Office of Chief Counsel
Internal Revenue Service

memorandum

CC:LM:CTM:LN:POSTF-101783-02
EYWu

date: FEB 15 2002

to: [redacted], Team Manager
[redacted], Revenue Agent, LMSB FE [redacted]

from: June Y. Bass, Associate Area Counsel (LMSB)
Joyce M. Marr, Senior Attorney (LMSB)
Erica Y. Wu, Attorney (LMSB)

subject: Taxpayer: [redacted], Inc.
EIN: [redacted]
Tax Year: [redacted]
Issue: Form 872
UIL: 6501.08-00, 6501.08-17
Statute of Limitations: [redacted]

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 memorandum responds to your request dated December 5, 2001. This memorandum should not be cited as precedent.

ISSUE

What is the proper caption for a consent to extend the time to assess any Federal income tax due for [redacted], Inc.'s fiscal year ending September 30, [redacted]?

CONCLUSION

Given the conflicting facts presented as to whether [redacted], Inc. was merged out of existence, we recommend that you secure two Forms 872.

1. First Form 872.

The first Form 872 should be captioned as:

> [redacted], Inc. (EIN:XX-XXXXXXX), formerly known as [redacted], Inc., as successor in interest to [redacted], Inc.(EIN: [redacted])*

Insert [redacted], Inc.'s current address in the address line.

At the Corporate Name line, type in "[redacted], Inc., as successor in interest to [redacted], Inc."

At the bottom of the front page, type in:

> * This is with respect to the tax liability of [redacted], Inc. (EIN: [redacted]) for the fiscal year ending September 30, [redacted].

Insert [redacted], Inc.'s EIN in the "Taxpayer Identification Number" block located at the upper right hand corner of the form.

2. Second Form 872.

The second Form 872 should be captioned as: "[redacted], Inc. (EIN: [redacted])."

Insert [redacted], Inc.'s current address in the address line.

At the Corporate Name line, type in "[redacted], Inc."

Insert [redacted], Inc.'s EIN in the "Taxpayer Identification Number" block located at the upper right hand corner of the form.

FACTS[1]

[redacted], Inc. ("[redacted]"), a California corporation, filed a Federal corporate income tax return for the fiscal year ending September 30, [redacted]. That return was received by the Service on March 18, [redacted]. The return reflects that [redacted] was incorporated on "[redacted]."

On [redacted], [redacted] entered into an Acquisition Agreement and Plan of Reorganization (the "Merger Agreement"). The Merger Agreement provides, in pertinent part, that (1) [redacted] and a California corporation named [redacted], Inc. ("Old [redacted]"), will merge into [redacted], Inc. ("[redacted]"), a Delaware corporation, with [redacted] as the surviving corporation; (2) [redacted] will change its name to [redacted], Inc.("New [redacted]"); and (3) the merger will be governed by California law. See paragraphs [redacted] and [redacted] of the Merger Agreement, attached hereto as Exhibit A.

[redacted] filed a final Federal corporate income tax return for the short year ending [redacted]. In that return, [redacted] stated that it merged into [redacted] on [redacted], with [redacted] as the surviving corporation, and that the merger qualified as a statutory merger within the meaning of I.R.C. § 368(a)(1)(A). See paragraph (1) of [redacted] statement attached hereto as Exhibit B.

According to information retrieved from the California Secretary of State's official website on January 20, 2002, [redacted] is still an active corporation. See the printout from the California Secretary of State's website, attached hereto as Exhibit C.

DISCUSSION

There are conflicting facts as to whether [redacted] has indeed merged out of existence. On the one hand, [redacted] has produced a fully executed merger agreement and filed a final return evidencing the alleged merger. On the other hand, [redacted] remains an active

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[1] Our understanding of the facts of this case is limited to the facts presented by you. Other than conducting a quick search at the California Secretary of State's official website, we have not undertaken any independent investigation of the facts of this case. If the actual facts are different from the facts known to us, our legal analysis and our conclusions and recommendations might be different. Accordingly, if you learn that the facts known to us are incorrect or incomplete in any material respect, you should not rely on the opinions set forth in this memorandum, and should contact our office immediately.

corporation according to the information appearing on the California Secretary of State's website.[2] Given the imminent expiration of the statute of limitations in this case, in an abundance of caution, we recommend that you secure two Forms 872: one to be prepared as if [redacted] has merged out of existence, and the other to be prepared as if [redacted] is still a validly existing entity.

