Office of Chief Counsel
Internal Revenue Service

memorandum

CC:LM:CTM:SF:POSTF148116-01
MTRobus

date: October 18, 2001

to: Mark Mertens, RA (LMSB)(Financial Services & Health Care)
Internal Revenue Service
Stop SF-6107; EG 1232
450 Golden Gate Avenue
San Francisco, CA 94102

from: Area Counsel
(Communications, Technology, and Media: Oakland)

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subject: [redacted] ("Taxpayer")
EIN: [redacted]
Consent to extend statute of limitations FYE [redacted] and [redacted]

Common Parent Agent for Subsidiaries
U.I.L. #: 1502.77-00 and
Alternative Agents of the Group
U.I.L. #: 1502.77-01

Disclosure Statement

This writing may contain privileged information. Any unauthorized disclosure of this writing may have an adverse effect on privileges, such as the attorney client privilege. If disclosure becomes necessary, please contact this office for our views.

This advice relies on facts provided by you to our office. If you find that any facts are incorrect, please advise us immediately so that we may modify and correct this advice. The Taxpayer has advised you that there have been no changes in the organizational structure that would affect the conclusions reached in this memo.

This advice is subject to 10-day post-review by the National Office. CCDM 35.3.19.4. Accordingly we request that you do not act on this advice until we have advised you of the National Office's comments concerning this advice.

ISSUES

1. When will the statute of limitations for assessment expire with respect to the Taxpayer's consolidated Form 1120 for the short year ending [redacted]?

2. Who is/are the proper party/parties to sign the consents to extend the statute of limitations for the years ending [redacted] and [redacted]?

3. Is Form 872-I (January 2001) the correct form to use to extend the statute of limitations, since the Taxpayer is an investor in more than [redacted]?

CONCLUSION

1. The statute date for the short year ending [redacted] is [redacted]. We recommend, however, that the earlier date of [redacted] be used for statute control purposes in order to avoid any controversy with the Taxpayer regarding the statute of limitations.

2. The proper parties to execute the consents for [redacted] and [redacted] are as follows:

a. New [redacted] as successor of Old [redacted] (but not as the agent of the Old [redacted], and,

b. [redacted] as agent for the Old [redacted] group.

In order to accomplish this, the Service should obtain two consents, one each from New [redacted] and [redacted]. You should identify the taxpayer on the front page of the Forms 872 obtained from the following entities as follows:

i. [redacted] as successor to [redacted]*
Put an asterisk at the bottom of the Form 872 followed by --

*This is with respect to [redacted]'s several liability for the consolidated federal income tax of [redacted] consolidated group for the group's taxable years ending [redacted] and [redacted].

ii. [redacted] as alternative agent for [redacted] consolidated group*

Put an asterisk at the bottom of the Form 872 followed by --

*This is with respect to the consolidated federal income tax of [redacted] consolidated group for the group's taxable years ending [redacted] and [redacted].

3. The proper form to use is Form 872, with the following language added after paragraph 2:

> Without otherwise limiting the applicability of this agreement, this agreement also extends the period of limitations for assessing any tax (including additions to tax and interest) attributable to any partnership items (see section 6231(a)(3)), affected items (see section 6231(a)(5)), computational adjustments (see section 6231(a)(6)), and partnership items converted to non-partnership items (see section 6231(b)). This agreement extends the period for filing a petition for adjustments under section 6228(b) but only if a timely request for administrative adjustment is filed under section 6227. For partnership items which have converted to non-partnership items, this agreement extends the period for filing a suit for refund or credit under section 6532, but only if a timely claim for refund is filed for such items. In accordance with paragraph (1) above, an assessment attributable to a partnership shall not terminate this agreement for other partnerships or for items not attributable to a partnership. Similarly, an assessment not attributable to a partnership shall not terminate this agreement for items attributable to a partnership.

DISCUSSION OF FACTS AND LAW

Background: On [redacted], a publicly-held Netherlands company, acquired [redacted] and its subsidiaries. Specifically, the parent of the consolidated group, [redacted] ("Old [redacted]"), was merged into [redacted], a wholly-owned subsidiary of [redacted]. Old [redacted] ceased to exist. Immediately thereafter, [redacted] changed its name to [redacted] ("New [redacted].

