Office of Chief Counsel
Internal Revenue Service

memorandum

CC:LM:MCT:CLE:PIT:TL-N-59-01
MAYost

date:

to: John Niederst, Team Manager - Group 1672

from: Associate Area Counsel, LM:MCT:CLE:PIT

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subject: **Proper Execution of Form 870**
[redacted]
U.I.L. Nos. 6231-06-00 and 1502.77-00

This is in response to your memorandum dated December 27, 2000, that requests advice on securing a Form 870, Waiver of Restrictions on Assessment and Collection of Deficiency in Tax and Acceptance of Overassessment, particularly with respect to a partnership adjustment relating to the consolidated tax return for the year ended [redacted] for [redacted].

This memorandum is subject to 10-day post review by our National Office and, therefore, is subject to modification.

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.

ISSUE

Who is the proper party to execute a Form 870, particularly with respect to an agreed partnership adjustment relating to the consolidated tax year of [redacted] for [redacted] and subsidiaries, and what special language, if any, should be added to the Form 870?

CONCLUSIONS

1. A partner-level agreement evidenced by a Form 870 is **not** necessary to make the appropriate assessment of tax for partnership item adjustments flowing from [redacted]. Under Treas. Reg. § 301.6231(a)(6)-1T, the Service is authorized to assess the tax arising from the partnership item adjustments through a computational adjustment, which can be made without securing any further agreement or waiver from [redacted]. We recommend that this procedure be followed. There is, however, only a short time period in which to timely make the assessment. Based upon the fact that a decision was entered by the Tax Court in the TEFRA proceeding relating to [redacted] on [redacted], **an assessment of the tax must be made prior to** [redacted].

2. We understand, however, that non-TEFRA audit adjustments with respect to [redacted]'s [redacted] tax year and/or other pre-reorganization years may be proposed in the future and a Form 870 waiver may be sought for these adjustments. If so, the proper party to execute the waiver (**prior to** [redacted]) would be an officer of old [redacted], subsequently renamed [redacted], which was the common parent of the consolidated group during the pre-reorganization years. [redacted], which remained in existence following the major reorganization, continues to have authority to act as the agent for the members of the old [redacted] group for the pre-reorganization years. Although [redacted] was liquidated in [redacted], the corporation remains a viable corporate body under Delaware law for three years to wind up its affairs. A Form 870 would appear to clearly fall within the scope of an officer's authority to wind up corporate business. After the three-year dissolution period, [redacted] generally will cease to exist, and will no longer be available to act as agent for the group, except with respect to an action or suit initiated during the dissolution period.

3. It is necessary that the Exam team verify that any person executing the Form 870 on behalf of [redacted] is an official authorized to transact corporate business

during the dissolution period. Further, the Form 870 should identify the taxpayer as "[redacted] (EIN: [redacted]), formerly [redacted]". The foregoing name should be asterisked, and somewhere below on the Form 870 an asterisk should be added followed by language indicating that the liability relates to the consolidated tax liability of the [redacted] consolidated group for the applicable pre-reorganization year(s).

FACTS

In [redacted], [redacted] (a Delaware corporation) agreed to transfer its [redacted] businesses and related assets to [redacted]. The latter, however, was not interested in acquiring [redacted]'s other unrelated business operations, so in order to complete the deal, [redacted] decided to shed these business assets. To accomplish this, [redacted] transferred its [redacted] assets into separate operating subsidiaries. [redacted] also formed New [redacted], a Delaware corporation, as a wholly-owned subsidiary, with EIN [redacted]. The stock of the operating subsidiaries containing the [redacted] businesses was then transferred as a contribution of capital to New [redacted]. Thereafter, the stock of New [redacted] was distributed to [redacted]'s public shareholders. New [redacted] then changed its name back to [redacted].

Simultaneously, old [redacted] kept its [redacted] businesses and retained a number of subsidiaries. Pursuant to a merger agreement between [redacted] and old [redacted], a transitory subsidiary of [redacted] ([redacted]) merged with and into old [redacted] with its shareholders receiving voting shares of [redacted]. Old [redacted] survived the merger and retained its old EIN of [redacted]. As part of the merger, old [redacted] changed its name to [redacted].

In [redacted], [redacted] was liquidated by [redacted], pursuant to I.R.C. § 332.

At the present time, Exam seeks to secure a Form 870 in order to assess an additional tax liability arising from adjustments made to a partnership, known as [redacted], in which one of [redacted]'s subsidiaries was a partner during the

consolidated year [redacted].[1] [redacted], the subsidiary which was the partner in [redacted], was spun off to New [redacted] as part of the [redacted] reorganization, but was a member of the old consolidated group for the [redacted] tax year. A stipulated Decision reflecting a resolution of the partnership level adjustments for [redacted] was signed by the tax matters partner (unrelated to [redacted] or [redacted]) and was filed with the Tax Court. The stipulated Decision was entered by the Tax Court on [redacted]. No notice of appeal was taken.

In the future, other non-TEFRA tax adjustments may be proposed with respect to [redacted]'s consolidated tax year [redacted] or other pre-reorganization years for which Exam may want to solicit a Form 870 waiver.

