Office of Chief Counsel
Internal Revenue Service

memorandum

CC:LM:FSH:BOS:TL-N-7109-00
MJGormley

date: FEB 20 2001

to: District Director, New England District
Attn: Alan Freed, LMSB Team Manager

from: Associate Area Counsel, (LMSB)
Area 1

subject: [redacted]
UIL# 6501.08-17
Earliest Statute: [redacted]

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. In no event may this document be provided to Examination, Appeals, or other persons beyond those specifically indicated in this statement. 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.

This is in response to your request for advice regarding a Consent to Extend the Time to Assess Tax and Closing Agreement for [redacted]'s taxable year ended [redacted]. We note that in your written request for advise you stated the year at issue was the taxable year ended [redacted]. However, you have since informed us that this date is incorrect and in fact, you are seeking to extend the statutory period for assessment on the taxable year ended [redacted]. The existing statute of limitations, based on the date of filing of

the tax return, will expire on [redacted].

ISSUES

1. Who is the proper party to execute a Form 872, Consent to Extend the Time to Assess Tax, for [redacted] for the tax year ended [redacted]?

2. What is the proper language to use in the caption and in the signature block of the Form 872 to identify the taxpayer and the proper signatory?

3. Who is the proper party to enter into a closing agreement, Form 906, with respect to the federal income tax liabilities of [redacted] for the tax year ended [redacted]?

CONCLUSION

1. The Service should obtain a Form 872 from [redacted], because [redacted] is the successor in interest and the alternative agent to [redacted] for the taxable year ended [redacted].

2. The Form 872 for [redacted] should be captioned as follows: "[redacted] (EIN: [redacted]), successor to [redacted] (EIN: [redacted]), and as alternative agent under Temp. Reg. § 1.1502-77T(a)(4)(ii)"*. On the bottom of the Form 872, you should add the following: "This is with respect to the several liability of [redacted] (EIN: [redacted]) for the consolidated tax liability of [redacted] (EIN: [redacted]) consolidated group for the taxable year ending [redacted]." This Form 872 should be signed by an authorized officer or director of [redacted].

3. A Form 906 Closing Agreement should be obtained with respect to the income tax liability of [redacted] for the taxable year [redacted], and be captioned as follows: "[redacted] (EIN: [redacted]) as successor in interest to [redacted] (EIN: [redacted])," and put an asterisk after it. At the bottom of the Form 906, type, "*This is with respect to the several liability of [redacted] (EIN: [redacted]) for the consolidated tax liability of [redacted] consolidated group for the taxable year ended [redacted]." This Form 906 should be executed by an authorized officer or director of [redacted].

FACTS

The facts set forth below, and upon which this advice is based, are as stated by your office. If our understanding of the facts is not correct, or if the facts have changed in any way, you should not rely on this advice but rather seek modified advice based on the changed circumstances.

The taxpayer, [redacted], is a Delaware corporation. The taxpayer is under examination for the years ended [redacted], [redacted], [redacted] and for the short year ending [redacted]. The taxpayer filed consolidated corporate returns (Forms 1120) for the years [redacted] through [redacted] in the name of [redacted], using EIN [redacted]. The statute of limitations for the [redacted] year will expire on [redacted]. Due to various events which occurred after these returns were filed, you have requested our advice regarding the preparation of Form a 872, Consent to Extend the Time to Assess Tax for the [redacted] year and a Form 906 Closing Agreement.

The following description of the transactions at issue is based on the Merger Agreement, Certificate of Merger and Articles of Merger provided by your office and your memorandum of [redacted]. A merger was effectuated pursuant to an Agreement and Plan of Merger ("Agreement") dated as of [redacted]. The parties to the Agreement were [redacted] ("[redacted]"), a Massachusetts corporation with EIN: [redacted], [redacted] ("[redacted]"), a Delaware corporation with EIN: [redacted] and a wholly owned subsidiary of [redacted], and [redacted] ("[redacted]"), a Delaware corporation with EIN: [redacted].