The documents registered by [redacted] with the Securities and Exchange Commission, Form F-4, show the following information:

Terms of the Merger General. At the time the merger

becomes effective, [redacted], [redacted] and [redacted], a wholly owned direct subsidiary of [redacted], will consummate the merger, in which [redacted] will merge into [redacted] and the separate corporate existence of [redacted] will cease. [redacted] will be the surviving corporation in the merger and will continue to be a wholly owned direct subsidiary of [redacted] and will continue to be governed by the laws of the State of Delaware. Upon consummation of the merger, the name of the surviving corporation will be changed to "[redacted]."

Certificate of Incorporation. The merger agreement provides that the certificate of incorporation of [redacted] shall be amended to change the name of [redacted] to "[redacted]," and as so amended, will be the certificate of incorporation of the surviving corporation.

By-Laws. The merger agreement provides that the by-laws of [redacted] in effect at the effective time of the merger will be the by-laws of the surviving corporation.

Directors and Officers. The merger agreement provides that the directors and officers of [redacted] at the effective time of the merger will be the directors and officers of the surviving corporation, until their respective successors are duly elected and qualified.

[redacted] and [redacted] have received opinions of [redacted] and [redacted], respectively, dated the date of this proxy statement-prospectus, to the effect that the merger will be treated for U.S. federal income tax purposes as a reorganization under Section 368(a) of the Code. . . .We have not requested nor will we request an advance ruling from the IRS as to the tax consequences of the merger.

1. Statute of Limitations Issue - Short Year Ending [redacted] - Two Returns Filed

Under I.R.C. § 6072(b), returns of corporations made on the basis of the calendar year shall be filed on or before the 15th day of March following the close of the calendar year, and such returns made on the basis of a fiscal year shall be filed on or before the 15th day of the third month following the close of the fiscal year.

Under Treas. Reg. §1.443-1, a return for a short period, i.e., a taxable year consisting of a period of less than 12 months, shall be made if a taxpayer is not in existence for the entire taxable year. A dissolving corporation which files its returns for the calendar year is required to file a return for the short period from January 1 to the date it goes out of existence. In general, the requirements with respect to the filing of returns and the payment of tax for a short period where the taxpayer has not been in existence for the entire taxable year are the same as for the filing of a return and the payment of tax for a taxable year of 12 months ending on the last day of the short period.

In accordance with the above rules, the return of Old [redacted] for the short year was due to be filed on or before the date which fell 2 months and fifteen days after [redacted], which was [redacted]. On [redacted], [redacted] as "Vice President - Taxes" signed the Form 7004, "Application for Automatic Extension of Time to File U.S. Corporation Income Tax Return" requesting the six-month automatic extension on behalf of Old [redacted] (Exhibit A). On [redacted], a Form 1120 in the name of "[redacted]" for the short year ending [redacted] (Exhibt B - first page and statement under Treas. Reg. § 1.268-3(a)), was received at the Internal Revenue Service Fresno Service Center in an envelope postmarked [redacted]. The return was signed by "[redacted], Vice President - Taxes." The overpayment shown on the return in the amount of $[redacted] was refunded to the Taxpayer on or about [redacted].

At the time that [redacted] signed both the extension request form and the [redacted] return, Old [redacted] was no longer in existence, and it is not clear whether [redacted] was an officer of New [redacted]. Further, the members of the Old [redacted] group had not designated an alternative agent under I.R.C. § 1.1502-77(d).

At the time of the merger, the [redacted] and [redacted] years of Old [redacted] were at issue in a docketed case. In connection with the resolution of that case, closing agreements were sought affecting the [redacted], [redacted] and [redacted] calendar years (and forward). Advice was obtained from our National Office that the closing agreement should have two parties sign as being responsible for the [redacted], [redacted], [redacted] and [redacted] years of the former consolidated group as follows: (1) New [redacted] (New Parent) as successor to the liabilities of the Old [redacted] (Old Parent) under state law; and (2) a designated agent of the old group (to be determined prior to the execution of the closing agreement).

That advice was based on Treas. Reg. § 1502-77(d) which authorizes remaining group members to designate one of its own as agent after the dissolution of the common parent has occurred pursuant to the regulation. Based on our understanding of the acquisition, it was likely that New [redacted], as a successor to Old [redacted] in a transaction to which I.R.C. § 381(a) applies, would be an alternative agent for the remaining members of the Old [redacted] group, under Treas. Reg. § 1502-77T(a)(4)(ii). However, the temporary regulation is limited to only two circumstances--notices of deficiency issued to alternative agents and waivers of statutes of limitation executed by alternative agents, and not to other situations such as executing closing agreements or filing tax returns.

