Office of Chief Counsel
Internal Revenue Service

memorandum

CC:NER:MAN:TL-N-4420-00
DARosen

date:

to: LMSB Heavy Manufacturing, Construction and Transportation (Field Operations Manhattan)
Attn: Revenue Agent Michael P. Tampa, Team 1646

from: District Counsel, Manhattan (CC:NER:MAN)

subject: [redacted]
Tax Years: [redacted], [redacted], and [redacted]
(Form 872 [Income])

Consents to Extend the Statute of Limitations on Assessment
U.I.L. Nos. 1502.77-00, 6501.08-09, 6501.08-17

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THIS ADVICE IS RENDERED ON THE BASIS THAT ALL REPRESENTATIONS AND FACTS IN THIS MEMORANDUM ARE CORRECT. WE RECOMMEND THAT YOU VERIFY THIS INFORMATION. IF ANY OF THE REPRESENTATIONS AND/OR FACTS ARE INCORRECT OR CANNOT BE SUBSTANTIATED, OUR ADVICE MAY NEED TO BE MODIFIED.

INTRODUCTION

This memorandum is in response to your request for advice concerning the proper entity to execute consents to extend the statute of limitations on assessment for the above-referenced taxpayer, as well as the proper language to be used in the consents. **The earliest date that the statute of limitations on assessment will expire with respect to the above-referenced taxpayer is** [redacted].

FACTS

For the tax years in issue, [redacted], presently known as [redacted] (incorporated under the laws of the state of Colorado) was the common parent of an affiliated group of corporations and filed consolidated U.S. Corporate Income Tax Returns (Forms 1120) with its affiliates. The Forms 1120 for the tax years ended [redacted] and [redacted] were filed with the Service on [redacted] and [redacted], respectively, under the name "[redacted]". The Form 1120 for the tax year ended [redacted] was filed with the Service on [redacted] under the name "[redacted], Formerly Known [redacted]".

On or about [redacted], [redacted], a Delaware Corporation, [redacted], a Colorado Corporation and wholly-owned subsidiary of [redacted], and [redacted] entered into an Agreement and Plan of Merger (the "Merger Agreement"). Pursuant to Section [redacted] of the Merger Agreement, [redacted] merged with and into [redacted], with [redacted] emerging as the surviving corporation. Upon consummation of the merger, pursuant to Section [redacted] of the Merger Agreement, each outstanding share of common stock owned by the shareholders of [redacted] (other than shares held by dissenting shareholders) was converted into the right to receive, upon surrender to [redacted], $[redacted] in cash (without interest), an amount in excess of their fair market value.[1] At the same time, the outstanding capital stock of [redacted], all of which was owned by [redacted], was converted into one new share of common stock of [redacted] pursuant to Section [redacted] of the Merger Agreement. Thus, immediately following the merger, [redacted], became a wholly-owned subsidiary of [redacted].

Pursuant to Section [redacted] of the Merger Agreement, the merger became effective as of the date that articles of merger were filed with the Secretary of State of the State of Colorado, which occurred on [redacted], subsequent to the close of the tax year ended [redacted].[2] On the same date, [redacted]

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[1] Dissenting shareholders, i.e., shareholders who chose not to surrender their shares in this manner, were entitled under the provisions of the Merger Agreement to receive the fair market value for the surrender of their shares, in accordance with Article 113 of the Colorado Business Corporation Act.

[2] Although we understand that the members of the [redacted] consolidated group joined the [redacted] consolidated group for the fiscal year ended [redacted] (as of the effective date of

[redacted] changed its name to [redacted] As of the date of this memorandum, [redacted] remains in existence.

Section [redacted] of the Merger Agreement provides that it shall be governed by, and construed in accordance with, the laws of the State of New York, without regard to conflict of laws principles.

ISSUES

1. What specific language should be used on the consents to extend the statute of limitations on assessment for the taxpayer [redacted], formerly known as [redacted], for the taxable years ended [redacted], [redacted], and [redacted]?

2. Who is the proper individual to execute consents, on behalf of the taxpayer, to extend the statute of limitations on assessment for the taxpayer [redacted], an affiliated group, for the tax years ended [redacted], [redacted], and [redacted]?

DISCUSSION

Extending the Limitations Period on Assessment - Introduction

In general, the statute of limitations on assessment expires three years from the date the tax return for such tax is filed. I.R.C. § 6501(a). I.R.C. § 6501(c)(4), however, provides an exception to the general three year statute of limitations on assessment. In accordance with this exception, the Secretary and the taxpayer may consent in writing to an agreement to extend the statute of limitations on assessment of any tax except estate tax. In the case of Chapter 1 taxes (income taxes) attributable to individuals or corporations, Form 872, Consent to Extend the Time to Assess Tax, is used to extend the statute of limitations on assessment.

