Office of Chief Counsel
Internal Revenue Service

memorandum

CC:LM:MCT:CLE:PIT:TL-N-1795-01
DPLeone

date: March 26, 2001

to: Kathy Beck
Case Manager

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

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subject: ████ - Consent for ████, ████, ████ and ████

This is in response to your written request for advice regarding the statute extensions for the ████ and ████ income tax years. Separate extension forms are to be solicited for the ████ and the ████ years. This will also address your oral questions concerning statute extensions for ████ and ████.

It is our understanding that you will immediately act upon this advice for ████ and ████ because the taxpayer needs to extend the statute for those years to enable it to timely file refund claims. Without extensions, the statute for ████ and ████ will expire on ████████.

However, for ████ and ████, we request that you delay submitting the consents to the taxpayer for signature until a date which is at least 10 days after the date of this memorandum, and that you contact our office prior to soliciting the consents. This memorandum is being sent to the National Office for 10-day post-review, and we want to make sure that there are no changes recommended before you actually solicit the consents.

DISCLOSURE STATEMENT

This advice constitutes return information subject to I.R.C. § 6103. This advice contains confidential information subject to attorney-client and deliberative process privileges and if prepared in contemplation of litigation, subject to the attorney work product privilege. Accordingly, the I.R.S. recipient of this document may provide it only to those persons whose official tax administration duties with respect to this case require such disclosure. In no event may this document be provided to I.R.S. personnel or other persons beyond those specifically indicated in this statement. This advice may not be disclosed to taxpayers or their representatives.

This advice is not binding on the I.R.S. and is not a final case determination. Such advice is advisory and does not resolve Service position on an issue or provide the basis for closing a case. The determination of the Service in the case is to be made through the exercise of the independent judgment of the office with jurisdiction over the case.

FACTS

filed consolidated returns for through . was the common parent of a group.

In , ( ) formed a subsidiary under Delaware law and capitalized it with $ (New Sub II). Pursuant to a plan of reorganization adopted for purposes of section 368 of the Code, ("Old ") was merged into New Sub II under Delaware law. Sub II survived the merger, and was renamed (which will be referred to as "New "). New remained the wholly-owned subsidiary of . New assumed all of the rights and obligations of Old .

Old stock was exchanged for stock of or cash. Allocations were to be readjusted per tax opinions to make sure that continuity of interest requirements for a reorganization under I.R.C. § 368(a)(1)(A) were met. It was the intent of the parties and the plan of reorganization that this would be a reorganization under I.R.C. § 368(a)(1)(A). The reorganization has not yet been the subject of audit since it only occurred in . However, the Internal Revenue Service at this time has no reason to believe that the merger would fail to qualify as a section 368(a)(1)(A) statutory merger. Further, the agent indicates that this reorganization was not a reverse acquisition.

Old had about - subsidiaries in its group. Upon merger, Old went out of existence and its group terminated. The subsidiaries followed New and became a part of the consolidated group. Old did not designate an agent for the group before it went out of existence.

There was a previous statute extension for , signed by an officer of New on , and by the Internal Revenue Service on . The name of the taxpayer on the Form 872 is: EIN , Successor in interest to EIN . The consent pertains to the amount of the federal income tax due on any return made by or for the above [named] taxpayer. The signature block for the taxpayer just has the corporate name, and a signature by the Assistant Controller.

There have been no partnerships identified for examination for , , or . However, it is our understanding that there is now a requirement to include language extending the TEFRA partnership statutes when soliciting Form 872 consents.

DISCUSSION

The consents must be signed by an individual authorized to act for New [redacted].

New [redacted] must sign the consents <u>both</u> in its capacity as successor to Old [redacted] (in order to extend the statute with respect to [redacted]'s several liability for the consolidated income tax of [redacted] consolidated group for the group's taxable years [redacted] - [redacted]) and in its capacity as an Alternative Agent under Temp. Treas. Reg. sec. 1.1502-77T(a)(4)(ii). New [redacted] must sign as Alternative Agent in order to extend the statute as to the members of the old consolidated group.

