Office of Chief Counsel
Internal Revenue Service

memorandum

CC:NER:MAN:TL-N-1389-99
AJKim

date:

to: Chief, Examination Division, Manhattan District
Attn: Dennis Zuckerbrot, Case Manager

from: District Counsel, Manhattan

subject: [redacted]
Execution of Form 872

Uniform Issue List #6501.08-10

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 to 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 memorandum is in response to your request for advice concerning the proper entity to execute a consent to extend the statute of limitations on assessment of income taxes for the above-referenced taxpayer for the taxable years [redacted] through [redacted]. No actions based on this advice should be taken until we have informed you that the National Office has confirmed the accuracy of the advice.

ISSUE

1. What is the proper entity to enter into a consent to extend the statute of limitations on assessment of income taxes for the taxpayer and of affiliated companies for their pre-merger tax years [redacted], [redacted], [redacted] and [redacted]?

2. What specific language should be used in the consent to extend the statute of limitations on assessment of income taxes for the taxpayer [redacted] for pre-merger tax years [redacted], [redacted], [redacted] and [redacted]?

CONCLUSION

1. [redacted] is the proper entity to enter into a consent to extend the statute of limitations on assessment of income taxes for itself and for the affiliated companies with respect to their pre-merger tax years [redacted], [redacted], [redacted] and [redacted].

2. As a result of the above, the specific language which should be used in the consent to extend the statute of limitations on assessment of income taxes for the taxpayer [redacted] for pre-merger tax years [redacted], [redacted], [redacted] and [redacted] is: "[redacted], [redacted], as agent for [redacted] [redacted]*." Further, we recommend language for the footnote as follows: "* - With respect to the consolidated liabilities of [redacted] [redacted] for taxable years [redacted], [redacted], [redacted] and [redacted]."

FACTS

[redacted] filed consolidated income tax returns with its affiliated companies for the taxable years [redacted], [redacted], [redacted] and [redacted]. [redacted] was the common parent of the affiliated group during the years at issue.

By an Amended and Restated Agreement and Plan of Merger, dated as of [redacted], as amended and restated by the parties as of [redacted], between [redacted], a Delaware corporation, and [redacted], a Delaware corporation, ("Agreement of Merger") a wholly-owned subsidiary of [redacted] merged into [redacted]. Article I, section 1.1, of the Agreement of Merger provides that [redacted] will form under the Delaware Corporation Law a wholly-owned subsidiary to be merged into [redacted]. Pursuant to the terms of the Agreement of Merger the separate corporate existence of the subsidiary of [redacted] ceased and [redacted] was the surviving corporation which became a wholly-owned subsidiary of [redacted].

The Agreement of Merger states in Article I, section 1.4, that the effect of the merger shall be as provided in the applicable provisions of Delaware law. Further, the Agreement of Merger provides that all liabilities of [redacted] shall continue to be liabilities of [redacted] as the surviving corporation.

Article I, section 1.6, of the Agreement of Merger provides: (a) that generally the Certificate of Incorporation of [redacted] as the surviving corporation shall be the Certificate of Incorporation of [redacted] as in effect immediately prior; (b) that generally the Bylaws of [redacted] as the surviving corporation shall be the Bylaws of [redacted] immediately prior; and (c) that generally the directors and officers of [redacted] immediately prior shall continue to serve in their respective offices of the surviving corporation.

By letter dated [redacted], [redacted] advised the Service that though [redacted] exists as a subsidiary of [redacted] the subsidiaries of [redacted] are unaffected by the merger and continue to exist as subsidiaries of [redacted] with the same names and employer identification numbers.

Subsequently, in a letter dated [redacted] from [redacted] to the Service, we were informed that [redacted] continues to exist as a wholly-owned subsidiary of [redacted]. Further, [redacted] informed the Service that no changes have occurred in the organizational structure of [redacted] or [redacted] which affect the parent/wholly-owned subsidiary relationship between the corporations.

DISCUSSION

1. In general, the statute of limitations on assessment expires three years from the date the return for such tax is filed. I.R.C. § 6510(a). Section 6501(c)(4), however, provides an exception to the general three year statute of limitations on assessment. In accordance with this exception, the Secretary and the taxpayer may consent in writing to an agreement to extend the statute of limitations. Form 872 ("Consent to Extend the Time to Assess Tax") is the form generally used by the Service to extend the statute of limitations on assessment.

