

Office of Chief Counsel
Internal Revenue Service

memorandum

CC:LM:FSH:BRK:TL-N-1122-01
REGole

date: **APR 10 2001**

to: Charles Utter
Territory Manager (Natural Resources)
Attn: Gerald Werkmann, Team Manager (Group 1464)

from: Jody Tancer
Associate Area Counsel (CC:LM:FSH:BRK)

subject:

EIN: [REDACTED]
UIL: 1502.77-00

Earliest Statute of Limitations: [REDACTED] (Forms 941 for the period ended [REDACTED])

This is in further response to your request for advice as to who is the proper party to execute Forms 872 and SS-10 (Consent to Extend the Time to Assess Tax) for the subject taxpayer. This memorandum should not be cited as precedent. Under routine Counsel procedures, we forwarded this case to our National Office for their review of the conclusions rendered in our memorandum dated March 30, 2001.

We have been advised that the National Office generally concurs with the conclusions reached by our office with respect to the language for the proposed Forms 872 for [REDACTED] for the period ended [REDACTED] and [REDACTED] for the period ended [REDACTED] and [REDACTED]. As we previously indicated, you should ensure that the signing officer is signing in the capacity of an authorized officer of the parent corporation and as an authorized officer or attorney-in-fact for each and all of the listed subsidiaries.

We note that you have not provided our office with a copy of a proposed Form 872 and accompanying rider for the separate corporate Forms 1120 filed after the [REDACTED] final consolidated return. Since there is no imminent statute of limitations, we will be glad to review the Forms 872 at a later date.

The National Office recommends the following proposed language for the caption of the proposed Form SS-10:

"██████████, on its own behalf and as the parent of the entities listed on the attached rider."

Please ensure:

- a. that the entities that are being audited for ██████ employment tax liabilities are all currently subsidiaries under ██████. If any are not, those entities will have to sign a separate SS-10; and
- b. that the SS-10 specifically shows that the person signing for the parent and subsidiaries is signing in the capacity of an authorized officer of the parent corporation and as an authorized officer or attorney-in-fact for each and all of the listed subsidiaries.

Also the taxpayer identification number and corporate name should be inserted on the Form SS-10. The corporate name should appear exactly as it appears in the caption.

In addition, you did not request our assistance in preparing language for the proper execution of Forms 872 and SS-10 for the ████████████████████. However, by facsimile dated April 2, 2001 you also forwarded proposed Forms 872 and SS-10 for those entities. By memorandum dated July 14, 2000, August 3, 2000 and August 30, 2000 our office rendered assistance with respect to the execution of Forms 872 for ████████████████████ for the years ██████ and ██████. The proposed Form 872 conforms with the advice previously rendered to you. Therefore, the Form 872 is proper assuming that no further corporate restructuring has taken place since our advice was rendered. In addition, we have verified with our National Office that the Form SS-10 is likewise correct assuming that the same corporate structure is in place. If any ████████████████████. subsidiaries have changed since ██████ separate Forms SS-10 would be required for those entities.

You are reminded of your obligation to advise the taxpayer of its rights under I.R.C. § 6501(c). To satisfy this requirement, you may provide Pub. 1035, "Extending the Tax Assessment Period," to the taxpayer when you solicit the Form 872/SS-10. Alternatively, you may advise the taxpayer orally or in some other written form of the IRC Section 6501 requirement (such as Letter 907). Regardless of which method you use to notify the taxpayer, you should document your actions in this regard in the case file.

As a final note, we wanted to clarify that the rider to the form 872 and/or SS-10 should indicate the type of tax and the period covered.

Any questions regarding this opinion should be referred to
Rose Gole at (516) 688-1702.

JODY TANCER
Associate Area Counsel
Brooklyn

By: *Rose E. Gole*
ROSE E. GOLE
Attorney

Attachment: [REDACTED] Prospectus

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subject:

EIN: [REDACTED]
UIL: 1502.77-00

Earliest Statute of Limitations: [REDACTED] (Forms 941 for the period ended [REDACTED])

This is in response to your request of February 16, 2001 for assistance in determining the proper party and language to be used for executing statute extensions for the corporate income tax and employment tax liabilities of the above-referenced consolidated taxpayer.

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 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 taxpayers or their representatives.

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 judgment of the office with jurisdiction over the case.

