

Office of Chief Counsel
Internal Revenue Service

memorandum

CC:LM:MCT:DET:TL-N-6974-00
MTHammoud

date: FEB 06 2001
to: Julie Short, Team Coordinator, Group 1692
from: Associate Area Counsel (LMSB)
Detroit, Michigan

subject: Consent to Extend Statute - Form 872
[REDACTED]

This memorandum supplements and supercedes our memorandum of January 8, 2001, wherein we responded to your request for advice regarding the above subject¹.

DISCLOSURE STATEMENT

This advice constitutes return information subject to I.R.C. § 6103. This advice contains confidential information subject to the attorney-client and deliberative process privileges and if prepared in contemplation of litigation, subject to the attorney work product privilege. Accordingly, the Examination or Appeals 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 Examination, Appeals, or other persons beyond those specifically indicated in this statement. This advice may not be disclosed to the taxpayer(s) involved or their representatives.

¹ Although you also requested our advice regarding the proper party to execute a consent to extend the statute for [REDACTED], a foreign sales corporation, (FSC), you recently informed us you do not have sufficient information on the FSC and asked us to only address your request insofar as [REDACTED], the domestic entity, is concerned.

This advice is not binding on Examination or Appeals 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 judgement of the office with jurisdiction over the case.

ISSUE

Whether [REDACTED], the former parent of a consolidated group, may currently execute a Consent to Extend the Time to Assess Tax, Form 872, for the consolidated group, when it has merged with another corporation and ceased to be the common parent, but remained in existence.

CONCLUSION

Since it remains in existence, [REDACTED], as the old common parent, may continue to act as the agent for the consolidated group, including executing waivers of statute of limitations, for those years it was the common parent. Temp. Reg. § 1.1502-77T(a)(4)(i). Accordingly, the Form 872 should reflect [REDACTED] as the taxpayer, and should be signed by an authorized officer of [REDACTED].

FACTS

The facts are as set forth in your correspondence of [REDACTED], the Stock Purchase Agreement, Agreement and Plan of Merger, and our discussion of [REDACTED].

The taxpayer, [REDACTED], a Delaware corporation, (hereinafter referred to as [REDACTED]), is currently under examination for the [REDACTED] tax years. The statute of limitations for the earliest year under audit expires on [REDACTED].

During the years under audit, [REDACTED] was the common parent of its consolidated group. However, as explained more fully below, in the year [REDACTED], [REDACTED] ceased to be the common parent and became a wholly owned subsidiary as a result of a merger.

Pursuant to the Agreement and Plan of Merger dated as of [REDACTED], [REDACTED], a Delaware corporation and a wholly owned subsidiary of [REDACTED] [REDACTED], also a Delaware corporation, (hereinafter referred to as [REDACTED]), purchased for cash all the issued and outstanding shares of [REDACTED] common stock. [REDACTED], then merged with [REDACTED], and its corporate existence ceased, with [REDACTED] being the surviving entity of the merger. The merger became effective on [REDACTED], with [REDACTED] becoming a wholly owned [REDACTED] and retaining the same Employer Identification Number (EIN).

Section 2.1 of the plan of merger provides that [REDACTED] [REDACTED], as the surviving entity in the merger, "shall possess all the rights, privileges, powers and franchises of a public as well as of a private nature and shall be subject to all of the restrictions, disabilities, duties, debts and obligation of [REDACTED] and [REDACTED] ..." as provided by the General Corporation Law of the State of Delaware.

As a result of the merger, exam requested our assistance regarding the proper party to execute a consent on behalf of [REDACTED], proposing that the consent be executed by [REDACTED].

DISCUSSION AND ANALYSIS

As a general rule, the common parent of a consolidated group 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). Accordingly, the common parent, in its own name, is the proper party to sign consents, including the Form 872 waiver to extend the period of limitations, for all members of the consolidated group.

An exception to this general rule is found in Temp. Reg. § 1.1502-77T, which provides for alternative agents in situations where a corporation that is the common parent of a consolidated group ceases to be the common parent. This temporary regulation applies to waivers of the statute of limitations for taxable years for which the due date (without extensions) of the consolidated return is after September 7, 1988, and thus, applies to the years at issue.

Pursuant to Temp. Reg. § 1.1502-77T(a)(3), a waiver of the statute of limitations relating to a consolidated group that is given by any one or more of the corporations listed in subparagraph (4) of the temporary regulation is deemed to be given by the agent of the group.

Pursuant to subparagraph (4)(i) of the temporary regulation, a "common parent of the group for all or any part of the year to which the ... waiver applies" qualifies as an alternative agent for the group.

Since [REDACTED] was the common parent during the years at issue and is still in existence, it should execute the waiver as an alternative agent pursuant to Temp. Reg. § 1.1502-77T(a)(4)(i). Accordingly, the Form 872 should reflect [REDACTED] as the taxpayer, and should be signed by an authorized officer of [REDACTED].

Please note that [REDACTED] cannot execute the consent, as suggested in your memorandum of [REDACTED], because [REDACTED] purchased [REDACTED] in a taxable stock acquisition. As a result, I.R.C. § 381(a) does not apply, and [REDACTED] cannot be considered an alternative agent under Temp. Reg. § 1.1502-77T(a)(4)(ii).

We have coordinated this advice with our National Office, and it concurs with our conclusion.

We hope the foregoing fully addresses your concerns regarding this issue. Please note and adhere to the notice requirements of I.R.C. § 6501(c)(4)(B) at the time the consent is sought.

Should you have any questions or require further assistance, please feel free to contact the undersigned at (313) 237-6432.

Phoebe Nearing
Associate Area Counsel
(Large and Mid-Size Business)

By: _____
MESO T. HAMMOUD
Attorney (LMSB)

CC: Larry Strong, Team Manager