Office of Chief Counsel
Internal Revenue Service

memorandum

CC:LM:FSH:MAN:2:TL-N-5219-00
VATaverna

date:

to: Territory Manager, Heavy Manufacturing, Construction Transportation
Attn: Revenue Agent Joseph Garafalo

from: Area Counsel (Financial Services & Healthcare)(Area 1 - Manhattan, NY)

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subject: [redacted]
Taxable Year [redacted]
Consent to Extend the Statute of Limitations on Assessment

STATUTE OF LIMITATIONS EXPIRES [redacted]

UIL Nos. 6501.08-00, 6501.08-09, 6501.08-17

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We write in response to your request for advice in the above-captioned matter. Specifically you have requested that we provide you with the appropriate language to use on Form 872 (Consent to Extend the Time to Assess Tax) to extend the statute of limitations on assessment of tax of [redacted] for the taxable year ending [redacted].

The advice given below is subject to post review by the Chief Counsel's national office. Therefore, we ask that you wait ten working days from the date of this memorandum, or until you earlier hear of approval, before acting on this advice.

Issues

1. Which entity is the proper entity to execute Form 872 for [redacted], and its subsidiaries, for the pre-merger tax year?

2. What specific language should be used on the Form 872 for [redacted], and its subsidiaries, for the pre-merger tax year?

3. Which individuals have authority to sign the Form 872 for [redacted], and its subsidiaries, for the pre-merger tax year?

Facts

For the taxable year ending [redacted] ("pre-merger tax year"), [redacted] ("[redacted]") (EIN [redacted]), a Delaware corporation, was the common parent of an affiliated group of corporations and filed consolidated U.S. Corporate Income Tax Returns (Forms 1120) with its affiliates. You are presently conducting an examination of [redacted] and its subsidiaries for the pre-merger tax year.

[redacted] ("[redacted]") is a Delaware corporation. [redacted] is wholly-owned by [redacted] ("[redacted]"), a Delaware corporation. On [redacted], [redacted], [redacted] and [redacted] entered into an Agreement and Plan of Merger ("Agreement").

The agreement provides, in pertinent part:

1. [redacted] shall be merged with and into [redacted]. [redacted] shall continue as the surviving corporation and the separate corporate existence of [redacted] shall cease;

2. Upon the merger becoming effective, all debts, liabilities and duties of [redacted] shall become the debts, liabilities and duties of the surviving corporation; and

3. Each share of [redacted] common stock issued and outstanding on the effective date of this merger shall no longer be outstanding and shall automatically be cancelled and retired and shall cease to exist.

Agreement of Merger, Section 1.1, Section 1.4, and Section 2.1(c). Furthermore, the merger was intended to qualify as a

tax-free reorganization pursuant to I.R.C. § 368(a).

Subsequent to the merger, [redacted] changed its name to [redacted] (EIN [redacted]) ("[redacted]").

Discussion

As a preliminary matter, we recommend that you pay strict attention to the rules set forth in the IRM. Specifically, IRM 4541.1(2) requires use of Letter 907(DO) to solicit the extension, and IRM 4541.1(8) requires use of Letter 929(DO) to return the signed extension to the taxpayer. Dated copies of both letters should be retained in the case file as directed. When the signed extension is received from the taxpayer, the responsible manager should promptly sign and date it in accordance with Treas. Reg. § 301.6501(c)-1(d) and IRM 4541.5(2). The manager must also update the statute of limitations in the continuous case management statute control file and properly annotate Form 895 or equivalent. See IRM 4531.2 and 4534. This includes Form 5348. In the event an extension becomes separated from the file or lost, these other documents would become invaluable to establish the agreement.

Furthermore, Section 3461 of the Restructuring and Reform Act of 1998, codified in I.R.C. § 6501(c)(4)(B), requires the Service to advise taxpayers of their right to refuse to extend the statute of limitations on assessment, or in the alternative to limit an extension to particular issues or for specific periods of time, each time that the Service requests that the taxpayer extend the limitations period. To satisfy this requirement, you may provide Publication 1035, "Extending the Tax Assessment Period," to the taxpayer when you solicit the Form 872. Alternatively, you may advise the taxpayer orally or in some other written form of the I.R.C. § 6501(c)(4)(B) requirement.

