

Office of Chief Counsel
Internal Revenue Service

memorandum

CC:NER: [REDACTED]:TL-N-3568-00
REGole

date: AUG 30 2000

to: District Director, [REDACTED]
Attn: Revenue Agent Andrew Vilardi

from: District Counsel, [REDACTED] New York

subject: [REDACTED]

EIN: [REDACTED]

Earliest Statute of Limitations: [REDACTED]

This is in further response to your request for advice as to who is the proper party to execute a Form 872 (Consent to Extend the Time to Assess Tax) for the subject taxpayer for the years [REDACTED] and [REDACTED]. Under routine Counsel procedures, we forwarded this case to our National Office for their review of the conclusions rendered in our memoranda dated July 14, 2000 and August 3, 2000.

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.

10106

We are enclosing a copy of the Informal Field Assistance dated August 10, 2000 which was drafted by the National Office. The memorandum indicates that the National Office generally concurs with the conclusions reached by our office. However, there is some discrepancy as to the relevant facts regarding the parties and timing of the acquisitions. The National office has confirmed that these fact are not critical to the determination that an officer of [REDACTED] is the proper party to execute the Form 872.

We recommend that you follow the recommendations contained in the National Office's informal assistance and our memorandum of August 14, 2000 regarding the form of the 872. In addition, the National office has recommended against soliciting a Form 977 at this time.

Also, we request that you follow the procedures set forth below 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).

Section 6501(c)(4)(B) can be satisfied by informing taxpayers, either orally or in writing, of their right to refuse to consent to an extension of the statute of limitations, or to limit such an extension to specific issues or to a specific time frame. You should secure consents to extend statutes of limitations by sending Letter 907(DO) (Rev. 2-2000) or Letter 907(SC) (Rev. 12-1999). See IRM 4541.1 and IRM 121.2.22.3. Your actions should be specifically documented in the administrative file.

Service personnel were also previously advised that they could provide the taxpayer with a copy of Publication 1035, Extending the Tax Assessment Period (Rev. 12-1999), each time a statute extension was requested, but the best practice would be to advise taxpayers of their rights by sending Letter 907(DO) (Rev. 2-2000), Letter 907(SC) (Rev. 12-1999), or Letter 967 (Rev. 12-1999). (See IRS RRA 98 National Resource Center Question 203.)

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

JODY TANCER
Acting District Counsel

By: 
ROSE E. GOLE
Attorney

Attachment: As stated.

Office of Chief Counsel
Internal Revenue Service

memorandum

CC:NER: [REDACTED]:TL-N-3568-00
REGole

date: AUG 03 2000

to: District Director, [REDACTED]
Attn: Revenue Agent Andrew Vilardi

from: District Counsel, [REDACTED], New York

subject: [REDACTED]

EIN: [REDACTED]

Earliest Statute of Limitations: [REDACTED]

This is in further response to our memorandum dated July 14, 2000. Based on the additional information set forth below, an authorized officer of the [REDACTED] is the proper party to execute a Form 872 to the statute of limitations.

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.

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FACTS

Revenue Agent Andrew Vilardi has obtained the following additional facts. As of [REDACTED] [REDACTED] became the parent of [REDACTED]. [REDACTED] is also known as [REDACTED]. On [REDACTED] [REDACTED] acquired the [REDACTED] (hereafter "[REDACTED]") [REDACTED]'s [REDACTED] businesses were contemporaneously sold to the [REDACTED], "[REDACTED]." [REDACTED] received [REDACTED]% of the common stock of [REDACTED]. We are uncertain as to whether there are any outstanding shares of preferred stock, and if there are outstanding shares with whom they are held. It is our understanding that [REDACTED]'s other assets, were delegated to other [REDACTED] subsidiaries.

[REDACTED] survived the acquisition transactions as demonstrated by the following facts. [REDACTED] filed its own corporate income tax on its own behalf for the year [REDACTED]. In addition, it has retained the same employer identification number. It does not, however, continue to file state franchise tax. It is also our understanding that there are no members of the [REDACTED] common group for the years under audit ([REDACTED] and [REDACTED]) which presently remain members of the group.

1. [REDACTED] may execute the Forms 872.

Where the common parent remains in existence, even if it no longer is the common parent, it remains the agent for the group with regard to years in which it was the common parent of the group. Treas. Reg. §§1.1502-77(a); 1.1502-77T(a)(4)(i). Here, prior to its merger into [REDACTED], [REDACTED] was the common parent for the years [REDACTED] and [REDACTED]. Accordingly, it may execute the extension of the statute of limitations with regard to those years.

