Office of Chief Counsel
Internal Revenue Service

memorandum

TL-N-355-01
[redacted]

date: FEB 2 8 2001

to: Group [redacted], Large and Mid-size Business Division,
Retailers, Food and Pharmaceuticals
Attn: [redacted], Team Manager

from: Associate Area Counsel (LMSB:[redacted]:[redacted]), [redacted] P.O.D. [redacted]

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subject: **Request for Advisory Opinion**

Taxpayer: [redacted]
EIN: [redacted] & [redacted]
Taxable year: [redacted]

Successor by merger: [redacted]
EIN: [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 I.R.S. 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 I.R.S. personnel 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 the I.R.S. 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.

Although we informally coordinated this matter with the National Office, the advisory is subject to the review procedures of CCDM (35)3(19)4(4). The CCDM procedures require us to transmit a copy of the memorandum to the National Office. The

National Office has ten days from receipt of our memorandum to respond. The National Office may extend the review period if necessary. We will keep you informed of any delays.

DISCUSSION

We are responding to your January 9, 2001, request for advice concerning the proper treatment of the [redacted] ("Old [redacted]") consolidated group following Old [redacted]'s merger into [redacted] ("New [redacted]"). Your questions include: (a) whether the Old [redacted] consolidated group terminated at the time of the merger; (b) who is authorized to sign on behalf of the Old [redacted] consolidated group Forms 872 extending the assessment statutes and Forms 870 agreeing to assessment of deficiencies; and (c) the proper employer identification numbers to be used to Old [redacted]'s [redacted] and [redacted] taxable years. We have addressed these issues below.

Facts

During its taxable years [redacted] and [redacted] Old [redacted] was the common parent for an affiliated group of corporations electing to file a consolidated income tax return. Through its subsidiaries, Old [redacted] distributed natural gas to residential and commercial customers, operated natural gas pipelines and gas plants and was involved in the exploration and production of oil and natural gas. Old [redacted]'s principal operations were located in [redacted].

On [redacted], Old [redacted] entered into an agreement to acquire the natural gas distribution business of [redacted] ("[redacted]"). Up to that time, [redacted] engaged in the: (a) natural gas distribution business in [redacted] and northeast [redacted]; (b) the electrical generation and distributing business in [redacted]; and (c) the provision of security products through [redacted] and [redacted]. The transaction represented a strategic alliance between Old [redacted] and [redacted] to combine their natural gas assets.

The transaction was structured in the following manner:

(a) [redacted] formed a new subsidiary, New [redacted], and transferred its natural gas distribution business to New [redacted];

(b) Old [redacted] merged into New [redacted] in a statutory merger under I.R.C. § 368(a)(1)(A) with New [redacted] being the survivor;

(c) Old [redacted] shareholders received common shares in New [redacted] and [redacted] received common shares and convertible preferred shares in New [redacted];

(d) After the merger [redacted] had [redacted]% of the value of the equity in New [redacted] and the Old [redacted] shareholders had [redacted]% of the value of the equity in New [redacted]; and

(e) New [redacted] changed its name to [redacted].

The merger occurred on [redacted].

After the merger, New [redacted] obtained a new EIN and used the new EIN on its [redacted] return. Old [redacted] also erroneously used the New [redacted] EIN on its [redacted] return filed on [redacted]. The Old [redacted] return for the [redacted] taxable year also erroneously reflected [redacted], New [redacted], as the common parent instead of the actual common parent, Old [redacted].

The government opened an examination cycle which included the Old [redacted] and [redacted] taxable years, as well as the New [redacted] taxable year. During the course of the examination, the government obtained Forms 872 covering Old [redacted]'s [redacted] and [redacted] taxable years and New [redacted]'s [redacted] taxable year. All of the Forms 872 used New [redacted]'s name. The [redacted] Form 872 correctly reflected Old [redacted]'S EIN. The Forms 872 for [redacted] and [redacted] used New [redacted]'s EIN. Officers of New [redacted] signed all Forms 872. The taxpayers agree that the parties to the Forms 872 intended to extend the Old [redacted] and New [redacted] assessment statutes despite the erroneous names and EIN's reflected on some of the forms.[1]

<u>Analysis</u>

Treas. Reg. § 1.1502-75(d)(3) addresses reverse acquisitions like the Old [redacted] merger into New [redacted]. The regulation provides that:

> (a) if a corporation ("first corporation") acquires either stock or substantially all the assets of a second corporation in exchange for stock of the first corporation; and
>
> (b) the stockholders (immediately before the acquisition) of the second corporation, as a result of owning stock of the second corporation, own (immediately after the

[1] Draft revenue agent reports for Old [redacted]'s [redacted] and [redacted] taxable years contain similar errors.