As part of the initial transaction, [redacted] and [redacted] entered into a Stock Option Agreement, whereby [redacted] granted [redacted] an option to purchase shares of common stock, par value $[redacted] per share, of [redacted]. The Stock Option Agreement was dated as of the date of the Agreement itself, [redacted]. *Agreement, Exhibit A.* In accordance with the terms of the Agreement and Plan of Merger, at the time of the merger each share of [redacted] common stock would be converted into the right to receive [redacted] of a share of [redacted]'s common stock. *Agreement, Article II, sec. 2.1(a).* [redacted] merged with and into [redacted], [redacted] ceased to exist, and [redacted] (EIN: [redacted]) continued as the surviving corporation to the merger. The effective date of the merger, pursuant to the terms of the Agreement was the date of the Certificate of Merger, [redacted]. *Agreement, Article I, sec. 1.2.* The Certificate of Incorporation of [redacted], as in effect

immediately prior to the merger, was the Certificate of Incorporation of [redacted], until amended, except that the name of the surviving corporation was [redacted] (EIN: [redacted]). The merger occurred pursuant to § 251 of the General Corporate Laws of the State of Delaware. *Agreement, Article I, sec. 1.1.*

By virtue of the terms of the Agreement, [redacted] and [redacted] intended that the merger of [redacted] with and into [redacted] would qualify as a reorganization within the meaning of I.R.C. § 368(a). *Agreement, Article VI, sec. 6.7.* The parties also agreed that both would use their reasonable best efforts to cause the business combination to be effected by the merger to be accounted for as a pooling of interests for accounting purposes. *Agreement, Article VI, sec. 6.8.* Additionally, [redacted] and [redacted] agreed that if proper written notice was given by [redacted] of its intention to merge [redacted] with and into [redacted], with [redacted] surviving, an "upstream merger" would occur immediately following the date of the first merger, [redacted]. *Agreement, Article VI, sec. 6.7.* You have advised us that [redacted] tax officials have represented that [redacted] intended to merge [redacted] into [redacted] as quickly as possible. However, this upstream merger did not occur until [redacted], due to unforseen legal complications with the closing of business operations in certain foreign jurisdictions. Thereafter, you have advised us that [redacted]'s existence as a corporation ceased and it became a branch of [redacted]. In this regard, you have provided us with a copy of the Articles of Merger of [redacted] and [redacted] dated [redacted], whereby [redacted] was merged into [redacted] pursuant to Chapter 156B, sec. 79 of the General Laws of Massachusetts. The Articles of Merger provided the effective date of the merger was the date it was approved and filed by the Secretary of State, [redacted]. Further, that there were no amendments to the surviving corporation's ([redacted]'s) Articles of Organization, and that the Agreement of Merger was adopted by [redacted] in a manner that complied with Delaware law.

LEGAL ANALYSIS

I.R.C. § 6501(c)(4)(A) provides, in general, that the taxpayer may consent to extend the time to assess tax in an agreement in writing executed by both the Secretary and the taxpayer. I.R.C. § 6501(c)(4)(B) provides, with respect to requests to extend the period of limitations made after December 31, 1999, that the Secretary shall notify the taxpayer of the taxpayer's right to refuse to extend the period of limitations, or to limit such extension to particular issues or to a particular period of time, on each occasion when the taxpayer is requested to provide such consent. The Chief Counsel's guidance

on this issue provides that the Service personnel may notify taxpayers of their rights under I.R.C. § 6501(c)(4)(B) either orally or in writing. The preferred method of notification is by sending taxpayers Letter 907(DO)(Rev. 2-2000), Letter 907(SC)(Rev. 12-1999), Letter 967(Rev. 12-1999), or Publication 1035, Extending the Tax Assessment Period (Rev. 12-1999).

If an affiliated group of corporations makes a consolidated return pursuant to I.R.C. § 1501, the common parent and each subsidiary that was a member of the affiliated group during any part of the consolidated return year is severally liable for the tax for such year. Treas. Reg. § 1.1502-6(a). The common parent, with certain exceptions, is the sole agent for each member of the group, duly authorized to act in its own name for all matters relating to the tax liability for the consolidated return year. Treas. Reg. § 1.1502-77(a). The common parent in its own name is the proper party to sign consents to extend the time to assess the tax for all members in the group. Treas. Reg. 1.1502-77(a).

