Office of Chief Counsel
Internal Revenue Service

memorandum

CC:NER:NED:BOS:TL-N-1570-99
BJLaterman

date: APR 28 1999

to: Ted Jones, Examination Division
Group Manager, Group 1108

from: District Counsel, New England District, Boston

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bject: [redacted]
Forms 872
Taxable Years ended [redacted] through [redacted]
and [redacted]

This is in response to your request that we provide advice regarding extending the statute of limitations for the above-mentioned consolidated group's taxable years ended [redacted] through [redacted] and [redacted].

We have reviewed the documents you initially provided and the additional information and documents subsequently provided. [redacted], a Massachusetts corporation, was the parent corporation of an affiliated group of corporations which filed a consolidated return for the above-mentioned taxable years. [redacted] was a [redacted] company with [redacted] affiliated corporations during the taxable years involved herein. [redacted] and [redacted] were subsidiary [redacted] which operated in Massachusetts and New Hampshire respectively. [redacted] is the principal subsidiary of [redacted].

[redacted] is a [redacted] company which is the parent corporation of an affiliated group. Said company had subsidiary [redacted] in Massachusetts, Connecticut, Florida and Rhode Island. The [redacted] a [redacted] association, all of whose voting securities are owned indirectly by [redacted] is the principal subsidiary of [redacted].

[redacted] was acquired by [redacted] in a tax free reorganization on [redacted]. Pursuant to the Agreement and Plan of Merger dated [redacted] formed a merger subsidiary which merged into [redacted] with [redacted] as the surviving corporation. [redacted] continued its corporate existence under the laws of the Commonwealth of Massachusetts until it was dissolved on

[redacted] under the provisions of the General Laws of the Commonwealth of Massachusetts, Chapter 156(b), Section 100.

The Agreement and Plan of Merger dated [redacted] provided for subsidiary [redacted] mergers with the object of establishing [redacted] subsidiary for each state in New England in which the parties to the agreement currently had [redacted] subsidiaries. Pursuant to said plan and subsequent to the consummation of the agreement between [redacted] and [redacted], [redacted] was merged into [redacted] with [redacted] as the surviving entity. The Plan of Reorganization and Agreement to Merge provided that [redacted] shall be responsible for all of the liabilities of every kind and description of each merging [redacted]. Both [redacted] and [redacted] were [redacted] associations duly organized and existing under the laws of the United States of America.

Generally, the common parent, with certain exceptions not applicable here, is the sole agent for each member of the group, duly authorized to act in its own name in all matters relating to the tax 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 also been given or executed by each such subsidiary. Treas. Reg. § 1.1502-77(a). Thus, generally the common parent is the proper party to sign consents, including the Form 872 waiver to extend the period of limitations, for all members in the group. Treas. Reg § 1.1502-77(a). Treas. Reg. § 1.1502-77(c) provides that, unless the District Director agrees to the contrary, an agreement entered into by the common parent extending the time within which an assessment may be made in respect of the tax for a consolidated return year, shall be applicable to each corporation which was a member of the group during any part of such taxable year. The common parent and each subsidiary which was a member of the consolidated group during any part of the consolidated return year is severally liable for the tax for such year. Treas. Reg. § 1.1502-6(a).

Temp. Reg. § 1.1502-77T provides exceptions to the general rule. Temp. Reg.§ 1.1502-77T provides for alternative agents in certain circumstances and applies to waivers of the statute of limitations for taxable years for which the due date (without extensions) of the consolidated return is after September 7, 1988. Therefore, the regulation is applicable in this case. Temp. Reg. § 1.1502-77T provides that a waiver of the statute of limitations with respect to the consolidated group given by any one or more corporations referred to in paragraph (a)(4) of the

section is deemed to be given by the agent of the group.

Subparagraph (a)(4)(i) lists as an alternative agent the common parent of the group for all or any part of the year to which the notice or waiver applies. In this case, the common parent, [redacted], was dissolved on [redacted] and is no longer in existence. Chapter 156B, Section 102 of the Business Corporation Law of the State of Massachusetts, however, provides that:

> Every corporation whose corporate existence for other purposes is terminated (1) by dissolution under the provisions of section ninety-nine, one hundred, or one hundred and one, (2) by the expiration of the period for its duration limited by its articles of organization, or (3) in any other manner, shall nevertheless be continued as a body corporate for three years after the time when its existence is terminated, for the purpose of prosecuting and defending suits by or against it and of enabling it gradually to settle and close its affairs, to dispose of and convey its property and assets remaining after the payment of its debts and obligations, but not for the purpose of continuing the business for which it was established; provided, that the corporate existence of such a corporation, for the purposes of any suit brought by or against it prior to the commencement of, or during, said period of three years, shall continue beyond said period for a further period of ninety days after the final judgement in the suit.

