Office of Chief Counsel
Internal Revenue Service

memorandum

TL-N-3012-00
JForsberg

date: May 19, 2000

to: Melvin Brown, Group 1225

from: District Counsel, North Central District, St. Paul

subject: [redacted]
Consent to Extend the Statute of Limitations

Our advice has been requested as to the proper manner to execute Forms 872 for the [redacted] consolidated group's taxable years ending [redacted], and [redacted]. For the reasons discussed, the Forms 872 should be executed in the manner set forth below.

FACTS

[redacted] ("Old [redacted]") was a Minnesota corporation. For the taxable year ended [redacted], Old [redacted] filed a consolidated return as the common parent of a consolidated group (the "[redacted] group"). On or about [redacted], Old [redacted] was merged into [redacted], a Delaware corporation, in section 368(a)(1)(F) reorganization. The apparent purpose of the reorganization was to reincorporate Old [redacted] as a Delaware corporation. [redacted] was the surviving corporation in the merger. Following the merger, [redacted] became the parent the [redacted] group. Under DEL. CODE, Title 8, § 259(a), [redacted], as the surviving corporation, assumed all liabilities of Old [redacted]. For the taxable year ended [redacted], [redacted] filed a consolidated return as the common parent of the [redacted] group.

DISCUSSION

Treas. Reg. § 1.1502-77(a) provides generally that the common parent of a consolidated group is the sole agent for each subsidiary in the group for any consolidated return year. Expressly included in the authority of the common parent is the power to execute waivers. Treas. Reg. § 1.1502-77(a) further provides that its provisions shall apply "whether or not a consolidated return is made for any subsequent year, and whether or not one or more subsidiaries have become or have ceased to be members of the group at any time."

Treas. Reg. § 1.1502-77T provides for alternative agents where a corporation that is the common parent of a group ceases to be the common parent. Under Treas. Reg. § 1.1502-77T(a)(3) & (4), a waiver of the statute of limitations given with respect to the group will be deemed to be given by the agent for the group if it is given by any of the following:

(i) The common parent of the group for all or any part of the year to which the notice or waiver applies,

(ii) A successor to the former common parent in a transaction to which section 381(a) applies,

(iii) The agent designated by the group under § 1.1502-77(d), or

(iv) If the group remains in existence under § 1.1502-75(d)(2) or (3), the common parent of the group at the time the notice is mailed or the waiver given.

I.R.C. § 381(a)(2) provides that that section applies to the acquisition of assets of a corporation by another corporation in a transfer to which section 361 applies where, inter alia, the reorganization is described in I.R.C. § 368(a)(1)(F).

In the present case, as [redacted] was the common parent of the [redacted] group for part of the group's taxable year [redacted], under Treas. Reg. § 1.1502-77T(a)(4)(i), it can execute consents for group's taxable year [redacted] in its own name.

Pursuant to Treas. Reg. § 1.1502-77T(a)(4)(ii), [redacted] can also execute consents for the [redacted] group's taxable year [redacted] as agent for the group. Technically, however, [redacted] was not itself a member of the group prior to the [redacted] merger. As such, [redacted] is arguably not primarily liable for the group's tax for the year [redacted] even though it is an agent for the group for the year. Delaware law, however, provides that the surviving corporation in a merger assumes all liabilities of the constituent corporations. Hence, under state law, [redacted] succeeds to old [redacted]'s several liability for the consolidated tax of the [redacted] group.

To ensure that the Service can proceed against both [redacted] and the remaining members of the [redacted] group, the Form 872 for [redacted] should be prepared as follows:

1. The line for the taxpayer's name at the top of the first page of the Form 872 should read:

> [redacted] as agent for the consolidated group and as successor-in-interest to [redacted]*

The following footnote should be put at the bottom of the first page:

* with respect to the [redacted] consolidated group for the taxable year ended [redacted].

2. The EIN of [redacted] should be used in the box for the taxpayer's EIN in the upper right corner of the first page of the Form 872.

3. The signature block on the second page of the Form 872 should use name "[redacted])" and should be executed by a current officer of [redacted].

If you have any questions respecting this matter, please call Jack Forsberg at 290-3473, ext. 227.

REID M. HUEY
District Counsel

By: Jack Forsberg
JACK FORSBERG
Special Litigation Assistant

cc: Assistant Chief Counsel
(Field Service)