Office of Chief Counsel
Internal Revenue Service

memorandum

CC:WR:SCA:LN:TL-N-684-00
TIRussell

date:

to: Lorna Fenton, Case Manager CE:1103

from: District Counsel, Southern California District, Laguna Niguel
June Y. Bass, Assistant District Counsel
T. Ian Russell, Attorney

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subject: **Extension of Limitations Period**
[redacted]

DISCLOSURE STATEMENT

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You asked us to confirm the correct name to use in a Form 872, Consent to Extend the Time to Assess Tax, for a Consolidated Group for the years [redacted] through [redacted], the common parent of which since [redacted] survived a merger with a second tier subsidiary of the common parent (a holding company was the single, first tier subsidiary), underwent a name change, and subsequently ceased to exist in [redacted] after merging into another affiliated corporation.

FACTS

The taxpayer is a consolidated group of corporations, the common parent of which during the years under examination was [redacted], a Delaware corporation (alternately referred to as "the taxpayer," "the common parent," or "old [redacted]").

The years under examination are the taxable fiscal years ended [redacted], [redacted], [redacted], and a short-year ending [redacted]. The earliest statute expiration date for the years under examination currently is [redacted].

Since [redacted], the common parent of the consolidated group survived a merger with a second tier subsidiary of the common parent (a holding company was the single, first tier subsidiary), underwent a name change, and subsequently ceased to exist in [redacted] after merging into another affiliated corporation. Following is a more detailed description of the changes to the former common parent.

During [redacted], the taxpayer formed [redacted], a Delaware corporation ("Holding"); [redacted], a Delaware corporation and a wholly-owned subsidiary of Holding ("[redacted] Sub"); and [redacted], a Delaware corporation and a wholly-owned subsidiary of Holding ("[redacted] Sub"). The taxpayer formed the holding company and the two subsidiaries to facilitate a merger with another consolidated group, the common parent of which was [redacted], a Delaware corporation.

The authorized capital of Holding, [redacted] Sub and Company Sub each consisted of [redacted] shares, [redacted] of which were issued and outstanding and, in the case of Holding, were held beneficially and of record by the taxpayer. As noted, Holding owned the stock of [redacted] Sub and Company Sub.

[redacted], [redacted] Sub, and [redacted] Sub were listed by the taxpayer as affiliated group members in a Form 7004, Application for Automatic Extension of Time to File Corporation Income Tax Return for the taxable fiscal year ended [redacted]. On the Form 7004, the EINs listed for [redacted], [redacted] Sub, and [redacted] Sub were [redacted], [redacted], and [redacted], respectively.

As a result of an oversight, neither [redacted], [redacted] Sub, nor [redacted] Sub were listed as affiliated corporations in the Form 851, Affiliations Schedule, filed with the taxpayer's Form

1120, U.S. Corporation Income Tax Return for the consolidated group for the taxable fiscal year ended [redacted].[1]

The taxpayer filed a Form 1128, Application to Adopt, Change or Retain a Tax Year to change its taxable fiscal year end from [redacted] to [redacted]. Permission was granted by the National Office, and the taxpayer filed a short-year return for the period [redacted] to [redacted].

On the Form 851 filed with the Form 1120 for the short taxable year ended [redacted], [redacted] was listed as an affiliated corporation, wholly owned by the taxpayer, and having a principal business activity of "Holding Company." [redacted] Sub was also listed as an affiliated corporation, wholly owned by [redacted], and having a principal business activity of "Merger Corp." Likewise, [redacted] Sub was listed as an affiliated corporation, wholly owned by [redacted], and having a principal business activity of "Acquisition Corp."

On [redacted] a reorganization was effected by and among Holding; the taxpayer; [redacted] Sub; [redacted]; and [redacted] Sub.[2]

The reorganization effected the following mergers: (1) A merger of [redacted] Sub into the taxpayer, and (2) a merger of [redacted] Sub into [redacted], such that the taxpayer and [redacted] became wholly-owned subsidiaries of Holding. In addition, the shareholders of the taxpayer and [redacted] became shareholders of Holding. Holding acted as a holding company for the taxpayer and [redacted].

After the closing, both the taxpayer and Holding changed their names as follows: (1) The taxpayer changed its name to [redacted], and (2) Holding changed its name to [redacted] ("new [redacted]").

Effective [redacted], [redacted] merged downstream into a wholly owned first tier subsidiary holding company, [redacted].