In [redacted] New [redacted] proposed to send a letter to the District Director, Northern California District, enclosing designations by the remaining corporations that were members of the affiliated group of which Old [redacted] was the common parent during the period from [redacted] through [redacted] designating another member of the old group to act as agent under Treas. Reg. 1.1502-77(d).

Subsequently in [redacted], New [redacted] decided to send separate letters designating the alternative agent for each year from [redacted] through [redacted], beginning with the designation for the short year [redacted]. The agent designated was [redacted]. The officer designated to act on behalf of [redacted] was [redacted], Vice President and Director of Taxes. [redacted] was also Vice President of New [redacted].

On [redacted], the Taxpayer was advised by the District Director (Exhibit C) that the designation of an agent for the Old [redacted] group with respect to the consolidated income tax return for the period ending [redacted] was approved subject to the following condition:

> An Officer of both New [redacted] and [redacted] should sign the consolidated income tax return for the period ending [redacted].

By letter to the Internal Revenue Service, Fresno Service Center, dated [redacted] (Exhibit D), the Taxpayer refiled the [redacted] return with the signature of [redacted] as Vice President of New [redacted] and Vice President and Director of Tax of [redacted], the designated agent (Exhibit E). That return was hand-delivered to Revenue Agent [redacted] on [redacted].

Under Treas. Reg. § 1.1502-77(a), the common parent is the sole agent for a consolidated group and has the authority to sign the return on behalf of all group members. Old [redacted] was the common parent of the Old [redacted] group. When Old [redacted] was merged into [redacted], the Old [redacted] group ceased to exist. See Treas. Reg. § 1.1502-75(d). Since Old [redacted] no longer existed, it could not sign the [redacted] return on behalf of the Old [redacted] group with respect to the pre-merger short taxable year. As the successor in interest to Old [redacted], New [redacted] could sign on behalf of Old [redacted] individually, with respect to the [redacted] year. Under Delaware law, New [redacted] succeeded to all of the properties, rights, privileges, powers, and franchises of Old [redacted]. Section 259(a) of title 8 of the Delaware General Corporation Law provides that "...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." See also *Lemelle v. Universal Mfg. Corp*, 18 F.3d 1268, 1273 (5th Cir. 1994). However, New [redacted]'s authority would not extend to acting as agent for the remaining members of the Old [redacted] group for the [redacted] pre-merger year.

Treas. Reg. § 1.1502-75(h)(3) provides that each return or form required to be made or prepared by a corporation must be executed by the person authorized under I.R.C. § 6062 to execute returns of separate corporations. Section 6062 of the Code provides in part that a return of a corporation with respect to income shall be signed by the president, treasurer, assistant treasurer, chief accounting officer or any other officer duly authorized so to act. In this particular case, Old [redacted] was no longer in existence and hence [redacted] could not be "duly authorized" to sign the return on behalf of Old [redacted] and the consolidated group.

Under case law, however, the filing of the return on [redacted] started the running of the statute of limitations. In the case of *General Manufacturing Corp. v. Commissioner*, 44 T.C. 513 (1965), the Tax Court found that the petitioner was not entitled to file a consolidated return with its parent corporation because it did not make a timely consent to the filing of a consolidated return. Although the return filed was rejected as a consolidated return, the Court further found that the consolidated return was filed in good faith and disclosed items of income and deductions of petitioner necessary for computation of tax, and, therefore, constituted the return of the petitioner sufficient to start the running of the statute of limitations on assessment under I.R.C. § 6501(a).

The Taxpayer's [redacted] return was due to be filed on [redacted]. As indicated above, it was received at the Fresno Service Center on [redacted] in an envelope postmarked [redacted]. In the case of *First Charter Financial Corp. v. United States*, 669 F.2d 1342 (9th Cir. 1982), the Court held that The return was not treated as having been filed on the date it was mailed because the timely-mailing--timely-filing rules are only applicable if a return is delivered to the Internal Revenue Service after the last date prescribed for filing. "Section 7502(a) intended to make the date of mailing the date of delivery only where a document would otherwise be considered untimely filed." *First Charter Financial Corp.*, 669 F.2d at 1346.

