

Office of Chief Counsel
Internal Revenue Service

memorandum

CC:LM:MCT:CLE:PIT:TL-N-2038-01
DPLeone

date:

to: Donald C. Bouquet, Team Manager LM:MCT:1706
Youngstown, Ohio

from: Associate Area Counsel CC:LM:MCT:CLE:PIT

subject:

[REDACTED]
(formerly [REDACTED]), statute
extensions for [REDACTED] and [REDACTED]

[REDACTED], statute extensions
for [REDACTED], [REDACTED] and [REDACTED] tax years

Statute of Limitations Date: [REDACTED]

This is in response to your request for advice dated March 26, 2001. This memorandum should not be cited as precedent. This advice has been sent to the National Office for 10-day post-review. Accordingly, please contact our office after 10 days from the date of this memorandum to make sure that there is no recommended change to the advice given.

ISSUES

1. What is the proper heading to be used on the Form 872 to be secured to extend the statute of limitations for [REDACTED] for the tax years ending [REDACTED], [REDACTED] and [REDACTED]?

2. What is the proper heading to be used on the Form 872 to be secured to extend the statute of limitations for [REDACTED] (formerly [REDACTED]) for the tax years ending [REDACTED] and [REDACTED]?

CONCLUSIONS

1. For the years ended [REDACTED], [REDACTED] and [REDACTED]: [REDACTED].

2. For the years ended [REDACTED] and [REDACTED]: [REDACTED] (formerly [REDACTED]).

FACTS

The facts as we understand them follow. [REDACTED] (" [REDACTED] "), a Pennsylvania corporation incorporated on [REDACTED], filed consolidated tax returns for the years ending [REDACTED], [REDACTED], and for the short year ending [REDACTED]. [REDACTED] was the parent of the consolidated group.

On [REDACTED], [REDACTED] (" [REDACTED] "), a Delaware corporation incorporated on [REDACTED], through [REDACTED], purchased [REDACTED] % of the stock of [REDACTED]. [REDACTED] was a one day corporation used to accomplish this transaction and was then liquidated. After the acquisition, [REDACTED] became a wholly owned subsidiary of [REDACTED]. However, [REDACTED] retained its corporate structure, remained in existence, and retained its federal identification number. For the taxable periods after [REDACTED], [REDACTED], as parent, filed consolidated tax returns and [REDACTED] was a member of that consolidated group.

On [REDACTED], [REDACTED] filed a Chapter 11 bankruptcy for itself and all of its subsidiaries. As part of [REDACTED]'s Chapter 11, [REDACTED]'s debt was exchanged for stock so that the banks and other creditors became the major stockholders when the bankruptcy court confirmed the plan of reorganization. Subsequent to the bankruptcy, [REDACTED] changed its name to [REDACTED]. It is our understanding that this was just a name change, and that the corporation was still operating under the initial charter issued upon incorporation on [REDACTED].

In [REDACTED], [REDACTED] was acquired by [REDACTED] (" [REDACTED] "), a New York corporation, and became a subsidiary of [REDACTED]. We have not been provided with any more details about the acquisition.

Attached to the Form 1120 filed by [REDACTED] for the tax period ended [REDACTED], are Forms 1122, Authorization and Consent of Subsidiary Corporation to be Included in a Consolidated Income Tax Return, on behalf of [REDACTED] (EIN [REDACTED]) and [REDACTED] (EIN: [REDACTED]). Additionally, both [REDACTED] (EIN [REDACTED]) and [REDACTED] (EIN: [REDACTED]) are included on the Form 851, Affiliations Schedule, attached to the Form 1120 for the tax year ended [REDACTED].

Despite the ownership changes and the affiliation with different consolidated groups, apparently both [REDACTED] and [REDACTED] (formerly known as [REDACTED]) continue in existence and have not dissolved nor lost their corporate identities. The advice given herein is contingent upon the accuracy of that factual conclusion.

DISCUSSION

Under the consolidated return regulations, the common parent of a consolidated group is the sole agent for each subsidiary in the group. 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). Generally, the common parent for a particular consolidated return year remains the common parent agent for purposes of extending the period of limitations with respect to that year even though that corporation is no longer the common parent of that group when some action, such as consenting to an extension, needs to be taken for that year.

