

Office of Chief Counsel
Internal Revenue Service
memorandum

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date:

to: Elaine Lew, Team Leader, Examination Division, LMSB, CEG:1223
Linda Escalona, Team Coordinator, Laguna Niguel POD, LMSB,
CEG:1223

from: Joyce M. Marr, Attorney (LMSB)
June Y. Bass, Associate Area Counsel (LMSB)

subject: [REDACTED] (formerly known as [REDACTED])
EIN: [REDACTED]
Advisory Opinion on Proper Entity to Execute Documents Following
Merger of [REDACTED] into [REDACTED]
Income Tax Years: [REDACTED] and [REDACTED]
Statute of Limitations: [REDACTED]

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 memorandum responds to your request for assistance dated June 13, 2001. This memorandum should not be cited as precedent.

Issue

Who is the proper party to execute Form 872 (Consent To Extend The Time To Assess Tax) for the former [REDACTED] formerly known as [REDACTED] consolidated group for the taxable years ended [REDACTED] and [REDACTED]?

Conclusion

When [REDACTED] merged into [REDACTED] under New York State law, [REDACTED] succeeded to the several liability of [REDACTED] for the consolidated tax liability of the [REDACTED] consolidated group for the tax years ended [REDACTED] and [REDACTED]. Therefore, [REDACTED] is the proper party to sign the Form 872 for the consolidated tax liability of the [REDACTED]

[REDACTED] consolidated group for the tax years ended [REDACTED], and [REDACTED]. [REDACTED] will be liable for any tax owed. The proper caption to use on the Form 872 is as follows: "[REDACTED]", as successor in interest to [REDACTED] (formerly known as [REDACTED])." Put an asterisk immediately thereafter. At the bottom of the page, the following language should be added (including the asterisk):

* This is with respect to the consolidated tax liability of the [REDACTED] (formerly known as [REDACTED]) consolidated return group for the taxable years ended [REDACTED] and [REDACTED].

The Form 872 should be signed by a current officer of [REDACTED]. Under the officer's name, you should type in his or her title and the name "[REDACTED]"

Since the requirements of I.R.C. § 6501(c)(4)(B), pertaining to giving the taxpayer notification of certain rights, must be satisfied, please ensure that the statute extension is requested by the most recent revision of Form Letter 907 or 967.

Facts²

[REDACTED], formerly known as [REDACTED]³ (EIN: [REDACTED]), which was the common parent of the [REDACTED] consolidated group, filed consolidated income tax returns for its taxable years ended [REDACTED] and [REDACTED]. On its Affiliation Schedules (Forms 851) for such returns, [REDACTED] listed three subsidiaries: [REDACTED]

¹ The EIN which we have set forth is the EIN shown on [REDACTED]'s Form 8-K dated [REDACTED], which we downloaded from LEXIS. When preparing the Form 872, please verify that this is the EIN for [REDACTED] according to the Service's records.

² In rendering the instant advice, we have relied on the facts being as stated below. If you uncover any information inconsistent with the facts recited in this memorandum, you should not rely on this memorandum, and you should seek further advice from this office.

³ According to information retrieved from the LEXIS CABIZ file, on [REDACTED], [REDACTED] underwent a name change to [REDACTED].

[REDACTED] and [REDACTED].

As of [REDACTED], [REDACTED] entered into an Agreement and Plan of Merger (the Merger Agreement) with [REDACTED], a corporation organized under the laws of Germany, and [REDACTED], a Delaware corporation and an indirect wholly owned subsidiary of [REDACTED].⁴

The Merger Agreement provides that: (1) [REDACTED] shall cause [REDACTED] to offer to purchase all outstanding common stock, no par value, of [REDACTED] through a tender offer at a price of \$ [REDACTED] per share, net to the seller in cash; and (2) [REDACTED] would merge into [REDACTED], with the separate corporate existence of [REDACTED] ceasing and [REDACTED] continuing its existence under the laws of the State of California as the surviving corporation.

According to information obtained from LEXIS, at midnight (EDT) on [REDACTED], [REDACTED] successfully completed its tender offer for all outstanding common shares of [REDACTED] and based on a preliminary count, [REDACTED] shares of [REDACTED]'s common stock were tendered and accepted for payment in accordance with the terms of the offer, resulting in [REDACTED] and its subsidiaries owning approximately [REDACTED]% of the shares of [REDACTED]'s outstanding common stock.

By virtue of the merger of [REDACTED] and [REDACTED], each share of [REDACTED]'s common stock owned by [REDACTED], any subsidiary of [REDACTED], [REDACTED] or any subsidiary of [REDACTED] was canceled and ceased to exist. In addition, each remaining share of [REDACTED] common stock was converted into the right to receive \$ [REDACTED] in cash, without interest. The merger was effective on [REDACTED]. By virtue of this merger, [REDACTED] became a wholly-owned subsidiary of [REDACTED]'s parent corporation, [REDACTED] ([REDACTED]), a Delaware corporation, which was a wholly-owned subsidiary of [REDACTED]. [REDACTED] held in safekeeping Certificate # [REDACTED] for [REDACTED] shares of its common stock registered in the name of [REDACTED].

⁴ According to information obtained from the LEXIS COMPANY file, at the time in question, [REDACTED] was a wholly owned subsidiary of [REDACTED], the [REDACTED] company in Germany.

██████████ filed a consolidated income tax return for the short period beginning on ██████████, and ending on ██████████. On this short-period return, ██████████ stated that it was incorporated on ██████████. Thus, this was the initial return filed by ██████████.