The Consolidated Return Regulations

In the case of a consolidated group, guidance as to the appropriate entity to enter into a consent to extend the statute of limitations on assessment can be found in the consolidated return regulations. Treas. Reg. § 1.1502-1 *et seq.* Pursuant to the consolidated return regulations, the common parent is the sole agent for each member of the group, duly authorized to act in its own name in all matters relating to the income tax

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the merger), we have not been asked to opine on consents to extend the statute of limitations for either the short-year pre-merger return or post-merger returns.

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 been given or executed by each such subsidiary. Treas. Reg. § 1.1502-77(a). Unless there is an agreement to the contrary, an agreement entered into by the common parent extending the time within which an assessment of income tax may be made for the consolidated return year shall be applicable to each corporation which was a member of the group during any part of such taxable year. Treas. Reg. § 1.1502-77(c).

The common parent remains the agent for the members of the group for any year during which it was the common parent, whether or not consolidated returns are filed in subsequent years and whether or not one or more subsidiaries have become or have ceased to be members of the group. See Treas. Reg. § 1.1502-77(a); Southern Pacific v. Commissioner, 84 T.C. 395, 401 (1985). Accordingly, as a general rule, the common parent remains the proper party to extend the statute of limitations for any taxable year for which it was the common parent, as long as it remains in existence.

Successor Liability Under State Law

Under New York Law, in a merger "the existence of one of the corporations is continued without the formation of a new corporation, the others being merged in it; the continuing corporation becomes the successor of the merged corporations subject to the rights and obligations imposed by the statute." In re Bergdorf's Will, 133 N.Y.S. 1012 (A.D.), aff'd, 206 N.Y. 309 (1912). Under Colorado law, the surviving corporation in a merger likewise succeeds to all liabilities of each corporation party to the merger. Colo. Rev. Stat. § 7-111-106 (1999).

Language for Caption

Since [redacted] survived the merger (as currently named [redacted]), this is the proper entity to extend the statute of limitations for the taxpayer. The caption on Form 872 should read as follows:

"[redacted] (E.I.N. [redacted]), formerly known as [redacted] (E.I.N. [redacted])*"

In addition, at the bottom of the page, the following language should be added:

> "*This is with respect to the consolidated tax liability of [redacted] (E.I.N. [redacted]) [redacted] consolidated group for the tax years ended [redacted] and [redacted], as well as the consolidated tax liability of [redacted] (E.I.N. [redacted]) and [redacted] consolidated group, formerly known as [redacted] (E.I.N. [redacted]) and [redacted] consolidated group for the tax year ended [redacted]."

Individual to Execute Consents

The regulations under I.R.C. § 6501(c)(4) do not specify who may sign consents to extend the statute of limitations for assessing income tax. Accordingly, the rules applicable to the execution of an original return have been deemed to apply to the execution of a consent to extend the time to make an assessment. Rev. Rul. 83-41, 1983-1 C.B. 399, clarified and amplified, Rev. Rul. 84-165, 1984-2 C.B. 305.

In the case of a corporate return, I.R.C. § 6062 provides that a corporation's income tax returns must be signed by the president, vice-president, treasurer, assistant treasurer, chief accounting officer, or any other officer duly authorized to act. Since the rules applicable to the execution of an original return also apply to a consent to extend the statute of limitations, any such consent may be signed by the above-noted individuals. Rev. Rul. 84-165, 1984-2 C.B. 305. Thus, in the subject case, any officer of [redacted] of the kind set forth in I.R.C. § 6062, supra, may sign these consents.

PROCEDURAL CONSIDERATIONS

Please note that Section 3461 of the Restructuring and Reform Act of 1998, codified in I.R.C. § 6501(c)(4)(B), requires the Service to advise taxpayers of their right to refuse to extend the statute of limitations on assessment, or in the alternative to limit an extension to particular issues or for specific periods of time, each time that the Service requests that the taxpayer extend the limitations period. To satisfy this requirement, you may provide Publication 1035, "Extending the Tax Assessment Period," to the taxpayers when you solicit the consents. Although you may advise the taxpayers orally of the I.R.C. § 6501(c)(4)(B) requirement, it is preferable that the notification be in writing. In any event, you should document your actions in this regard in the case files.

In addition to the recommendations made herein, we further recommend that you pay strict attention to the rules set forth in the IRM. Specifically, IRM 4541.1(2) requires use of Letter 907(DO) to solicit a Form 872, and IRM 4541.1(8) requires use of Letter 929(DO) to return a signed Form 872 to the taxpayer. Dated copies of both letters should be retained in the case file(s) as directed. When the signed Forms 872 are received from the taxpayer the responsible manager should promptly sign and date them in accordance with Treasury Regulation § 301.6501(c)-1(d) and IRM 4541.5(2). The manager must also update the respective statutes of limitations in the continuous case management statute control files and properly annotate Form 895 or equivalent. See IRM 4531.2 and 4534. This includes Form 5348. In the event a Form 872 becomes separated from the file or lost, these other documents would become invaluable to establish the agreement.

If you have any questions, please contact the attorney assigned to this matter, Daniel A. Rosen, at (212) 264-5473, extension 262.

LINDA R. DETTERY
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