Arguably, if [REDACTED] controls [REDACTED] within the meaning of I.R.C. § 1504(a)(2), it would be an alternative agent authorized to execute the Form 872. I.R.C. § 1504(a)(2) establishes an 80 percent voting and value test whereby:

The ownership of stock of any corporation meets the requirements of this paragraph if it-

- (A) possesses at least 80 percent of the total voting power of the stock of such corporation, and
- (B) has a value equal to at least 80 percent of the total value of the stock of such corporation.

Although it is our understanding that [REDACTED]% of the common stock of

[REDACTED] has been transferred to [REDACTED], we are uncertain of the ownership of [REDACTED]'s preferred stock. Therefore, we do not recommend treating [REDACTED] as an alternative agent.

2. Drafting and Executing the Form 872.

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 of [REDACTED] should execute the Form 872 by signing his or her name and official title at [REDACTED].

The caption on the Form 872 should read "[REDACTED] [REDACTED]." In addition, you should insert the following statement at the bottom of the Form 872 by placing an asterisk (*) after the word company in the caption:

This is with respect to the consolidated return liability of [REDACTED] for the consolidated group's [REDACTED] and [REDACTED] years.

Also, we request that you follow the procedures set forth below 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).

Section 6501(c)(4)(B) can be satisfied by informing taxpayers, either orally or in writing, of their right to refuse to consent to an extension of the statute of limitations, or to limit such an extension to specific issues or to a specific time frame. You should secure consents to extend statutes of limitations by sending Letter 907(DO) (Rev. 2-2000) or Letter

907(SC) (Rev. 12-1999). See IRM 4541.1 and IRM 121.2.22.3. Your actions should be specifically documented in the administrative file.

Service personnel were also previously advised that they could provide the taxpayer with a copy of Publication 1035, Extending the Tax Assessment Period (Rev. 12-1999), each time a statute extension was requested, but the best practice would be to advise taxpayers of their rights by sending Letter 907(DO) (Rev. 2-2000), Letter 907(SC) (Rev. 12-1999), or Letter 967 (Rev. 12-1999). (See IRS RRA 98 National Resource Center Question 203.)

3. Arguably, [REDACTED] is A Transferee in Equity

You may wish to solicit a Form 977, Consent to Extend the Time to Assess Liability at Law or in Equity for Income, Gift, and Estate Tax Against a Transferee or Fiduciary and Form 2045, Transferee Agreement from [REDACTED]. Please advise the taxpayer that it is the Service's position that execution of Form 2045 does not establish transferee liability in and of itself. The Service must still prove that such liability exists. In addition, if such consent is solicited, you should request at least two years longer than requested on the Form 872 since the statute of limitations for transferee liability provides the Service with an additional year for making its assessment.

Code section 6901(a) provides a procedure through which the Service may collect from a transferee of assets unpaid taxes owed by the transferor of the assets if a basis exists under applicable state law or equity for holding the transferee liable. Hagaman v. Commissioner, 100 T.C. 180, 183 (1993). The Service bears the burden of proving that a taxpayer's acts render the taxpayer liable as a transferee. See I.R.C. § 6902; T.C. Rule 142. The Service must establish that there is a transfer of property from one person or entity to another. Second, the transferor, in this case [REDACTED], must be liable for a tax at the time both of the transfer and when such liability is asserted.

There are two types of transferee liability - transferees at law and transferees in equity. Estate of Stein v. Commissioner, 37 T.C. 945 (1962), subsequent proceedings, 40 T.C. 275 (1963). Although the relevant facts have not been adequately established, [REDACTED] may be a transferee in equity. In order to establish transferee liability in equity, the Service must demonstrate a

¹ You should verify whether the legal name of the corporation is [REDACTED] or [REDACTED].

transfer for less than full and adequate consideration or with intent to defraud its creditors. In addition, the transferor must be insolvent at the time of the transfer or as a result of the transfer. The transferor's liability must also have accrued prior to the transfer. Finally, the Service must establish that all efforts to collect from the transferor have been exhausted.

Arguably, the transfer of [REDACTED]'s assets, other than the [REDACTED] businesses, down to [REDACTED] was made without full and adequate consideration. Therefore, [REDACTED] may be subject to liability as a transferee in equity. Therefore, you may wish to solicit a Form 977.

The transferee forms should read as follows:

[REDACTED], also known as [REDACTED], (E.I.N. #) as transferee of [REDACTED]. (E.I.N. [REDACTED]).

The forms should be signed by a current officer of [REDACTED]. Under the officer's name, you should type in his or her title and the name [REDACTED].

We note that we have no facts relevant to determining the other elements of liability. In addition, the Service has not attempted to collect its liability from [REDACTED]. Accordingly irrespective of [REDACTED]'s cooperation in executing Forms 2045 and 977, you should expeditiously secure a Form 872 from [REDACTED].