ISSUES

1. Who is the proper party to execute Forms 872 for [REDACTED] [REDACTED], for the period ended [REDACTED]?
2. Who is the proper party to execute Forms 872 for [REDACTED] [REDACTED] for the period ended [REDACTED] and the final consolidated return on [REDACTED]?
3. How should Forms 872 and Forms SS-10 be executed for the members of the [REDACTED] affiliated group that filed separate returns for the periods ended [REDACTED] and [REDACTED]?

CONCLUSION

1. [REDACTED] is the alternative agent of the consolidated group for the year ended [REDACTED]. An authorized officer of [REDACTED] is the proper party to execute a Form 872 for the period ended [REDACTED].
2. [REDACTED] is the alternative agent of the consolidated group for the final consolidated year ended [REDACTED]. Furthermore, we recommend soliciting a consent from [REDACTED] as to the period ended [REDACTED].
3. A single Form 872 or SS-10 can be obtained from an authorized officer of [REDACTED], formerly [REDACTED], formerly [REDACTED], as common parent of [REDACTED] and [REDACTED]. All subsidiaries should be identified in an attached rider. the Consent and Rider should both be executed by an authorized officer of each of the identified subsidiaries.

FACTS

The facts, as we understand them to be, are as follows.
 [REDACTED], "[REDACTED]" was in the business of providing [REDACTED] needs to customers in [REDACTED], including [REDACTED], and [REDACTED]. [REDACTED] serviced approximately [REDACTED] people.

reorganization:

underwent a corporate restructuring prior to and in anticipation of a planned merger with the . The goal of the reorganization was to establish a parent holding company and subsidiary operating companies. established a new corporation, , on under the laws of . The corporation initially had no assets and all outstanding shares of stock were owned by . As of shares were exchanged for shares of . One share of common stock was exchanged for one share of stock. became the parent holding company of continued to operate its business as a subsidiary of . It was anticipated that other subsidiaries would be established as direct subsidiaries of . As a result of the restructuring became a wholly owned subsidiary of the holding company, . obtained a legal opinion from that:

The consummation of the share exchange will not result in the termination of the existence of the affiliated group of corporations of which has been the common parent, and will be included in such affiliated group of corporations of which will become the new common parent.

On , a wholly owned subsidiary of , became the parent of the consolidated group. and subsidiaries filed a Form 1120 for the period ending .

Merger with

The , " , provided service to more than customers throughout and in , as well as the of county, .

As of entered into a Plan of Exchange and Merger with . It was intended that would become the parent company, and would be substituted for when the merger was to be consummated. (The Prospectus, at page ; Merger Agreement at page). On was incorporated under business law. On , amended its name to . On , pursuant to the earlier plan of merger, shares were exchanged for shares in (), the parent company of the combination. The ratio of the share exchange was

dependent on the timing of a separate merger between [REDACTED] and the [REDACTED], which is discussed below. Outstanding shares of [REDACTED] preferred stock were unchanged by this transaction.

[REDACTED] created a subsidiary [REDACTED]. [REDACTED] merged with [REDACTED]. [REDACTED] was the surviving corporation.

On [REDACTED], [REDACTED] merged with the [REDACTED] to form [REDACTED]. (EIN: [REDACTED]).

[REDACTED] attached a statement to its form 1120, Corporate Income Tax Return for the period ended [REDACTED], identified as a "Ratable Allocation under IRS Reg. 1.1502-76(b)(2)(ii)". The statement states in pertinent part that [REDACTED] is a newly formed corporation. [REDACTED] became the common parent of the new affiliated group. [REDACTED] elected not to file a consolidated return for the new affiliated group. It further states that [REDACTED] filed a final consolidated return for the period [REDACTED] through [REDACTED]. Each member of the consolidated group filed separate federal income tax returns for the period [REDACTED] to [REDACTED] to complete the fiscal period. Each member of the former [REDACTED] further requested a change to a [REDACTED] year end to conform with [REDACTED]'s year end. Effective [REDACTED], [REDACTED] changed its name to [REDACTED] doing business as [REDACTED]. (Form 424B3).

DISCUSSION

Issue 1: Who is the proper party to execute Forms 872 for [REDACTED], for the period ended [REDACTED]?

