Office of Chief Counsel
Internal Revenue Service

memorandum

CC:NER:NED:BOS:TL-N-2370-00
MPHamilton

date: AUG - 8 2000

to: District Director, New England District
Attn: Ted Jones, Case Manager, Group 1108

from: District Counsel, New England District, Boston

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subject: **Request for Technical Advice**
[redacted] ([redacted])
EIN: [redacted]
Forms 872 for Taxable Years [redacted], [redacted], **and** [redacted]
Earliest Statute Expiration [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 is in response to your request for advice regarding extending the statute of limitations for [redacted] ([redacted]) with respect to the taxable years [redacted], [redacted], and [redacted].

ISSUE

What is the proper form and content of a waiver, where the taxpayer [redacted] merged into another corporation, and [redacted]'s successor underwent a further merger into a corporation that was ultimately named [redacted].

CONCLUSION

The Service should obtain a Form 872 from [redacted] because [redacted] is the successor (after a series of mergers) to [redacted] for the taxable years ended [redacted], and [redacted], and because [redacted] is the alternative agent for the [redacted] consolidated group pursuant to Temp. Reg. § 1.1502-77T(a)(4)(ii).

FACTS

The taxpayer was formerly a Massachusetts voluntary association, within the meaning of M.G.L. ch. 182 § 1, organized on [redacted]. The taxpayer previously filed its federal income tax returns as a corporation. The taxpayer is under examination for the years [redacted] through [redacted]. The taxpayer filed consolidated corporate returns (Forms 1120) for the [redacted] and [redacted] years in the name of [redacted], using the EIN of [redacted]. The taxpayer filed a corporate return in the name of [redacted] [no mention of the subsidiaries] for the [redacted] year. Page 1 of the [redacted] return indicates that it is a consolidated return, and there is a schedule of affiliated corporations attached. The [redacted], [redacted], and [redacted] returns were signed by [redacted], Treasurer.

The taxpayer [redacted] executed two consents on Form 872 for taxable years [redacted] through [redacted]. One Form 872 was for the [redacted] and [redacted] years, with the taxpayer's name listed as [redacted]. The second Form 872 was for the [redacted] year, with the taxpayer's name listed as [redacted]. The Forms 872 were executed on behalf of the taxpayer by [redacted], Treasurer, on [redacted] and on behalf of the District Director on [redacted]. The Forms 872 extended the respective statutes until [redacted]. However, the new Letter 907 and Publication 1035 were not given to the taxpayer when the consents were solicited. The District Director must solicit new Forms 872 in compliance with I.R.C. § 6501(c)(4)(B). You have requested advice because of various events which occurred after these consents were signed.

The following description of the transactions is based on the merger agreements and merger certificates provided by your office in [redacted]. The following simultaneous transactions occurred on [redacted]:

1. A merger was effectuated pursuant to an Agreement and Plan of Merger ("Agreement") dated [redacted]. The parties to the Agreement were:

(a) [redacted], a public limited company incorporated under the laws of England and [redacted], with registration number [redacted] ("[redacted]");

(b) [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], directly and indirectly wholly owned by [redacted]; and

(c) [redacted] ("[redacted]" or "the surviving entity").

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]. [As a result of other transactions on [redacted], [redacted] was no longer in existence after [redacted].] This merger occurred pursuant to M.G.L. ch. 182 § 2 and M.G.L. ch. 156C § 59. Agreement, sec. 1.01.

By virtue of the merger, the membership interests in LLC were converted into shares of [redacted], and the former shareholders of [redacted] received cash. At the effective time of the merger, each one percent of the issued and outstanding membership interests in LLC were converted into one transferable certificate of participation or share of the surviving entity. Agreement, sec. 2.01(a). All issued and outstanding shares of [redacted] were canceled and converted into the right to receive "merger consideration," e.g., cash. Agreement, sec. 2.01(b(i) and (ii).

The Agreement provided that Massachusetts General Law and Massachusetts Limited Liability Company Act was mandatorily applicable to the Merger and the rights of the Shareholders of the constituent corporations, but that otherwise the Agreement would be governed by the laws of New York. Agreement, sec. 10.08.

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] ("Trustee I") (EIN [redacted]), a Massachusetts limited liability company organized on [redacted]. Trustee I survived the merger and continued to use the EIN [redacted].

The Second Agreement stated that the merger of [redacted] with and into Trustee I was pursuant to the Massachusetts Limited Liability Company Act, M.G.L. ch. 156C § 59, and M.G.L. ch. 182 § 2. The Second Agreement stated that this merger was intended to qualify as a reorganization within the meaning of I.R.C. § 368(a)(1)(F), i.e., a mere change in identity, form, or place of organization of one corporation, however effected. The separate existence of [redacted] ceased, except insofar as it may be 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. [To qualify as a § 368(a)(1)(F) reorganization, one of the merged corporations would have to be a non-operating company. We assume for purposes of this advice that this requirement is satisfied, based on information provided by your office, because Trustee I LLC appears to be a non-operating company organized for the sole purpose of merging with [redacted].]

