to the contrary, an agreement entered into by the common parent extending the time within which an assessment may be made in respect of the tax for a consolidated return year, shall be applicable to each corporation which was a member of the group during any part of such taxable year. The common parent and each subsidiary which was a member of the consolidated group during any part of the consolidated return year is severally liable for the tax for such year. Treas. Reg. 1-1502-6(a).

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Treas. Reg. § 1.1502-77T provides for alternative agents and applies if the corporation that is the common parent of the group ceases to be the common parent, whether or not the group remains in existence. Temp. Reg. § 1.1502-77T provides that a waiver of the statute of limitations, with respect to the consolidated group, given by any one or more corporations referred to in paragraph (a)(4) of the section is deemed to be given by the agent of the group. Subparagraph (a)(4)(i) lists as an alternative agent the common parent of the group for all or any part of the year to which the notice or waiver applies. In this case, the common parent, [REDACTED] merged into [REDACTED] and is no longer in existence. Therefore, this subparagraph cannot apply.

Under Treas. Reg. § 1.1502-(a)(4)(ii), the alternative agents for the group include "a successor to the former common parent in a transaction to which I.R.C. § 381(a) applies." I.R.C. § 381(a) applies, in part, to an acquisition of assets of a corporation by another corporation in a transfer to which I.R.C. § 361 (relating to nonrecognition of gain or loss to corporations) applies, but only if the transfer is in connection with a reorganization described in subparagraph (A), (C), (D), (F), or (G) of I.R.C. § 368(a)(1). On [REDACTED] [REDACTED] (formerly [REDACTED]) merged into [REDACTED] with [REDACTED] surviving. If the merger is an "A" reorganization, I.R.C. § 381 will apply. If so, pursuant to Temp. Reg. § 1502-77T(4)(ii), [REDACTED] (now known as [REDACTED]) would be an alternative agent for [REDACTED] consolidated group for the taxable years ended [REDACTED] and [REDACTED]. Any waiver given by [REDACTED] with respect to the pre-merger taxable years of the [REDACTED] consolidated group would be deemed to be given by the agent of the group.

The merger of [REDACTED] into [REDACTED] was pursuant to state law (Massachusetts and Rhode Island law). This is one of the requirements for an "A" reorganization. However, it is not sufficient alone to ensure the application of I.R.C. § 368(a)(1)(A). There are certain requirements which must be met in order for the statutory merger to qualify as an "A" reorganization. We do not know whether all these requirements have been met, but for purposes of this advice, we will assume that the facts as developed will most likely indicate that the above-noted requirements are met and that the merger constitutes a tax-free "A" reorganization under I.R.C. § 368(a). Therefore, I.R.C. § 381 would apply to this

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reorganization. Consequently, [REDACTED] is an alternative agent for the [REDACTED] consolidated group and is the proper party to execute a Form 872 with respect to the taxable years ended [REDACTED] and [REDACTED] of [REDACTED] consolidated group. If the merger does not constitute a tax-free reorganization, then Temp. Reg. § 1.1502-77T would not apply and under Treas. Reg. § 1.1502-77T, [REDACTED] would not be an alternative agent for [REDACTED] consolidated group for the taxable years involved herein.

Another basis for obtaining a Form 872 from [REDACTED] is that said corporation is a successor in interest by merger to [REDACTED] (formerly [REDACTED]). A surviving or resulting corporation in a merger or consolidation under state law may validly sign an extension agreement on behalf of the transferor (predecessor) corporation for a period before the transfer. Rev. Rul. 59-399, 1959-2 C.B. 448.

General Laws, Chapter 16 B, Section 79 (Massachusetts Business Corporation Law) provides:

(a) Any one or more corporations may consolidate or merge with one or more other corporations organized under the laws of any other state or states of the United States, if the laws of such other state or states permit. ...

(b) Such corporations as desire to consolidate or merge shall enter into an agreement of consolidation or merger which shall specify the state under the laws of which the resulting or surviving corporation is organized... if the resulting or surviving corporation is to be governed by the laws of another state, the resulting or surviving corporation shall agree that it may be sued in this commonwealth for any prior obligation of any constituent domestic corporation...