In the case of a consolidated group, guidance as to the appropriate entity to enter into a consent to extend the statute of limitations on assessment can be found in the consolidated return regulations. Treas. Reg. § 1.1502-1 et seq. Pursuant to the consolidated return regulations, the common parent is the sole agent for each member of the group, duly authorized to act in its

own name in all matters relating to the income 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 been given or executed by each such subsidiary. Treas. Reg. § 1.1502-77(a). Unless there is an agreement to the contrary, an agreement entered into by the common parent extending the time within which an assessment of income tax may be made for the consolidated return year shall be applicable to each corporation which was a member of the group during any part of such taxable year. Treas. Reg. § 1.1502-77(c).

The common parent remains the agent for the members of the group for any year 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. See Treas. Reg. § 1.1502-77(a); Southern Pacific v. Commisioner, 84 T.C. 395, 401 (1985). Accordingly, as general rule, the common parent remains the proper party to extend the statute of limitations for any taxable year for which it was the common parent, as long as it remains in existence.

Pursuant to the Agreement of Merger, a wholly-owned subsidiary of [redacted] merged with, and into, [redacted]. Pursuant to the terms of Agreement of Merger, the separate corporate existence of the subsidiary of [redacted] ceased and [redacted] was the surviving corporation which became a wholly-owned subsidiary of [redacted]. Id. The Agreement of Merger states in Article I, section 1.4, that the effect of the merger shall be as provided in the applicable provisions of Delaware law. The Agreement of Merger further provides in Article I, section 1.4, that all liabilities of [redacted] shall continue to be liabilities of [redacted] as the surviving corporation.

The Agreement of Merger, Article I, section 1.6, states in (a) that generally the Certificate of Incorporation of [redacted] as the surviving corporation shall be the Certificate of Incorporation of [redacted] as in effect immediately prior, in (b) that generally the Bylaws of [redacted] as the surviving corporation shall be the Bylaws of [redacted] immediately prior and in (c) that generally the directors and officers of [redacted] immediately prior shall continue to serve in their respective offices of the surviving corporation.

Section 251(a) of the General Corporation Law of the State of Delaware provides, in part, with respect to a merger of constituent corporations as follows:

> Any 2... corporations existing under the laws of this State may merge into a single corporation, which may be any 1 of the constituent corporations... pursuant to an agreement of merger... complying and approved in accordance with this section.

Section 259 of the General Corporation Law of the State of Delaware provides, in part, with respect to a merger of constituent corporations that

> ...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.

Pursuant to section 259 of the General Corporation Law, [redacted] as the surviving corporation continues to be subject to all liabilities incurred during pre-merger years. See also I.R.C. § 1.1502-77. Presently, [redacted] continues to exist as a wholly-owned subsidiary of [redacted]. Furthermore, the subsidiaries of [redacted] are unaffected by the merger and continue to exist as subsidiaries of [redacted] with the same names and employer identification numbers. Accordingly, [redacted] is the proper entity to enter into a consent to extend the statute of limitations on assessment of income taxes for itself and for the affiliated companies with respect to the pre-merger tax years [redacted], [redacted], [redacted] and [redacted].

2. Form 872 should be executed by an authorized officer of [redacted], the proper entity identified above. Under section 6501(c)(4), the Service and a taxpayer may consent in writing to an extension of the time for making an assessment if the consent is executed before the expiration of the normal period of assessment or the extension date agreed upon in a prior extension agreement between the parties. Section 6061 provides that any return, statement or other document made under any internal revenue law must be signed in accordance with the applicable forms or regulations.

The regulations under section 6501(c)(4) do not specify who may sign consents. Accordingly, 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. Rev. Rul. 83- 41, 1983-1 C.B. 399, clarified and amplified, Rev. Rul. 84-165, 1984- 2 C.B. 305.

In the case of corporate returns, section 6062 provides that a corporation's income tax returns 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 individual's name is signed on the return is prima facie evidence that the individual is authorized to sign the return. I.R.C. section 6064. Accordingly, any such officer may sign a consent, whether or not that person was the same individual who signed the return. Rev. Rul. 84-165, 1984-2 C.B. 305.

[redacted] was the common parent during the group's taxable years from [redacted] through [redacted], inclusive. Since [redacted] is still in existence, it is the proper party to extend the limitations period in its own name for the members of its group for the taxable years at issue. Treas. Reg. section 1.1502-77(a). As a result, the specific language which should be used in the consent to extend the statute of limitations on assessment of income taxes for the taxpayer [redacted] for its pre-merger tax years [redacted], [redacted], [redacted] and [redacted] is as follows:

> [redacted], as agent for [redacted]*

Further, we recommend language for the footnote as follows:

> * - With respect to the consolidated liabilities of [redacted] for taxable years [redacted], [redacted], [redacted] and [redacted]

Should you have any questions regarding this matter, please contact Attorney Anthony J. Kim of this office at (212) 264-5473 - extension 238.

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