Also effective [redacted], [redacted] merged into [redacted].

Clause 2.1 of Article II of the plan of merger states that

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[1] The taxpayer informed Exam that this was an oversight, and that neither [redacted], [redacted] Sub, nor [redacted] Sub filed a separate return for the year.

[2] The Agreement and Plan of Reorganization was developed on [redacted].

"[t]he Merger will occur in accordance with the laws of the State of Indiana."

Clause 2.2 of Article II of the plan of merger, entitled "Effect of the Merger; Assumption of Obligations.", provides as follows:

> Upon completion of the Merger, the Surviving Corporation [[redacted])] shall possess any and all rights, privileges, franchises, immunities, and licenses of the Merging Corporation [redacted] (f/k/a [redacted])]. All property, whether real, personal, or mixed, tangible or intangible, and all debts due on whatever account belong to, or due and owing to the Merging Corporation, shall be transferred to and vested in the Surviving Corporation without further act or deed to the fullest extent provided by Indiana law. The Surviving Corporation shall assume and be responsible and liable for all liabilities and obligations of the Merging Corporation as required by Indiana law [(the state of incorporation of [redacted]].

Clause 4.1 of Article IV of the plan of merger, entitled "Cancellation of Merging Corporation Shares.", provides as follows:

> As of the Effective Date, each outstanding share of the Merging Corporation shall be cancelled and no shares of the Surviving Corporation shall be issued in exchange therefor. Each certificate that prior to the Effective Date represented shares of the Merging Corporation shall, from and after the Effective Date, represent shares of common stock of the Surviving Corporation.

Clause 4.2 of Article IV of the plan of merger, entitled "Surviving Corporation Shares.", provides as follows:

> Each share of the Surviving Corporation's Common Stock, which is issued and outstanding immediately prior to the Effective Date shall, as of and after the Effective Date, continue to be an issued and outstanding share of common stock of the Surviving Corporation. Each certificate that, prior to the Effective Date, represented shares of Surviving Corporation common stock shall, from and after the Effective Date, represent shares of common stock of the Surviving Corporation.

According to Exam, neither the old [redacted] or the members of the

old [redacted] group has filed with the Service a designation of another member to act as agent.

Statements filed with the [redacted] return of [redacted] (the new [redacted] and relevant portions of the agreement and plan of reorganization between old [redacted] Holdings, [redacted] Sub, [redacted] Sub, and [redacted] are attached hereto as Exhibit A.

Relevant portions of the articles of merger and plan of merger between [redacted] and [redacted] are attached hereto as Exhibit B.

Relevant portions of the articles of merger and plan of merger between [redacted] (f/k/a [redacted] and [redacted] are attached hereto as Exhibit C.

Relevant portions of the Form 1120, Form 7004, and Form 851 filed by the old [redacted] and subsidiaries for the taxable fiscal year ending [redacted] are attached hereto as Exhibit D.

Relevant portions of the Form 1120, Form 7004, and Form 851 filed by the old [redacted] and subsidiaries for the short taxable fiscal year ending [redacted] are attached hereto as Exhibit E.

Relevant portions of the Form 1120, Form 7004, and Form 851 filed by the new [redacted] and subsidiaries (note the different EIN) for the taxable year ending [redacted] are attached hereto as Exhibit F.

Organizational charts for the years [redacted] to [redacted] are attached hereto as Exhibit G.

A copy of the Form 1128 and letter from the National Office granting permission to the tax year to [redacted] is attached hereto as Exhibit H.

Relevant portions of the Delaware and Indiana corporate/business law, retrieved from a Lexis-Nexis search, are attached hereto as Exhibit I.

LEGAL ANALYSIS

I. Law.

In general, the common parent corporation and each subsidiary which was a member of the group during any part of the

consolidated return year is severally liable for the tax of the group for such year (i.e., is responsible for the tax of the entire group, not simply its proportionate share). Treas. Reg. § 1.1502-6(a).

Generally, the common parent 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. Id. Thus, generally the common parent is the proper party to sign consents, including Forms 872, for all members of the group. Id.

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 is applicable to each corporation which was a member of the group during any part of such taxable year, and to each corporation the income of which was included in the consolidated return for such taxable year, notwithstanding that the tax liability of any such corporation is subsequently computed on the basis of a separate return under the provisions of section 1.1502-75. Treas. Reg. § 1.1502-77(c).

