Office of Chief Counsel
Internal Revenue Service

memorandum

CC:LM:MCT:CLE:PIT:TL-N-6433-00
MAYost

date: DEC 6 2000

to: Ron Loncharich, Case Manager
[redacted] - Audit

from: Associate Area Counsel, LM:MCT:CLE:PIT

subject: Consent for [redacted] - [redacted] Audit
U.I.L. No. 1502.77-01

This is in response to your memorandum dated November 6, 2000, that requests advice on securing a consent to extend the statute of limitations on the consolidated return for [redacted] for the tax year [redacted]. This memorandum is subject to 10-day post review by our National Office and, therefore, is subject to modification.

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. 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.

ISSUE

Who is the proper party to execute a Form 872 with respect to the [redacted] consolidated group for the taxable year [redacted]

following a reverse acquisition and subsequent liquidation of the old common parent for the group?

CONCLUSION

[redacted] can execute a From 872 with respect to the old [redacted] consolidated group for its taxable year [redacted].

The proper language to describe the taxpayer on the Form 872 is "[redacted] (EIN: [redacted]), formerly [redacted], as an alternative agent under Temp. Reg. § 1.1502-77T(a)(4)(iv) for [redacted] (EIN: [redacted], [redacted]*". For the sake of clarity, the foregoing name should be asterisked, as indicated, and at the bottom of the consent after the asterisk the following language should be inserted:

> "* With regard to the consolidated tax liability of the [redacted] (EIN: [redacted] and [redacted] consolidated group for the group's [redacted] taxable year."

FACTS

Prior to [redacted] [redacted] (EIN [redacted] was the top-tier corporation of a group of affiliated corporations. As the common parent, [redacted] filed a consolidated Federal income tax return for the tax year [redacted]. Prior to [redacted], [redacted] [redacted] (EIN [redacted] was also the common parent of a separate consolidated group and filed a consolidated tax return for the tax year [redacted].

On [redacted], the [redacted] consolidated groups combined. The combination was effectuated by the formation of a new holding company known as [redacted] [redacted] (EIN [redacted]. [redacted] formed two acquisition subsidiaries and [redacted] and [redacted] each merged with one of the acquisition subsidiaries. [redacted] and [redacted] were the survivors of their respective mergers. As a consequence of the mergers, [redacted] owned [redacted]% of the outstanding shares of both [redacted] and [redacted]. [redacted] itself was owned [redacted]% by the former shareholders of [redacted] and [redacted]% by the former shareholders of [redacted]. The [redacted] consolidated group, whose former shareholders owned more than [redacted]% of [redacted]'s stock, was treated as continuing in existence, with [redacted]

[redacted]'s consolidated group being added as a new member, and [redacted] taking the place of [redacted] as the common parent. See Treas. Reg. § 1.1502-75(d)(3). On the other hand, [redacted]'s consolidated group ceased to exist as of the date of its merger, since its former shareholders owned less than [redacted] of [redacted]'s stock. Id.

For the tax years [redacted] through [redacted], [redacted] was part of the consolidated group of [redacted].

In [redacted], [redacted] changed its name to [redacted]. The corporation also underwent a sweeping corporate reorganization. As a part of the reorganization, it contributed all of its stock in [redacted] to [redacted]. The latter entity was a single-member Delaware limited liability company which did not elect to be treated as a corporation for federal income tax purposes . On [redacted] [redacted] distributed all of its assets to [redacted] and was dissolved under applicable local law.

Exam wants to secure a consent to extend the statute of limitation on assessment for [redacted]'s consolidated return for the pre-merger year [redacted]. A prior restricted consent for [redacted] was solicited from [redacted] in [redacted] of [redacted] which extended the statute to [redacted]. We assume the present consent will also be restricted.

LAW AND ANALYSIS

I.R.C. § 1501 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 I.R.C. § 1502.

Under Treas. Reg. § 1.1502-77(a)[1], the common parent of the consolidated group is the sole agent for each subsidiary in the

[1] Proposed regulations amending this regulation and removing § 1.1502-77T were published on September 26, 2000. The proposed regulations are to apply to consolidated return years beginning on or after the date final regulations are published in the Federal Register. Until then, the current rules set forth in §§ 1.1502-77 and 1.1502-77T continue to apply.

group and duly authorized to act in its own name in all matters relating to the consolidated tax liability of the group. The common parent 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.