The general rule does not apply when the common parent is not in existence at the time such action is necessary. Treas. Reg. § 1.1502-77(d). The common parent is considered to have gone out of existence when it formally dissolves under state law or merges into another corporation. Although we have not been provided with facts concerning the acquisition by [REDACTED] in [REDACTED], it is our understanding that throughout all of the acquisitions, neither [REDACTED] nor [REDACTED] were dissolved under state law nor merged into other corporations. Accordingly, the general rule should still apply and [REDACTED] (as common parent for the periods [REDACTED], [REDACTED], and [REDACTED]) and [REDACTED] (formerly known as [REDACTED]) (as common parent for the periods [REDACTED] and [REDACTED]) should execute the Forms 872 to extend the statute of limitations.

In addition to the general rule, Temp. Reg. § 1.1502-77T is applicable in this case since both [REDACTED] and [REDACTED] have ceased to be the common parent of their respective groups, and the statutes of limitation that are to be extended are for taxable years for which the due dates (without extensions) for filing the

¹ The Commonwealth of Pennsylvania, Department of State, Corporation Bureau confirmed that [REDACTED], registered as of [REDACTED], was still listed as a corporation in good standing on [REDACTED]. The corporate standing of [REDACTED] was not checked because the State of Delaware charges \$10 per phone inquiry.

consolidated returns are after [REDACTED].²

Under Temp. Reg. § 1.1502-77T(a)(4)(i), there are "alternative agents" which are authorized to sign statute extensions for the group. One of the permissible "alternative agents" which may sign the waiver is the common parent of the group for all or any part of the year for which the waiver applies. Since [REDACTED] and [REDACTED] are proper alternative agents, they should each sign the consents with respect to the years for it was the common parent.

The revenue agent questions whether the current parent, [REDACTED], should be included in the heading (and, presumably, should sign the consent) since it is now the parent of the group. Generally, and as stated above, the common parent of a consolidated group is the sole agent for each subsidiary in the group for the consolidated return year. Treas. Reg. § 1.1502-77(a). Since the common parent is the sole agent for the group, it might seem to follow that the current common parent should be included on the consent. However, under the regulations, the common parent's authority to act as an agent for the group is determined on a year-by-year basis, so for any particular year the entity that is the common parent for that year is the sole agent for procedural matters related to that year. So long as the common parent remains in existence, even if it is no longer the common parent, it remains the agent for the group with respect to the years in which it was the common parent for the group. Southern Pacific Co. v. Commissioner, 84 T.C. 395, 401 (1985). Accordingly, just because there is a new common parent it does not necessarily mean that the "new" parent should sign the consent or, for that matter, would even have the authority to sign the consent.

Under the regulations, [REDACTED] would only have the authority to sign the consent if it qualified as an alternative agent under Temp. Reg. § 1.1502-77T. Permissible alternative

² The applicability of Temp. Reg. § 1.1502-77T to the years at issue in this case serves to distinguish the situation from the one presented in Interlake Corporation v. Commissioner, 112 T.C. 103 (1999). In Interlake, the Tax Court held that the former common parent of a consolidated group did not have the authority to act for the group, at least with respect to the issuance and receipt of tentative refunds, after the former common parent became disaffiliated from the group following a spinoff. The holding in Interlake has contributed to the uncertainty about who has the authority to act for a group when the common parent ceases to be the common parent for a group. However, since Interlake involved years prior to the effective date of the temporary regulations establishing alternative agents, involved a tentative refund adjustment governed by Treas. Reg. § 1.1502-78, and involved a situation in which the common parent was spun off and was no longer affiliated in any way with the group, the holding in Interlake should not cause concern as to [REDACTED] and [REDACTED]'s ability to execute the consents in this case.

agents under Temp. Reg. § 1.1502-77T(a)(4) are as follows:

(i) The common parent of the group for all or any part of the year to which the notice or waiver applies (the category which fits both [REDACTED] and [REDACTED] for their respective years),

(ii) A successor to the former common parent in a transaction to which section 381(a) applies,

(iii) The agent designated by the group under § 1.1502-77(d), or

(iv) If the group remains in existence under § 1.1502-75(d)(2) or (3) (i.e., a downstream merger or a reverse acquisition), the common parent of the group at the time the notice is mailed or the waiver given.

The only way in which [REDACTED] would be a permissible alternative agent would be if the acquisition of [REDACTED] was a reverse acquisition. There are insufficient facts to determine whether there was a reverse acquisition. Further, so long as [REDACTED] and [REDACTED] are available to execute the consents, we do not believe it is advisable or necessary to pursue further factual development to determine whether [REDACTED] may also execute the consents.

In conclusion, [REDACTED] and [REDACTED] should execute the consents, and [REDACTED] should not be listed in the heading nor should [REDACTED] sign the consents.

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. Also, if you have any questions, please call Donna P. Leone at 412-644-3442.

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(Large and Mid-Size Business)

By: _____
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