

Office of Chief Counsel
Internal Revenue Service

memorandum

CC:MSR:ILD:CHI:TL-N-3308-00
RAVillageliu

date: June 20, 2000

to: Chief, Examination Division, Illinois District
Attention: Kris Silkaitis, Team Coordinator, LMSB:1352

from: District Counsel, Illinois District

subject: AO: Request for Advice on Extension of Statute of Limitations
Taxpayer: [REDACTED]
Year ended [REDACTED]
S/L expires: [REDACTED]

Non-docketed large case opinion: CEP.¹

Caption

The taxpayer's Form 1120, U.S. Corporation Income Tax Return, for the taxable year beginning on [REDACTED] and ending on [REDACTED] was a consolidated return with its attached Form 851, Affiliations Schedule. It was simply captioned as "[REDACTED]." It was not captioned "[REDACTED]" or any such. We recommend that on the front of the Form 872, on the line designated taxpayer, you type the name

¹A copy of this opinion is being sent to the national office for coordination purposes. This opinion is based on legal advice which the undersigned has received from the national office in somewhat similar cases in the past and general training materials and on our own research and experience. However, this whole area of the law can be deceptive. It presents more complicated issues and practical solutions than a neophyte would expect. In a real sense, the area can be as complicated as the subject of corporate reorganizations, because only an accurate understanding of what remains after a corporate reorganization can provide a correct answer, as to who is left to sign a consent for a corporate group. Therefore, if the national office chooses to post-review this opinion, modifications to this opinion may result. If this occurs, you will be notified. We may do this by a simple telephone call or by supplemental memorandum, in order to provide you with timely advice, in an efficient manner. Absent, notification of any such modifications, you may consider this opinion to be final.

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of the taxpayer, as follows²:

_____* successor-in-interest
to the taxpayer _____**

* _____ (EIN: _____), a Delaware corporation, formerly known as _____ (EIN: _____), a Delaware corporation, formerly known as _____ (EIN: _____), a Delaware corporation, formerly known as _____ (EIN: _____), a Delaware corporation, formerly known as _____ (EIN: _____), a Delaware corporation.

** _____ (EIN: _____), as successor-in-interest to _____ (EIN: _____), and as alternative agent under Treas. Reg. § 1.1502-77T(a)(4), for the members of the _____ (EIN: _____) consolidated return group, for the taxable year ended _____.

²There is more than one legally proper way to caption a Form 872 using an alternative agent. One method is, as follows: On the front of the Form 872, on the line designated taxpayer, type the name of the consolidated group exactly as it appears on the consolidated return for the year for which the consent is being signed.

"YYY Corporation (EIN of YYY Corporation) and Subsidiaries consolidated group."

On the second page of the Form 872, just under the signature line, type the name of the individual authorized to execute the Form 872, her/his title, and the name of the corporation for which s/he is signing (the corporation of which s/he is a current officer).

SUE SMITH
Vice President
ZZZ Corporation, as alternative agent for YYY Corporation and Subsidiaries consolidated group.

Given the fact that in our instant case "YYY Corporation" (_____) no longer exists and the fact that the current agent and common parent has a history of name changes, we have slightly modified the standard language to include the "successor-in-interest" characterization and the EIN information.

Signature for the Taxpayer

On the second page of the Form 872 just under the signature line, type the name of the individual authorized to execute the Form 872, her/his title, and the name of the corporation for which s/he is signing [the corporation of which he is a current officer, (here [REDACTED])].

SUE SMITH

Title

[REDACTED], as
alternative agent for [REDACTED]
[REDACTED] consolidated group

Authority to sign for the Taxpayer

The key to executing a proper consent to extend the period of limitations for a corporation is proper authorization. You must ascertain that this authority exists prior to having the Service accept the document, by signing it. We highly recommend that you obtain documentation of the officer's authority. I.R.C. §6062 provides, generally, that a corporation's income tax returns must be signed by the president, vice-president, treasurer, assistant treasurer, chief accounting officer or any other officer duly authorized to act. Accordingly, any such officer may sign a consent, whether or not that person was the same individual who signed the return. Rev. Rul. 83-1 C.B. 349.

The language that you suggested to cover the interests held in entities that are subject to the TEFRA unified audit and litigation procedures is essentially correct. We only noted one mistake, namely, in one place where the language should read, "in accordance with paragraph (1)," what was typed instead was "in accordance with paragraph (2)". The complete and correct language to be used in the Form 872 is, as follows³:

³We have run across other versions of this paragraph, which also appear to be legally sufficient. For example, in a September 9, 1999 memorandum for Regional Chief Compliance Officers, the following version appears.

"With regard to interests held in entities that are subject to the TEFRA unified audit and litigation procedures, and without otherwise limiting the applicability of this agreement, this agreement also

"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 section 6231(a)(3)), affected items (see section 6231(a)(5)), computational adjustments (see section 6231(a)(6)), and partnership items converted to nonpartnership items (see section 6231(b)). This agreement extends the period for filing a petition for adjustment under section 6228(b), but only if a timely request for administrative adjustment is filed under section 6227. For partnership items which have been converted to nonpartnership items, this agreement extends the period for filing a suit for refund or credit under section 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."

extends the period of limitations for assessing any tax (including additions to tax and interest) attributable to any partnership items, affected items, computational adjustments, and partnership items converted to nonpartnership items. This agreement extends the period for filing a request for administrative adjustment and the period for filing a petition regarding such a request. For partnership items that have converted to nonpartnership items, this agreement extends the period for filing a suit for refund or credit. 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."

