Office of Chief Counsel Internal Revenue Service

memorandum

TL-N-355-01

date: FEB 2 8 2001

o: Group , Large and Mid-size Business Division,

Retailers, Food and Pharmaceuticals

Attn: , Team Manager

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

subject: Request for Advisory Opinion

Taxpayer:

EIN:

Taxable year:

&

Successor by merger:

EIN:

DISCLOSURE STATEMENT

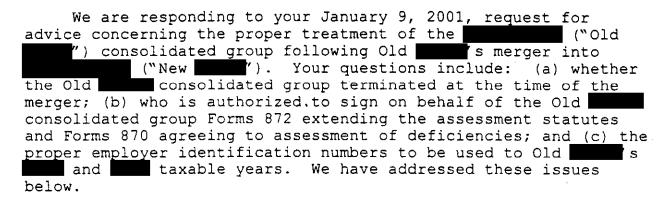
This advice constitutes return information subject to I.R.C. § 6103. This advice contains confidential information subject to attorney-client and deliberative process privileges and if prepared in contemplation of litigation, subject to the attorney work product privilege. Accordingly, the I.R.S. recipient 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.

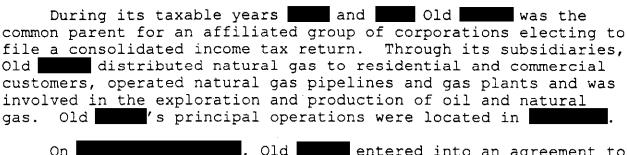
Although we informally coordinated this matter with the National Office, the advisory is subject to the review procedures of CCDM (35)3(19)4(4). The CCDM procedures require us to transmit a copy of the memorandum to the National Office. The

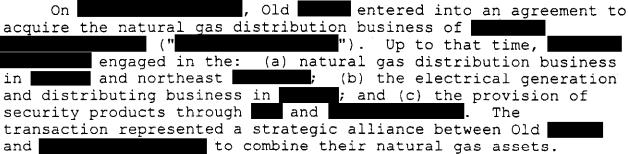
National Office has ten days from receipt of our memorandum to respond. The National Office may extend the review period if necessary. We will keep you informed of any delays.

DISCUSSION



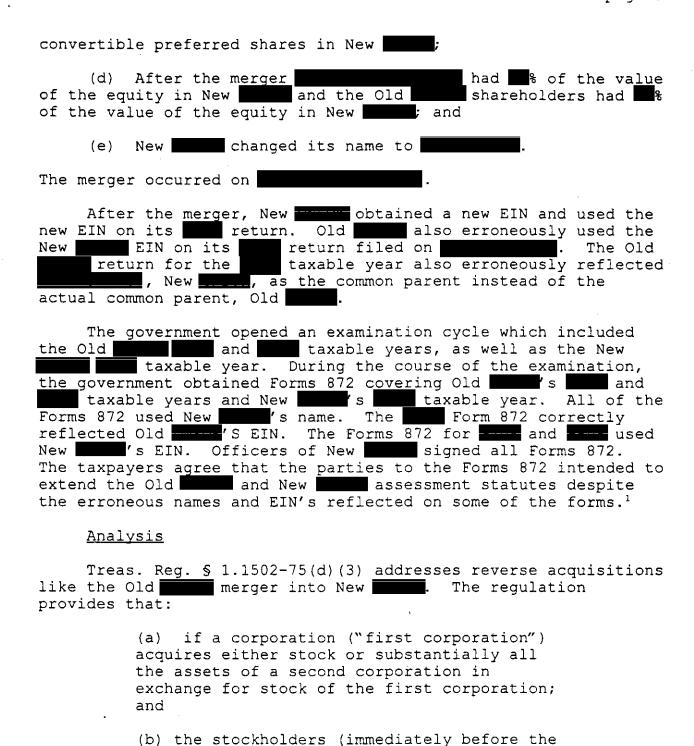
Facts





The transaction was structured in the following manner:

- (a) formed a new subsidiary, New and transferred its natural gas distribution business to New;
- (b) Old merged into New in a statutory merger under I.R.C. § 368(a)(1)(A) with New being the survivor;
- (c) Old shareholders received common shares in New and received common shares and



acquisition) of the second corporation, as a

result of owning stock of the second corporation, own (immediately after the

Draft revenue agent reports for Old star s and taxable years contain similar errors.

acquisition) more than 50% of the fair market value of the outstanding stock of the first corporation;

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

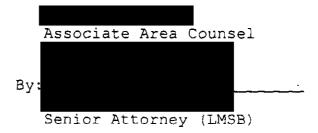
Nor does the use of the wrong EIN on the Form 872 for the Old taxable year invalidate the consents. In <u>Woods v. Commissioner</u>, 92 T.C. 776, 789 (1989), the Tax Court determined that a consent containing a mutual mistake, such as an erroneous taxpayer's name or EIN, could be reformed to reflect 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. <u>Id</u>.

Here, there is no controversy as to the intent of the parties with respect to the Old Form 872. The taxpayer agrees it signed the document intending to extend Old assessment statute. Furthermore, even without the taxpayer's agreement, there is sufficient evidence to reform the document. No corporation even existed during the taxable year which used New Form 5 EIN. Old titself used the erroneous EIN when identifying the Old consolidated group on its return. Lastly, the course of dealings between the parties reflect an intent to cover Old taxable year with the executed Form 872 for Thus, the Old 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 state of the correct old state old

Please contact if you have any questions.



cc: AAC (LMSB: