

Office of Chief Counsel
Internal Revenue Service
memorandum

CC:LM:NR:HOU:2:TL-N-923-01
NGraml

date: August 2, 2001

to: Bud A. Schroeder, Team Manager, LMSB, Natural Resources, Houston, Stop 4102 HOU
Attn: Ralph A. Edwards, Team Coordinator, LMSB Group 1382, Stop 4101 HOU,
1919 Smith St., Houston, Texas 77002

from: Large and Midsize Business Division Counsel, Houston

subject: [REDACTED] ([REDACTED])

(f/k/a [REDACTED])
EIN: [REDACTED]
Taxable Year: none in issue

[REDACTED] ([REDACTED])
EIN: [REDACTED]
Taxable Year: none in issue

[REDACTED] ([REDACTED])
EIN: [REDACTED]
Taxable Year: none in issue

[REDACTED] (f/k/a [REDACTED] [REDACTED])
EIN: [REDACTED]
Taxable Year: none in issue

[REDACTED] ([REDACTED])
(f/k/a [REDACTED] ([REDACTED]))
EIN: [REDACTED]
Taxable Year: none in issue

[REDACTED] (f/k/a [REDACTED])
EIN: [REDACTED]
Taxable Years: [REDACTED], [REDACTED], and [REDACTED] (all of which end on [REDACTED])

¹ This is distinguished from [REDACTED] (f/k/a [REDACTED])
(EIN [REDACTED]) ([REDACTED]), a current taxpayer which is not the subject of this examination.

TIN: [REDACTED]
 Taxable Years: [REDACTED], [REDACTED], and [REDACTED] (all of which end on [REDACTED])
 Statute Expiration: [REDACTED]

You requested our assistance regarding the issues below for this C.E.P. case.

ISSUES

1. What is the proper entity to execute a Form 872-F² on behalf of [REDACTED] for the taxable year [REDACTED], when it was part of [REDACTED]'s ([REDACTED]) consolidated return as a subsidiary and now, [REDACTED] and its former parent, [REDACTED] are both part of [REDACTED]'s consolidated return as subsidiaries?

2. What is the proper entity to execute a Form 872-F on behalf of [REDACTED] for the taxable years [REDACTED] and [REDACTED], when it was part of [REDACTED]'s ([REDACTED]) consolidated return as a subsidiary and now [REDACTED] and its former parent, [REDACTED] ([REDACTED]), are both part of [REDACTED]'s consolidated return as subsidiaries?

CONCLUSION

1. With respect to the first issue, we recommend that Form 872-F be captioned as follows:

[REDACTED] (E.I.N.: [REDACTED]), formerly [REDACTED], common parent of the [REDACTED] consolidated group*

On the bottom of the front page of the Form 872-F, the asterisk should refer to the following:

*This is with respect to the consolidated tax liability of [REDACTED] ([REDACTED] (E.I.N.: [REDACTED]) [REDACTED] consolidated group (which used the name "[REDACTED]" in its [REDACTED] consolidated return), a partner in [REDACTED] ([REDACTED] (E.I.N.: [REDACTED]) for the taxable year ended [REDACTED].

Place the E.I.N. for [REDACTED] in the E.I.N. box on Form 872-F.

² "Consent to Extend the Time to Assess Tax Attributable to Items of a Partnership or S Corporation That Have Converted Under Section 6231(b) of the Internal Revenue Code"

The signature block should be signed as follows:

[REDACTED]

The signature block should be signed by a current officer of [REDACTED]. You should make sure that [REDACTED] is still in existence at the time the Form 872-F is procured from it.

2. With respect to the second issue, we recommend that Form 872-F be captioned as follows:

[REDACTED] (E.I.N.: [REDACTED]), formerly [REDACTED] common parent of the [REDACTED] consolidated group*

On the bottom of the front page of the Form 872-F, the asterisk should refer to the following:

*This is with respect to the consolidated tax liability of [REDACTED] (E.I.N.: [REDACTED]) [REDACTED] consolidated group (which used the name "[REDACTED]" in its [REDACTED] and [REDACTED] consolidated returns), a partner in [REDACTED] (E.I.N.: [REDACTED]) for the taxable years ended [REDACTED] and [REDACTED].

