

Office of Chief Counsel
Internal Revenue Service

memorandum

CC:MSR:ILD:CHI:TL-N-7545-99
RAVillageliu

date: December 29, 1999

to: Chief, Examination Division, Illinois District
Attn: Case Manager Gilbert D. Drucker, Group 1171
Attn: Senior Team Coordinator Marvin B. Kushner

from: District Counsel, Illinois District

subject: LO: [REDACTED]

Non-Docketed Large Case.¹

You requested our advice on the proper name(s) to use on Form(s) 872, Consent to Extend the Time To Assess Tax, against [REDACTED], from partnership flow thru adjustments from an originating partnership's calendar years [REDACTED] and [REDACTED]. You have informed us that your inquiry does not pertain to the protection of the statute of limitations for assessing against the partnerships.² Your inquiry is only with respect to protecting the statute of limitations on assessing the one flow-thru entity, [REDACTED]. The statute of limitations on assessing against [REDACTED], absent an extension, will expire on or about [REDACTED].

Facts pertaining to the liability to be assessed

The Service adjusted (decreased) the [REDACTED] and [REDACTED] Low Income Housing Credits claimed by a limited partnership named [REDACTED]

¹This opinion has not been sent to the national office prior to its being issued. Given the imminent expiration of the Statute of Limitations and the holiday season immediate action by this office was necessary to protect the Service. Additionally, the opinion is based on well-established legal principles and doctrines. A copy of this opinion, however, is being sent to the national office for coordination purposes and whatever action the national office may deem appropriate or necessary. Therefore, modifications to this opinions may result.

²The partnerships at issue have already been audited and are being controlled out of another district.

...").³ This adjustment flowed thru to [REDACTED], which had a [REDACTED] % profit limited partner interest in [REDACTED], during all of [REDACTED] and [REDACTED]. The adjustment continued to flow thru to [REDACTED], which had a [REDACTED] % profit limited partner interest in [REDACTED], during all of [REDACTED] and [REDACTED].

[REDACTED] and its Affiliates filed a consolidated Form 1120, US Corporate return for the years [REDACTED] and [REDACTED]. [REDACTED] was the common parent and agent for the affiliated group of corporations for federal corporate income tax purposes.

All entities involved report their taxes on a calendar year basis. The exact amount of tax liability flow-thru to [REDACTED], at issue is nominal only \$ [REDACTED] and \$ [REDACTED], for [REDACTED] and [REDACTED], respectively.

Facts pertaining to the merger

[REDACTED] is a Delaware corporation. In [REDACTED] proxy material dated [REDACTED], the following was stated:

[REDACTED]

The merger was consummated on [REDACTED], all regulatory approvals were received. Shortly after the merger [REDACTED] issued a news release about the terms of the merger. In pertinent part, it states:

[REDACTED]

The news release also states the number and value of the [REDACTED] shares to be received for each share of [REDACTED] stock. The exchange ratio is [REDACTED] shares of [REDACTED] for each share of [REDACTED].

³Its Tax Matters Partner was [REDACTED]

Facts pertaining to the execution of the consents

_____ was "acquired"⁴ by _____ on _____. On _____, which was prior to the acquisition, Examination Illinois District received from Steve Reihard, TEFRA coordinator, Kansas City Service Center, closing packages for _____ and _____ relative to _____'s interest in _____.

The one year TEFRA statute to assess _____'s share of the deficiencies resulting from the adjustments to the _____ and _____ partnership returns expires on _____. Consents to extend this one year statute to _____ were solicited on _____. On _____, _____ provided the executed consents. An officer of _____ had signed these consents back on _____. This was approximately _____ weeks before _____'s "acquisition" by _____.

Discussion and Legal Opinion

1. The Forms⁵ 872, Consents to Extend the Time to Assess Tax, signed by the Vice President and Comptroller of _____ and dated _____ (the one for _____) and _____ (the one for _____) are legally valid and sufficient to protect the statute of limitations, once they are signed by the Service. The Service should proceed to sign them and date them without delay. A copy of the consents are attached as Exhibits A and B. **These are the essential consents that you must timely complete to protect the statute at issue in this case.**

We must note, however, that the language that you used with respect to the partnership derived adjustments has been improved upon in recent cases. Although there is nothing legally wrong

⁴The acquisition appears to be a reverse triangular merger: _____ acquiring sub. was the one that disappeared into the target, _____. Usually we associate these with taxable mergers. Examiner assumes the merger to be a tax-free reorganization under I.R.C. §368(a)(1)(A), where the special rules under I.R.C. §368(a)(2)(E) apply. Be that as it may be, for our S/L purposes, this all immaterial. What is important is that _____ survived, and remained in the group.

⁵One for _____ and another for _____. Both are fine as drafted.

with the language that is used in the consents already in your possession and we understand that the taxpayer insisted on the restrictive additional language that appears in your consents, we note that your language is not the latest language that is being used around the country. The newest, improved version of the language is, as follows:

"With regard to interests held in entities that are subject to the TEFRA unified audit and litigation procedures, and 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, affected items, computational adjustments, and partnership items converted to non-partnership items. This agreement extends the period for filing a request for administrative adjustment and the period for filing a petition regarding such a request. For partnership items that have converted to nonpartnership items, this agreement extends the period for filing a suit for refund or credit. 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."