Inasmuch as [redacted] was dissolved pursuant to the provisions of Chapter 156(B), Section 100 of the Business Corporation Law, the three year winding up period provisions are applicable.

One of the general powers granted to a Massachusetts Corporation is the power to execute consents to extend the statute of limitations for assessment on its own behalf. American Feature Film Co. v. Commissioner, 11 B.T.A. 1271 (1928); Commissioner v. Angier Corp. 50 F.2d 887 (1st Cir.), cert. denied, 284 U.S. 673 (1931). This power is given to officers and directors of a corporation. Rev. Rul. 83-41, 1983-1 C.B. 399, clarified and amplified by, Rev. Rul. 84-165, 2 C.B. 305. Accordingly, the District Director could obtain a Form 872 from an authorized officer or director of [redacted] during their winding up period. We note that a notice of deficiency must be issued within the three year winding up period to be effective, Alexander v. Casco Music Systems, Inc., 323 N.E.2d (Mass. App. Ct. 1975); Gonzales v. Progressive Tool & Die, Co., 463 F. Supp. 117 (E.D.N.Y. 1979); and DeLuca v. Medford Operating Co., 59

Mass. App. Dec. 78 (1976), since a statute extension obtained during the winding up period can only extend for three years from the date of dissolution. Therefore, reliance on the winding up provisions of the Massachusetts corporate law to extend for the consolidated group would leave the statute unprotected after July 30, 2001.

We strongly recommend, however, that you not deal with the officers of the former common parent while it is in its three-year winding up period. Although this option may work, we can find little or no statutory or case law that would support the Service here. Because of this and because of a practical consideration (i.e., even if you sent the statutory notice of deficiency within the three-year winding up period, you could not collect from [redacted], because by then it may have distributed its assets), we do not think that this option is viable.

Subparagraph (a)(4)(ii) of Temp Reg. 1.1502-77T lists as an alternative agent a successor to the former common parent in a transaction in which I.R.C. § 381(a) applies. I.R.C § 381(a) applies, in part, to an acquisition of assets of a corporation by another corporation in a distribution to such other corporation to which I.R.C. § 332 (relating to liquidations of subsidiaries) applies. On [redacted], [redacted] was dissolved and, if the distribution to [redacted] was a I.R.C § 332 liquidation then pursuant to Temp. Reg. § 1.1502-77T(4)(ii), [redacted] would be an alternative agent for the [redacted] consolidated group for the taxable years involved herein. However, we do not know whether the requirements of I.R.C. § 332 have been met and accordingly we do not believe it would be in the best interests of the government to rely upon this subparagraph in this case.

Subparagraph (a)(4)(iii) of Temp. Reg. § 1.1502-77T lists as an alternative agent the agent designated by the group under Treas. Reg. 1.1502-77(d). Treas. Reg. § 1.1502-77(d) provides that if the common parent corporation dissolves, the common parent and/or the remaining members of the consolidated group may designate another member of the group to act as agent, subject to the approval of the District Director. In this case, we assume that the common parent and/or remaining members of the [redacted] consolidated group did not designate another member of the group to act as agent. Accordingly, subparagraph (a)(4)(iii) does not apply.

Subparagraph (a)(4)(iv) of Temp Reg § 1.1502-77T lists as an alternative agent, the common parent of the group at the time the waiver is given if the group remains in existence under Treas.

Reg. § 1.1502-75(d)(2) or (3). In this case, there is no "F" reorganization or downstream transfer as described in Treas. Reg. § 1.1502-75(d)(2) or reverse acquisition within the meaning of Tres. Reg. § 1.1502-75(d)(3). Accordingly, subparagraph (iv) does not apply.

Since we have concluded that the subparagraphs of Temp. Reg. § 1.1502-77T(4) do not apply or that we may not be able to rely on them in this case, there is no alternative agent for the [redacted] consolidated group. Accordingly, pursuant to Treas. Reg. § 1.1502-77(d), the Service could obtain consents individually from the remaining members of the [redacted] consolidated group. Treas. Reg. § 1.1502-77(d) provides that if the common parent corporation and/or the remaining members of the consolidated group do not designate another member of the group to act as agent, then the District Director may deal directly with any member in respect of its liability. Therefore, in this case, the Service can rely on Treas. Reg. § 1.1502-77(d) as support for obtaining consents from remaining members of the [redacted] consolidated group and the theory of successor liability (discussed below) as support for obtaining consents from successors of former members of the [redacted] consolidated group.