Place the E.I.N. for [REDACTED] in the E.I.N. box on Form 872-F.

The signature block should be signed as follows:

[REDACTED]

The signature block should be signed by a current officer of [REDACTED]. You should make sure that [REDACTED] is still in existence at the time the Form 872-F is procured from it.

The [REDACTED] partnership name and E.I.N. should remain the same and in the same place as in the taxpayer's originally proposed Forms 872-F.

As a final matter, we recommend that you pay strict attention to the rules set forth in the Internal Revenue Manual (IRM). Specifically, IRM 121.2.22.3 requires use of the Letter 907(DO) to solicit the Form 872, and IRM 121.2.22.4.2 requires use of Letter 929(DO) to return the signed Form 872 to the taxpayer. Dated copies of both letters should be retained in the case file as directed. When the signed Form 872 is received from the taxpayer, the authorized manager should promptly sign and date it in accordance with Treas. Reg. § 301.6501(c)-1(d) and

IRM 121.2.22.3. 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 a Form 872 becomes separated from the file or lost, these other documents would become invaluable to establish the agreement.

Further, please note that section 3461 of the Restructuring and Reform Act of 1998, codified in I.R.C. § 6501(c)(4)(B), requires the Internal Revenue 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 Internal Revenue Service requests that the taxpayer extend the limitations period. To satisfy this requirement, you must give Publication 1035, Extending the Tax Assessment Period, to the taxpayer when you solicit the statute extensions.

FACTS

[REDACTED] ([REDACTED]), a TEFRA partnership, was under examination for [REDACTED], [REDACTED], [REDACTED], and [REDACTED]. [REDACTED] owned [REDACTED] percent of [REDACTED] as a partner during [REDACTED], [REDACTED], and [REDACTED]. On [REDACTED], Appeals agreed to a [REDACTED] adjustment for certain partners, including [REDACTED], for [REDACTED], [REDACTED], and [REDACTED]. [REDACTED] is currently a first tier subsidiary of [REDACTED], and is part of [REDACTED]'s consolidated return.

The flow through adjustments resulted in an overpayment due [REDACTED] for [REDACTED] and deficiencies for [REDACTED] and [REDACTED]. The [REDACTED] overpayment exceeded the sum of the deficiencies and qualifies for Joint Committee status. The Joint Committee requires at least one year remaining on the statute for assessment in order to consider the overpayments. The Service must include the executed consents to reflect this time period in the proposal that it sends to the Joint Committee. On or about July 6, 2001, the Service sent a package of documents to the Joint Committee which included two executed consents drafted by the taxpayer. These Forms 872-F provide the following relevant information numbered in accordance to the issues, above.

1. For the taxable year ending [REDACTED], for TIN [REDACTED] the name on Form 872-F is:

[REDACTED] (fka: [REDACTED]) as common parent for [REDACTED] (EIN: [REDACTED]) (fka: [REDACTED]), as common parent for [REDACTED] (fka: [REDACTED]) (EIN: [REDACTED]), ... of partner (Shareholder) in [REDACTED] (EIN: [REDACTED])

2. For the taxable years ending [REDACTED] and [REDACTED] for [REDACTED] the name on Form 872-F is:

³ The Appeals settlement agreement reflects no adjustment for [REDACTED] for [REDACTED]

██████████ (fka: ██████████) as
common parent for ██████████ (fka: ██████████
██████████) (EIN: ██████████), . . . of partner (Shareholder) in ██████████
██████████ (EIN: ██████████)

The Service seeks our opinion regarding whether the above consents are properly stylized. If our opinion differs from the above, the Service requests an expedited advisory opinion so that the parties can execute new consents. Below are the known relevant facts:

██████████. During ██████████, the first year in issue, ██████████, then known as ██████████ was a subsidiary of ██████████ (██████████) (now known as ██████████) and was part of the latter's consolidated return for that year. The consolidated return parent was ██████████ (██████████). The name on the return was ██████████ ██████████.