The common parent is the highest tier domestic corporation. I.R.C. § 1504(a). Generally, the common parent, in its own name, is the sole agent for each subsidiary in the group, duly authorized to act in all matters relating to the tax liability for the consolidated return year. Treas. Reg. § 1.1502-77(a); Craigie, Inc. v. Commissioner, 84 T.C. 466 (1985). The common parent in its name may execute waivers which are binding upon each of its subsidiaries. Generally the common parent is the proper party to execute consents including Forms 872 on behalf of all members of the consolidated group. Where the common parent remains in existence, even if it is no longer the common parent, it remains the agent for the group with regard to years in which it was the common parent of the group. Southern Pacific Co. v. Commissioner, 84 T.C. 395, 401 (1985). [REDACTED] was the common parent

of the consolidated group until [REDACTED], at which time [REDACTED] purchased the outstanding common shares of [REDACTED] and became the parent for the consolidated group. It appears that [REDACTED] survived the merger.

Your request for advice asks how the Service should frame a consent as to [REDACTED]'s consolidated liability. However, based on the facts presented, it appears that the Service should protect the statute of limitations as to [REDACTED] consolidated liabilities for the period ended [REDACTED], the date of [REDACTED] reorganization into [REDACTED].

If [REDACTED] remains in existence, but ceases to be the common parent of the consolidated group, it is still authorized to act as an alternative agent for purposes of executing a Form 872 to extend the statute of limitations for the year ended [REDACTED] with respect to the consolidated liabilities of [REDACTED] and its subsidiaries for the period between [REDACTED] and [REDACTED].

This authority is pursuant to Temp. Treas. Reg. § 1.1502-77T.

Temp. Treas Reg. § 1.1502-77T(a) (4) provides:

(a) *General rules*--(1) *Scope*. This section applies if the corporation that is the common parent of the group ceases to be the common parent, whether or not the group remains in existence under § 1.1502-75(d).

(2) *Notice of deficiency*. A notice of deficiency mailed to any one or more corporations referred to in paragraph (a) (4) of this section is deemed for purposes of § 1.1502-77 to be mailed to the agent of the group. If the group has designated an agent that has been approved by the district director under § 1.1502-77(d), a notice of deficiency shall be mailed to that designated agent in addition to any other corporation referred to in paragraph (a) (4) of this section. However, failure by the district director to mail a notice of deficiency to that designated agent shall not invalidate the notice of deficiency mailed to any other corporation referred to in paragraph (a) (4) of this section.

(3) *Waiver of statute of limitations*. A waiver of the statute of limitations with respect to the group given by any one or more corporations referred to in paragraph (a) (4) of this section is deemed to be given by the agent of the group.

(4) *Alternative agents*. The corporations referred to in paragraph (a) (2) and (3) of this section are--

- (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 § 1.1502-77(d), or
- (iv) If the group remains in existence under § 1.1502-75(d)(2) or (3), the common parent of the group at the time the notice is mailed or the waiver given.

Therefore [REDACTED] may be an authorized agent for purposes of executing a Form 872 even if it is no longer the common parent.

A corporation's income tax return must be signed by a duly authorized officer, including the president, vice-president, treasurer, assistant treasurer, or chief accounting officer. I.R.C. § 6062. The signature of an officer on a return is prima facie evidence that he is authorized to sign the return. I.R.C. § 6062. The Service applies these rules to the execution of consents. Rev. Rul. 83-41; Rev. Rul. 84-165. An authorized officer should execute the Form 872 by signing his name and his official title at [REDACTED].

The caption on the Form 872 should read "[REDACTED] Company and Subsidiaries, as the former common parent and alternative agent of [REDACTED] company and subsidiaries" In addition, you should insert the following statement at the bottom of the Form 872 by placing an asterisk (*) after the word subsidiaries in the caption:

This is with respect to the consolidated return liability of [REDACTED] Company and Subsidiaries (EIN: [REDACTED]) for the consolidated group's liabilities for the period ended [REDACTED].

The signature block should specify [REDACTED] and the title of the current officer authorized to execute the form 872.

Issue 2: Who is the proper party to execute Forms 872 for [REDACTED] [REDACTED] for the period ended [REDACTED] and the final consolidated return on [REDACTED]?

[REDACTED] and subsidiaries filed a Form 1120 for the period ended [REDACTED] and a final consolidated return for the period ended [REDACTED]. Unless the [REDACTED]

return relates to the reorganization, it appears to our office that the liabilities for the period [REDACTED] through [REDACTED] relate to the liabilities of [REDACTED]. However, since [REDACTED] filed a Form 1120 on behalf of the new consolidated group, we recommend that you protect the statute of limitations with respect to the [REDACTED] for the period ended [REDACTED].