MASS. ANN. LAWS Ch. 156 B, § 79 (Law. Co-op. 1979).

[REDACTED] (now known as [REDACTED]) the foreign surviving corporation, so agreed to be sued in Massachusetts in both the Agreement and

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Plan of Merger and in the Articles of Merger filed with the Commonwealth of Massachusetts. Furthermore, General Laws, Chapter 156 B, Section 80 (b) (Massachusetts Business Corporation Law) which deals with the effect of consolidation or merger provides:

(b) The rights of creditors of any constituent corporation shall not in any manner be impaired, nor shall any liability or obligation, including taxes due or to become due, or any claim or demand in any cause existing against such corporation... be released or impaired by any such consolidation or merger, but such resulting or surviving corporation shall be deemed to have assumed, and shall be liable for, all liabilities and obligations of each of the constituent corporations in the same manner and to the same extent as if such resulting or surviving corporation had itself incurred such liabilities or obligations.

MASS. ANN. LAWS Ch. 156 B. § 80 (Law. Co-op 1979).

Therefore under the laws of Massachusetts, [REDACTED] (now known as [REDACTED]) assumed all the liabilities including taxes due or to become due of [REDACTED]. Accordingly [REDACTED] is a successor in interest to [REDACTED]. Southern Pacific Transportation Co. v. Commissioner, 84 T.C. 387 (1985), later proceeding, 90 T.C. 771 (1988).

In addition, under I.R.C. § 6901, [REDACTED] is a transferee at law of [REDACTED] because there was a statutory merger by which [REDACTED] assumed the liabilities of [REDACTED]. A determination against the surviving corporation for tax due by the merged corporation for a period prior to the merger is not generally handled as a transferee case. Rather it should generally be handled by asserting primary liability against the surviving corporation. There is an exception if the statutory period for assessing a deficiency has expired under primary liability; the Service would then argue that the surviving corporation should be liable as a transferee. See generally CCDM (35) (10) 61.

Therefore, it is preferable to assert primary instead of transferee liability against the surviving corporation, [REDACTED] if the statutory period for assessing a deficiency has not expired under primary liability. The transferee liability approach should be reserved for the situation where time for asserting primary liability has expired. In this case, the time for asserting primary liability against [REDACTED] the surviving corporation, has not expired and, therefore, utilization of the transferee liability approach is not warranted in this case.

Accordingly, you should obtain a Form 872 from [REDACTED] for [REDACTED] s taxable years ended [REDACTED] and [REDACTED]. The Form 872 should be signed by an authorized officer or director of [REDACTED]. Rev. Rul. 83-41, 1983 C.B. 399, clarified and amplified, Rev. Rul. 84-165, 1984-2 C.B. 305.

The caption of the Form 872 should read "[REDACTED] (EIN. [REDACTED]), formerly known as [REDACTED] (EIN. [REDACTED]) formerly known as [REDACTED], (EIN. [REDACTED]), as successor to [REDACTED] (EIN. [REDACTED]) formerly known as [REDACTED] (EIN. [REDACTED]) and as alternative agent for the [REDACTED] (EIN. [REDACTED]) [REDACTED] consolidated group." On the bottom of the form, you should add the following: *This is with respect to the consolidated tax liability of [REDACTED] [REDACTED] for the taxable years ended [REDACTED] and [REDACTED]. The name [REDACTED] should be placed on the signature block of the Form 872.

New I.R.C. § 6501(c)(4)(B) provides that the Service shall notify the taxpayer of their right: 1) to refuse to extend the period of limitations; 2) to limit such extension to particular issues; or 3) to limit the extension to a particular period of time. This notice must be provided to the Taxpayer by field personnel each time an extension is requested. The legislative history of the provision states that Congress believed that taxpayers should be fully informed of their rights with respect to the statute of limitations on assessment.

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If we can be of any further assistance, please feel free to call the undersigned at 617/565-7855.

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