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 the Third Agreement, 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]. The Third Agreement stated that the merger of Trustee I into [redacted], was in accordance with the applicable provisions of the Massachusetts Limited Liability Company Act, M.G.L. ch. 156C § 59, and the Delaware General Corporation Law, 8 Del. C. § 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. The Third Agreement stated that the 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].

The following information is based on your memorandum dated April 27, 2000, and discussions with the Revenue Agent on various dates.

The subsidiaries of [redacted] are now subsidiaries of [redacted]. The subsidiaries have kept their original names except as follows: (1) [redacted] ([redacted]) is now called [redacted], but has kept the EIN of [redacted]. (2) [redacted] ([redacted]) changed its name to [redacted] is a consulting company, and its name change was unrelated to the merger between [redacted] and [redacted].

The parent of [redacted] is [redacted], which elected to file as a corporation and which was started on [redacted]. [redacted] is owned by [redacted].

[redacted] will file a return for it and its subsidiaries for the short period [redacted], through [redacted]. After the short period return for [redacted], it will file as a consolidated group under the new parent, [redacted], for the period ending [redacted]. However, that election will not be made until the return is filed some time in [redacted]. [We have the following comment on this portion of the facts you have provided, although we do not believe these facts affect the conclusion herein. It is unclear to us why [redacted] is filing 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, and if so, the [redacted]

consolidated group continues in existence. Thus, it appears that it would be sufficient to have [redacted] file a consolidated return for the [redacted] for the period [redacted] through [redacted].]

DISCUSSION

I.R.C. § 6501(c)(4)(A) provides, in general, that the taxpayer may consent to extend the time to assess tax in an agreement in writing executed by both the Secretary and the taxpayer. I.R.C. § 6501(c)(4)(B) provides, with respect to requests to extend the period of limitations made after December 31, 1999, that the Secretary shall notify the taxpayer of the taxpayer's right to refuse to extend the period of limitations, or to limit such extension to particular issues or to a particular period of time, on each occasion when the taxpayer is requested to provide such consent. The Chief Counsel's guidance on this issue provides that the Service personnel may notify taxpayers of their rights under I.R.C. § 6501(c)(4)(B) either orally or in writing. The preferred method of notification is by sending taxpayers Letter 907(DO)(Rev. 2-2000), Letter 907(SC)(Rev. 12-1999), Letter 967(Rev. 12-1999), or Publication 1035, Extending the Tax Assessment Period (Rev. 12-1999).

Generally, the common parent, with certain exceptions not applicable here, is the sole agent for each member of 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). The common parent in its name will give waivers, and any waiver so given, shall be considered as having also been given or executed by each subsidiary. Treas. Reg. § 1.1502-77(a). Thus, generally, the common parent is the proper party to sign consents, including the Form 872 waiver to extend the period of limitations, for all members in the group. Treas. Reg. § 1.1502-77(a). Treas. Reg. § 1.1502-77(c) provides that, unless the District Director agrees to the contrary, an agreement entered into by the common parent extending the time within which an assessment may be made in respect of the tax for a consolidated return year, shall be applicable to each corporation which was a member of the group during any part of such taxable year. 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).

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. Treas. Reg. § 1.1502-77T(a)(3) provides that a waiver of the statute of limitations, with respect to the consolidated group, given by any one or more corporations referred to in paragraph (a)(4) of the section is deemed to be given by the agent of the group. Subparagraph (a)(4)(i) lists as an alternative agent the common parent of the group for all or any part of the year to which the notice or waiver applies. In this case, the common parent, [redacted], is no longer in existence. Therefore, this subparagraph cannot apply.

Under Treas. Reg. § 1.1502-77T(a)(4)(ii), the alternative agents for a group include "a successor to the former common parent in a transaction to which [I.R.C.] section 381(a) applies." I.R.C. § 381(a) applies to an acquisition of assets of a corporation by another corporation in either (1) a distribution to such other corporation to which section 332 (relating to liquidations of subsidiaries) applies, or (2) a transfer to which I.R.C. § 361 (relating to nonrecognition of gain or loss to corporations) applies, but only if the transfer is in connection with a reorganization described in subparagraph (A), (C), (D), (F), or (G) of I.R.C. § 368(a)(1). I.R.C. § 381(a)(1) and (2).

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]. If the mergers were "A" reorganizations, I.R.C. § 381 will apply. If so, pursuant to Temp. Reg. § 1.1502-77T(4)(ii), [redacted] would be an alternative agent for the [redacted] group for taxable years [redacted], [redacted], and [redacted]. Any waiver given by [redacted] with respect to these pre-merger taxable years of the [redacted] consolidated group would be deemed to be given by the agent of the group.

