Office of Chief Counsel
Internal Revenue Service

memorandum

CC:LM:FSH:BOS:TL-N-7031-00
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date: MAR 12 2001

to: Territory Manager, LMSB - Financial Services & Healthcare
Attn: Ted Jones, Team Manager (LMSB), Group 1129

from: Area Counsel (LMSB), Area 1, Financial Services & Healthcare

subject: [redacted]
Form 906
Taxable Year ended [redacted]

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.

This refers to your memorandum requesting additional advice concerning a closing agreement with respect to the tax liability of [redacted] ([redacted]) (EIN: [redacted]) [redacted] consolidated group for the taxable year ended [redacted].

ISSUE

The proper party to enter into an agreement on behalf of [redacted] ([redacted]) where [redacted] merged into a corporation which underwent a further merger into another corporation which, thereafter, underwent a name change, and on behalf of the remaining members of the [redacted] consolidated group for the taxable year [redacted].

CONCLUSION

The Service should enter into the closing agreement on Form 906 with [redacted], because [redacted] is the successor (after a series of mergers) to [redacted] for the taxable year ended [redacted], and with a corporation that was a member of the group for the consolidated return year which has been designated by the remaining members of the group to sign as the agent for the group under Treas. Reg. § 1.502-77(d).

FACTS

The basic facts set forth below, and upon which this advice is based, are as stated by your office and summarized in two prior memoranda to your office concerning this taxpayer. According to your office there have been no subsequent changes in corporate ownership or form. You have now determined, however, that the fuel credits at issue in this case were, in fact, generated by members of the consolidated group other than [redacted], and that the closing agreement will reflect a refund due the taxpayer. If our understanding of the facts is not correct, or if the facts have changed in any other way, you should not rely on this advice, but rather seek modified advice based on the changed circumstances.

[redacted] was organized on [redacted] as a Massachusetts voluntary association, MASS. ANN. LAWS ch 182, § 1 (Law. Co-op. 2000), and filed its federal income tax returns as a corporation. The taxpayer filed a consolidated corporate return (Form 1120) for the taxable year ending [redacted] in the name of [redacted], using the EIN of [redacted]. The return was signed by [redacted], Treasurer.

The following simultaneous transactions occurred on [redacted]:

A. A merger was effectuated pursuant to an Agreement and Plan of Merger (Agreement) dated [redacted] by and between (1) [redacted], a public limited company incorporated under the laws of England and [redacted] with registration number [redacted]; (2) [redacted], which changed its name on [redacted], to [redacted] (LLC), a Massachusetts limited liability company formed on

[redacted] solely for purposes of the merger, with EIN [redacted], and directly and indirectly wholly owned by Group; and (3) [redacted]. According to the Agreement, § 1, this merger occurred pursuant to the Massachusetts Limited Liability Company Act, MASS. ANN. LAW ch 156C, § 59 (Law Co-op. 2000) and the Massachusetts Law of Voluntary Associates and Certain Trusts, MASS. ANN. LAW ch 182, § 2 (Law Co-op. 2000). The Agreement, § 10.08, further provided that although Massachusetts General Law and the Massachusetts Limited Liability Company Act were mandatorily applicable to the Merger and the rights of the shareholders of the constituent corporations, the Agreement would be governed by the laws of New York.

In this transaction, [redacted] became the owner, directly or indirectly, of all the issued and outstanding common shares of [redacted]. LLC merged with and into [redacted], and [redacted] survived the merger. The Certificate of Merger stated that [redacted] would continue to use the EIN [redacted].[1] By virtue of the merger the membership interests in LLC were converted into shares of [redacted] with the former shareholders of [redacted] receiving cash. At the effective time of the merger each one percent of the issued and outstanding membership interests in LLC was converted into one transferable certificate of participation or share of the surviving entity, Agreement, § 2.01(a), and each outstanding share of [redacted] was canceled and converted into the right to receive cash as merger consideration, Agreement, §§ 2.01(b)(i) and (ii).

II. A merger was effectuated pursuant to an Agreement of Merger dated [redacted] (Second Agreement). Under the Second Agreement [redacted] (EIN [redacted]) merged with and into [redacted] (EIN [redacted]) (Trustee I), a Massachusetts limited liability company organized on [redacted]. Trustee I survived the merger and continued to use EIN [redacted]. Pursuant to the Second Agreement the merger of [redacted] with and into Trustee I was pursuant to the Massachusetts General Law, MASS. ANN. LAW ch 182,

[1] As a result of other transactions on [redacted], however, [redacted] was no longer in existence after [redacted].