Where the common parent remains in existence, even if it is no longer the common parent, it remains the agent for the group with regard to years in which it was the common parent of the group. Id.; Southern Pacific Co. v. Commissioner, 84 T.C. 395, 401 (1985).

If for any reason the common parent corporation's existence is about to terminate, the regulations require that it notify the district director with whom the consolidated return is filed of such fact and designate, subject to the approval of such district director, another member to act as agent in its place to the same extent and subject to the same conditions and limitations as are applicable to the common parent. Treas. Reg. § 1.1502-77(d).

If the notice thus required is not given by the common parent, or the designation is not approved by the district director, the remaining members may, subject to the approval of such district director, designate another member to act as such agent, and notice of such designation shall be given to such district director. Id. Until a notice in writing designating a new agent has been approved by such district director, any notice of deficiency or other communication mailed to the common parent shall be considered as having been properly mailed to the agent of the group; or, if such district director has reason to believe

that the existence of the common parent has terminated, he may, if he deems it advisable, deal directly with any member in respect of its liability. Id.

Temp. Reg. section 1.1502-77T, promulgated in 1988 to supplement Treas. Reg. section 1.1502-77, modifies the "exclusive agent" rule of Treas. Reg. section 1.1502-77(a). In general, where a common parent corporation ceases to be the common parent of a group, whether or not the group remains in existence, Temp. Reg. section 1.1502-77T(a)(4) provides "alternative agents" for the affiliated group, but only for purposes of mailing notices of deficiency and for executing waivers of the statute of limitations.

Under Temp. Reg. section 1.1502-77T(a)(4), any one or more of the following corporations may act as "alternative agents" for the group:

> (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 section 1.1502-77(d), or
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> (iv) If the group remains in existence under section 1.1502-75(d)(2) or (3), the common parent of the group at the time the notice is mailed or the waiver given.

Temp. Reg. section 1.1502-77T is effective for taxable years for which the due date (without extensions) for filing the consolidated return is after September 7, 1988. Temp. Reg. section 1.1502-77T(b). Simultaneous with the promulgation of the temporary regulation, the Service amended Treas. Reg. section 1.1502-77 by adding paragraph (e), cross referencing to Temp. Reg. section 1.1502-77T.

Treas. Reg. section 1.1502-75(d) provides for when a group remains in existence. Treas. Reg. section 1.1502-75(d)(2) provides in relevant part as follows.

> (2) Common parent no longer in existence--(i) Mere change in identity. For purposes of this paragraph, the common parent corporation shall remain as the common parent irrespective of a mere change in identity, form, or place of organization of such common parent corporation (see section 368(a)(1)(F)).

(ii) Transfer of assets to subsidiary. 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 of 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 an includible corporation and which was a member of the group prior to the date such former parent ceases to exist. * * *.

Temp. Reg. section 1.1502-75(d)(3) provides in relevant part as follows.

(3) Reverse acquisitions--(i) In general. If a corporation (hereinafter referred to as the "first corporation") or any member of a group of which the first corporation is the common parent acquires after October 1, 1965--

(a) Stock of another corporation (hereinafter referred to as the second corporation), and as a result the second corporation becomes (or would become but for the application of this subparagraph) a member of a group of which the first corporation is the common parent, or

(b) Substantially all the assets of the second corporation, in exchange (in whole or in part) for stock of the first corporation, and the stockholders (immediately before the acquisition) of the second corporation, as a result of owning stock of the second corporation, own (immediately after the acquisition) more than 50 percent of the fair market value of the outstanding stock of the first corporation, then any group of which the first corporation was the common parent immediately before the acquisition shall cease to exist as of the date of acquisition, and any group of which the second corporation was the common parent immediately before the acquisition shall be treated as remaining in existence (with the first corporation becoming the common parent of the group). Thus, assume that corporations P and S comprised groups PS (P being the common parent), that P was merged into corporation T (the common parent of a group composed of T and corporation U), and that the shareholders of P immediately before the merger, as a result of owning stock in P, own 90 percent of the fair market value of T's stock immediately after the merger. The group of which P was the common parent is treated as continuing in existence with T and U being added as members of the group, and T taking the place of P as the common parent.