[REDACTED] remained in existence it is authorized to act as an alternative agent for purposes of executing a Form 872 to extend the statute of limitations for the year ended [REDACTED] with respect to the consolidated liabilities of [REDACTED] and its subsidiaries for the period ended [REDACTED] and [REDACTED].

The caption on the Form 872 should read "[REDACTED] and Subsidiaries, as the former common parent and alternative agent of [REDACTED] and Consolidated subsidiaries" In addition, you should insert the following statement at the bottom of the Form 872 by placing an asterisk (*) after the word subsidiaries in the caption:

This is with respect to the consolidated return liability of [REDACTED] and Subsidiaries (EIN:) for the consolidated group's liabilities for the periods ended [REDACTED] and [REDACTED].

The signature block should specify [REDACTED] and the title of the current officer authorized to execute the form 872.

Issue 3: How should Forms 872 and Forms SS-10 be executed for the members of the [REDACTED] affiliated group that filed separate returns for the periods ended [REDACTED] and [REDACTED]?

Each member of the former [REDACTED] filed separate Forms 1120 for the remainder of the year end until [REDACTED]. In addition, each member of the former [REDACTED] and any new members of [REDACTED] filed short returns for the period between [REDACTED] and [REDACTED]. You wish the assistance of our office in captioning consents to extend the statute of limitations for income tax liabilities and employment tax liabilities of the respective parent and subsidiary corporations.

Pursuant to Rev. Proc. 72-38, 1972-2 C.B. 813, the Service will accept a single statute consent form to cover a parent corporation and any or all of its subsidiary corporations. Also see I.R.M. 8.2.1.3.3.9, Parent-Subsidiary Corporation Consents. Rev. Proc. 72-38 applies to Forms 872 and Forms SS-10. The Form 872 or Form SS-10 must clearly identify by name the parent corporation and the number of named subsidiary corporations. A

separate rider must contain the name, address, employment identification number and type of tax covered. Both the Form 872 and the rider must be executed by a duly authorized officer of the parent corporation and each of the named subsidiaries. If more than one officer is authorized to execute the consents for the respective subsidiary corporations, the corporations should be arranged to delineate which officer is authorized to sign on behalf of each of the respective corporations.

We are attaching Rev. Proc. 72-38 which provides further details for the execution of the relevant agreements.

██████████ merged with ██████████ to form ██████████ on ██████████. Therefore, the parent corporation of the separate members of the affiliated group for the period between ██████████ and ██████████ and ██████████ through ██████████ was ██████████. The Forms 872 and Forms SS-10 should reflect the name changes of ██████████. Therefore we recommend captioning the forms 872 and forms SS-10 as follows:

██████████ (EIN ██████████), formerly ██████████, formerly ██████████, on its own behalf and as parent of ██████████, ██████████ and the other subsidiaries identified in the attached rider.

Also, we request that you follow the procedures set forth herein to ensure compliance with I.R.C. § 6501(c)(4)(B). Section 6501(c)(4)(B) provides that the Service shall notify the taxpayer of their right: 1) to refuse to extend the period of limitations; or 2) to limit such extension to particular issues; or 3) to limit the extension to a particular period of time.

The required notice must be provided each time an extension is requested. The legislative history of this provision states that Congress believed that taxpayers should be fully informed of their rights with respect to the statute of limitations on assessment. Congress expressed concern that in some cases taxpayers were not fully aware of their rights to refuse to extend the statute of limitations, and have felt that they had no choice but to agree to extend the statute of limitations upon the request of the Service. See H.R. Conf. Rep. No. 105-599 at 286 (1998).

You should be aware that, under routine procedures, which have been established for opinions of this type, we have referred this opinion to the National Office for review. That review might result in modifications of the conclusions herein. You should not execute Forms 872 based on this advice until you receive a supplemental memorandum wherein we finalize our opinion. However, because of the short statute of limitations with respect to the Form 940 liabilities, we suggest that you use the suggestions in this memorandum to start drafting the appropriate consents. We will

inform you in writing of the result of the review as soon as we hear from the National Office. In the meantime, the conclusions reached in this opinion should be considered to be only preliminary.

Any questions regarding this opinion should be referred to Rose Gole at (516) 688-1702.

JODY TANCER
Associate Area Counsel
Brooklyn

By:

ROSE E. GOLE
Attorney

Attachment: Rev. Proc. 72-38 and exhibits