Given the de minimus nature of the taxes at issue, the fact that the consent language already in your possession is legally sufficient (for the particular Service purposes of this case), the imminent expiration of the statute of limitations, and the additional aggravation that would be involved to an already reluctant taxpayer, we are not recommending that you obtain a new consent simply to use the latest language version. Therefore, we reiterate that, in our opinion, the consents already in your possession are legally valid and sufficiently protect the Service in the instant case.

2. Should you obtain an additional Consent signed by [REDACTED] [REDACTED]? As an academic question, the answer is definitely yes. As a practical matter, given the nominal amounts at issue, (\$ [REDACTED] for [REDACTED] and \$ [REDACTED] for [REDACTED], and the fact that you already have obtain the consents we consider to be essential, (the ones signed by [REDACTED], in the Service's view the true agent for the group's pre-acquisition yrs.), the answer is that preparing, soliciting, and obtaining a consent from [REDACTED] [REDACTED], under an imminent statute expiration date, from a reluctant taxpayer may be a waste of your scarce resources

and an unnecessary aggravation to the taxpayer.⁶ You are in the best position to make the judgement call whether to go ahead and solicit one. But we can help you by making clear that as a legal matter, we feel that the Service is amply justified in relying only on the [REDACTED] consents already obtained. Further, in our opinion, no one could reasonably fault Illinois Examination, if it were to decide to rely only on the consents already signed by [REDACTED] under the particular facts of this one instant case.⁷ The following is the law and discussion pertaining to this question, for your present and future guidance.

After the apparent reverse subsidiary merger in this case, [REDACTED] will definitely be the consolidated return group agent for [REDACTED] post-acquisition years. The years at issue, however, are [REDACTED] and [REDACTED]. For these pre-acquisition years, the Service's position is that the common parent, [REDACTED] which survived the merger and remains in existence remains the agent for the members of the consolidated return group for the taxable years [REDACTED] and [REDACTED], which are pre-acquisition years. It is important also that in this case [REDACTED] has not been spun-off or otherwise separated from the consolidated group, but rather remains as a 2nd tier member of the group, right below the new agent [REDACTED], so no one can credibly argue that [REDACTED]'s actions are being taken from outside the consolidated group. Cf. Interlake Corp. v. Commissioner, 112 T.C. 103 (1999).

In Southern Pacific v. Commissioner, 84 T.C. 375 (1985 (pre-1966 regulations)) and 84 T.C. 395 (1985 (current regs.)), the court held that after a reverse acquisition, the new common parent became the agent for group members for both pre- and post-acquisition years. The holding in the case created uncertainty. Arguably, under a broad reading of Southern Pacific, the new common parent may be the agent for the members of the continuing

⁶We understand that [REDACTED]'s Tax Director, Exam's contact point with [REDACTED], may not be too happy with the taxpayer(s) having to execute more consents. Apparently, he may feel that the Service has already been protected, and we can not disagree. In any case, the Service should avoid placing unnecessary burdens on taxpayers, to preserve the public's confidence and the specific taxpayer's future cooperation.

⁷If more than nominal amounts were at issue, then, definitely, Examination would want to seek consents from [REDACTED] [REDACTED], in addition and never in substitution, to those from [REDACTED].

group after a reverse acquisition or downstream transfer for pre-acquisition years of the member even in cases where the old common parent remains in existence. A better view, in our opinion, is that of Union Oil v. Commissioner, 101 T.C. 130 (1993), that either the old common parent or the new common parent is an acceptable agent for the group.

Although we consider it legally unnecessary, under the particular de minimus tax facts of this case, if you, nevertheless, choose to seek an additional Forms 872 from [REDACTED] [REDACTED] You should captioned it, as follows:

" [REDACTED] (EIN: that of [REDACTED], as alternative agent under Treas. Reg. §1.1502-77T(a)(4) or other applicable authority, for the members of the [REDACTED] consolidated return group"

3. Each of the consents forms is signed by the proper agent for [REDACTED] group. Each is properly signed by an appropriate officer of [REDACTED] which remains in existence. The fact that the [REDACTED] stock is now held by new a shareholder ([REDACTED]) as a result of the reverse triangular merger is immaterial. It does not affect the valid actions of the officers of the legally separate [REDACTED].

4. You properly used the name "[REDACTED] [REDACTED]" in the consents, copying it, as it appears on the tax returns.

Conclusion

This concludes our legal opinion. If you have any questions, please contact the undersigned at (312) 886-9225, extension 308. If the national office suggests any modifications, clarifications, or corrections, we will contact

you and let you know. We will do this by supplemental memorandum or by telephone, depending on what is most appropriate under the circumstances, and on what time permits. Subject to the above, we are closing our legal file in this matter.

RICHARD A. WITKOWSKI
District Counsel

By:


ROGELIO A. VILLAGELIU
Special Litigation Assistant

Attachments:
Copies of the consents.

CC:District Counsel, Illinois District

CC:Assistant Regional Counsel (Large Case), MS (Chicago)

CC:Assistant Regional Counsel (TL), MS (Dallas)

CC:DOM:FS (2 copies, with attachments).

a: [REDACTED] wpd