§ 2 (Law. Co-op. 2000) and the Massachusetts Limited Liability Company Act, MASS. ANN. LAW ch 156C § 59 (Law. Co-op. 2000). Pursuant to the Second Agreement this merger was intended to qualify as a reorganization within the meaning of I.R.C. § 368(a)(1)(F), "a mere change in identity, form, or place of one corporation, however effected."[2] The separate existence of [redacted] ceased, except insofar as it may have continued in law or in order to carry out the purposes of the Second Agreement.

Under the terms of the Second Agreement Trustee I succeeded to the obligations of [redacted] and all debts, liabilities, and duties of [redacted] attached to Trustee I. In this transaction, the outstanding equity of the constituent entities, [redacted] and Trustee I, was converted into membership interests in the surviving entity, Trustee I.

III. A merger was effectuated pursuant to an Agreement of Merger dated [redacted] (Third Agreement) under which Trustee I ([redacted]) merged with and into [redacted] (EIN [redacted]), a Delaware corporation organized on [redacted], which was a member of the [redacted]. [redacted] survived the merger, and continued to use the EIN [redacted]. According to the Third Agreement the merger of Trustee I into [redacted] was in accordance with the applicable provisions of the Massachusetts Limited Liability Company Act, MASS. ANN. LAW ch. 156C, § 59 (Law. Co-op. 2000) and the Delaware General Corporation Law, DEL. CODE ANN. tit. 8, § 264 (1999).

In the third merger the outstanding equity of the constituent entities, Trustee I and [redacted], was converted into shares of [redacted]. Each limited liability company membership interest in Trustee I was canceled. Each share of [redacted], issued in the name of Trustee I was canceled, but each share issued and outstanding in the name of any person or entity other than Trustee I remained in effect. According to the Third Agreement the

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[2] To qualify as a section 368(a)(1)(F) reorganization one of the merged corporations would have to be a non-operating company. We assume, based on information provided by your office, that this requirement is satisfied because Trustee I appears to be a non-operating company organized for the sole purpose of carrying out the merger with [redacted].

merger of Trustee I into [redacted] was intended to qualify as a tax-free liquidation under I.R.C. § 332. Under the terms of the Merger, [redacted] succeeded to the obligations of Trustee I. The Certificate of Merger of [redacted], and [redacted] was amended to change the name of [redacted], as of [redacted], to [redacted].

Through the above described process the subsidiaries of [redacted] became subsidiaries of [redacted]. The subsidiaries, except for the following, have kept their original names: (1) [redacted] ([redacted]) is now called [redacted], but has kept the EIN of [redacted]; and (2) [redacted] ([redacted]) changed its name to [redacted]. [redacted] is a consulting company, and its name change was unrelated to the merger between [redacted] and [redacted].

The parent of [redacted], was started on [redacted] and elected to file as a corporation. [redacted] is owned by [redacted]. According to information provided by your office [redacted] will file a return for it and its subsidiaries for the short period [redacted] through [redacted]. After the short period return for [redacted] your office reports that [redacted], with its subsidiaries, anticipates joining in the filing of a consolidated return under its new parent, [redacted], for the period ending [redacted].[3]

This office provided advice dated August 8, 2000, with

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[3] It is not clear why [redacted] filed a short year consolidated return for the period [redacted] through [redacted]. The mere fact that [redacted], along with its subsidiaries, anticipates joining in the filing of a consolidated return with [redacted] for the period ending [redacted] is not sufficient to require [redacted] to file a short year consolidated return. It appears that the replacement of [redacted] with [redacted] as common parent is essentially nothing more than a reverse acquisition. Thus it appears that it would be sufficient for [redacted] to file aconsolidated return for the [redacted] for the period [redacted] through [redacted].

respect to extending the statute of limitation for the federal income tax liabilities of the [redacted] consolidated group for the taxable years [redacted], [redacted] and [redacted]. We recommended that your office obtain a Form 872 from [redacted], because [redacted] is the successor (after a series of mergers to [redacted] for the taxable years ended [redacted], [redacted] and [redacted] and because [redacted] is the alternative agent for the [redacted] consolidated group pursuant to Temp. Treas. Reg. § 1.1502-77T(a)(4)(ii).

