Office of Chief Counsel
Internal Revenue Service

memorandum

CC:SER:DEM:WAS:TL-N-7583-98
KEChandler

date: FEB - 8 1999

to: Tom Petersen, Case Manager, Group 1106

from: Associate District Counsel, Delaware-Maryland District, Washington, D.C.

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subject: [redacted] - [redacted] **Reorganization**
Effect on Representation

This is in response to your request for advice regarding the proper party to deal with concerning the [redacted], [redacted] consolidated group's income tax liabilities for the years following [redacted]'s [redacted] corporate reorganization. You currently have under examination the consolidated income tax returns filed for the calendar years ending [redacted], [redacted] and [redacted].

DISCLOSURE STATEMENT

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ISSUES

Following [redacted]'s [redacted] reorganization, for the years currently under examination:

1. Who is the proper party to execute an extension of the statute of limitations?

2. Who is the proper party to execute a partial or complete settlement of proposed adjustments?

3. To what entity(ies) should a notice of deficiency be sent?

4. What, if any, disclosure limitations exist relating to the former members of the [redacted] consolidated group or the newly formed current parent of those former members in requesting information or discussing proposed adjustments?

FACTS

In [redacted], the Examination Team held an opening conference with the [redacted] (hereinafter "Old [redacted]") regarding the examination of its [redacted], [redacted] and [redacted] consolidated federal tax returns. As of that date and during the years under examination, Old [redacted] was the common parent of an extensive group whose affiliates joined in filing consolidated federal income tax returns. Old [redacted], directly and through it's wholly owned subsidiaries was engaged in three businesses:

1. managing and franchising certain [redacted] (hereinafter "Business A");

2. developing, managing, and selling [redacted] programs; developing, operating and managing [redacted]; distributing [redacted] and supplies to certain [redacted] operations (hereinafter "Business A1"); and,

3. providing [redacted] and [redacted] management to various business and industrial operations, health care facilities and schools, and colleges and universities (hereinafter "Business B").

Prior to [redacted], [redacted], a French corporation, also engaged in Business B and Old [redacted] entered negotiations to combine their B businesses. After receiving a [redacted] letter ruling, Old [redacted] undertook a spin-off of it's A and A1 businesses to facilitate it's proposed transaction with [redacted]. Old [redacted]'s spin-off consisted of creating a new subsidiary (subsequently "New [redacted]") to which it transferred all of the assets used in Business A and it's wholly owned subsidiaries conducting Business A1 in exchange for New [redacted] stock. The stock of New [redacted] was distributed to Old [redacted]'s shareholders pro rata.

New [redacted]'s headquarters is currently located at the corporate offices occupied by Old [redacted] prior to the [redacted] reorganization. This is the location of the IRS Examination Team auditing the consolidated returns of the Old [redacted] group for the years [redacted] through [redacted]. In it's new configuration as the parent corporation of a group consisting of former subsidiaries in Business B and [redacted] subsidiaries engaged in business B, Old [redacted]'s headquarters are presently located in [redacted], Maryland.

In connection with the [redacted] reorganization a Tax Sharing and Indemnification Agreement (hereinafter "Agreement") was entered by Old [redacted], New [redacted] and [redacted]. That Agreement provides, among other things, that:

1. Generally, New [redacted] is liable for any tax deficiency for the years currently under examination, or is entitled to any refund attributable to those years;

2. Whenever New [redacted] becomes aware of an issue which could increase any tax liability of Old [redacted] or any member of its current group, New [redacted] is required to notify Old [redacted]. Conversely, whenever Old [redacted] becomes aware of an issue which could increase any tax liability of New [redacted] or any member of its current group, Old [redacted] is required to notify New [redacted];

3. New [redacted] has primary responsibility for conducting any audit for the years currently under IRS examination and for conducting any subsequent litigation relating thereto;

4. Old [redacted] is required to cooperate with, and provide information to, New [redacted] relating to any audit of the years currently under IRS examination. In this regard Section 4.05 (b) of the Agreement provides:

> ... It is expressly the intention of the parties to this Agreement to take all actions necessary to establish [redacted] [New [redacted]] as the sole agent for tax purposes of each member of the Affiliated Group with respect to all combined, consolidated and unitary Tax

> Returns of the Affiliated Group for Pre-Distribution Taxable Periods as if [New] were the common parent of the Affiliated Group, and as the sole agent for tax purposes ...

5. New is the designated owner of all Tax Returns, related schedules and workpapers, and all material records and other documents relating to those Tax Returns for the periods currently under IRS examination.

DISCUSSION

Old

Section 1501 of the Code grants affiliated groups of corporations the privilege of filing returns on a consolidated basis. If consolidated returns are filed, the members of the group consent to be bound by the legislative regulations promulgated pursuant to the authority in section 1502. See I.R.C. § 1501. Under those regulations, the common parent of the consolidated group is the sole agent for the members of the group with respect to the consolidated tax liability of the group.

Treas. Reg. § 1.1502-77(a) provides that the common parent "shall be the sole agent for each subsidiary in the group, duly authorized to act in its own name in all matters relating to the tax liability for the consolidated return year." The common parent, i.e. Old , remains the agent for the members of the group for any years during which it was the common parent, whether or not consolidated returns are filed in subsequent years and whether or not one or more subsidiaries have become or have ceased to be members of the group at any time. See Treas. Reg. § 1.1502-77(a). See also, Craigie, Inc. v. Commissioner, 84 T.C. 466, 472 (1985); Southern Pacific Co. v. Commissioner, 84 T.C. 395, 401 (1985).