██████████ included ██████████ (██████████) on the Affiliations Schedule (Form 851) for the consolidated return it filed for the short period ended ██████████. ██████████ also included ██████████ on the Affiliations Schedule for a short-period return filed by it for the tax year beginning ██████████, and ending ██████████.

██████████ was an indirect subsidiary of ██████████, a German corporation which is the ultimate parent of a large multinational group of companies. On ██████████, as part of an internal reorganization of the ██████████ group corporate structure, all of the shares of ██████████ were transferred to ██████████, a Delaware corporation.

On the Affiliations Schedule for ██████████'s ██████████ consolidated income tax return, ██████████ included the following corporations: ██████████ and ██████████. Affixed hereto as Exhibit A is an organizational chart showing that as of ██████████: (1) ██████████'s parent corporation was ██████████; and (2) ██████████'s parent corporation was ██████████, a Delaware corporation, a first tier subsidiary of ██████████.

On ██████████, a consortium consisting of ██████████, an affiliate of ██████████, and another distributor of electronics entered into a share purchase agreement to purchase the ██████████ for \$ ██████████ in cash. See ██████████'s Form 8-K dated ██████████, which is affixed hereto as Exhibit B. The share purchase agreement provided that "[s]ubject to the terms and conditions set forth herein, . . . ██████████ hereby sells to ██████████] ...all the shares in issue in ██████████. . . ." See Paragraph 1.1(a)(v) of Article 1 of the Share Purchase Agreement which is affixed hereto as Exhibit C.⁵

⁵ Section 4 of the Recitals in the Share Purchase Agreement states that ██████████ "owns and will immediately prior to Closing own . . . ██████████ fully paid shares and constituting all of

Effective [REDACTED], after [REDACTED] had purchased the shares of [REDACTED] and two other corporations⁶ were merged with and into [REDACTED]. The merger was consummated pursuant to Section 905 of the Business Corporation Law of the State of New York and [REDACTED] "assum[ed] all of the liabilities and obligations" of the constituent entities. As a result of this merger [REDACTED] owned all the outstanding shares of [REDACTED].

Effective [REDACTED], pursuant to Section 905 of the Business Corporation Law of the State of New York, [REDACTED] was merged with and into [REDACTED]. Affixed hereto as Exhibit D is a copy of the relevant "Certificate of Merger."

According to information we have retrieved from LEXIS, which is affixed hereto as Exhibit E, [REDACTED] and [REDACTED] -- [REDACTED], i.e., two of the subsidiaries included on the consolidated returns of [REDACTED] for the tax years [REDACTED] and [REDACTED], were merged with and into [REDACTED] on [REDACTED]. Also affixed hereto as Exhibit F is information retrieved from the California Secretary of State website which confirms that these two subsidiaries were merged out of existence.

Effective [REDACTED], [REDACTED] (i.e., the third subsidiary included on the consolidated returns of [REDACTED] for the tax years [REDACTED] and [REDACTED] was merged with and into [REDACTED].

The statute of limitations on assessment against the [REDACTED] consolidated group for the tax years ended [REDACTED], and [REDACTED] has previously been extended until [REDACTED]. Exam now wishes to further extend the assessment period for such tax years.

the issued shares, free and clear of any encumbrance, in [REDACTED] [REDACTED]...."

⁶The two other corporations were [REDACTED] and [REDACTED]

Discussion

In general, the common parent corporation and each subsidiary which was a member of a consolidated group during any part of a consolidated return year is severally liable for the tax of the group for such year (i.e., is responsible for the tax of the entire group, not simply its proportionate share). Treas. Reg. § 1.1502-6(a). Therefore, [REDACTED] was severally liable for the [REDACTED] consolidated group's tax liabilities for the tax years ended [REDACTED], and [REDACTED].

Section 906(b)(3) of the Business Corporation Law of the State of New York provides, in pertinent part, that when a merger is effected, "[t]he surviving ... corporation shall assume and be liable for all the liabilities, obligations and penalties of each of the constituent entities." Thus, under New York law, [REDACTED] succeeded to the several liability of [REDACTED] for the consolidated tax liability of the [REDACTED] consolidated group for the tax years ended [REDACTED] and [REDACTED], and is liable for this liability. Thus, [REDACTED] is the proper party to sign the Form 872 for the consolidated tax liability of the [REDACTED] consolidated group for the tax years ended [REDACTED] and [REDACTED].

The caption on the Form 872 should read as follows:

[REDACTED]) as successor
in interest to [REDACTED]
[REDACTED] (formerly known as [REDACTED]) *

At the bottom of the page, you should put the following:

*This is with respect to the consolidated tax liability of the [REDACTED] (formerly known as [REDACTED] and [REDACTED] consolidated return group for the taxable years ended [REDACTED] and [REDACTED].

The Form 872 should be signed by a current officer of [REDACTED] Rev. Rul. 83-41, 1983-1 C.B. 399, clarified and amplified, Rev. Rul. 84-165, 1984-2 C.B. 305 (the Service will apply the rules applicable to the execution of original returns to the execution of consents to extend the time to make an assessment). Under the officer's name, you should type his or

⁷ See supra note 1.

her title and the name [REDACTED]

This advice has been coordinated with the Office of Chief Counsel. With the rendition of this advice, we are closing our file. Please contact the undersigned at telephone number (949) 360-2688 if you have any questions or comments concerning the foregoing.

JOYCE M. MARR
Attorney (LMSB)

Attachments: As stated