

Office of Chief Counsel
Internal Revenue Service

memorandum

CC:LM:RFP:STP:TL-N-1018-01
JForsberg

date: February 14, 2001

to: Allen Davey, Team Manager
[REDACTED]

from: Associate Area Counsel (LMSB)
St. Paul, Minnesota,

subject: [REDACTED]
Form 872 for the TYEs [REDACTED] & [REDACTED]

Our advice has been requested as to the proper party to execute, and the proper form for, a Form 872 for the old [REDACTED] consolidated group's taxable years ending [REDACTED] and [REDACTED]. Based on the facts as represented to us, we believe that the Form 872 should be executed on behalf of the old [REDACTED] group by old [REDACTED] in the manner set forth below.

FACTS

[REDACTED] (EIN [REDACTED]) ("old [REDACTED]") was an [REDACTED] corporation which filed consolidated returns as the common parent of a consolidated group (the "old [REDACTED]") for the taxable years ending [REDACTED] and [REDACTED]. [REDACTED] (EIN [REDACTED]) (" [REDACTED]" or "new [REDACTED]") was a Delaware corporation which also filed consolidated returns as the common parent of a consolidated group. You have indicated that in [REDACTED] [REDACTED] acquired all of the stock of old [REDACTED] old [REDACTED] changed its name to "[REDACTED]", [REDACTED] changed its name to "[REDACTED]", and Old [REDACTED] and its subsidiaries became part of the [REDACTED] group. You have specifically indicated that there was no merger of old [REDACTED] in connection with the transaction and that old [REDACTED]'s separate corporate existence continues to date, although it is now a second-tier subsidiary of new [REDACTED] (fka [REDACTED]). It also appears that on [REDACTED] new [REDACTED] reincorporated as an [REDACTED] corporation.

DISCUSSION

Treas. Reg. § 1.1502-77(a) provides generally that the common parent of a consolidated group is the sole agent for each subsidiary in the group for any consolidated return year. Expressly included in the authority of the common parent is the power to give waivers. Treas. Reg. § 1.1502-77(a) further provides that its provisions shall apply "whether or not a consolidated return is made for any subsequent year, and whether or not one or more subsidiaries have become or have ceased to be members of the group at any time."

In the present case, the old [REDACTED] group ceased to exist after [REDACTED] acquired old [REDACTED] in [REDACTED]. However, the corporate existence of old [REDACTED] (now [REDACTED]) continued unabated, albeit as part of the [REDACTED] group. Accordingly, old [REDACTED] continues as agent for the old [REDACTED] group's pre-merger years, notwithstanding that the group itself has ceased to exist. Thus, old [REDACTED] (now [REDACTED]) can continue to execute waivers for the old [REDACTED] group's pre-merger taxable years (including the TYE's [REDACTED] and [REDACTED]).¹

In preparing the Form 872, we suggest that:

1. The taxpayer's name read:

[REDACTED] (EIN [REDACTED]), formerly [REDACTED]
[REDACTED], as agent for the consolidated group*

The following footnote should be put at the bottom of the page:

* with respect to the consolidated income tax liability of [REDACTED] (EIN [REDACTED]) and Affiliated Corporations.

- 2 The EIN of old [REDACTED] ([REDACTED]) should be used as the taxpayer's EIN.

¹ We have not been provided with copies of the acquisition agreement or any other source documents sufficient for us to independently ascertain the form of the transaction and are therefore necessarily relying on your representations as to the facts.

3. The signature block should use name " [REDACTED] (formerly [REDACTED]) and should be executed by a current officer of [REDACTED]. See, Rev. Rul. 83-41, 1983-1 C.B. 349, clarified and amplified, Rev. Rul. 84-165, 1984-2 C.B. 305.

At the time the Form 872 is solicited, the taxpayer should be advised of its right to refuse to extend the statute or limit the scope of the extension as provided under I.R.C. § 6501(c)(4)(B). I.R.C. § 6501(c)(4)(B) requires that the IRS 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 it solicits a statute extension. To satisfy this requirement, you may provide the taxpayer with Publication 1035 ("Extending the Tax Assessment Period") at the time you solicit the Form 872. Alternatively, you may advise the taxpayer orally or in some other written form of the I.R.C. § 6501 requirement. Regardless of which method you use, you should document your actions in this regard in the case file. Although section 6501(c)(4)(B) does not provide a sanction or penalty on the Service's for failure to comply with the notification requirement, a court might conclude that an extension of the statute of limitations is invalid if the Service did not properly notify the taxpayer. Thus, it is important to document your actions in this regard in the case file.

If you have any questions respecting this matter, please call Jack Forsberg at (651) 290-3473, ext. 227.

REID M. HUEY
Associate Area Counsel (LMSB)

By: *Jack Forsberg*
JACK FORSBERG
Special Litigation Assistant

cc: Ed Sweeney, Team Coordinator
Associate Chief Counsel (Procedure and Administration)