██████████ The following sequence of events occurred:

1. ██████████ (██████████) formed a new subsidiary, ██████████ (██████████).
2. ██████████ formed a new subsidiary, ██████████ (██████████).⁴
3. ██████████ merged into ██████████ (██████████) (now known as ██████████ ██████████), and kept the ██████████ EIN. ██████████ survived.
4. ██████████ changed its name to ██████████ (██████████) (now known as ██████████ ██████████ or "██████████") and kept the same EIN. ██████████ survived.
5. For ██████████ and ██████████, ██████████ (██████████) was the common parent of ██████████ ██████████ and ██████████ (now known as ██████████). ██████████ was a first tier subsidiary of ██████████, and ██████████ was a second tier subsidiary of ██████████ ██████████ was part of ██████████'s consolidated returns for ██████████ and ██████████. The name on the consolidated return was ██████████ (with a different EIN than on the ██████████ return).

██████████ and ██████████ In ██████████ spun-off its industrial and shipbuilding businesses to its shareholders. One day later, ██████████ acquired what remained of ██████████ by acquiring, in an I.R.C. § 368(a)(1)(B) reorganization,⁵ at least 80 percent of the total combined voting

⁴ The details of the reorganization relating to ██████████ and ██████████ are provided in the Agreement and Plan of Merger, dated ██████████ attached as Exhibit A.

⁵ This means the acquisition of one corporation, in exchange solely for all or a part of its voting stock (or in exchange solely for all or part of the voting stock of a corporation which is in control of the acquiring corporation), of stock of another corporation if, immediately after the

power of all classes of stock and at least 80 percent of the total number of shares in all other classes of stock. [REDACTED] then changed [REDACTED]'s name to [REDACTED] and kept the same [REDACTED]

For [REDACTED] and [REDACTED], [REDACTED] filed a consolidated return as the common parent and did not include [REDACTED] in the consolidated return. Because [REDACTED] owned less than [REDACTED] percent of the value of all classes of [REDACTED] stock,⁶ [REDACTED] filed consolidated returns as a common parent, separate from [REDACTED],⁷ which included its subsidiary, [REDACTED]. [REDACTED] filed in the name of [REDACTED]

Effective [REDACTED], [REDACTED] merged into [REDACTED] and [REDACTED] ceased to exist. [REDACTED] formed a new subsidiary, [REDACTED]. [REDACTED] formed a new subsidiary, [REDACTED] ([REDACTED]). [REDACTED] merged into [REDACTED]. [REDACTED] survived. [REDACTED] shareholders exchanged their stock for [REDACTED] stock. [REDACTED] became the common parent of [REDACTED], filed the [REDACTED] consolidated return, and [REDACTED] continued to exist as [REDACTED]'s subsidiary. As a result of this reorganization, [REDACTED] shareholders ended up owning [REDACTED] percent of [REDACTED]'s outstanding stock. [REDACTED] became a subsidiary of [REDACTED], but [REDACTED] filed a separate consolidated return for [REDACTED].

[REDACTED] made a very large capital contribution of assets to [REDACTED] in exchange for additional [REDACTED] common stock so that the value of [REDACTED]'s total common stock ownership in [REDACTED] was more than the total stock value of 80 percent of [REDACTED] and [REDACTED] was and still are [REDACTED]'s subsidiaries and were included in [REDACTED]'s consolidated income tax return for [REDACTED]. Both [REDACTED] and [REDACTED] continue to exist.

[REDACTED]. [REDACTED], a subsidiary of [REDACTED], merged into [REDACTED] [REDACTED], which owns all of

acquisition, the acquiring corporation has control of such other corporation (whether or not such acquiring corporation had control immediately before the acquisition). I.R.C. § 368(a)(1)(B).

⁶ I.R.C. § 1504 requires the common parent to own 80 percent total voting power of the stock and 80 percent of the total stock value in a corporation to include the corporation in the common parent's affiliated group.