Regardless of which method you use to notify the taxpayer, you should document your actions in this regard in the case file. Although section 6501(c)(4)(B) does not provide a sanction or penalty on the Service for failure to comply with the notification requirement, a court might conclude that an extension of the statute of limitations is invalid if the Service did not properly notify the taxpayer. Thus, it is important to document your actions in this regard in the case file.

1. Which entity is the proper entity to execute Form 872 for [redacted], and its subsidiaries, for the pre-merger tax year?

In general, the statute of limitations on assessment expires three years from the date the tax return for such tax is filed.

I.R.C. § 6501(a). Section 6501(c)(4), however, provides an exception to the general three year statute of limitations on assessment. This exception provides that the Secretary and the taxpayer may consent in writing to an agreement to extend the statute of limitations. The Service uses the Form 872 to memorialize such consent.

In the case of a consolidated group, guidance as to the appropriate entity to enter into a consent to extend the statute of limitations on assessment for income tax can be found in the consolidated return regulations. Treas. Regs. § 1.1502-1 et seq. Pursuant to the consolidated return regulations, the common parent is the sole agent for each member of the group, duly authorized to act in its own name in all matters relating to the income 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 been given or executed by each such subsidiary. Treas. Reg. § 1.1502-77(a). Unless there is an agreement to the contrary, an agreement entered into by the common parent extending the time within which an assessment of tax may be made for the consolidated return year shall be applicable to each corporation which was a member of the group during any part of such taxable year. Treas. Reg. § 1.1502-77(c).

The common parent remains the agent for the members of the group for any year during which it was the common parent, whether or not consolidated returns are filed in subsequent years and whether or not one or more subsidiaries have become or have ceased to be members of the group. See Treas. Reg. § 1.1502-77(a); Southern Pacific v. Commissioner, 84 T.C. 395, 401 (1985). Accordingly, as a general rule, the common parent remains the proper party to extend the statute of limitations for income tax for any taxable year for which it was the common parent, as long as it remains in existence.

When a common parent ceases to exist, Treas. Reg. § 1.1502-77(d) provides three rules for determining which corporation has authority to act in matters relating to the tax liability of the members of the group: (1) an entity designated by the old common parent can act as agent for the members of the group; or (2) if the old common parent fails to make such a designation, the surviving members of the old group can designate an agent; or (3) if neither the old parent nor the surviving members make such a designation, the district director may deal with the old group members on an individual basis.[1]

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[1]While th district director no longer exists, the regulations have not been modified to account for the reorganization of the I.R.S. Accordingly, in instances where the

Pursuant to Treas. Reg. § 1.1502-77(d), "[i]f the common parent corporation contemplates dissolution, or is about to be dissolved ... it shall forthwith notify the district director ... and designate, subject to the approval of such district director, another member to act as agent in its place to the same extent and subject to the same conditions and limitations as are applicable to the common parent." Furthermore, subsequent to a merger, only former members of the consolidated group can designate an agent for the consolidated group. Treas. Reg. § 1.1502-77T(d). Here, neither before the merger, nor after the merger, did [redacted] inform the district director of the merger. Therefore, no designation within the scope of Treas. Reg. § 1.1502-77(d) has been made. Accordingly, the old group members may be dealt with on an individual basis. This may not be administratively practical, however, given the number of affiliated subsidiaries of [redacted] for the year at issue. Fortunately, the regulations provide for additional alternatives.

Temp. Treas. Reg. § 1.1502-77T provides alternative agents for the purpose of extending the statute when the common parent of a group ceases to be a common parent. Under this provision, a waiver obtained from any one of several alternative agents is deemed to be given by the agent of the group. Temp. Treas. Reg. § 1.1502-77T(a)(3). The alternative agents listed 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;
>
> (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 Treas. Reg. § 1.1502-77(d);
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> (iv) If the group remains in existence after a reverse acquisition or downstream transfer, the common parent of the group at the time the waiver is given or the notice mailed. Temp. Treas. Reg. § 1.1502-77T(a)(4).