> For purposes of determining under (a) of this subdivision whether the second corporation becomes (or would become) a member of the group of which the first corporation is the common parent, and for purposes of determining whether the former stockholders of the second corporation own more than 50 percent of the outstanding stock of the first corporation, there shall be taken into account any acquisitions or redemptions of the stock of either corporation which are pursuant to a plan of acquisition described in (a) or (b) of this subdivision.

The laws of many states specify that the corporation surviving a statutory merger assumes all the powers, rights, debts, and liabilities of the corporation merged into it. Under such laws, the successor corporation becomes primarily liable with regard to the tax liabilities of the merged corporation. See Missile Systems Corp. v. Commissioner, T.C. Memo. 1964-212; Rev. Rul. 81-77, 1981-1 C.B. 582, (Jan. 01, 1981).

Section 259(a) of the Delaware General Corporation Law (governing status, rights, liabilities, etc., of constituent and surviving corporations following merger or consolidation) provides, in part, as follows:

> All rights of creditors and all liens upon any property of any said constituent corporations shall be preserved unimpaired, and all debts, liabilities, and duties of the respective constituent corporations shall thenceforth attach to said resulting or surviving corporation, and may be enforced against it *to the same extent as if said debts, liabilities, and duties had been incurred or contracted by it.* (Italics supplied.)

Indiana law provides that when a merger takes effect, "the surviving corporation has all liabilities of each corporation party to the merger". Ind. Ann. Stat. § 23-1-40-6(a)(3) (Burns 1999).

II. Analysis.

As the common parent corporation of the group during the years under examination, the old [redacted] (which underwent a name-change to [redacted]) was severally liable for the tax of the group for such years (i.e., was responsible for the tax of the entire group, not simply its proportionate share). Treas. Reg. § 1.1502-6(a).

Pursuant to the plan of merger between [redacted] [redacted] (f/k/a [redacted] and

[redacted] succeeded to [redacted], and expressly assumed and became responsible and liable for all liabilities and obligations of [redacted] (the old [redacted].

The merger was pursuant to Indiana law, the law of the incorporation state of the surviving corporation, which provides that when a merger takes effect, "the surviving corporation has all liabilities of each corporation party to the merger". Ind. Ann. Stat. § 23-1-40-6(a)(3) (Burns 1999). The law of the incorporation state of the merging corporation, Delaware, effectively provides the same. See 8 Del. C. § 259 (1999).

[redacted] is currently the sole first tier subsidiary of the common parent (the new [redacted]), and all of the other subsidiary members are owned through it. Therefore, [redacted] should have ample assets to cover any liability arising from a proposed adjustment.

Accordingly, a Form 872 executed by [redacted] in its capacity as successor in interest to the old [redacted] should be sufficient to protect the government's interest.

In addition, the facts suggest two potential alternative agents under Temp. Reg. section 1.1502-77T(a)(4): (1) The new [redacted] (f/k/a [redacted]) as an alternative agent under Temp. Reg. section 1.1502-77T(a)(4)(iv), or (2) [redacted] as an alternative agent under Temp. Reg. section 1.1502-77T(a)(4)(ii).

1. The new [redacted] (f/k/a [redacted]) as an alternative agent under Temp. Reg. section 1.1502-77T(a)(4)(iv).

The facts suggest that the old [redacted] group has remained in existence pursuant Treas. Reg. section 1.1502-75(d)(2)(ii), thereby qualifying the new [redacted] as an alternative agent under Temp. Reg. section 1.1502-77T(a)(4)(iv).

Treas. Reg. section 1.1502-75(d)(2)(ii) provides that 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 of 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 an includible corporation and which was a

member of the group prior to the date such former parent ceases to exist.

Prior to [redacted], [redacted], [redacted] Sub and [redacted] Sub were members of the old [redacted] group. During [redacted], the old [redacted] merged downstream into [redacted] Sub., with the old [redacted] being the surviving corporation. Since that time, [redacted] (the new [redacted] after a name change) has remained the common parent of the group, and the old [redacted] merged out of existence into another subsidiary of the new [redacted] group.

Accordingly, the members of the group have succeeded to and become the owners of substantially all of the assets of the former parent (the old [redacted]), and there remains one or more chains of includible corporations connected through stock ownership with a common parent corporation (the former [redacted] (now the new [redacted])) which is an includible corporation and which was a member of the group prior to the date the former parent (the old [redacted] ceased to exist. Therefore, the new [redacted] [redacted] [redacted] (f/k/a [redacted]) should qualify as an alternative agent under Temp. Reg. section 1.1502-77T(a)(4)(iv).[3]

2. [redacted] as successor in interest to [redacted] (f/k/a [redacted], and as an alternative agent under Temp. Reg. section 1.1502-77T(a)(4)(ii).

