Office of Chief Counsel
Internal Revenue Service

memorandum

CC:LM:FSH:BOS:TL-N-3216-00
PColleran

date: NOV 15 2000

to: William A. Dwyer, Revenue Agent

from: Associate Area Counsel, Large and Mid-Size Business, Boston

subject: [redacted]
Taxable years ended: [redacted] and [redacted]
Consents to Extend the Period of Limitations
Earliest Expiration of Statute of Limitations: [redacted]

DISCLOSURE STATEMENT

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This refers to the memorandum from your office requesting guidance on extending the statute of limitations for assessment with respect to [redacted] for the taxable years ended [redacted] and [redacted].

ISSUE

Whether certain extensions executed after the dissolution of [redacted] were effective to extend the periods of limitation for assessment.

CONCLUSION

Extensions of the statutes of limitations executed by the dissolved [redacted] during the post-dissolution period were valid.

FACTS

[redacted] was incorporated in Delaware on [redacted]. It was a privately held manufacturer of [redacted] and [redacted] systems with operations in [redacted], Massachusetts and [redacted], Texas.

[redacted] was the parent corporation of an affiliated group of corporations which filed consolidated income tax returns for the taxable years ended [redacted] and [redacted]. [redacted] reported a net operating loss of $[redacted] and unused general business credit of $[redacted] on its consolidated income tax return for the taxable year ended [redacted]. On [redacted] [redacted] filed Form 1139, Corporation Application for Tentative Refund carrying back the net operating loss and unused general business credit form its taxable year ended March 28, 1998 to its taxable years ended [redacted] and [redacted] generating tax refunds of $[redacted]. Accordingly, the case is subject to review by the Joint Committee on Taxation.

You have surveyed [redacted] consolidated income tax return for the taxable year ended [redacted] You are proposing that the net operating loss and the general business credit carrybacks be allowed as filed on the application for tentative refund.

On [redacted], [redacted] filed a Certificate of Dissolution with the Secretary of State of the State of Delaware. The Certificate of Dissolution provides that the dissolution was authorized by a majority vote of the stockholders entitled to vote on a dissolution and the directors of the corporation in accordance with Section 275(c) of the General Corporation Law of the State of Delaware. The directors of the corporation are listed as [redacted] and [redacted]. The officers of the corporation are listed as [redacted], President and Secretary, and [redacted] Treasurer. The Certificate of Dissolution is executed by [redacted], in his capacities of shareholder and sole Director, [redacted] in his capacity as Director and [redacted], in her capacity as stockholder.

[redacted] filed its final consolidated income tax return for the short taxable year ended [redacted].

The Service and [redacted] executed consents to extend the period for assessment (Forms 872) for the taxable years ended [redacted] and [redacted]. At the time the extensions were request the Service notified [redacted] of its 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 by providing the taxpayer with copies of Letter 907(DO)(Rev. 2-2000) and Publication 1035, Extending the Tax Assessment Period (Rev. 12-1999). The consents were signed on behalf of [redacted] on [redacted] by [redacted], in his capacity as President. [redacted], President acted based on the law of Delaware which specifies a fixed winding-up period after dissolution of a corporation. The winding up period applicable to [redacted] expires on [redacted]. The consents were signed on behalf of the Internal Revenue Service on [redacted] by Glen DiTulio, Team Manager, Acting Director of Field Operations.

LAW AND ANALYSIS

[redacted] was, prior to its dissolution on [redacted], a corporation organized under the laws of the State of Delaware. Delaware law provides that a corporation's existence is deemed to continue for three years from the date of dissolution for the limited purpose of "winding up" its affairs. 8 Del. C. § 278 (1997).

The authority of a corporate officer to act for a dissolved corporation in tax matters derives from the law of the state or territory of incorporation. United States v. Krueger, 121 F.2d 842, 845 (3rd Cir. 1941), cert. denied, 314 U.S. 677 (1941). In a case involving a predecessor provision under Delaware law, the Board of Tax Appeals held that the officer of a dissolved corporation had authority to execute a consent, provided that the consent was executed within the three-year winding-up period. H.D. Walbridge & Co. v. Commissioner, 25 B.T.A. 1109 (1932); compare, Union Shipbuilding Co. v. Commissioner, 43 B.T.A. 1143, 1145 (1941), acq., 1941-1 C.B. 11 (extension executed after expiration of three-year winding-up period specified by Delaware law invalid).

Generally, the common parent, with certain exceptions not applicable here, 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. Treas. Reg. § 1.1502-77(a). Thus, generally, the common parent 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). Section 1.1502-77(c) provides that, unless the district director agrees to the contrary, 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, shall be applicable to each corporation which was a member of the group during any part of such taxable year. The common parent and each subsidiary which 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).

Treas. Reg. § 1.1502-77T provides for alternative agents and applies if the corporation that is the common parent of the group ceases to be the common parent, whether or not the group remains in existence. 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. Subparagraph (a)(4)(i) lists as an alternative agent the common parent of the group for all or any part of the year to which the notice or waiver applies. Since [redacted] was the common parent of the group for the taxable years ended [redacted] and [redacted] subparagraph (a)(4)(i) applies. Therefore, [redacted] is the proper party to execute the consents to extend the period of limitations for all members of the group.

I.R.C. § 6501(a) provides that as a general rule, tax must be assessed within three years of the filing date of the return. In accordance with I.R.C. § 6501(c)(4), a taxpayer and the Internal Revenue Service may consent in writing to extensions of time for making assessments. The regulations under this Code section do not specify who may sign such consents; however, the Service generally applies the rules applicable to execution of the original returns to consents to the extension of time to make an assessment. I.R.C. § 6062 provides generally that a corporation's income tax return must be signed by the president, vice-president, treasurer, assistant treasurer, chief accounting

officer or any other officer duly authorized to act. The fact that an individuals's name is signed on the return is prima facie evidence that the individual is authorized to sign the return. Rev. Rul. 83-41, 1983-1 C.B. 399 clarified and amplified, Rev. Rul. 84-165, 1984-2 CB. 305.

Applying these precedents to the present case, the extensions executed within the statutory winding up period were valid.

Finally, Delaware law provides that the corporation will continue to exist beyond the three-year winding-up period to satisfy any judgment against it, but only if the action or proceeding was begun during the winding-up period. Under Delaware law, the execution of a consent does not constitute the commencement of a suit or proceeding. Rather, it is the service of a notice of deficiency that constitutes the commencement of a suit or proceeding. Ross v. Venezuelan- American Independent Oil Producers Ass'n, Inc., 230 F. Supp. 701, 702 (D. Del. 1964). Accordingly, we recommend that any notice of deficiency be mailed within the three-year winding-up period.

If you need further assistance, please contact Paul Colleran at (617) 565-7838.

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By: _____
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