We provided advice dated October 30, 2000, in which we explained that Temp. Treas. Reg. § 1.1502-77T applies only to waivers of the statute of limitations and to statutory notices of deficiency, and not to closing agreements. See Field Service Advice 199917016, n. 3 (Jan. 19. 1999). We therefore recommended that a closing agreement obtained with respect to the income tax liability of [redacted] for the taxable year [redacted] be captioned as follows: "[redacted] (EIN: [redacted]), formerly [redacted], as successor in interest to [redacted] (EIN: [redacted]), successor to [redacted] (EIN: [redacted])," and that an asterisk be put after it. At the bottom of the Form 906, we recommended that the following explanatory statement be typed: "*This is with respect to the several liability of [redacted] (EIN: [redacted]) for the consolidated tax liability of [redacted] (EIN: [redacted]) [redacted] consolidated group for the taxable year ended [redacted]."

We noted in our advice of October 30 that although the above action would bind [redacted] as the successor of [redacted], it would not bind any other members of the group, and that, in order to bind the other members of the group, it would be necessary to have each member sign the closing agreement or have the remaining members designate, as a new agent for the group under Treas. Reg. § 1.502-77(d), a corporation that was a member of the group for the consolidated return year at issue, and for that agent to sign the closing agreement as the agent for the group.

You have now advised this office that, in fact, the fuel credits were generated not by [redacted], but by other members of the group. You have also advised this office that your audit of the [redacted] consolidated return, including consideration of the refund claim filed with respect to fuel credits, will result in a partial agreement reflecting a refund, and that final resolution will likely also be a refund. You seek advice under these modified facts.

LAW AND ANALYSIS

Treas. Reg. § 1.1502-77(a) provides that the common parent, with exceptions not relevant here, shall be for all purposes "the sole agent for each subsidiary in the group, duly authorized to act in its own name in all matters relating to the tax liability for the consolidated return year. Treas. Reg. § 1.1502-77(a) further provides that "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 document so executed, shall be considered as having also been given or executed by each such subsidiary." Finally, Treas. Reg. § 1.1502-77 provides that the "provision of this paragraph 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." Thus, generally the common parent is the proper party to sign a closing agreement for all members in the group. Treas. Reg. § 1.1502-77(a). The common parent and each subsidiary which was a member of the consolidated group during any part of the consolidated return year is severally liable for the tax for such year. Treas. Reg. § 1.1502-6(a).

On [redacted], [redacted] merged with and into [redacted]; [redacted] merged with and into [redacted]; and [redacted] merged with and into [redacted], which immediately changed its name to [redacted]. Each of the simultaneous mergers was pursuant to state law. [redacted] is liable as a successor under the state merger law for the debts of Trustee I which in turn is liable under the state merger law for the debts of [redacted]. Therefore, [redacted] is primarily liable for any and all debts of [redacted]. [redacted] is severally liable under Treas. Reg. § 1.1502-6 for the entire amount of the [redacted] consolidated group's tax liability for those periods in which it was a member of the group. Thus, [redacted] is primarily liable under state law for [redacted]'s several liability for the entire amount of the [redacted] consolidated group's tax liabilities for the taxable year [redacted].

As set forth above, [redacted] is the successor in interest, after a series of mergers, to [redacted]. The surviving or resulting corporation in a merger or consolidation under state law may validly sign a closing agreement on behalf of the transferor or predecessor corporation for a period before the transfer. Rev. Rul. 59-399, 1959-2 C.B. 448. Successor liability may be established in this case.

The Massachusetts General Law concerning the effect of consolidation or merger provides, in part, as follows:

> . . .(5) all of the estate, property, rights, privileges, powers and franchises of the constituent corporations and all of their property, real, personal and mixed, and all the debts due on whatever account to any of them . . . shall be transferred to and vested in the resulting or surviving corporation . . .
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> (b) The rights of creditors of any constituent corporation shall not in any manner be impaired, nor shall any liability or obligation, including taxes due or to become due, or any claim or demand in any cause existing against such corporation, or any stockholder, director, or officer thereof, be released or impaired by any such consolidation or merger, but such resulting or surviving corporation shall be deemed to have assumed, and shall be liable for, all liabilities and obligations of each of the constituent corporations in the same manner and to the same extent as if such resulting or surviving corporation had itself incurred such liabilities or obligations . . ..

MASS. ANN. LAW ch 156B, § 80 (Law. Co-op. 2000).

> Delaware General Corporation Law provides in part:
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> Status, rights, liabilities, of constituent and surviving or resulting corporations following merger or consolidation.
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> (a) When any merger or consolidation shall have become effective under this chapter... all rights of creditors and all liens upon any property of any of said constituent corporation shall be preserved unimpaired, and all debts, liabilities and duties of the respective constituent corporations shall thenceforth attach to said surviving or resulting corporation, and may be enforced against it to the same extent as if said debts, liabilities and duties had been incurred or contracted by it.