Although we can not discern any legal infirmities with this alternative version, we recommend that you use the standard language, set forth in the body of this opinion, instead. It has been approved by our national office in similar cases, in the past.

Signature and Authority to sign for the Service

We understand that the Commissioner's new Large and Mid-Size Business Division stands up on June 4, 2000. You have correctly determined that under Delegation Order 42, your Director of Field Operations will be the signatory of the Form 872. The Team Manager will actually sign the document. If the new forms 872 are not available, the old form will indicate the title as District Director. You have correctly concluded that a pen and ink change should be made to Director of Field Operations until new forms are printed.

Forms 977 and 2045

In this case there is no need for Forms 977 or 2045. [REDACTED], the successor-in-interest, was a subsidiary consolidated return group member for the year ended [REDACTED]. As such it is already primarily liable for any tax liability for this year, that may be determined against the group. All members of the consolidated return group are jointly and severally liable for the consolidated return group liability.

Entering into a Form 2045, Transferee Liability Agreement, in this case would just add confusion, to an otherwise clear situation. Form 2045, by its own terms, provides that the Service, in consideration for the execution of the Form 2045, foregoes issuing a notice of deficiency against the transferor. Where the transferor taxpayer no longer exists or is insolvent, this is not much of a concession. The reason you try to assert and collect from a transferee is because the primarily liable taxpayer can no longer pay them. [REDACTED] no longer exists, but the other consolidated return group members remain in existence, and they are not shell corporations.

As noted, the express consideration flowing from the Service to a transferee, to support the Form 2045 Transferee Liability agreement, is not issuing a notice of deficiency to the transferor. Consequently, entering into a Form 2045 in this case would allow the taxpayer to argue that the Service is no longer free to issue a notice of deficiency to the consolidated return group taxpayer. Under that argument the government would be left only with the right to issue a notice of transferee liability against [REDACTED]. Under that argument, the other consolidated group members would escape their joint and several liability for the group. This would be an absurd result.

In our opinion, that argument is not convincing. The Service can argue that the only consideration for entering into the Form 2045 was foregoing issuing a notice of deficiency against the

actual transferor, [REDACTED], only, and that no concessions were made with respect to the other members. The Service would argue that it remains free to issue a notice of deficiency against the remaining consolidated return group members.

Although to us it seems very clear that the taxpayer is the group and that the Service does not give up its right to issue a notice of deficiency to any members of the group other than [REDACTED], by entering into a Form 2045, we see no need to create any legal clouds. In the instant case, where we the Service can collect from the primarily liable taxpayers and where the presumptive transferee [REDACTED], is already primarily liable, being a member of the consolidated return group, the Service should not seek a Form 2045.

Additionally, if contrary to our analysis of the case, if it ever became necessary to establish [REDACTED] transferee (as opposed to primary) liability, this could be readily accomplished without a Form 2045. [REDACTED] is a successor-in-interest by merger to [REDACTED]. As such, its transferee liability at law, should be easily established pursuant to Delaware merger state law principles.

Similarly, the Service also does not need a Form 977, to extend the statute to assess transferee liability. There is no practical need to extend the transferee statute by a Form 977. The transferee statute will already have been extended, as a practical matter, by the 872 extension. The statute of limitations for assessing transferee liability lasts an additional year after the statute against the transferor lapses, by virtue of I.R.C. §6901, without a need for a signed Form 977 extension. Therefore, we recommend that you do not seek either a Form 977 or a Form 2045 in this case.

Conclusion

This concludes our legal opinion. We are closing our legal file with regard to this particular matter. As stated before, if modifications are made, we will so inform you, orally or by memorandum, as appropriate. If you have any questions, please contact the undersigned at (312) 886-9225, extension 308.

RICHARD A. WITKOWSKI
District Counsel

By:


ROGELIO A. VILLAGELINO

Special Litigation Assistant

Enclosures: None.

CC:District Counsel, Illinois District

CC:Assistant Regional Counsel, Large Case, MS (Chicago)

CC:Assistant Regional Counsel, MS (Dallas)

CC:DOM:FS (2 copies). National Office is to also receive copies of the following:

1. Copy of penciled corporate diagram.
2. Stock Purchase Agreement dated [REDACTED] between [REDACTED] and [REDACTED] regarding the stock of [REDACTED].
3. Amendment to the Stock Purchase Agreement dated [REDACTED]
4. State of Delaware Merger Certificate dated [REDACTED]. Consent of sole shareholder. Certificate of ownership and merger.
5. Certificate of amendment of certificate of incorporation changing name of [REDACTED] to [REDACTED]
6. State of Delaware merger certificate dated [REDACTED] for [REDACTED] and [REDACTED], Minutes dated [REDACTED], approving merger, and Plan and Agreement of Merger.
7. State of Delaware name change Certificate for [REDACTED] to [REDACTED], certificate of amendment of certificate of incorporation, and consent of Bd. of Directors.
8. Page 1 of the [REDACTED] tax return of [REDACTED].
9. Form 851, Affiliation Schedule, from the [REDACTED] tax return, and
10. Page 1 of the [REDACTED] tax return of [REDACTED].

a: [REDACTED]