The consolidated return regulations have provisions for execution of consents when a corporation is dissolved. Treas. Reg. § 1.1502-77(d) provides that if a common parent contemplates dissolution, or is about to dissolve or for any other reason is about to terminate its existence, it shall notify the District Director of such facts, and designate, subject to the approval of such District Director, another member to act as its agent. If the notice is not given, or the designation is not approved, the remaining members may designate another member to act as agent. Based on the facts provided, no such designation of agent was made by Data General.

However, Temp. Reg. § 1.1502-77T(a)(4) provides for alternative agents for the affiliated group if the common parent ceases to be the common parent of the group, whether or not the group remains in existence.[1] Pursuant to Temporary Regulation § 1.1502-77T(a)(4), the alternative agent for the affiliated group is:

(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 I.R.C. § 381(a) applies;

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[1] Temp. Reg. § 1.1502-77T(a)(4) is applicable 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. Temp. Reg. § 1.1502-77T(a)(3).

(iii) The agent designated by the group under Treas. Reg. § 1.1502-77(d); or

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

I.R.C. § 381(a) provides that an acquiring corporation succeeds to and takes into account the certain items of the distributing or transferor corporation if the distributing corporation's assets are acquired in a transfer to which I.R.C. § 361 applies and the transfer is in connection with a reorganization described in subparagraph (A), (C), (D), (F), or (G) of § 368(a)(1). I.R.C. § 361 provided that a corporation will not recognize gain or loss on an exchange of property resulting from a plan of reorganization if the corporation exchanged the property for stock or securities in another corporation that is a party to the reorganization. Pursuant to I.R.C. § 368(a)(1)(A), a "reorganization" includes a statutory merger or consolidation.

In this case, [redacted], the common parent of the consolidated group, and [redacted], on [redacted], merged pursuant to § 251 of the General Corporation Law of Delaware, with [redacted] surviving. Thereafter, on [redacted], [redacted] merged up and into [redacted] pursuant to Chapter 156B, § 79 of the General Laws of the Commonwealth of Massachusetts, with [redacted] surviving. Therefore, as of [redacted], [redacted] is the successor to the common parent of [redacted] consolidated group and it became a successor as a result of a reorganization to which I.R.C. § 381(a) applied. Accordingly, pursuant to Temporary Regulation § 1.1502-77T(a)(4)(ii), [redacted] is an alternative agent for the consolidated group as of the date of the second, upstream merger. Thus, a current agent of [redacted], in his or her capacity as an officer of [redacted] is the proper party to execute a Form 872, Consent to Extend the Time to Assess Tax for [redacted] for the tax year ended [redacted].

Additionally, we note [redacted] would be primarily liable as a successor under Massachusetts merger law for the debts of [redacted]. M.G.L. Ch. 156B, § 80 (2000). Chapter 156B, § 80(a) of the General Laws of the Commonwealth of Massachusetts provides in part that:

> [u]pon the effective date of the consolidation or merger under articles of consolidation or merger filed pursuant to sections seventy-eight or seventy-nine, for all purposes of the laws of Massachusetts:
>
> * * *
>
> 5. all of the estate, property, rights, privileges, powers and franchises of the constituent corporations and all of their property, real, personal, and mixed, and all the debts due on whatever account to any of them...shall be transferred to and vested in the resulting or surviving corporation, without further act or deed....
>
> (b) The rights of the 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 or any stockholder, director, or officer thereof, 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....

In this case, [redacted] and [redacted] merged under Chapter 156B, § 79 of the Massachusetts General Laws. As the surviving corporation, [redacted] succeeded to the interests of each corporation that was a party to the merger under Massachusetts law. M.G.L. Ch.156B § 80(a)((5). Accordingly [redacted] is primarily liable as the statutory successor in interest to [redacted]. [redacted] is severally liable under Treas. Reg. § 1.1502-6 for the entire amount of [redacted]'s consolidated group's tax liability for those periods in which it was a member of the group. Thus, [redacted] is primarily liable for [redacted]'s several liability for the entire amount of [redacted]'s consolidated group's tax liabilities for the taxable years at issue.