⁷ I.R.C. § 368(c) defines "control" as stock ownership in at least 80 percent of the total combined voting power of all classes of stock entitled to vote and at least 80 percent of the total number of shares of all other classes of stock in the corporation. I.R.C. § 1504(a)(2) defines an affiliated group to include stock ownership if such group possesses at least 80 percent of the total voting power of the stock in such corporation and has a value equal to at least 80 percent of the total value of the stock of such corporation. [REDACTED] had outstanding voting preferred stock, owned by the public, that constituted less than 20 percent of the vote, but more than 20 percent of the value. Accordingly, the control requirement of I.R.C. § 368(c) was met because [REDACTED] owned at least 80 percent of the vote and 80 percent of all other classes of stock. The voting and value tests of I.R.C. § 1504 were not met, however, because [REDACTED] owned less than 80 percent of the value in all classes of [REDACTED] stock.

█'s outstanding stock, changed its name to █ but kept █'s previous EIN. Under Delaware corporation law, the former █ ceased to exist and █ succeeded to the former █'s liabilities. Currently, both █ and █ are first tier subsidiaries of █⁸ █ is a first tier subsidiary of █

LAW AND ANALYSIS

Treas. Reg. § 1.1502-77(a) generally provides that the common parent, for all purposes (except those not applicable herein), shall be the sole agent for each subsidiary in the group, duly authorized to act in its own name in all matters relating to the tax liability for the consolidated return year. Except as provided in the preceding sentence, no subsidiary shall have authority to act for or to represent itself in any such matter. In the case of a subsidiary that previously filed as a common parent, we assume that the referenced exception allows such a subsidiary to act as the sole agent for the year when it previously filed as a common parent. A "common parent" is a corporation that files income tax returns on a consolidated basis for an affiliated group of corporations. See L.R.C. § 1504(a); Rev. Proc. 99-9, 1999-1 C.B. 278. Of course, if the common parent ceases to exist, its authority to act for the group terminates. See Interlake Corp. v. Commissioner, 112 T.C. 103 (1999).

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 (1) to each corporation which was a member of the group during any part of such taxable year; and (2) to each corporation the income of which was included in the consolidated return for such taxable year, notwithstanding that the tax liability of any such corporation is subsequently computed on the basis of a separate return under Treas. Reg. § 1.1502-75. This regulation seems to say that the current common parent's execution of a Form 872 -F applies only to the members that filed in its affiliated group, not to a current member that filed as a common parent of another affiliated group for the taxable year in issue.

In Southern Pacific Co. v. Commissioner, 84 T.C. 395 (1985), the Tax court said that, for any given year in which a consolidated return is filed, the common parent for that particular year is thereafter the sole agent with respect to any procedural matter that may arise in connection with the group's tax liability for that year. Id. at 401.

Moreover, regarding the █ taxable year, the temporary regulations provide that waiver of the statute of limitations is deemed given by the group's agent when it is given by the corporation that was the common parent for the year to which the waiver applies. Treas. Reg. § 1.1502-77T(a)(4)(i) (effective for taxable years with a consolidated return original due date after September 7, 1998).

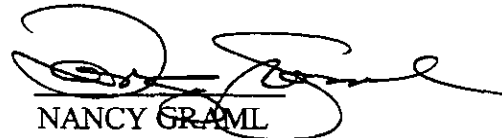
⁸ In Priv. Ltr. Rul. 98-48-029 (Aug. 28, 1998), the taxpayer proposed that, on or about █, █ would sell its █ stock to █ for fair market value consideration. The taxpayer confirms that this transaction took place.

Both former common parents herein, [REDACTED] ([REDACTED]) and [REDACTED] ([REDACTED]), continue to survive as [REDACTED] subsidiaries. Applying Treas. Reg. § 1.1502-77 and the Southern Pacific rule to the facts yields a conclusion that these former common parents would sign the Form 872-F as [REDACTED]'s sole agents for the applicable years when [REDACTED] was part of their consolidated returns.

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. If you have any questions, please call me at (281) 721-7358.

BERNARD B. NELSON
Area Counsel (Natural
Resources: Houston)

By:


NANCY GRAML
Senior Attorney (LMSB)