Office of Chief Counsel
Internal Revenue Service

memorandum

CC:NER:NED:BOS:TL-N-712-98
BJLaterman

date: JUN 21 2000

to: Appeals, New England District, Boston
Attn: V. Smith

from: District Counsel, New England District, Boston

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ubject: [redacted]
Form 872 for the Taxable Years Ending October 31, [redacted], October 31, [redacted], March 31, [redacted] and June 28, [redacted]

Statute of Limitations: June 30, [redacted]

This memo is in response to your request that we provide advice regarding extending the statute of limitations for the above-mentioned consolidated group's taxable years ending October 31, [redacted], October 31, [redacted], March 31, [redacted] and June 28, [redacted].

[redacted], a Massachusetts corporation, was the parent corporation of an affiliated group of corporations which filed consolidated returns for the taxable years ending October 31, [redacted], October 31, [redacted], March 31, [redacted] and June 28, [redacted]. The affiliated corporations included [redacted], a [redacted] organized under the laws of Massachusetts, which was a wholly owned subsidiary. It is our understanding that the other members of the group with the exception of [redacted] (a wholly owned subsidiary of the parent) were wholly owned subsidiaries of [redacted].

[redacted], formerly [redacted], a Massachusetts corporation, is a [redacted] company which is the parent corporation of an affiliated group. Said company had subsidiary [redacted] in [redacted], [redacted], [redacted] and [redacted], [redacted], formerly [redacted], is a national [redacted] association, all of whose voting securities are owned indirectly by [redacted].

[redacted] was acquired by [redacted] in a tax free reorganization on [redacted]. Pursuant to the Agreement and Plan of Reorganization, [redacted]

[redacted] formed a merger subsidiary which merged into [redacted] with [redacted] as the surviving corporation. [redacted] continued its corporate existence under the laws of the Commonwealth of Massachusetts until [redacted]. (At such time, [redacted] was liquidated pursuant to I.R.C. § 332 and its assets distributed to [redacted], its parent.) Shareholders of [redacted] received [redacted] shares of [redacted] stock for each share of [redacted] stock that they owned. Prior to the reorganization, the subsidiaries of [redacted] were liquidated pursuant to I.R.C. § 332 and their assets distributed to their parent. As part of the reorganization, [redacted] was merged into [redacted] with [redacted] as the surviving corporation.

[redacted], a [redacted] corporation, is a [redacted] company. [redacted] is engaged in a general [redacted] management business through its [redacted] subsidiaries located in [redacted], [redacted], [redacted], [redacted], [redacted], [redacted], [redacted] and [redacted].

On [redacted], [redacted] and [redacted] entered into an Agreement and Plan of Merger subject to their respective shareholder's consent. This Agreement and Plan of Merger provided that [redacted] shall merge with and into [redacted] with [redacted] as the surviving corporation. [redacted] shareholders received the right to obtain [redacted] stock in exchange for their [redacted] stock. After said exchange, the pre-merger shareholders of [redacted] would control the combined entity. It was further provided that the name of the surviving corporation be changed from [redacted] to "[redacted]." It was intended by the parties that for U.S. tax purposes that the merger constitute a tax free reorganization.

Subject to the terms and conditions of the Agreement and Plan of Merger between [redacted] and [redacted] and in accordance with the provisions of the Massachusetts Business Corporation Law (General Laws, Chapter 156 B, Section 79) and the [redacted], [redacted] was merged into [redacted] on [redacted]. On or about [redacted], [redacted], a subsidiary of [redacted], was merged into [redacted], with [redacted] the surviving entity. [redacted] is now known as [redacted].

The common parent and each subsidiary that 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). However, with certain exceptions not applicable here, the common parent is the sole agent for each member of the group and is duly authorized to act in its own name with respect to all matters relating to the tax liability for the consolidated return year. Treas. Reg. § 1.1502-77(a). Therefore, the common parent in its name will give waivers, and any waiver so given, is also considered as having been given or executed by each subsidiary. Treas. Reg. § 1.1502-77(a). Thus, an agreement entered into by the common parent extending the time for assessment of tax for a consolidated return year applies to each corporation which was a member of the group during any part of the taxable year, unless the district director agrees to the contrary. Treas. Reg. § 1.1502-77(c). Accordingly, the common parent generally is the proper party to sign consents, including the Form 872 waiver to extend the period of limitations, for all members in the group. Treas. Reg. § 1.1502-77(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. Therefore, the regulation may be applicable 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. Agency is, however, not applicable in this case since there are no remaining members of [redacted] consolidated group; i.e., there is no one to be an agent for. The better approach is to secure extensions from successors to and transferees of members of [redacted] consolidated group.

Successor liability can be established as follows. In this case, the merger of [redacted] into [redacted], now known as [redacted], was effected under the laws of Massachusetts. Since the merger of [redacted] into [redacted] was effected under Massachusetts law, [redacted] is primarily liable for [redacted]'s debts, including taxes due. Southern Pacific Transportation Co. v. Commissioner, 84 T.C. 387 (1985), later proceeding, 90 T.C. 771 (1988). [redacted]

[redacted]

* * *

[redacted]

In addition to being primarily liable for the debts of [redacted] under state law, [redacted] is also primarily liable under the terms of the merger agreement. Under the terms of Section [redacted] of the Agreement of Merger between [redacted] and [redacted], the surviving entity is responsible for all of the liabilities of every kind and description of both [redacted] and [redacted] existing at the effective time of the [redacted]. Therefore, we recommend that you obtain a Form 872 from [redacted] as successor in interest to [redacted].