DEL. CODE ANN. tit. 8, § 259 (1999).

The mergers of [redacted] with and into [redacted], and of [redacted] with and into [redacted], were pursuant to Massachusetts corporate law; the merger of [redacted] with and into [redacted], was pursuant to Massachusetts corporate law and Delaware General Corporation Law. [redacted] immediately changed its name to [redacted].

If, as it appears, the merger of [redacted], the immediate successor of [redacted], into [redacted], formerly

known as [redacted], was effected under Delaware law, then [redacted] is primarily liable for [redacted]'s debts, including taxes due. Southern Pacific Transportation Co. v. Commissioner, 84 T.C. 387 (1985), later proceeding, 90 T.C. 771 (1988). Under I.R.C. § 6901 and Treas. Reg. § 301.6901-1(b), a surviving corporation in a merger is also secondarily liable as a transferee, because a transferee at law includes a successor of a corporation. A determination against the surviving corporation for tax due by the merged corporation for a period prior to the merger is not generally handled as a transferee case. Rather, it should generally be handled by asserting primary liability against the surviving corporation.[4] We believe that the established facts will support the Service's primary reliance on [redacted]'s liability as a successor by merger under state law. This will not prevent consideration of transferee liability assessments, if appropriate, at a later time.

Although the above action will bind [redacted] as the successor of [redacted], it will not bind any other members of the group. In order to bind the other members of the group, either each member must sign the closing agreement the remaining members must designate a new agent for the group under Treas. Reg. § 1.502-77(d) to sign as the agent for the group. The designated agent would have to be a corporation that was a member of the group for the consolidated return year at issue. It is our understanding that you have discussed this with the remaining members and that they are in the process of providing you with the written designations pursuant to Treas. Reg. § 1.1502-77(d). Each designation should include language by which that member "designates X, pursuant to Treas. Reg. § 1.1502-77(d), as the new agent for the [redacted] (EIN) [redacted] consolidated group." Such language will allow you to deal with the named member not only for purposes of signing the Forms 907 and 870, but also for other purposes relating to your audit of the group's consolidated returns.

We provided, by our memorandum dated July 24, 2000, our opinion that, based upon the facts presented in your earlier request, and pursuant to Delegation Order 236, the Examination

division had the authority to enter into a Form 906 reflecting the amount of fuel tax credits allowed for the taxable years

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[4] There is an exception if the statutory period for assessing a deficiency has expired under primary liability; the Service would then argue that the surviving corporation should be liable as a transferee. See generally CCDM (35)(10)61.

currently under audit. You have provided no additional information which would alter that advice.

Based on the foregoing, we recommend that a closing agreement obtained with respect to the tax liability of [redacted] consolidated group for the taxable year [redacted] be captioned as follows: "[redacted] (EIN: [redacted]), formerly [redacted], as successor in interest to [redacted] (EIN: [redacted]), successor to [redacted] (EIN: [redacted])* and [*NAME*] (EIN: *[NUMBER]*).**" At the bottom of the Form 906, type the following two statements: "*This is with respect to the several liability of [redacted] (EIN: [redacted]) for the consolidated tax liability of [redacted] (EIN: [redacted]) [redacted] consolidated group for the taxable year ended [redacted]" followed by "**Pursuant to Treas. Reg. § 1.1502-77(d), this is with respect to the several liability of members of [redacted] (EIN: [redacted]) [redacted] consolidated group for the consolidated tax liability of [redacted] (EIN: [redacted]) [redacted] consolidated group for the taxable year ended [redacted]."

The Form 906 should be executed both by an authorized officer of the corporation chosen as the agent for the remaining members of the consolidated group, and by an authorized officer of [redacted], analogous to the procedure set forth in Rev. Rul. 83-41, 1983-1 C.B. 399, clarified and amplified, Rev. Rul. 84-165, 1984-2 C.B. 305 (the Service will apply the rules applicable to the execution of the original returns to the execution of consents to extend the time to make an assessment).