Principal subsidiaries of the respective [redacted] consolidated group and [redacted] consolidated group were [redacted] and [redacted] was merged into [redacted] under the terms of a merger agreement which provided that [redacted] shall be responsible for all of the liabilities of every kind and description of [redacted] Consequently, The [redacted] is primarily liable by virtue of the merger agreements. Therefore, you can obtain a Form 872 from [redacted] as successor in interest to [redacted]. It is noted that [redacted] has been renamed [redacted] as of [redacted]. Therefore, the caption of the Form 872 should read: [redacted] formerly known as [redacted] successor by merger to [redacted] * On the bottom of the form, you should add the following: * [redacted] formerly known as [redacted] is the successor in interest by merger to [redacted] with respect to [redacted]'s several liability under Treas. Reg. § 1.1502-6 for the tax due for the consolidated return years [redacted], [redacted], [redacted] and the year ended [redacted] of the [redacted] consolidated group. The Form 872 should be executed by an authorized officer of [redacted] Rev. Rul. 83-41, 1983-1 C.B. 399 clarified and amplified, Rev. Rul. 84-165, 1984-2 C.B.

305.

With regard to the other [redacted] affiliated corporations of the [redacted] consolidated group, there is no information in the file which indicates which entities still exist or have been liquidated, dissolved or merged into other entities. As indicated previously, the Agreement between [redacted] and [redacted] contemplated subsidiary branch mergers with the object of establishing [redacted] subsidiary for each state. Generally, we recommend that statute extensions be secured from the remaining members of the consolidated group. This approach, however, may not be practical in this instance in view of the large number of entities involved and the time remaining on the statute; i.e, the statute expires in June 1999. We do recommend, however, that a statute extension, if possible, be secured from [redacted] or its successor, since it was another major subsidiary of [redacted]. In any case, the statute extension secured from [redacted] as successor to [redacted] should be sufficient to protect the government's interest inasmuch as we have extended for the principal entity of the group.

We further note that Treas. Reg. § 1.1502-77(a) requires that before dealing with individual members of a consolidated group, the District Director must notify the common parent of its intention to deal directly. In view of the three year winding up period and to counter any possible argument that [redacted] is the successor to [redacted], an agency breaking letter should be sent to both [redacted] the former (dissolved) common parent and [redacted]. If you need assistance in drafting such a letter, please feel free to contact the undersigned for assistance.

It appears, although we do not definitively conclude here, that the [redacted] (the holding company) is a transferee with regard to the assets of [redacted]. According to the facts contained in the file, [redacted] dissolved. As a general matter, anytime a corporation dissolves, it liquidates. Where a corporation disposes of all of its assets and then distributes the proceeds from the sale to its stockholders in liquidation or dissolution, the stockholder-distributees are "transferees". Vendig v. Commissioner, 229 F.2d 93 (2d. Cir. 1956), aff'g 22 T.C. 1127 (1954); Fairless v. Commissioner, 67 F.2d 475 (6th Cir. 1933), aff'g 19 B.T.A. 304 (1930); Caire v. Commissioner, 101 F.2d 992 (5th Cir. 1932), aff'g 36 B.T.A. 1328 (1937); Foster v. Commissioner, 26 T.C.M. 1143 (1967), appeal dism'd (3d. Cir. 1969). See also Troy State University v. Commissioner, 62 T.C. 493 (1974). Stockholders who receive liquidating distributions from a corporation that subsequently

winds up its affairs and dissolves without making adequate provisions for taxes are liable as transferees.

Accordingly, if it is determined that [redacted] is a transferee, you should obtain Forms 977 (Consent to Extend the time to Assess Liability at Law or in Equity for Income, Gift, and Estate Tax against a Transferee or Fiduciary) and Form 2045 (Transferee Agreement) from that corporation. However, since the file lacks details regarding transferee liability, we do not conclude here that the [redacted] is in fact a transferee. We leave that decision up to you.

Finally, if you do determine that the [redacted] is, or should be treated as, a transferee, we recommend that you wait until it is certain that [redacted], has distributed its assets before obtaining Forms 977 and 2045 from the [redacted].

If we can be of any further assistance, please feel free to contact the undersigned at 617-565-7838.

BARRY J. LATERMAN
Special Litigation Assistant