Accordingly, we recommend the following language for the Form 872:

> [redacted] (EIN [redacted]), formerly known as [redacted], as successor in interest to, by way of merger with, [redacted] (EIN [redacted]), and as alternative agent for [redacted] (EIN [redacted]) consolidated group*
>
> * This is with respect to the consolidated federal income tax of [redacted] (EIN [redacted]) consolidated group for the tax years ending [redacted], [redacted], [redacted] and [redacted].[1]

Please note that, if the merger of Old [redacted] into New [redacted] did not qualify as a reorganization under section 368(a)(1)(A), and would not qualify as a transaction to which I.R.C. § 381(a) applies under any other provision, then New [redacted] would not be authorized to act as an Alternate Agent to extend the statute for the members of the old consolidated group. Further, there are no other available Alternate Agents available under Temp. Reg. 1.1502-77T(a)(4). Accordingly, if there is substantial doubt that the merger will qualify as a transaction to which I.R.C. § 381(a) applies, we recommend having the remaining members of the old consolidated group to designate an agent under Treas. Reg. § 1.1502-77(d) to execute the statute extensions on behalf of the members of the old consolidated group. The only other alternative would be to have each subsidiary execute its own individual consent.

(b)(5)(AC)

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[1] This language does not expressly state that New [redacted] is signing as successor of Old [redacted] with respect to Old [redacted]'s several liability for the group's tax, but that is implied.

(b)(5)(AC)

We see no harm in securing the proposed 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, for and , nor in securing the proposed Form 2045, Transferee Agreement for .[2] Please note, however, that the surviving corporation to the merger did not expressly assume liability for Old 's debts. Accordingly, while New , the surviving corporation, remains primarily liable as a successor in interest under Delaware law, it may be that New will not be a transferee at law. See, Southern Pacific Transportation Company v. Commissioner, 84 T.C. 367, 373-374 (1985); Missile Systems Corp. of Texas v. Commissioner, T.C. Memo. 1964-212. Therefore, even if the proposed Forms 977 and Form 2045 are signed, it would not be prudent to rely on either transferee liability or the statute extensions to .

We recommend a drafting change to the Form 2045. The Form 2045 should reflect only as the transferor since the affiliates were not transferors. Additionally, the transferee should add "fka " to the corporate name.

Similarly, the Form 977 should add "fka " after the reference to the "new" .

[2] It is our understanding that Forms 977 and 2045 are not needed for the and years because those years are only to be kept open to process refund claims and the Internal Revenue Service is not asserting any deficiency or additional amounts due from Old for those tax years. Additionally, a Form 2045 is not being requested for since one has already been obtained for that year.

Finally, we have a recommendation as to the proposed language for extending the TEFRA statute contained in the consent to be solicited for ▇▇▇.[3] In this case, since no specific TEFRA partnership has been identified, we recommend the following language:

> Without otherwise limiting the applicability of this agreement, this agreement also extends the period of limitations for assessing any tax (including additions to tax and interest) attributable to any partnership items (see § 6231(a)(3)), affected items (see § 6231(a)(5)), computational adjustments (see § 6231(a)(6)), and partnership items converted to non-partnership items (see § 6231(b)) <u>that are determined with respect to any member of ▇▇▇ (EIN ▇▇▇) consolidated group.</u>[4] This agreement extends the period for filing a petition for adjustments under § 6228(b) but only if a timely request for administrative adjustment is filed under § 6227. For partnership items which have converted to non-partnership items, this agreement extends the period for filing a suit for refund or credit under § 6532, but only if a timely claim for refund is filed for such items. In accordance with paragraph (1) above, an assessment attributable to a partnership shall not terminate this agreement for other partnerships or for items not attributable to a partnership. Similarly, an assessment not attributable to a partnership shall not terminate this agreement for items attributable to a partnership. <u>Finally, this agreement is executed by ▇▇▇ (EIN ▇▇▇) not only for the partner(s), but additionally for the other members of the consolidated group who are not partners in the partnership(s) of the partner(s) because the parent and the other members of the group are severally liable for the tax attributable to the partnership items of any member who is a partner in a partnership.</u>

Please call Donna P. Leone at 412-644-3442 if you have any

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[3] This language is properly not included in the consent to be solicited for ▇▇▇ because the TEFRA statute had not been extended on previous consents secured for that tax period.

[4] The underlining is to highlight the difference between the language on the Form 872 submitted for review, and the recommended language. The language should <u>not</u> be underlined on the Form 872 when it is typed.

questions.

RICHARD S. BLOOM
Associate Area Counsel
(Large and Mid-Size Business)

By:_______________________________
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Senior Attorney (LMSB)