We note that according to the Examination of Returns Handbook, "[a] partially agreed case contains more than one issue, of which at least one issue is agreed to by the taxpayer and at least one issue is not agreed to by the taxpayer." IRM Part IV, Handbook 4.2, SubSection 8.5(2). The reports and forms required to close a partially agreed individual or corporate case are set forth in Subsection 8.5.1 and include From 4665, Report Transmittal; Form 4549-A marked "Agreed Issues" and prepared using only the agreed adjustments; Form 870 reflecting the deficiency or overassessment based on the agreed issues; a second Form 4549-A showing both agreed and unagreed adjustments; and Form 886-A for remaining unagreed issues. According to IRM 4400, SubSubSection 4484.1(1), "[a]fter completing necessary action in Examination function, cases involving claims will be disposed of in the same manner as those not involving claims." When a claim

is allowed in full or in part in a partially agreed case with other adjustments, IRM, Part IV, Handbook 4.2, SubSection 8.8.6(2) specifies that a Form 4549-A is used, and a statement regarding the disposition of the claims is included in the "Other Information" section.

According to your office, your audit of the taxpayer's [redacted] taxable year, including review of the taxpayer's claims, will result in a partial agreement, and the Form 870 reflecting the agreement will reflect an overassessment for the [redacted] consolidated return year. Because the payments were collectively made by the consolidated group, they cannot readily be allocated among members of the group. As noted in IRS FSA 200027026, July 7, 2000, "(t)he Service does not keep records of which member of a consolidated group actually made any payments of a consolidated group's tax liabilities, but records the payments as being made on an account for each taxable period of the group using the tax identification number (TIN) of the group's parent." Thus, payments of the [redacted] consolidated group's tax liabilities for [redacted] would have been recorded as payments by the group on a single account under [redacted]'s TIN.

Nothing in the statute or regulations governing consolidated returns requires the Service to make such allocations. Section 1501 gives groups of corporations the privilege of filing consolidated returns and section 1502 gives the Service the authority to prescribe regulations that it deems necessary for returning, determining, computing, assessing, collecting and adjusting a consolidated group's tax liability. As part of these regulations, in Treas. Reg. § 1.1502-77(a), the common parent of a consolidated group is designated as "the sole agent for each subsidiary in the group, duly authorized to act in its own name in all matters relating to the tax liability for the consolidated return year."

The usual practice of making payments, is for the common parent of a consolidated group to make a collective payment or payments on behalf of the group, and then to allocate the liability among the group, using accounting adjustments or transferring payments among the group members. Sometimes group members make their own cash deposits, but the Service does not track the source of the deposits. See IRS FSA 200027026 (July 7, 2000).

Under routine circumstances, the Service has no need to allocate te source of payments among the members of a

consolidated group. Pursuant to Treas. Reg. § 1.1502-77(a), "[t]he common parent will file claims for the refund of or credit, and any refund will be made directly to and in the name of the common parent and will discharge any liability of the Government in respect thereof to any such subsidiary."

Treas Reg. § 1.1502-77(d) provides a remedy if the common parent designated by the regulation to act as the agent for the group dissolves, as in this case. Thus, whereas the regulations provide that the parent of a consolidated group is the person authorized to file a claim for refund or credit, the member of the consolidated group designated to replace a dissolved parent under Treas. Reg. § 1.1502-77(d) is the appropriate person to claim a refund or credit under such circumstances. See, IRS FSA 200027026 (July 7, 2000).

We recommend that a Form 870 be prepared reflecting the proposed refund with respect to the [redacted] consolidated group consolidated tax liability for the taxable year [redacted] resulting from the partial agreement, and that the form be signed both on behalf of [redacted], as successor to [redacted], and on behalf of the agent for the group named under Treas. Reg. § 1.1502-77(d).

It is further noted that the Form 870 is to be processed prior to the issuance of the 30-day letter for the unagreed issues, and that the Form 3198, Special Handling Notice should be firmly affixed to the outside of the case file specifying "Partial Agreement." IRM Part IV, Handbook 4.2, SubSection 8.5.1(7). On the Form 3198 it should be clearly stated that the case involves a partial agreement; that the freeze should remain in effect; and that the processing of the closing agreement and waiver should result in no refund to the taxpayer pending a final determination of overpayment. The AIMS/Processing Handbook, chapter 12, "Examined Closings, Surveyed Claims, and Partial Assessments," provides that the use of priority code 4 will allow the partial to post without releasing the Master File freeze. IRM 104.3.12.4.20.4. If this is a joint committee case, the taxpayer, under certain conditions may be allowed to use the modified expedited refund procedures may apply. See IRM 4.3.5.6; IRS FSA 200037039, 2000 FSA LEXIS 105 (September 15, 2000).

Since there appears to be no further action to be taken by our office at this time we have marked our file closed. There

are no administrative files to be returned to your office. If there are any questions, you may contact the undersigned at (617)565-7914. We are also available to review draft versions of Forms 906 and 870 should you require such additional assistance.

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