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 solicit Forms 872 based on this advice until you receive a supplemental memorandum wherein we finalize our opinion. 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
Acting District Counsel

By:



ROSE E. GOLE
Attorney

Office of Chief Counsel
Internal Revenue Service

memorandum

CC:NER: [REDACTED]:TL-N-3568-00

REGole

JUL 14 2000

SENT VIA FACSIMILE (W/O ATTACHMENTS)
AND COURIER (W/ ATTACHMENTS)

to: District Director, [REDACTED]
Attn: Revenue Agent Andrew Vilardi

from: District Counsel, [REDACTED], New York

subject: [REDACTED]

EIN: [REDACTED]

Earliest Statute of Limitations Expires: [REDACTED]

This is in response to your request for advice as to who is the proper party to execute a Form 872 (Consent to Extend the Time to Assess Tax) for the subject taxpayer for the years [REDACTED] and [REDACTED]. The taxpayer has provided our office with copies of the Agreement and Plan of Merger dated [REDACTED] and [REDACTED] [REDACTED]'s Proxy Statement for the Shareholders Meeting of [REDACTED], "the Proxy Statement". Since the information in the proxy does not contain all the information necessary for determining who should execute the Form 872, our conclusions, as set forth below, are preliminary.

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

Our advice will be supplemented after you have had an opportunity to further establish the relevant facts. We are attaching hereto a list of questions and requests for information which we believe will clarify this issue. However, because of the imminent expiration of the statute of limitations, we are providing our preliminary conclusions to you at this time.

FACTS

The facts, as we understand them to be, are as follows:

As of [REDACTED] (prior to its merger with [REDACTED]) The [REDACTED], "[REDACTED]", provided service to more than [REDACTED] customers throughout [REDACTED] in [REDACTED], as well as the [REDACTED].

[REDACTED] company, "[REDACTED]" was in the business of providing [REDACTED] needs to customers in New York City, including [REDACTED], [REDACTED] and [REDACTED]. [REDACTED] serviced approximately [REDACTED] people.

[REDACTED] is a New York corporation and a wholly owned subsidiary of [REDACTED]. [REDACTED] underwent a restructuring independent of the merger with [REDACTED]. As a result of the restructuring [REDACTED] became a wholly owned subsidiary of the holding company, [REDACTED].

As of [REDACTED] entered into a Plan of Exchange and Merger with [REDACTED]. It was intended that [REDACTED] would become the parent company, and would be substituted for [REDACTED] when the merger was to be consummated. (The Prospectus, at page [REDACTED]; Merger Agreement at page [REDACTED]). Pursuant to the plan of merger, [REDACTED] shares were exchanged for shares in [REDACTED]¹, the parent company of the [REDACTED]-[REDACTED] 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]

¹ We speculate that [REDACTED] is the legal name of the holding company which owned [REDACTED] and [REDACTED], or [REDACTED]'s. However, this information is not contained the materials provided.

appeared that [REDACTED] was intended to survive the merger with [REDACTED] and that [REDACTED] acquired [REDACTED]'s distribution business through a stock sale.

DISCUSSION

If [REDACTED] still remains in existence, it is the agent authorized to execute the 872.

Determining who is a proper agent for purposes of executing a Form 872, depends upon whether or not [REDACTED] survived its mergers with [REDACTED] and [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 for the years at issue.

We do not know whether any of the subsidiaries that were part of [REDACTED]'s return survived the merger. However,

Treas. Reg. § 1.1502-75(d)(1) provides generally:

A group remains in existence for a tax year if the common parent remains as the common parent and at least one subsidiary that was affiliated with it at the end of the prior year remains affiliated with it at the beginning of the year, whether or not one or more corporations have ceased to be subsidiaries at any time after the group was formed.

The common parent is the agent for the subsidiaries in the group for all purposes, exclusive of those specifically set forth in Treas. Reg. § 1.1502-77(a), including executing a consent to extend the statute of limitations. The provisions of Treas. Reg. § 1.1502-77(a) "shall apply whether or not a consolidated return is made for any subsequent year, and whether or not one or more of the subsidiaries have become or have ceased to be members of the group at any time."

Therefore, if [REDACTED] remains in existence, and if at least one subsidiary that was part of the consolidated group for the years [REDACTED] and [REDACTED] remains a member of the group, an executive officer of [REDACTED] is authorized to extend the statute of limitations under Treas. Reg. § 1.1502-77.

Furthermore 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 years at issue. 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,

until you receive a supplemental memorandum wherein we finalize our opinion. 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
Acting District Counsel

By: 
ROSE E. GOLE
Attorney

Attachments: Proxy Statement
Agreement and Plan of Merger

cc: Louis Jones (Group 1647) (w/o attachments)