Office of Chief Counsel
Internal Revenue Service

memorandum

CC:NER:NED:BOS:TL-N-778-99
BJLaterman

date:

to: District Director, New England
E:PPQMB: DAronson

from: District Counsel, New England

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subject: [redacted]
Forms 872 For Taxable Years Ended [redacted] through [redacted] and [redacted]
Statute of Limitations: [redacted]

This is in response to your memorandum of February 2, 1999, requesting guidance in extending the statute of limitations for above-mentioned consolidated group's taxable years ending [redacted] through [redacted] and [redacted].

[redacted] was a [redacted] Corporation which supplied [redacted] for [redacted] applications. It served [redacted] equipment manufacturers in the [redacted] and [redacted] sectors. The product lines included [redacted] and [redacted]. [redacted] and its subsidiaries filed consolidated returns for the taxable years ending [redacted] through [redacted] and [redacted].

[redacted] is a [redacted] corporation, which is a leading producer of [redacted] and [redacted] devices. [redacted] and [redacted] entered into an Agreement and Plan of Merger dated [redacted]. The parties agreed that [redacted] would acquire all of [redacted]'s outstanding stock pursuant to the merger of [redacted], a wholly owned subsidiary of [redacted] into [redacted]. The agreement further provided that [redacted] would be the surviving company and that the parties intend that the merger be treated as a tax free reorganization within the meaning of I.R.C.§ 368(a). The effective date of the merger was [redacted].

[redacted] filed a short period return for the consolidated group for the tax year ended [redacted]. [redacted] and subsidiaries then filed as members of the [redacted] consolidated group for subsequent taxable years.

On [redacted], [redacted] and [redacted] entered into a "Plan of Merger". The Plan provided that as of the effective time, [redacted] shall be merged with and into [redacted] with [redacted] as the sole surviving corporation. The effective date of the merger was [redacted]. The Plan also provided that the Articles of Merger be filed with the Secretary of the [redacted] and with the Secretary of the [redacted].

On [redacted], [redacted] entered into an Agreement and Plan of Merger with [redacted]; a wholly owned subsidiary of [redacted]. The Agreement provides for the acquisition of [redacted]'s outstanding stock pursuant to the merger of [redacted], a wholly owned subsidiary of [redacted], into [redacted] with [redacted] as the surviving company. Revenue Agent Jack Quinn has indicated the projected date of completion of the Agreement and Plan of Merger is [redacted].

You have requested advice as to extending the statute of limitations for the [redacted] consolidated group, [redacted] and [redacted]. Revenue Agent Jack Quinn has indicated that your are only seeking to extend for the [redacted] consolidated group. It is noted, however, that [redacted] appears to have filed as a member of the consolidated group.

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 waivers 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. The returns for the years in question in this case were due after September of 1988. Accordingly, Temp. Reg. § 1.1502-77T may apply 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] merged into [redacted] and is no longer in existence. Therefore, this subparagraph cannot apply.

Subparagraph (a)(4)(ii) 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 transfer to which I.R.C. § 361 (relating to nonrecognition of gain or loss to corporations) applies, but only if the transfer is in connection with a reorganization described in subparagraph (A), (C), (D), (F), or (G) of I.R.C. § 368(a)(1). I.R.C. § 381 also 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] merged into [redacted] with [redacted] surviving. If the merger is a valid "A" reorganization, I.R.C. § 381 will apply to the merger. Even if the merger does not qualify as a Type A reorganization, I.R.C. § 381 still applies because the merger would be deemed a liquidation under I.R.C. § 332. Since [redacted] appears to be liable as a "successor" under the governing [redacted] law, then pursuant to Temp. Reg. § 1.1502-77T(a)(4)(ii), [redacted] would be an alterative agent for the [redacted] consolidated group for the taxable years involved herein.

Another reason for obtaining a Form 872 from [redacted] is that [redacted] may be a successor in interest by merger to [redacted] as stated above, and thus succeeds to [redacted]'s several liability as the consolidated tax of the group. Articles of Merger were filed with the [redacted] which provide that the merger of [redacted] into [redacted] would be effected pursuant to the [redacted]. [redacted] provides in part:

[redacted]

* * * *

[redacted]

* * * *

[redacted]

[redacted]

* * * *

[redacted]

MASS. ANN. LAWS ch. 156B, § 80 (Law. Co-op. 1979).

Under the [redacted] assumed all the liabilities, including taxes due or to become due, of [redacted] [redacted] is severally liable under Treas. Reg. § 1.1502-6 for the consolidated tax of the [redacted] and subsidiaries condolidated group for the fiscal years ended [redacted] through [redacted] and [redacted].Accordingly, [redacted] is a successor in interest by merger to [redacted].

We recommend that the Form 872 be captioned as follows: [redacted] (E.I.N...) successor in interest to [redacted] (E.I.N...) and alternative agent for the [redacted] (E.I.N...) and subsidiaries consolidated group.# On the bottom of the form, you should add the following: "[redacted] is the alternative agent for the [redacted](E.I.N.) and subsidiaries consolidated group pursuant to Temp. Reg. § 1.1502-77T with respect to the tax liabilities of the consolidated group for the taxable years [redacted] and is also the successor in interest by merger to [redacted] (E.I.N...) with respect to [redacted]s (E.I.N...)several liability under Treas. Reg. § 1.1502-6 for the consolidated tax liabilities of the [redacted] (E.I.N...) and subsidiaries consolidated group for the tax years [redacted].

The Form 872 should be executed by an authorized officer of [redacted]. Under I.R.C. § 6501(c)(4), the Service and a taxpayer may consent in writing to an extension of the time for

making an assessment if the consent is executed before the expiration of the normal period of assessment or the extension date agreed upon in a prior extension agreement between the parties.

I.R.C. § 6061 provides that any return, statement or other document made under any internal revenue law must be signed in accordance with the applicable form or regulations.

The regulations under I.R.C. § 6501(c)(4) do not specify who may sign consents. Accordingly, the Service will apply the rules applicable to the execution of the original returns to the execution of consents to extend the time to make an assessment. Rev. Rul. 83-41, 1983-1 C.B. 399, clarified and amplified, Rev. Rul. 84-165, 1984-2 C.B. 305.

In the case of corporate returns, I.R.C. § 6062 provides that a corporation's income tax returns must be signed by the president, vice-president, treasurer, assistant treasurer, chief accounting officer or any other officer duly authorized to act. The fact that an individual's name is signed on the return is prima facie evidence that the individual is authorized to sign the return. I.R.C. § 6064. Accordingly, any such officer may sign a consent, whether or not that person was the same individual who signed the return. Rev. Rul. 84-165, 1984-2 C.B.305.

We also recommended that you obtain Form 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 2045 (Transferee Agreement) from [redacted] as a protective measure. Please contact us if you need assistance regarding these forms. Since, the Service has the burden of proving transferee liability, we recommend that you obtain complete copies of the merger agreements for the [redacted], [redacted] and [redacted] mergers.

It is important to be certain that [redacted] is still in existence on the date the form 872 is secured. We note that although the projected date of the completion of the plan of merger in which [redacted] will go out of existence is [redacted], it could be accomplished sooner. If the Form 872 is signed on behalf of [redacted] after it is no longer in existence, the consent may be invalid.

If you have any further questions, please feel free to contact the undersigned at (617) 565-7838.

BARRY J. LATERMAN
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