Under Treas. Reg. §1.6081-3(b), an application for an automatic extension of time for filing a consolidated return shall be made by a person authorized by the parent corporation to request such extension. Such person must be a person authorized under section 6062 to execute the return of the parent corporation. Upon the timely filing of Form 7004 with the internal revenue officer with which such corporation files its return, the six-month extension shall be considered as granted to the affiliated group for the filing of its consolidated return or for the filing of each member's separate return.

As indicated above, [redacted] signed Form 7004, "Application for automatic Extension of Time to File Corporation Income Tax Return" on [redacted], requesting an automatic six-month extension to file Old [redacted]'s final return for the short period from [redacted] to [redacted]. [redacted] requested an extension to [redacted]. The extension would have expired on [redacted], however, which is six months following the [redacted] due date. If that extension were valid, the [redacted] filing date would be timely. If it were not valid, the [redacted] return would not be timely, and the [redacted] postmark date would not remedy that delay. Hence, in this case, the [redacted] date is the filing date of the return for statute of limitation purposes. We recommend, however, that the [redacted] date be used in order to avoid any controversy with the Taxpayer.

2. Who is/are the proper party/parties to sign the consent to extend the statute of limitations for the years ending [redacted] and [redacted]?

Treas. Reg. section 1.1502-75(d)(1) provides the general rule that a consolidated group remains in existence if the common parent corporation (i.e., the highest-tier includible corporation) remains the common parent and at least one

subsidiary remains affiliated with it. In this case, Old [redacted] no longer existed after [redacted], and, hence, the general rule does not apply. One of the exceptions to the general rule is the reverse acquisition rule in section 1.1502-75(d)(3). If there is a reverse acquisition, the acquired consolidated group continues, with a new common parent and the old common parent is no longer the common parent of the group. A reverse acquisition within the meaning of section 1.1502-75(d)(3)(i) occurs when:

1) any member of a consolidated group acquires stock of the common parent of another group (so that the acquired common parent would become a member of the acquiring group but for the application of this rule) or acquires substantially all of the assets of the common parent of another consolidated group; and

2) the former shareholders of the acquired corporation receive more than 50 percent in value of the stock of the common parent of the acquiring group in exchange for the stock or assets of the acquired group.

If a transaction constitutes a reverse acquisition, any group of which the acquired corporation was the common parent immediately before the acquisition will be treated as remaining in existence (with the acquiring corporation becoming the common parent of the group). *See* Treas. Reg. § 1.1502-75(d)(3)(i).

Form 20-F filed with the Securities and Exchange Commission as of [redacted] with regard to the year ending [redacted] indicates that [redacted] had registered on the New York Stock Exchange common shares outstanding of [redacted]. The registration further explains that on [redacted] completed the acquisition of [redacted] exchanged [redacted] shares plus $[redacted] in cash for all outstanding shares of [redacted]. Clearly the former shareholders of Old [redacted] did not receive more than 50 percent in value of the stock of [redacted], and hence the reverse acquisition rules do not apply.

The same reasons that required both New [redacted] and [redacted] to sign the [redacted] income tax return are applicable to signing the consents for [redacted], i.e., (1) New [redacted] is the successor to Old [redacted] and is severally liable for the tax for such year, and (2) [redacted] is the designated agent for the remaining members of the Old [redacted] group (except Old [redacted]), which members are each severally liable for the tax for such year.

The Taxpayer's [redacted] return was filed on or about [redacted] (Exhibit F), which date preceded the [redacted] merger. With regard to signing the consent to extend the statute of limitations for the [redacted] year, an argument can be made that either [redacted] or [redacted] are alternative agents under Treas. Reg. § 1.1502-77T(4)(ii) and (iii), respectively, and either could sign the 9812 consent form. In order to be consistent, however, with the earlier signed closing agreements and the [redacted] return, we recommend that both New [redacted] and [redacted] execute the consent.

3. Is Form 872-I (January 2001) the correct form to use to extend the statute of limitations, since the Taxpayer is an investor in more than [redacted]?

We have been advised by the TEFRA Technical Advisor, Mark Ransick (512-464-3180) that the January 2001 revision should not be used, and that a new revision is currently under review. The proposed changes to Form 870-I are to change the title of the form and to take out the quotation marks. It is recommended that you use Form 872 and add the language indicated above.

Please call me at (415) 744-9217 if you have any questions.

LAUREL M. ROBINSON
Acting Associate Area Counsel

By:_____
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Attachments: Exhibits A through F

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