In the subject case, subparagraph (a)(4)(i) does not apply because [redacted] is no longer in existence. Likewise, subparagraph (a)(4)(iii) does not apply because no agent appears to have been designated by the group. Based on the facts provided to our office, subparagraph (a)(4)(iv) does not apply, as there appears to be neither a downstream transfer nor a reverse acquisition within the meaning of Treas. Reg. § 1.1502-75(d)(3).

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district director appears in the regulations, refer to the I.R.M. for the authorized individual to act as the District Director.

Nevertheless, we believe that subparagraph (a)(4)(ii) applies.

Section 381 applies, in part, to an acquisition of assets of a corporation by another corporation in a transfer to which section 361 applies, but only if the transfer is in connection with a reorganization described in subparagraph A, C, D, F or G of section 368(a)(1). We believe that section 368(a)(1)(A)("Type A"), a statutory merger or consolidation, is the type of tax-free reorganization applicable here. In order to qualify as a reorganization under section 368(a)(1)(A) the transaction must be a merger or consolidation pursuant to the corporate laws of the United States or a State or Territory of the District of Columbia. Treas. Reg. § 1.368-2(b). In the instant case, the reorganization appears to have been structured as a Type A reorganization. According to the Articles of Merger, an Agreement and Plan of Merger dated [redacted] was approved by [redacted], the merging corporation, in the manner and by the vote required by its charter and the laws of Delaware and by [redacted], the surviving corporation, in the manner and by the vote required by the laws of Delaware and by its charter. When [redacted] merged into [redacted], all of its outstanding stock was either converted or canceled and [redacted] ceased to exist. Furthermore, Delaware corporate law provides, in part, that as of the date of the merger, the surviving corporation succeeds to and assumes all of the rights and obligations of the extinguished corporation. (See Del. Code Ann. tit. 8, section 259 (1999)).

The Service also holds that where two or more corporations are merged pursuant to state law, with fusion of assets and liabilities, so that the resultant corporation becomes in effect the same taxable entity as its absorbed constituents, a consent (Form 872) executed by the resultant corporation on behalf of an absorbed constituent to extend the period of limitation on assessment of income tax constitutes a valid agreement to extend the time for assessment. Rev. Rul. 59-399, 1959-2 C.B. 488.

In view of the above, we believe that [redacted] (formerly [redacted]), successor to the former common parent [redacted], is the appropriate alternative agent to sign the consent for the pre-merger tax period ending [redacted].

2. What specific language should be used on the Form 872 for [redacted], and its subsidiaries, for the pre-merger tax year?

As a result of [redacted]'s merger with [redacted], [redacted] ceased to exist effective [redacted]. Accordingly, [redacted] is the proper entity to sign the Form 872 executed after [redacted], in a dual capacity: as an alternative agent for [redacted] under Temp. Treas. Reg. §1.1502-77T and as a successor in interest, by way of merger, with [redacted]. The name of the taxpayer

appearing on the Form 872 should be as follows:

"[redacted] (E.I.N. [redacted]) (formerly known as [redacted]), as alternative agent for [redacted] (E.I.N. [redacted]), [redacted] consolidated group, pursuant to Temp. Treas. Reg. § 1.1502-77T, and as successor in interest by way of merger with [redacted] (E.I.N. [redacted])*"

In addition, at the bottom of the page, the following language should be added:

"*This is with respect to the consolidated tax liability of [redacted] (E.I.N. [redacted]) [redacted] consolidated group for the taxable year ending [redacted]."

The E.I.N. of [redacted] (E.I.N. [redacted]) should be entered in the upper right hand corner of the Form 872.

3. Which individuals have authority to sign the Form 872 for [redacted], and its subsidiaries, for the pre-merger tax year?

The Form 872 should be executed by the president, vice-president, treasurer, assistant treasurer, chief accounting officer or any other officer duly authorized to act on behalf of [redacted]. See Rev. Rul. 83-41, 1983-1 C.B. 349, clarified and amplified, Rev. Rul. 84-165, 1984-2 C.B. 305.

Should you have any questions regarding this matter, please contact Viviana Taverna of this office at (212) 264-1595, ext. 211.

ROLAND BARRAL
Area Counsel (Financial Services & Healthcare:Manhattan)

By: _____
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