1. If [redacted] has merged out of existence.

When state law so provides, the successor in interest is primarily liable for the debts and obligations of the absorbed corporation. Phillips v. Lyman H. Howe Films Co., 33 F.2d 891, 892 (3d Cir. 1929). The party that is liable for the debts of the merged corporation is the one that must sign the waiver of the statute of limitations on behalf of the merged corporation. See Gott v. Live Poultry Transit Co., 17 Del. Ch. 288, 153 A. 801 (1931).

When state law provides for primary liability of a surviving corporation after a statutory merger, the surviving corporation should sign the consent to extend the statute of limitations as "Surviving Corporation, successor in interest to predecessor corporation." Primary Liability and Transferee Liability of Successor Corporation, G.C.M. 34,970, I-4092 (July 31, 1972). If the taxpayer has undergone a name change, the consent should be prepared using both names, such as "Mary Doe, formerly Mary Brown." See Section 22.5.2 of IRM 121.2, Statute of Limitations Handbook.

California law governs the merger between the [redacted] and [redacted]; we therefore look to California law to determine who is primarily liable for [redacted] tax liability. Under California law, when a merger takes effect: (1) the separate existence of the disappearing corporation ceases; (2) the surviving corporation shall succeed to all the rights and property of the disappearing corporation; and (3) the surviving corporation shall be subject to all the debts and liabilities of the disappearing corporation as if the surviving corporation had itself incurred them. See Cal. Corp. Code § 1107(a) (West 2001).

According to California law, [redacted], the successor in interest to [redacted], is primarily liable, as a successor in interest, for [redacted] income taxes. Given that [redacted] has changed its name

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[2] Additionally, the official website for the California Secretary of State shows that Old [redacted] has been an active corporation since [redacted]. See the printout from the California Secretary of State's website, attached hereto as Exhibit D. This further suggests that the merger between [redacted], Old [redacted], and [redacted] never took place.

to [redacted], Inc., we recommend that the Form 872 be captioned as:

> [redacted], Inc. (EIN:XX-XXXXXXX), formerly known as [redacted], Inc., as successor in interest to [redacted], Inc. (EIN: [redacted])*

Insert [redacted], Inc.'s current address in the address line.

At the bottom of the front page, type in:

> * This is with respect to the tax liability of [redacted], Inc.(EIN: [redacted]) for the fiscal year ending September 30, [redacted].

At the Corporate Name line, type in "[redacted], Inc., successor in interest to [redacted], Inc."

You should insert [redacted], Inc.'s EIN in the "Taxpayer Identification Number" block located at the upper right hand corner of this Form 872.[3]

2. <u>If [redacted] still exists</u>.

If [redacted] still exists, and has not changed its name, the Form 872 should be captioned as "[redacted], Inc. (EIN: [redacted])."

Insert [redacted] current address in the address line.

At the Corporate Name line, type in "[redacted], Inc."

You should insert [redacted]'s EIN in the "Taxpayer Identification Number" block located at the upper right hand corner of this Form 872.

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[3] Section 22.5.8 of IRM 121.2, Statute of Limitations Handbook, provides that the taxpayer's EIN should be shown in the upper right hand corner of the Form 872. Since [redacted], Inc. is the taxpayer primarily liable for [redacted]'s tax liability, its EIN should appear at the upper right hand corner of the Form 872.

3. Notice Requirement.

We recommend that you pay strict attention to the rules set forth in the IRM. Specifically, the Statute of Limitations Handbook, IRM 121.2.22 provides procedures for processing consents to extend the statute of limitations on assessment. In particular, IRM 121.2.22.3 sets forth procedures to comply with the notification that the Service must provide taxpayers on each occasion when the taxpayer is requested to extend the statute of limitations by consent. The IRM requires that this notification be made to the taxpayer by sending or presenting Letter 907(DO) and sending or presenting Publication 1035, which together inform the taxpayer of its right to refuse to extend the limitation period, the right to request the extension to be limited to a particular issue, and the right to request the limitation period to be limited to a specific date.

This advice has been coordinated with the National Office using the pre-preview procedure. Please contact Erica Wu at (949)360-2678 if you have any questions.