Office of Chief Counsel
Internal Revenue Service

memorandum

CC:MSR:ILD:CHI:TL-N-1049-99 Supplement
RAVillageliu

date: April 6, 1999

to: Chief, Examination Division, Illinois District
Edna Manson, Case Manager, E:CEB:1104:19
IRS, 860 E. Algonquin Road, Schaumburg, IL 60173
Attn: Irwin Shudnow, Case Coordinator Fax(847) 303-4528

from: District Counsel, Illinois District

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subject: **Supplement AO: [redacted] consolidated return group**
Extension of statute for consolidated return group Form 1120
Years: [redacted] and [redacted]

Non-Docketed Large Case[1]

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 Examination or Appeals 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 Examination, Appeals, or other persons beyond those specifically indicated in this statement. **This particular advice may be disclosed to taxpayers or their representatives, if it facilitates your obtaining the statute extension which the Service desires.**

This advice is not binding on Examination or Appeals 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

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[1] We provided you with our opinion by memorandum dated March 15, 1999. We advised you that we would issue a supplemental opinion, if necessary, to incorporate our national office's views and add our own suggestions based on their assistance. The instant memorandum is said supplemental opinion.

to be made through the exercise of the independent judgment of the office with jurisdiction over the case.

FACTS

The Service wants to extend the statute for the [redacted] consolidated return group's U.S. Corporation Income Tax for the group's taxable years [redacted] and [redacted]. During [redacted] the consolidated return group was headed by [redacted] (formerly known as [redacted], a Delaware corporation. On [redacted], [redacted] reorganized, pursuant to a plan of reorganization allegedly qualifying under I.R.C. Section 368(a)(1)(C) or (D). Pursuant to the plan of reorganization and under Delaware law, the consolidated group common parent, [redacted] liquidated.[2] The common parent's certificate of dissolution was filed with the State of Delaware and became effective on [redacted]. We understand that the [redacted] group has informed the Revenue Agent that the common parent did not designate another member of the group as agent for the members of the group for taxable years ending prior to its dissolution and that the remaining members have not yet designated a new agent for the members of the group.

The [redacted] Form 1120 shows the taxpayer's name as "[redacted]

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[2]As it is usual in reorganizations involving multicorporate groups, the parties add to the reigning confusion by trading names back and forth. This case is no exception. [redacted], a Delaware corporation, was the surviving corporation of the [redacted] reorganization. At the time of the reorganization, [redacted] was only a subsidiary of the liquidating consolidated return common parent (for the years [redacted]) [redacted]. "[redacted] however, had been the consolidated return group common parent for the years [redacted] through [redacted]. During the years when [redacted], was the common parent, the company's name was [redacted]. On [redacted] the company changed its name from "[redacted]" to "[redacted]." This is probably because it was no longer the common parent (for [redacted]). After the [redacted] reorganization merger, [redacted] resumed its role of common parent for subsequent years. [redacted] also recovered its name. On [redacted], it changed its name form "[redacted]" to "[redacted]." It retained its EIN, to wit, EIN: [redacted].

[redacted] formerly [redacted]." The [redacted] Form 1120 shows the taxpayer's name simply as "[redacted]). " [redacted] went out of existence.

ISSUE

1. Who is the proper party to execute Form 872 for the [redacted] consolidated group for the tax years [redacted] and [redacted]?

Answer: The national office agrees that in the absence of a designated agent, which is the present situation, a separate 872 could be signed by every member of the [redacted] consolidated group. Additionally, however, they conclude that [redacted] formerly [redacted] should sign the Form 872 as an alternative agent for the [redacted] consolidated group under Temp. Reg. Section 1.1502-77T(a)(4)(iv). We agree.

2. Provide the language for the Form 872

Answer: The national office has recommended, and we recommend to you that the taxpayer should be identified as follows: (Top of Form 872) [redacted] (formerly [redacted] as agent for the group.*

They have also recommended, and we recommend to you that on the front of the Form 872 the asterisk should refer to the following: *This is in respect to the [redacted] consolidated group for the taxable years ending [redacted] and [redacted]. The asterik footnote can be set forth on the bottom of the front page of the Form 872.

They have also recommended, an we recommend to you that it be verified that [redacted] (formerly [redacted] is in existence at the time the consent is obtained.

3. Is there transferee liability in this case for the consolidated return group tax liability?

Answer: We believe that there is. On [redacted], the consolidated return group common parent reorganized. Pursuant to the plan, [redacted], was the surviving corporation of the reorganization, and [redacted], dissolved. In our opinion, the surviving corporation

[redacted], now again known as [redacted] (having recovered its original name after [redacted], dissolved) assumed the liability of the dissolved common parent for the taxable years [redacted] and [redacted]. Because the plan of reorganization for the company does not appear to expressly assume the liabilities of the dissolved corporation, our national office has advised that you should be prepared to assert transferee liability in equity, using the appropriate state fraudulent transfer statute to supplement I.R.C. Section 6901 as necessary.

The national office agreed with our previous recommendation that you request [redacted] to execute the Form 977, Consent to Extend the Time to Assess Liability At Law or Equity for Income, Gift and Estate Tax Against a Transferee or Fiduciary, and the Form 2045, Transferee Agreement, as a precaution in this situation.

