Office of Chief Counsel
Internal Revenue Service

memorandum

CC:LM:CTM:SF:POSTF-161200-01
MTRobus

date: November 26, 2001

to: Brad Lyle, Revenue Agent (LMSB) EG:1593 **VIA U.S. MAIL**
Internal Revenue Service
4330 Watt Avenue M/S SA-3111
North Highlands, CA 95660

from: Area Counsel
(Communications, Technology, and Media: Oakland)

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subject: [redacted] **("Taxpayer")**
EIN: [redacted]
Consent to extend statute of limitations FYE [redacted]

U.I.L. #: 1502.75-10
When Group Remains in Existence

Disclosure Statement

This writing may contain privileged information. Any unauthorized disclosure of this writing may have an adverse effect on privileges, such as the attorney client privilege. If disclosure becomes necessary, please contact this office for our views.

This advice relies on facts provided by you to our office. If you find that any facts are incorrect, please advise us immediately so that we may modify and correct this advice. We have informally discussed the issues herein with Krishna P. Vallabhaneni (CC:CORP:5). However, this advice is subject to 10-day post-review by the National Office. CCDM 35.3.19.4. Accordingly we request that you do not act on this advice until we have advised you of the National Office's comments, if any, concerning this advice.

ISSUES

1. What is the proper language that should be used in the preparation of Form 872-I for this Taxpayer to extend the statute of limitations for the year ending [redacted]?

2. Should transferee liability Forms 2045 and 977 be secured in this case?

CONCLUSION

1. The proper language is as follows: You should identify the Taxpayer on the front page of the Form 872-I as [redacted] **and subsidiaries consolidated group***

Put an asterisk at the bottom of the Form 872-I followed by -- ***This is with respect to [redacted] and subsidiaries consolidated group for the taxable year ending [redacted].**

2. Transferee liability forms are not required.

DISCUSSION OF FACTS AND LAW

Facts

The year under examination is the fiscal year ending [redacted]. For that year a consolidated return was filed in the name of [redacted]. [redacted] was incorporated on [redacted] as a Delaware corporation. Shortly thereafter on [redacted], [redacted] entered into an "Initial Stock Purchase and Asset Transfer Agreement" ("Agreement"). Prior to the date of the Agreement, [redacted] had not issued any shares of stock. Under the terms of the Agreement, [redacted] transferred [redacted] shares, representing [redacted]% of its common stock, to the purchasers consisting of [redacted] trusts and [redacted] individuals. In exchange for the [redacted] stock, the purchasers transferred to [redacted] certain assets owned by them. [redacted] of the purchasers transferred [redacted]% of the stock of a California corporation known as [redacted] to [redacted]. [redacted] thereby became a wholly-owned subsidiary of [redacted]. In exchange for the [redacted] stock, the [redacted] shareholders received [redacted]% of the stock of [redacted].

For the previous fiscal year ending [redacted], [redacted] had filed a return as the parent of a consolidated group using the EIN [redacted]. After the [redacted] stock purchase and asset transfer, however, [redacted] filed the consolidated return for the year ending [redacted] with [redacted] as its wholly-owned subsidiary. The [redacted] return reflects the same EIN as was on the [redacted] return. Subsequently, however, [redacted] obtained a new EIN, i.e., EIN [redacted], which it used on the return for the fiscal year ending [redacted].

Legal Analysis

Proper Language on Form 872-I

Under Treas. Reg. § 1.1502-77(a), the common parent is the sole agent for a consolidated group and has the authority to sign the return on behalf of all group members.

Treas. Reg. § 1.1502-75(d)(1) provides the general rule that a consolidated group remains in existence if the common parent corporation (i.e., the highest-tier includible corporation) remains the common parent and at least one subsidiary remains affiliated with it. That is not the case here. One of the exceptions to the general rule, however, is the reverse acquisition rule in Treas. Reg. § 1.1502-75(d)(3). If there is a reverse acquisition, the acquired consolidated group continues with a new common parent, and the old common parent is no longer the common parent of the group. A reverse acquisition occurs when:

1) any member of a consolidated group acquires stock of the common parent of another group (so that the acquired common parent would become a member of the acquiring group but for the application of this rule) or acquires substantially all of the assets of the common parent of another consolidated group; and

2) the former shareholders of the acquired corporation receive more than 50 percent in value of the stock of the common parent of the acquiring group in exchange for the stock or assets of the acquired group.

If a transaction constitutes a reverse acquisition, any group of which the acquired corporation was the common parent immediately before the acquisition will be treated as remaining in existence, with the acquiring corporation becoming the common parent of the group. *See* Treas. Reg. § 1.1502-75(d)(3)(i).

Accordingly, since [redacted] acquired [redacted]% of the stock of [redacted], which was the common parent of a group, from the purchasers pursuant to the Agreement, and since the shareholders of [redacted] received more than 50 percent of the stock of [redacted], the acquisition by [redacted] of the stock of [redacted] qualifies as a reverse acquisition under Treas. Reg. § 1.1502-75(d)(3)(i), and the group consisting of [redacted] and [redacted] is treated as remaining in existence after the acquisition and must continue to file consolidated returns with [redacted] as the common parent. As you rightfully concluded in your memo, the reverse acquisition rule applies despite the fact that [redacted], the acquiring corporation, was not a

member of an affiliated group at the time of the acquisition, but [redacted], the acquired corporation, was. *See* Rev. Rul. 72-322, 1972-1 C.B. 287 and Rev. Rul. 73-303, 1973-2 C.B. 315.

Transferee Liability

With respect to transferee liability, it is sometimes recommended that Internal Revenue Service audit teams obtain Forms 977 and 2045 for protective purposes. Form 977 is entitled "Consent to Extend the Time to Assess Liability at Law or in Equity for Income, Gift, and Estate Tax Against a Transferee or Fiduciary." Form 2045 is entitled "Transferee Agreement" and is used to secure an agreement from the transferee concerning its tax liability to the extend provided in I.R.C. § 6901. Section 6901 is often referred to as the "transferee liability" provision of the Internal Revenue Code, but the section itself does not actually impose liability. Rather, it sets forth the procedure whereby the Service can enforce the existing liability of a transferor against a transferee. The liability of the transferee "shall be assessed, paid, and collected in the same manner and subject to the same provisions and limitations" as the liability of the taxpayer who is the transferor. *See* I.R.C. § 6901(a). Thus, there are actually two liability questions -- the first being the determination of the transferor's liability, and the second being the extent to which the transferee is liable for that tax liability. The first question is answered under federal tax law, while the second, or transferee liability question, is generally determined under state law. *Commissioner v. Stern*, 357 U.S. 39 (1958).

Transferee liability arises when a merged corporation goes out of existence and the surviving corporation takes over the liabilities of the dissolved corporation. Potential transferee liability may also arise if there is a transfer of assets without consideration. Here there is no transferee liability, since [redacted] is still in existence, and there was an exchange of stock for stock, presumably in an arms-length transaction. Further, transferee liability would not arise in this case since, under

Treas. Reg. § 1.1502-6, the common parent and each subsidiary which was a member of the group is severally liable for the tax liability of the group. Hence the Taxpayer here as the common parent of a consolidated group is already liable for the tax.

Please call me at (415) 744-9217 if you have any questions.

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Acting Associate Area Counsel

By:_____
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