> acquisition) more than 50% of the fair market value of the outstanding stock of the first corporation;
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> (c) then any group of which the first corporation was the common parent immediately before the acquisition shall cease to exist as of the date of acquisition; and
>
> (d) any group of which the second corporation was the common parent immediately before the acquisition shall be treated as remaining in existence with the first corporation becoming the common parent of the group.

Treas. Reg. §1.1502-75(d)(3)

Treas. Reg. § 1.1502-76(b)(5), Ex. 2(c) provides an example of a reverse acquisition. There, X acquires all of P's assets in exchange for more than 50% of X's stock in a reorganization constituting a reverse acquisition under Treas. Reg. § 1.1502-75(d)(3). As a result, the X group terminates and the P group continues with X as its new common parent. The example goes on to explain that P's items for the portion of Year 1 ending with the acquisition are treated as the items of the common parent that must be included in the P group's return for Year 1, and X's items are treated as the items of a subsidiary included in the P group's return for the portion of Year 1 for which X is a member.

In our case, Old [redacted] merged into New [redacted], with the Old [redacted] shareholders owning [redacted] percent of the New [redacted] stock. Under Treas. Reg. § 1.1502-75(d)(3), the Old [redacted] group is treated as remaining in existence but New [redacted] is the new common parent. Even though Old [redacted] ceased to exist after the merger, the Old [redacted] group does continue. For that reason, New [redacted] officers, with the requisite authority, could extend the statute of limitations for the Old [redacted]'s [redacted] and [redacted] taxable years. As officers of New [redacted], the successor common parent for the Old [redacted] group, those individuals could bind the members of the Old [redacted] consolidated return group with respect to the [redacted] and [redacted] taxable years. The same New [redacted] officers would also have the authority to sign Forms 870, agreeing to additional assessment of tax for the [redacted] and [redacted] Old [redacted] taxable years.

Nor does the use of the wrong EIN on the Form 872 for the Old [redacted] [redacted] taxable year invalidate the consents. In Woods v. Commissioner, 92 T.C. 776, 789 (1989), the Tax Court determined that a consent containing a mutual mistake, such as an erroneous taxpayer's name or EIN, could be reformed to reflect the parties' actual agreement. Reformation of scrivener's error of this type is available where the true intent of the parties can be shown by clear and convincing evidence. Id.

Here, there is no controversy as to the intent of the parties with respect to the Old [redacted] Form 872. The taxpayer agrees it signed the document intending to extend Old [redacted]'s [redacted] assessment statute. Furthermore, even without the taxpayer's agreement, there is sufficient evidence to reform the document. No corporation even existed during the [redacted] taxable year which used New [redacted]'s EIN. Old [redacted] itself used the erroneous EIN when identifying the Old [redacted] consolidated group on its [redacted] return. Lastly, the course of dealings between the parties reflect an intent to cover Old [redacted]'s [redacted] taxable year with the executed Form 872 for [redacted]. Thus, the [redacted] Old [redacted] Form 872 would be reformed to reflect the correct EIN.

To avoid any confusion in the future, we suggest that one revenue agent report ("RAR") be prepared covering Old [redacted]'s taxable years [redacted] and [redacted]. The RAR should reflect the correct Old [redacted] name and EIN. A separate RAR should be prepared for New [redacted]'s [redacted] taxable year and should reflect New [redacted]'s correct name and EIN. Similarly, it is advisable to have one Form 870 prepared for the agreed [redacted] and [redacted] Old [redacted] adjustments and another Form 870 prepared for the agreed [redacted] New [redacted] adjustments. The Forms 870 should reflect the correct names and EIN's for the respective corporations.

Please contact [redacted] if you have any questions.

[redacted]
Associate Area Counsel
[redacted]

By: [redacted]
Senior Attorney (LMSB)

cc: AAC (LMSB: [redacted])