4. How do you preserve the statute of limitations for transferee liability?

Answer: As we previously advised you, to preserve the statute of limitations for transferee liability, Forms 2045 (Transferee Agreement) and 977 (Consent to Extend the Time to Assess Liability at Law or Equity for Income, Gift, and Estate Tax Against a Transferee or Fiduciary) should be executed by [redacted]. You may use a single Form 2045 and a single Form 977 for both years [redacted] and [redacted]. We suggest that you solicit those forms.

5. What names should you use in the Forms 2045 and 977?

The national office agrees with our March 16, 1999 recommendations to you with regard to the proposed form of these Forms 2045 and 977 consents to extend the period of limitation, including the proposed way the company names should be listed. We repeat our March 16, 1999 advice to you regarding these forms, immediately below, for your convenience.

To preserve the statute of limitations for transferee liability, Forms 2045 (Transferee Agreement) and 977 (Consent to Extend the Time to Assess Liability at Law or Equity for Income, Gift, and Estate Tax Against a Transferee or Fiduciary) should be executed by [redacted]. You may use a single Form 2045 and a single Form 977 for both years [redacted] and [redacted]. List the transferor's name in the Forms 2045 and 977, as follows:

"[redacted]"

Similarly, list the transferee's name in the Forms 2045 and 977, as follows:

"[redacted]."

LEGAL OPINION AND DISCUSSION

When the common parent goes out of existence, the common parent can designate another member of the group as agent for the members of the group for taxable years ending prior to its dissolution or, if the common parent goes out of existence without making a designation, the remaining members may designate a new agent for the members of the group. Neither happened in this case. Given that the common parent or the remaining members have not designated an agent for the consolidated group, the district director could deal with each member of the group individually. See Treas. Reg. Section 1.1502-77(a) or - 77(d). Therefore, you could seek the Form 872 or 872A extension with respect to the Forms 1120, U.S. Corporation Income Tax Returning Tax Return, directly, from each member of the group. Fortunately, you do not have to deal with each member of the group in this case. [redacted] formerly [redacted] is an alternative agent for the [redacted] consolidated group under Temp. Reg. Section 1.1502-77T(a)(4)(iv). Therefore, you can simply obtain a consent from this alternative agent, rather than dealing with each member of the group separately.

Absent a designated agent seek the alternative agent's consent

Temp. Reg. § 1.1502-77T(a)(4)(iv) applies if the corporation that is common parent of the group ceases to be the common parent of the group and the group remains in existence under Treas. Reg. 1.1502-75(d)(2) or (d)(3). If these requirements are met, the new common parent of the continuing consolidated group is the proper party to sign the 872 as an alternative agent for the group.

[redacted] was the common parent of the [redacted] consolidated group. However, after it transferred substantially all of its assets into its subsidiary [redacted], [redacted] ceased to exist and [redacted]

became the new common parent of the group. The group continued to exist under Treas. Reg. § 1.1502-75(d)(2). Under Treas. Reg. § 1.1502-75(d)(2) the group shall be considered as remaining in existence notwithstanding that the common parent is no longer in existence if the members of the affiliated group succeed to and become the owners of substantially all the assets of such former parent and there remains one or more chains of includible corporations connected through stock ownership with a common parent corporation which is a includible corporation and which was a member of the group prior to the date such former parent ceases to exist.

[redacted] and the other members of the affiliated group succeeded to and become owners of substantially all of the assets of [redacted] pursuant to a plan of reorganization under either I.R.C. § 368(a)(1)(C) or (D). [redacted] was the new common parent of the [redacted] consolidated group, and they were also a member of the group prior to the time that [redacted] ceased to exist. Therefore, [redacted] is an alternative agent for the [redacted] consolidated group and can sign the 872 as agent of the group.

<u>What if an agent is designated?</u>

If the group designates an agent, after you have already obtained a signed consent from the alternative agent, the Service is protected. However, there is no harm in seeking a consent from the designated agent as well. This is probably justified if someone other than the alternative agent were to be designated as agent for the group. In that case, the inconvenience of seeking the additional consent can be justified because of the danger inherent in this complex reorganization where the Service could have received incomplete or inaccurate facts.

If the group designates an agent before the Service obtains the alternative agent's signed consent, we believe that you should seek that designated agent's consent. Where a designation has already occurred, the undersigned believes that it is imprudent to simply seek the alternative agent's consent.

<u>Transferee Liability</u>

Finally, you should consider protecting the transferee liability statute of limitations. On [redacted], reorganized. Pursuant to the

plan, [redacted], was the surviving corporation. The taxpayer reported the transaction as qualifying as a reorganization under either I.R.C. Section 368(a)(1)(C) or (D). Under the plan, *inter alia*, voting common stock of [redacted], was issued to [redacted] in exchange for all of the assets of [redacted]. These shares were then distributed to all of the shareholders of [redacted]. In our opinion, [redacted] assumed [redacted]'s liabilities, some of them expressly, and the rest under state general corporation law principles because of having received its transferor's assets and being the survivor of the merger.

CONCLUSION

This opinion is being sent to you by facsimile transmission, per your request, and by regular mail. The legal file with respect to the particular legal questions covered in this opinion is now closed in this office. If you have further questions, please contact the undersigned at (312) 8867-9225, ext. 308.

RICHARD A. WITKOWSKI
District Counsel

By: /s/ ROGELIO A. VILLAGELIU
ROGELIO A. VILLAGELIU
Special Litigation Assistant

Attachments: None.

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