When the common parent is about to cease to exist or has ceased to exist under state law, Treas. Reg. § 1.1502-77(d) provides rules for determining which corporation has authority to act in matters relating to the tax liability of the members of the group. The rules allow the common parent, before terminating its existence, to designate another member of the group to act as agent or, if the corporate existence of the common parent has already terminated, the remaining members may designate another member to act as agent. In the absence of any designation, the Service may deal directly with any member in respect of its liability.

Additionally, in the context of a reverse acquisition where the group continues under Treas. Reg. § 1.1502-75(d), it is Service position that a consent obtained from an old common parent for pre-transaction years may be defended under the express language of Treas. Reg. § 1.1502-77(a) where the old common parent remains in existence under state law. Further, there is case law which indicates that the new common parent of the group after a reverse acquisition also can qualify as an agent for the members of the group for pre-transaction years, regardless of whether the old common parent survived. See, Southern Pacific Co. v. Commissioner, 84 T.C. 395 (1985)(new common parent held to be agent for the group after old common parent ceased to exist following an reverse acquisition); Union Oil Company of California v. Commissioner, 101 T.C. 130 (1993)(in dictum, Court concluded that new common parent is also an agent for the group even where the old common parent remained in existence and affiliated with the group after a reverse acquisition).

In 1988, the Service issued temporary regulations under I.R.C. § 1502. For taxable years for which the due date of the consolidated return (without extensions) is after September 7, 1988, Temp. Treas. Reg. § 1.1502-77T provides alternative agents for purposes of extending the statute of limitations for a consolidated group. Under this regulation, where the common parent of the group ceases to be the common parent, whether or

not the consolidated group remains in existence, a consent can be obtained from any one of several alternative agents for the group. The alternative agents under Temp. Treas. Reg. § 1.1502-77T(a)(4) are:

> (i) The common parent of the group for all or any part of the tax year to which the consent applies;
>
> (ii) A successor to the former common parent in a transaction to which I.R.C. § 381(a) applies;
>
> (iii) The agent designated by the group under Treas. Reg. § 1.1502-77(d); or
>
> (iv) If the group remains in existence after a reverse acquisition or downstream transfer, the common parent of the group at the time the consent is given.

In the instant case, pursuant to Treas. Reg. § 1.1502-75(d)(3), [redacted] became the new common parent of the [redacted] group after the reverse acquisition in [redacted]. The [redacted] group was treated as continuing in existence, while the [redacted] group was added as a new member.

Exam had [redacted] execute the prior consent for the pre-merger year [redacted]. [redacted] being the old common parent of the group during the year to which the consent applied, was authorized to sign the consent under Temp. Treas. Reg. § 1.1502-77T(a)(4)(i). Exam also could have had [redacted] as the new common parent of the continuing [redacted] group execute the consent for the pre-merger year, under the authority of Temp. Treas. Reg. § 1.1502-77T(a)(4)(iv).

Since [redacted] was liquidated sometime after [redacted] it is no longer available to sign another consent for the tax year [redacted]. [redacted], now called [redacted], still exists and can sign the second consent as the new common parent of the [redacted] group. See, Temp. Treas. Reg. § 1.1502-77T(a)(4)(iv); Southern Pacific Co. v. Commissioner, 84 T.C. 395 (1985). The mere change in [redacted]'s identity to [redacted] does not affect its status as the common parent of the [redacted] group. Treas. Reg. § 1.1502-75(d)(2).

[redacted] into which [redacted] was liquidated was owned

[redacted] by [redacted]. Since [redacted] has a single owner and did not elect otherwise, it is disregarded for Federal income tax purposes as an entity separate from its owner. Treas. Reg. § 301.7701-3(b)(1)(ii). Due to its status as a disregarded entity, there is some question whether [redacted] has the authority to sign a consent for the [redacted] group as the successor to [redacted]. This question does not have to be addressed in this case, however, since [redacted] as the new common parent for the group following the reverse acquisition clearly has the authority as an alterative agent under Temp. Treas. Reg. §§ 1.1502-77(a)(4)(iv) to sign the consent.

If you have any questions, please feel free to call Michael A. Yost, Jr. at (412) 644-3441.

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By: _____
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