Old as the common parent prior to the restructuring, is the sole agent of the consolidated group for the years currently under examination. Treas. Reg. § 1.1502-77(a). As the common parent for the consolidated return years under examination, Old remains the common parent agent for purposes of extending the statute of limitations with respect to those years even though it is no longer the common parent of all

of the subsidiaries. Treas. Reg. § 1.1502-77(c); Lone Star Life Ins. Co. v. Commissioner, T.C. Memo. 1997-465. Consequently, as necessary, Form(s) 872 (Consent to Extend the Time to Assess Tax) should be executed by Old [redacted] to extend the statute of limitations.

As the continuing common parent for the consolidated years under examination, Old [redacted] also remains the proper party to execute Forms 870 (Waiver of Restrictions on Assessment and Collection).

Treas. Reg. § 1.1502-77(a) explicitly provides, in part, "notices of deficiencies will be mailed only to the common parent, and the mailing to the common parent shall be considered as a mailing to each subsidiary in the group." As the continuing common parent for the consolidated years under examination, Old [redacted] is the proper entity to receive any notice of deficiency for the years currently under examination. Treas. Reg. § 1.1502-77(a); Union Oil Company of California v. Commissioner, 101 T.C. 130 (1993).

New [redacted]

New [redacted], having directly received assets from Old [redacted], is liable to the extent of the value of those assets as a transferee. I.R.C. § 6901; Treas. Reg. § 301.6901-1(b); IRM § 4582.21(6); Southern Pacific Transportation v. Commissioner, 84 T.C. 367 (1985). Additionally, in the Tax sharing and Indemnification Agreement, New [redacted] contractually obligated itself to pay the consolidated federal tax liabilities for the consolidated years currently under examination. Article II, Section 3.01 of the Agreement. That Agreement renders New [redacted] liable as a transferee at law. Southern Pacific Transportation v. Commissioner, Id.; Southern Pacific Transportation v. Commissioner, 84 T.C. 387 (1985).

In addition to the Forms 872 executed by Old [redacted], a Forms 872 executed by New [redacted] should be obtained to cover its potential primary liability as the transferee at law of assets. Further, because of New [redacted]'s potential secondary liability, 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) executed by New [redacted] should be obtained to extend the statute of limitations as to transferee liability. See, I.R.C. § 6901(d)(1); Treas. Reg. § 301.6901-1(d)(1); IRM § 4582.21(5).

In addition to Forms 870, a Form 2045 (Transferee Agreement) executed by New [redacted] as to its potential transferee liability should be obtained as to any partial or complete settlement. See, IRM § 4582.21(4).

If a Notice of Deficiency is sent to Old [redacted], a Notice of Transferee Liability should also be sent New [redacted]. This is consistent with the agreement between Old [redacted] and New [redacted] that New [redacted] will be liable for any tax deficiency for the years currently under examination.

Disclosures

Section 6103(k)(6) of the Internal Revenue Code provides:

> An internal revenue officer or employee may, in the course of his official duties relating to any audit, collection activity, or civil or criminal tax investigation or any other offense under the internal revenue laws, disclose return information to the extent that such disclosure is necessary in obtaining information, which is not otherwise reasonably available, with respect to the correct determination of tax, liability for tax, the amount to be collected or with respect to the enforcement of any provision of this title.

See also, Treas. Reg. § 301.6103(k)(6)-1(b).

To the extent concerns exist regarding disclosures to New [redacted], this provision of I.R.C. §6103 is applicable. As New [redacted] has the relevant records, it is appropriate to discuss issues and request necessary information from New [redacted].

The Agreement between Old [redacted] and New [redacted] provides that New [redacted] has primary responsibility for the current audit and has possession of all of the relevant records. Consistent with the Agreement, and to forestall any future confusion, a Power of Attorney from Old [redacted] designating New [redacted] its agent for purposes of the on-going examination should be obtained.

CONCLUSIONS

1. Old [redacted] is the proper party to execute Form(s) 872 to extend the statute of limitations. Form(s) 872 and 977 executed by New [redacted] should also be obtained to extend the statute of limitations as to its primary and transferee liability.

2. Old [redacted] is the proper party to execute Form(s) 870 reflecting any partial or complete settlement of proposed adjustments. Form(s) 2045 executed by New [redacted] should also be obtained to reflect its agreement to such settlement.

3. Any notice of deficiency should be sent to Old [redacted]. A notice of transferee liability should be sent to New [redacted].

4. Disclosure relating to the former members of the [redacted] consolidated group or the newly formed current parent of those former members in requesting information or discussing proposed adjustments is not limited. We recommend that, consistent with the agreement between Old [redacted] and New [redacted], a Power of Attorney be obtained from Old [redacted] designating New [redacted] its agent for purposes of the on-going examination.

This advisory is being post reviewed by the National Office. We will advise you if they have any comments. If you have any question regarding this memorandum or want to discuss this issue further, please contact Karen E. Chandler directly at (202) 634-5403, ext. 224.

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