LAW AND ANALYSIS

At the outset, it should be noted that a partner-level agreement evidenced by a Form 870 is not necessary to make the appropriate assessment of tax for partnership item adjustments against a partner of [redacted]. Once the stipulated decision in the TEFRA proceeding in the Tax Court became final, it bound all of the partners. Under Treas. Reg. § 301.6231(a)(6)-1T, the Service is authorized to assess the tax arising from the partnership item adjustments through computational adjustments, which can be made without any further agreement from the partners and without the issuance of a notice of deficiency. If a partner disagrees with the computational adjustment, his exclusive recourse is to file a claim for refund to contest the computation within six months after the day on which a notice of computational adjustment is mailed. I.R.C. § 6230(c)(1) and (2).

Since a computational adjustment is the prescribed procedure under the applicable TEFRA regulations, we recommend that this procedure be followed in making the tax assessment against [redacted] flowing from the partnership item adjustments to [redacted]. The statute of limitations for assessment, however, is rather short. A decision determining the partnership item adjustments of [redacted] was entered by the Tax Court on [redacted]. Under I.R.C. § 6229(d), a computational adjustment must be made within one year from the date that the decision became final. I.R.C. § 7481 provides that a decision of the Tax Court becomes final upon the expiration of the time

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[1] The partnership's tax year at issue was [redacted], which ended during [redacted]'s consolidated year [redacted].

allowed for filing a notice of appeal, which is 90 days after entry of the Tax Court decision, pursuant to Fed. R. App. P. 13(a). Accordingly, the Tax Court decision became final on [redacted] and the one-year period under I.R.C. § 6229(d) for making the assessment will expire before [redacted].

We also understand, however, that non-TEFRA audit adjustments may be proposed in the near future with respect to [redacted] and other pre-reorganization years and a Form 870 waiver may be sought for these adjustments. If so, the proper party (prior to [redacted]) to execute the waiver would be an authorized officer of old [redacted], renamed [redacted], which was the common parent of the consolidated group during the pre-reorganization years.

As a result of the sweeping [redacted] reorganization, the old [redacted] group effectively divided into [redacted] separate groups, but old [redacted] remained in existence. It was the survivor corporation in what [redacted] contends was a reverse triangular merger with the [redacted] subsidiary. Following the merger, old [redacted] merely changed its identity, while continuing to use its old EIN. Under Treas. Reg. § 1.1502-77(a), the common parent of the consolidated group is the sole agent for each subsidiary in the group and duly authorized to act in its own name in all matters relating to the consolidated tax liability of the group. The common parent remains the agent for the members of the group for any years 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 at any time. Thus, Treas. Reg. § 1.1502-77(a) supports the continued agency authority of an old common parent for pre-acquisition years where the old common parent remains in existence following a reverse acquisition. See also, Union Oil Company of California v. Commissioner, 101 T.C. 130 (1993)(old parent held to be an agent for the consolidated group after a reverse acquisition for purposes of issuance of a deficiency notice.) It follows, therefore, that [redacted], as the surviving common parent of the old [redacted] group, continued to have authority to act as the agent for the members of that group for the pre-acquisition years.

The facts indicate that [redacted] was liquidated in [redacted]; however, under Delaware law, [redacted] remains a viable corporate body for three years to wind up its affairs and thereafter for purposes of

any proceeding begun during this winding up period.[2] During the three-year period, the officers and directors of the corporation can prosecute and defend suits, generally settle and close the business, dispose of property, discharge liabilities, and distribute assets to its shareholders. 8 Del. Code Ann. § 278 (1999); see, Lone Star Industries, Inc. v. Redwine, 757 F.2d 1544, 1549-1550 (5th Cir. 1985). Clearly, execution of a Form 870 would fall within the scope of an officer's authority to wind up corporate affairs, since it represents an action taken in the course of settling and closing the business and discharging corporate liabilities. Other types of waivers executed during a winding up period, specifically those extending the statute of limitations, have been held to be authorized. See, Rev. Rul. 71-467, 1971-2 C.B. 411 (Connecticut dissolution law similar to that of Delaware); Associates Investment Co. v. Commissioner, 59 T.C. 441 (1972)(Nebraska law patterned after Model Business Corporation Act); Field v. Commissioner, 32 T.C. 187 (1959), aff'd, 286 F.2d 960 (7th Cir. 1960) (Mich. Law); United States v. Krueger, 121 F.2d 842, 844 (3rd Cir. 1941)(waiver of statute of limitation within the power to settle corporate affairs under New Jersey dissolution statute.)

Of course, the Exam team should verify that any person executing the Form 870 on behalf of [redacted] is still an official authorized to transact corporate business during the dissolution period. The Form 870 should identify the taxpayer as "[redacted] (EIN: [redacted]), formerly [redacted]". For the sake of clarity, the foregoing name should be asterisked, and somewhere below on the Form 870, an asterisk should be added followed by language indicating that the liability relates to the consolidated tax liability of the [redacted] consolidated group for the applicable pre-reorganization year(s).

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[2] The Exam team should also give serious consideration now to requesting [redacted] to designate another member of its former group to act as a successor agent pursuant to Treas. Reg. § 1.1502-77(d) before termination of the three-year dissolution period.

If you have any questions, please feel free to call Michael A. Yost, Jr. at (412) 644-3441.

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By:_____
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