Each of the simultaneous mergers was pursuant to state law. This is one of the requirements of "A" reorganizations. However, to qualify as "A" reorganizations, not only do the mergers have to qualify as mergers under state law, but they must also pass the judicially imposed requirements of tax-free reorganizations: continuity of interest, continuity of business enterprise, and business purpose. We do not know whether the mergers meet these requirements. If the facts as developed indicate that the mergers were tax-free "A" reorganizations under I.R.C. § 368(a), then I.R.C. § 381 would apply to these reorganizations. If so, the Service can rely on subparagraph (4)(ii) of Temp. Reg. § 1.1502-77T in this case. Accordingly, [redacted] would be an alternative agent for the [redacted] consolidated group and the proper party to execute a Form 872 with respect to the taxable

years [redacted], [redacted], and [redacted] of the [redacted] consolidated group. If [redacted] has sufficient assets to cover the full extent of the [redacted] consolidated group's tax liabilities, then whether or not the transaction qualifies as an "A" reorganization, the Service should, as a fail safe measure, obtain a Form 872 from [redacted] with regard to the [redacted] consolidated group's tax liabilities.

If the [redacted]-Trustee I LLC merger does not constitute a tax-free "A" reorganization, [redacted] would not qualify as an alternative agent of the [redacted] group under Temp. Reg. § 1.1502-77T(a)(4)(ii). Nevertheless, the Form 872 extending the statute of limitations on assessment as to the [redacted] consolidated group's [redacted], [redacted], and [redacted] taxable years would be valid *at least as to* [redacted] in its role as a successor to a successor. [redacted] is liable as a successor under the state merger law for the debts of Trustee I LLC, 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 years [redacted] through and including [redacted].

As set forth above, we are relying on Temp. Reg. § 1.1502-77T, which treats [redacted] as the alternative agent in this case, as a basis for obtaining a Form 872 from [redacted]. However, another reason for obtaining a Form 872 from [redacted] is that [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 an extension agreement on behalf of the transferor (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.

Mass. Ann. Laws ch. 156B § 80 (2000) provides in part:

Effect of Consolidation or Merger.

...(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...

(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 deeded 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....

Delaware General Corporation Law provides in part:

8 Del. C. § 259 (1999): Status, rights, liabilities, of constituent and surviving or resulting corporations following merger or consolidation.

(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.

The mergers of [redacted] with and into [redacted], and of [redacted] with and into [redacted], were pursuant to Massachusetts corporate law; the merger [redacted] with and into [redacted], were 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).

We recommend that you obtain a Form 872 for [redacted], [redacted], and [redacted]. The Form 872 should be captioned as follows: "[redacted]

[redacted] (EIN: [redacted]), formerly [redacted], successor to [redacted], successor to [redacted] (EIN: [redacted]), and as alternative agent under Temp. Reg. § 1.1502-77T(a)(4)(ii).*" On the bottom of the Form 872, you should add the following: "*With respect to the consolidated tax liability of [redacted] (EIN: [redacted]) for the taxable years ending [redacted], [redacted], and [redacted]." This Form 872 should be signed by an authorized officer or director of [redacted]. Rev. Rul 83-41, 1983 C.B. 399, clarified and amplified, Rev. Rul. 84-165, 1984-2 C.B. 305. The current Letter 907 and Publication 1035 should be provided to the taxpayer when the consent is solicited.

We have considered whether a separate Form 872 should be obtained for the [redacted] year because the taxpayer listed its name on its [redacted] return as "[redacted]" without referencing the subsidiaries, while the [redacted] and [redacted] returns both list the taxpayer's name as "[redacted]." However, the [redacted] Form 1120 indicates on page 1 that it is a consolidated return. In addition, a list entitled "[redacted] Form 7004-[redacted], Name and Address of Each Member of Affiliated Group," is attached to the [redacted] return. We do not see any indication that the [redacted] return was not a consolidated return. We believe it is appropriate to combine the three years on one Form 872.

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. [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.] We believe that the established facts will support the Service's primary reliance on [redacted]'s liability as an alternative agent pursuant to Temp. Reg. § 1.1502-77T(a)(4)(ii), and as a successor by merger under state law. The use of the Form 872 to extend the statute of limitations with respect to [redacted] is adequate, therefore, and need not be supplemented by the use of 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 at this time. This will not prevent consideration of transferee

liability assessments, if appropriate, at a later time.

Please contact attorney Mary P. Hamilton at (617) 565-7915 if you need further assistance in this matter. There are no files to be returned to you.

GERALD J. O'TOOLE
District Counsel

By: _____
DAVID N. BRODSKY
Assistant District Counsel