

Office of Chief Counsel
Internal Revenue Service

memorandum

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JSRepsis

date: July 31, 2000

to: Dave Allday, Team Chief, Southeast Region

from: District Counsel, North Texas District, Dallas

subject: [REDACTED] - [REDACTED], [REDACTED] and [REDACTED]
Pro Forma Closing Agreement

THIS DOCUMENT MAY INCLUDE CONFIDENTIAL INFORMATION SUBJECT TO THE DELIBERATIVE PROCESS PRIVILEGE, AND WAS PREPARED IN ANTICIPATION OF LITIGATION. THIS DOCUMENT SHOULD NOT BE DISCLOSED TO ANYONE OUTSIDE THE INTERNAL REVENUE SERVICE, INCLUDING THE TAXPAYER INVOLVED, AND ITS USE WITHIN THE SERVICE SHOULD BE LIMITED TO THOSE WITH A NEED TO REVIEW THE DOCUMENT IN RELATION TO THE SUBJECT MATTER OR CASE DISCUSSED HEREIN. THIS DOCUMENT ALSO IS TAX INFORMATION OF THE INSTANT TAXPAYER WHICH IS SUBJECT TO THE PROVISIONS OF I.R.C. § 6103.

By memorandum dated [REDACTED], you solicited our office's advice and comments regarding the use of a pro-forma closing agreement for [REDACTED]'s [REDACTED], [REDACTED] and [REDACTED] audit cycle. This memorandum is in response to your request.

ISSUE

[REDACTED] was the common parent of a group of corporations which filed a consolidated return for their [REDACTED] and [REDACTED] tax years. During [REDACTED], [REDACTED] was merged with a subsidiary of [REDACTED], but was the surviving company. For its [REDACTED], [REDACTED] and [REDACTED] tax years, may [REDACTED] execute a closing agreement on behalf of the consolidated group?

SHORT CONCLUSION

The consolidated return regulations vest sole authority to execute closing agreements in the common parent of a consolidated group. This authority exists so long as the common parent is in existence. Since [REDACTED] is the surviving corporation after its merger with [REDACTED], it may execute the closing agreements on behalf of the consolidated group.

FACTUAL SYNOPSIS

██████████ and consolidated subsidiaries (██████████) were audited by the Service for their ██████████, ██████████ and ██████████ tax years. At the time the tax returns were filed for these tax years and throughout the examination, ██████████ existed as the common parent of a consolidated group which had elected to file a consolidated tax return.

On ██████████ a reorganization was effected between ██████████ and ██████████. Under this reorganization, ██████████ created a wholly-owned first-tier subsidiary called ██████████ (██████████). By terms of an "Agreement and Plan of Merger," ██████████ stock was exchanged for shares of ██████████ stock. Each share of ██████████ common stock, which was not held as treasury stock or owned by ██████████ or any subsidiary of ██████████, was converted into the right to receive ██████████ shares of ██████████ common stock. Furthermore, each share of ██████████ Series B Preferred Stock was converted into the right to receive one share of a new series of ██████████ preferred stock.

██████████ was merged into ██████████ with ██████████ being the surviving corporation. In the end, ██████████ still existed and was a first-tier subsidiary of ██████████. This same corporate structure exists today, except ██████████ has changed its name to ██████████.

LEGAL ANALYSIS

Common Parent is the Sole Agent for the Consolidated Group

Treas. Reg. § 1.1502-77(a) provides the general rule that upon the election to file a consolidated tax return, the common parent, for all purposes (with certain exceptions not relevant here), is the sole agent for each subsidiary in the group. As common parent, it is duly authorized to act in its own name in all matters relating to the tax liability for the consolidated group's tax year. A subsidiary has no authority to act or to represent itself in any such matter. As to closing agreements, the regulation specifically provides:

... and the common parent in its name will give waivers, give bonds, and execute closing agreements, offers in compromise, and all other documents, and any waiver or bond so given, or agreement, offer in compromise, or any other documents so executed, shall be considered as having also been given or executed by each such subsidiary. ...

The authority of the common parent continues 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. Treas. Reg. § 1.1502-77(a) and Craigie, Inc. v. Commissioner, 84 T.C. 466, 473-474 (1984).

The common parent generally remains the common parent for the tax year in which the consolidated tax return is filed even if it is no longer the common parent of that group by the time some action (e.g., executing a closing agreement) has to be taken concerning that tax year. Exceptions exist which primarily concern circumstances where the common parent is no longer in existence. See Treas. Reg. § 1.1502-77(d).

Even in instances of a reverse acquisition, the old common parent remains an agent for the pre-acquisition consolidated group, if it remains in existence. In this situation, either the new common parent or the old common parent has authority to act for the pre-acquisition consolidated group. See Union Oil Company of California v. Commissioner, 101 T.C. 130 (1993).

In the present situation, [REDACTED] was merged into [REDACTED], but [REDACTED] survived. As such, the common parent for the [REDACTED], [REDACTED] and [REDACTED] is still in existence today. Accordingly, [REDACTED] may execute the closing agreements on behalf of the consolidated group.

Closing Agreement Language

We have reviewed your proposed closing agreement language. We suggest a revision to the preamble as follows:

Pursuant to Section 7121 of the Internal Revenue Code of [REDACTED] (IRC) (as amended), [REDACTED], EIN [REDACTED] (See Statement 1 for a list of the members of the consolidated group which are entering into and made a part of this agreement) of [REDACTED] (herein collectively referred to as "Taxpayer"), and THE COMMISSIONER OF INTERNAL REVENUE SERVICE ("Commissioner") make the following closing agreement:

By including a statement regarding who are members of the consolidated group, any question regarding who is bound by the closing agreement will be eliminated.

The succeeding paragraphs regarding the merger are helpful in understanding the company's current position in the new consolidated corporate structure. These paragraphs may, however, be omitted at your discretion.

The signature line for [REDACTED] is correct as currently styled:

[REDACTED] on its own behalf and as common parent of the affiliated group of corporations with which it filed consolidated returns.

CONCLUSION

Since [REDACTED] survived its merger with [REDACTED], it remains the common parent of its former consolidated group. Pursuant to the treasury regulations, it retains the authority to bind itself and the consolidated group by means of a closing agreement.

This document is subject to the Large Case Coordination Procedures of CCDM 35(19)4(4). Pursuant to this provision, a copy of this advice has been forwarded to the Assistant Chief Counsel for his review concurrent with the providing of this advice to you. Within ten days of receipt, the appropriate Associate Chief Counsel is required to respond regarding the advice. The response will indicate whether the National Office: (a) concurs with the Field advice; (b) believes some modification of the advice is appropriate; or (c) needs additional information or time for analysis in order to evaluate the advice. Our office will inform you of the comments received by us.

Our office will maintain its file on this case pending notification from you that it may be closed. If you should have any questions regarding this memorandum, please contact the undersigned at (972) 308-7917.

THOMAS R. THOMAS
District Counsel

By: 

JOHN S. REPSIS
Attorney