

Office of Chief Counsel
Internal Revenue Service

memorandum

CC:LM:MCT:CLE:TL-N-1385-01
MASHapiro

date: April 10, 2001

to: LM:NR:1486
Independence, Ohio
Attn: Cheryl M. Dever, Team Coordinator

from: Associate Area Counsel CC:LM:MCT:CLE

subject: Language for [REDACTED], [REDACTED] EIN [REDACTED]

Taxpayer: [REDACTED]
EIN: [REDACTED]
Year: [REDACTED]

In a memorandum dated February 26, 2001, you requested assistance as to the proper taxpayer name to be inserted in a Form 872, Consent to Extend the Time to Assess Tax. This memorandum responds to your request for assistance, but should not be cited as precedent. Our understanding of the facts, as well as our recommended language, is discussed below. Please note that our advice is based solely on the facts discussed below. Also, this memorandum is subject to 10-day post review by our National Office, and therefore, is subject to modification.

Issue

What is the proper wording to be used on the Form 872 for taxpayer's [REDACTED] tax year.

Conclusion

We believe the Form 872 should read:

" [REDACTED] (EIN: [REDACTED]) as alternative agent for the [REDACTED] (EIN: [REDACTED]) [REDACTED] consolidated return group pursuant to Temp. Treas. Reg. section 1.1502-77T, and as successor in interest to [REDACTED] (EIN: [REDACTED]) by way of consolidation of [REDACTED] into [REDACTED] (EIN: [REDACTED]). *"

We recommend that on the front of the Form 872 the asterisk should refer to the following: *This is with respect to the consolidated tax liabilities of [REDACTED] consolidated return group for the taxable year [REDACTED]

Facts

During the subject [REDACTED] tax year, [REDACTED] ("taxpayer") was the parent of a consolidated group. During the year [REDACTED], taxpayer, [REDACTED], and a newly formed Ohio corporation (Newco) were consolidated into a new Ohio corporation called [REDACTED].¹ The consolidation was intended to qualify as an I.R.C. § 368(a)(1)(A) reorganization. The separate corporate existence of taxpayer, [REDACTED] and Newco ceased. Prior to the consolidation, [REDACTED] was the parent of a different consolidated group. The former shareholders of taxpayer and [REDACTED] received stock of [REDACTED] as a result of formerly owning their shares of taxpayer and [REDACTED] respectively. The subsidiaries of taxpayer and [REDACTED] became subsidiaries of [REDACTED]. The transaction qualified as a reverse acquisition under Treas. Reg. § 1.1502-75(d)(3)(i) because the [REDACTED] shareholders received [REDACTED]% of [REDACTED]'s stock (taxpayer received [REDACTED]% of the [REDACTED] stock). Accordingly, the [REDACTED] consolidated group continued in existence.

Analysis

Generally, the common parent is the sole agent for each member of a consolidated group, duly authorized to act in its own name in all matters relating to the tax liability for the consolidated return year. Moreover, the common parent is generally the proper party to sign consents and receive all correspondence. Treas. Reg. § 1.1502-77(a).

Under Treas. Reg. § 1.1502-77(d), if the common parent corporation contemplates dissolution, or is about to be dissolved, or if for any other reason its existence is about to terminate, it must notify the district director with whom the consolidated return is filed of such fact and designate another member as agent to act in its place. If the notice is not given (or not approved), the remaining members can designate another

¹Newco was formed as part of the consolidation to ensure that [REDACTED] would be incorporated in Ohio. Taxpayer and [REDACTED] were Delaware corporations. Newco went out of existence when the consolidation was effected.

member to act as such agent. Until a notice in writing designating a new agent has been approved by such district director, if the district director has reason to believe that the existence of the common parent has terminated (in the present case he knows such fact), he may deal directly with any member in respect of its liability.

Solely for purposes of mailing a notice of deficiency or obtaining a waiver of the statute of limitations, Treas. Reg. § 1.1502-77T provides for alternative agents and 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. Here, taxpayer has gone out of existence and obviously has ceased to be the common parent of the group. Under Treas. Reg. § 1.1502-77T(a)(3), a waiver of the statute of limitations for the former taxpayer group can be given by the alternative agent corporations referred to in § 1.1502-77T(a)(4). Under § 1.1502-77T(a)(4), the alternative agents for the group include "a successor to the former common parent in a transaction to which section 381(a) applies" (We assume in this case that no agent designation was made under section 1.1502-77(d)).

Under § 381(a), in the case of 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 § 368(a)(1)(A), the acquiring corporation shall succeed to and take into account, as of the date of transfer, specified items of the transferor corporation. In the present case, we have a reorganization (a consolidation) under § 368(a)(1)(A).

Because [REDACTED] is the acquiring corporation in the "A" reorganization to which § 381 applies, it is the "successor to the former common parent (taxpayer) in a transaction to which section 381(a) applies," and can act as the alternative agent of the taxpayer consolidated group for the subject [REDACTED] tax year.

Also, under Ohio law, [REDACTED] possesses all assets and property of every description of taxpayer, and as the surviving corporation, [REDACTED] is liable for all obligations of taxpayer. Ohio Rev. Code Ann. § 1701.82(A)(3) and (4) (West 1994).

The Form 872 should be signed by an officer of [REDACTED] who is authorized to act in such capacity. Also, the names on the Form 872 should match the names as they appear on the Federal Tax Returns. Finally, please verify the EINs.

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. Also, if you have any questions or need further information, please feel free to contact Marc Shapiro, the attorney assigned this matter, at 216-522-3380.

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By: _____
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