Pursuant to Temp. Reg. section 1.1502-77T(a)(4)(ii), a successor to the former common parent in a transaction to which section 381(a) applies may act as an alternative agent for the group.

Section 381(a) provides in relevant part that in a transfer of assets to which section 361 applies, and which is in connection with a reorganization described in section 368(a)(1)(A), inter alia, the acquiring corporation succeeds to and takes into account the items of the transferor corporation described in section 381(c).

Section 361(a) provides that no gain or loss shall be recognized to a corporation if such corporation is a party to a reorganization and exchanges property, in pursuance of the plan of reorganization, solely for stock or securities in another corporation a party to the reorganization.

Finally, section 368 defines what constitutes a

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[3] This conclusion is suggested by the facts, which are limited due to time constraints.

reorganization within the meaning of section 361. Section 368(a)(1)(A) provides that the term "reorganization" means "a statutory merger or consolidation."

The merger of [redacted] into [redacted] was pursuant to a written, executed plan of merger that expressly provided that "[t]he Merger will occur in accordance with the laws of the State of Indiana." The two merged corporations were both wholly owned by the same parent corporation, which remains the 100% owner of the surviving corporation.

Pursuant to the plan of merger, the assets (and obligations) of [redacted] were transferred to or merged into [redacted], and the outstanding stock certificates of [redacted] became shares in the surviving corporation.[4] See Clauses 2.2, 4.1, and 4.2 of the plan of merger at Exhibit C.

The facts provided suggest a section 368(a)(1)(A) statutory merger involving (in effect) an exchange of property for stock to which section 361 would apply, and therefore section 381(a) would apply to the transaction. That being the case, [redacted] should qualify to act as an alternative agent for the old [redacted] group pursuant to Temp. Reg. section 1.1502-77T(a)(4)(ii).[5]

III. Recommendation.

We recommend that two Forms 872 be executed.[6]

One Form 872 should be executed by: "[redacted] as successor in interest to [redacted] (f/k/a [redacted]) and as an alternative agent under Temp. Reg. section 1.1502-77T(a)(4).*" At the bottom of the Form 872, denote with an asterisk (*) the following: "* This is with respect to the consolidated Federal income tax liability of the [redacted] and [redacted] consolidated group for the taxable

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[4] The transaction can be viewed as [redacted] receiving shares in the surviving corporation in return for the transfer of assets, and in turn distributing those shares to its shareholder in liquidation.

[5] This conclusion is suggested by the facts, which are limited due to time constraints.

[6] Of the two Forms 872, the first is preferred.

years ended [redacted], [redacted], [redacted] [redacted], and the short taxable year ended [redacted]."

A second Form 872 should be executed by: [redacted] (f/k/a [redacted]) as an alternative agent under Temp. Reg. section 1.1502-77T(a)(4).*" At the bottom of the Form 872, denote with an asterisk (*) the following: "* This is with respect to the consolidated Federal income tax liability of the [redacted] consolidated group for the taxable years ended [redacted], [redacted], [redacted] and the short taxable year ended [redacted]."

In addition, at the bottom of each Form 872, include the following statement: "In executing this Form 872, taxpayer acknowledges that it has been advised by Exam of its right to refuse to consent to an extension of the statute of limitations, or to limit such an extension to specific issues or to a specific time frame, pursuant to section 6501(c)(4)(B)."

CONCLUSION

The two Forms 872 as described are recommended to ensure protection of the government's interest.

When presenting the Forms 872 for execution, please advise the taxpayer of their right to refuse to consent to an extension of the statute of limitations, or to limit such an extension to

specific issues or to a specific time frame, pursuant to section 6501(c)(4)(B).[7]

T. IAN RUSSELL
Attorney

Attachments: as stated.

[7] Request the extensions by letter using Letter 907(DO)(Rev. 2-2000), Letter 907(SC)(Rev. 12-1999), or Letter 967 (Rev. 12-1999) (note that these are revised versions); and furnish the taxpayer or representative with a copy of any of these specific revisions of Publication 1035: Rev. 12-1999, Rev. 8-1996, or Rev. 8-1987.