As set forth above, we are relying on Temp. Treas. Reg. § 1.1502-77T, which treats [redacted] as the alternative agent in this case, as a basis for obtaining a Form 872 from [redacted]. However, another reason for obtaining a Form 872 from [redacted] is that [redacted] is the successor in interest to [redacted]. The surviving or resulting corporation in a merger or consolidation under state law may validly sign an extension agreement on behalf of the predecessor corporation for a period before the transfer. Rev.

Rul. 59-399, 1959-2 C.B. 488. Successor liability may be established in this case.

We recommend that the Form 872 for [redacted] be captioned as follows: "[redacted] (EIN: [redacted]), as successor to [redacted] (EIN [redacted]), and as alternative agent for [redacted] (EIN [redacted]) consolidated group under Temp. Reg. § 1.1502-77T(a)(4)(ii).*" On the bottom of the Form 872, you should add the following:"*With respect to the consolidated tax liability of [redacted] (EIN: [redacted]) consolidated group for the taxable year ended [redacted]."

With regard to the Form 906, Closing Agreement, we note that while Temp. Treas. Reg. § 1.502-77T applies to the years at issue in this case, it is inapplicable here because it applies only to waivers of the statute of limitations and to statutory notices of deficiency, and not to closing agreements. See Field Service Advice 199917016, n. 3 (Jan. 19. 1999).

As set forth above, [redacted] is the successor in interest, after the mergers, to [redacted]. The surviving or resulting corporation in a merger or consolidation under state law may validly sign a closing agreement on behalf of the transferor or predecessor corporation for a period before the transfer. Rev. Rul. 59-399, 1959-2 C.B. 448. Successor liability may be established in this case.

Delaware General Corporation Law provides in part:

> Status, rights, liabilities, of constituent and surviving or resulting corporations following merger or consolidation.
>
> (a) When any merger or consolidation shall have become effective under this chapter... all rights of creditors and all liens upon any property of any of said constituent corporation shall be preserved unimpaired, and all debts, liabilities and duties of the respective constituent corporations shall thenceforth attach to said surviving or resulting 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.

DEL. CODE ANN. tit. 8, § 259 (1999).

The merger of [redacted] with and into [redacted] was pursuant to Delaware General Corporation Law; the merger of [redacted] with and into [redacted] was pursuant to Massachusetts corporate law and Delaware General Corporation Law.

If, as it appears, the merger of [redacted] into [redacted] was effected under Delaware and Massachusetts law, then [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). Under I.R.C. § 6901 and Treas. Reg. § 301.6901-1(b), a surviving corporation in a merger is also secondarily liable as a transferee, because a transferee at law includes a successor of a corporation. However, a determination against the surviving corporation for tax due by the merged corporation for a period prior to the merger is not generally handled as a transferee case. Rather, it should generally be handled by asserting primary liability against the surviving corporation.[2] We believe that the established facts will support the Service's primary reliance on [redacted]'s liability as a successor by merger under state law. This will not prevent consideration of transferee liability assessments, if appropriate, at a later time.

Based on the foregoing, we recommend that a closing agreement obtained with respect to the income tax liability of [redacted] for the taxable year [redacted] be captioned as follows: "[redacted] (EIN: [redacted]) as successor in interest to [redacted] (EIN: [redacted])," and put an asterisk after it. At the bottom of the Form 906, type, "*This is with respect to the several liability of [redacted] (EIN: [redacted]) for the consolidated tax liability of [redacted] consolidated group for the taxable year ended [redacted]."

This Form 906 should be executed by an authorized officer of [redacted], analogous to the procedure set forth in Rev. Rul. 83-41, 1983-1 C.B. 399, clarified and amplified, Rev. Rul. 84-165, 1984-2 C.B. 305 (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).

If you need further assistance, please contact the

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[2] There is an exception if the statutory period for assessing a deficiency has expired under primary liability; the Service would then argue that the surviving corporation should be liable as a transferee. See generally CCDM (35)(10)61.

undersigned at 617/565-7858.

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