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1 [redacted]

The Form 872 obtained from [redacted] should be set up as follows. The caption should read "[redacted] (EIN), formerly known as [redacted] (EIN) successor in interest by merger to [redacted] (EIN)* On the bottom of the Form 872 you should add the following: "[redacted], formerly known as [redacted] is the successor in interest of [redacted] with regard to its several liability under Treas. Reg. § 1.1502-6 for the tax due for the consolidated return years ended October 31, [redacted], October 31, [redacted], March 31, [redacted] and June 28, [redacted] of [redacted] consolidated group." The Form 872 should be executed by an authorized officer of [redacted]. Rev. Rul. 83-41, 1983-1 C.B. 399, clarified and amplified, Rev. Rul. 84-165, 1984-2 C.B. 305.

It is further noted that under the facts provided there is potential transferee liability of [redacted] (now known as [redacted]) as the result of the merger of [redacted] into said entity. Accordingly, you may also wish to secure Forms 2045 and 977 from [redacted], formerly known as [redacted] as transferee of the assets of [redacted].

[redacted] was a transferee with regard to the assets of [redacted]. On [redacted], [redacted] was liquidated and its assets were distributed to its parent, [redacted]. Where a corporation disposes of all its assets and then distributes the proceeds from the sale to its stockholders in liquidation or dissolution, the stockholder-distributees are "transferees." Vendig v. Commissioner, 229 F.2d 93 (2d. Cir. 1956), aff'g 22 T.C. 1127 (1954); Fairless v. Commissioner, 67 F.2d 475 (6th Cir. 1933), aff'g 19 B.T.A. 304 (1930); Caire v. Commissioner, 101 F.2d 992 (5th Cir. 1932), aff'g 36 B.T.A. 1328 (1937); Foster v. Commissioner, 26 T.C.M. 1143 (1967), appeal dism'd (3d. Cir. 1969). See also Troy State University v. Commissioner, 62 T.C. 493 (1974). Stockholders who receive liquidating distributions from a corporation that subsequently winds up its affairs and dissolves without making adequate provisions for taxes are liable as transferees.

Accordingly, you should consider obtaining a Form 977 (Consent to Extend the Time to Assess Liability at Law and in Equity for Income, Gift and Estate Tax against a Transferee or Fiduciary) and Form 2045 (Transferee Agreement) from [redacted] for [redacted] (with regard to [redacted]'s several liability for the tax liability of the consolidated group) since [redacted] is the successor in interest by merger to

[redacted]. [redacted] succeeds to [redacted]'s liabilities and obligations under state law and pursuant to the terms of the merger.

General Laws, Chapter 16 B, Section 79 (Massachusetts Business Corporation Law) provides:

> (a) Any one or more corporations may consolidate or merge with one or more other corporations organized under the laws of any other state or states of the United States, if the laws of such other state or states permit. ...
>
> (b) Such corporations as desire to consolidate or merge shall enter into an agreement of consolidation or merger which shall specify the state under the laws of which the resulting or surviving corporation is organized... if the resulting or surviving corporation is to be governed by the laws of another state, the resulting or surviving corporation shall agree that it may be sued in this commonwealth for any prior obligation of any constituent domestic corporation...

MASS. ANN. LAWS Ch. 156 B,§ 79 (Law. Co-op. 1979).

[redacted], the foreign surviving corporation, so agreed to be sued in Massachusetts in both the Agreement and Plan of Merger and in the Articles of Merger filed with the Commonwealth of Massachusetts. Furthermore, General Laws, Chapter 156 B, Section 80 (b) (Massachusetts Business Corporation Law) which deals with the effect of consolidation or merger provides:

> (b) The rights of creditors of any constituent corporation shall not in any manner be impaired, nor shall any liability or obligation, including taxes due or to become due, or any claim or demand in any cause existing against such corporation... be released or impaired by any such consolidation or merger, but such resulting or surviving corporation shall be deemed to have assumed, and shall be liable for, all liabilities and obligations of each of the constituent corporations in the same manner and to the same extent as if such resulting or surviving corporation had itself incurred such liabilities or obligations.

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

Therefore under the laws of Massachusetts, [redacted] assumed all the liabilities including taxes due or to become due of [redacted]. Accordingly [redacted] is a successor in interest to [redacted]. Southern Pacific Transportation Co. v. Commissioner, 84 T.C. 387 (1985), later proceeding, 90 T.C. 771 (1988).

It is also noted that under the facts provided, there is the potential transferee of a transferee liability of [redacted] for [redacted]'s several liability as the result of the merger of transferee [redacted] into [redacted]. Accordingly, you may wish to secure Forms 2045 and 977 from [redacted] as transferee of the assets of [redacted] with respect to [redacted]'s liability as a transferee of the assets of [redacted].

It is further noted that I.R.C. § 6501(c)(4)(B) provides that the Service shall notify the taxpayer of their right: 1) to refuse to extend the period of limitations; or 2) to limit such extension to particular issues; or 3) to limit the extension to a particular period of time. This notice must be provided each time an extension is requested. This provision applies to requests to extend the period of limitations made after December 31, 1999. The best practice would be to advise taxpayers of their rights by sending Letter 907(DO) (Rev. 2-2000), Letter 907(SC)(Rev. 12-1999), or Letter 967 (Rev. 12-1999). (See IRS RRA 98 National Resource Center Question 203.) Service personnel are to document their actions.

If we can be of any further assistance, the undersigned can be reached at 617/565-7838.

BARRY J. LATERMAN
Special Litigation Assistant