Office of Chief Counsel
Internal Revenue Service

memorandum

CC:WR:RMD:SLC:TL-N-8110-98
MHHoward

date: January 19, 1999

to: Examination Division, Salt Lake City
Attention: Richard Druk and Reed Bloxham

from: MARK H. HOWARD
Special Litigation Assistant

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subject: **Request for advisory opinion**
Taxpayer: [redacted]

We have written this memorandum in response to your request for advice on statute consent problems.

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 advice may not be disclosed to taxpayers or their representatives.

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

FACTS

The conclusion we reached in this case relies on the facts set out below. If you believe we have misstated the facts or have missed important facts, we request that you notify us as that could change our opinion in this matter.

Since submitting this request for advice, the taxpayers have agreed to extend the statute of limitations for both corporations at issue. However, you think further questions might arise so you have asked that we provide a response even though it has no current application.

The auditor and the taxpayer do not agree on the statute of limitations for the final short year returns of two related entities at issue in this audit, [redacted] (taxpayer identification number [redacted]) and [redacted] (taxpayer identification number [redacted]).

[redacted] had filed tax returns on a calendar year basis. [redacted] owned all of the stock of [redacted]. On [redacted], [redacted] and its subsidiary became subsidiaries of [redacted] in an I.R.C. § 368(a)(1)(A) reorganization. As part of this transaction:

1. [redacted] exchanged the stock of [redacted] for stock in [redacted];

2. [redacted] and its subsidiary liquidated leaving [redacted] holding the assets of these two liquidated corporations.

[redacted] filed a final short period return for the period ending [redacted], and listed the following name and address in that return:

[redacted]

[redacted] requested an extension of time to file the short period return on [redacted], and then filed the short year return on [redacted].

[redacted] filed its tax returns on a calendar year basis. On [redacted], [redacted] requested an extension of time to file its return for the calendar year [redacted]. It filed that return on [redacted], and included in that return the operations of prior [redacted] assets for the period [redacted] through [redacted].

The revenue agent working this case believes that the statute of limitations for the short year return of [redacted] will run on [redacted]. The taxpayer asserts that the statute of limitations will not run until [redacted].

[redacted] operated as a holding corporation and it held stock in other corporations as its only assets. On [redacted], [redacted] transferred all of the stock of its subsidiaries to [redacted] in an I.R.C. § 368(a)(1)(A) reorganization and then liquidated, terminating its corporate existence. This transaction qualified for carryover of certain corporate attributes as specified in I.R.C. § 381. [redacted] filed a short year return for the period ending [redacted], on [redacted] that return listed the name and address as follows:

[redacted]

[redacted] filed its returns on a calendar year basis. On [redacted] [redacted] requested an extension of time to file its [redacted] return and it subsequently filed that return on [redacted]. This return included the operations of the former subsidiaries of [redacted] for the period from [redacted] through [redacted].

The revenue agent working this case believes that the statute of limitations for the short year return of [redacted] will run on [redacted]. The taxpayer asserts that the statute of limitations will not run until [redacted].

LEGAL DISCUSSION

The general rule for the statute of limitations on assessment comes from I.R.C. § 6501(a) which states:

> Except as otherwise provided in this section, the amount of any tax imposed by this title shall be assessed within 3 years after the return was filed (whether or not such return was filed on or after the date prescribed) or, if the tax is payable by stamp, at any time after such tax became due and before the expiration of 3 years after the date on which any part of such tax was paid, and no proceeding in court without assessment for the collection of such tax shall be begun after the

> expiration of such period. For purposes of this chapter, the term "return" means the return required to be filed by the taxpayer (and does not include a return of any person from whom the taxpayer has received an item of income, gain, loss, deduction, or credit).

If the taxpayer files the return before the last filing date for the return, specified by the statute or by regulations, then the law treats the return as filed on that last date. I.R.C. § 6501(b).

If the corporations in question became part of consolidated groups as a result of the described transactions, then they would have to treat the period prior to the acquisition as separate tax years subject to rules applicable to short periods. Treas. Reg. § 1.1502-76(b)(1)(iii). However, neither corporation became part of a new consolidated group as both corporations liquidated. Thus both corporations came under the rules applicable to short periods found in I.R.C. § 443(a)(2). The Commissioner has ruled that when corporations liquidate during a tax year, the corporation must file a tax return "on or before the fifteenth day of the third month following the close of the taxable year of such corporation" unless the District Director agrees to a different time for filing the return. Rev. Rul. 71-129, 1971-1 C.B. 397. [redacted] liquidated on or about [redacted], while [redacted] liquidated on or about [redacted]. Based on Rev. Rul. 71-129, [redacted] should have filed its short period return on or before [redacted], while [redacted] should have filed its short period return on or about [redacted]. While [redacted] requested an extension of time to file the short period return on [redacted], this request made after the due date of the return did not comply with the requirements for such an extension. Treas. Reg. § 1.6081-3. Accordingly, we conclude the taxpayers filed their corporate returns after their due date and the statute of limitations period for assessment would run from the date the taxpayers filed their returns.

In this case, the taxpayers rely on the provisions of Treas. Reg. § 1.1502-76(c)(1) to assert that [redacted] and [redacted] did not have to file until the extended due date of the entity which acquired the corporation or its assets. The taxpayers further assert that under I.R.C. § 6501(b), the IRS should treat the returns filed by these two entities as filed on the extended due date of the acquiring corporations. We disagree with the taxpayers' conclusion for several reasons.

The first and most significant problem for both [redacted]

[redacted] and [redacted] is that they did not become part of the acquiring corporate groups. While [redacted] became a subsidiary of [redacted] immediately liquidated its new subsidiary. Thus [redacted] never had the chance to consent to the filing of a consolidated return with [redacted]. I.R.C. § 1501. [redacted] transferred the stock of its subsidiaries to [redacted] and then liquidated. It never became a subsidiary of [redacted] and thus never qualified to become part of the [redacted] consolidated group. The Treasury Regulations the taxpayers rely on contemplate the corporation whose return is at issue becoming part of the consolidated group of the acquiring entity. Since this did not occur, we believe the taxpayers have mistakenly relied on this regulation.

Even if we did find that the regulation applied, the facts would dictate the application of Treas. Reg. § 1.1502-76(c)(2) instead of Treas. Reg. § 1.1502-76(c)(1). In each instance, the acquiring corporation did not file a consolidated return by the due date of the return for the acquired corporation. Under those facts, the Treasury Regulation requires the acquired corporation to file its own return by its own due date. Accordingly, we agree with the revenue agent that the statute of limitations will expire soon and that the agent should obtain statute extensions or else take action to protect the statute of limitations by proceeding to issue the notice of deficiency.

CONCLUSION

We conclude that the taxpayers have inappropriately relied on Treas. Reg. § 1.1502-76(c)(1) and that it does not act to extend the statute of limitations in this case.

If you have any questions, you can contact me at telephone number (801) 799-6620.

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