Office of Chief Counsel
Internal Revenue Service

memorandum

CC:LM:MCT:[redacted]:POSTF135886-02
[redacted]

date: August 20, 2002

to: [redacted], Employment Tax Specialist, Group [redacted]

from: Associate Area Counsel, LMSB, [redacted]

subject: **Consent to Extend the Statute - Form SS-10**

This memorandum responds to your request for our advice regarding the proper entity to sign a Consent to Extend the Time to Assess Employment Taxes, Form SS-10. This memorandum should not be cited as precedent.

ISSUE

Between a limited liability company that is a disregarded entity and its single owner, who is the proper party to execute a Consent to Extend the Time to Assess Employment Taxes (Form SS-10)?

CONCLUSION

The owner of a limited liability company is ultimately responsible for the employment tax obligations of the disregarded entity. However, since the employment tax obligations pre-existed the formation of the limited liability company, the Form SS-10 should be executed by both the limited liability company and its owner.

FACTS

The facts are as reflected by the information you submitted to our office and our discussion on July 2, 2002.

You are currently conducting an employment tax audit of the [redacted] Corporation ([redacted]), a Delaware corporation, for the [redacted] and [redacted] tax years. The statute of limitations for the [redacted] year expires on [redacted].

[redacted], formerly [redacted] Corporation, incorporated as a wholly owned subsidiary of [redacted] Corporation in [redacted] of [redacted]. On [redacted], [redacted] Corporation entered into a Combination Agreement with [redacted] and became a wholly owned subsidiary of [redacted]. On [redacted], [redacted] Corporation changed its name to [redacted] Corporation ([redacted]), and [redacted] Corporation changed its name to [redacted] Corporation. On [redacted], [redacted] contributed its [redacted] stock to [redacted] ([redacted]).

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On [redacted], [redacted] Company LLC (LLC) was formed, with [redacted] as its only member. The LLC became a disregarded entity for tax purposes[1], and changed its Employer Identification Number (EIN). On [redacted] paid a dividend to [redacted], consisting of all the stock of [redacted], and [redacted] then merged into LLC, with LLC being the surviving entity. The LLC filed an employment tax return, Form 941, for the first quarter of [redacted].

Based on the above, you requested our assistance with regard to whether LLC or [redacted] is the proper entity to execute the Form SS-10. As part of the request, you also inquired about persons authorized to execute the Form SS-10, and whether the Form SS-10 should contain any special language.

DISCUSSION AND ANALYSIS

Pursuant to Del. Code Ann. Title 8, § 264 (2001), any one or more corporations of the State of Delaware may merge or consolidate with one or more limited liability companies. Del. Code Ann. Title 8, § 259(a) (2001) provides that after a merger, the separate existence of the merged corporation shall cease to exist, and the surviving entity shall possess "all property, real, personal or mixed, and all debts due..." of the merged corporation. This section further provides that all debts of the merged corporation shall "attach" to the surviving entity, 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 301.7701-3(a) of the Procedure and Administration Regulations, an entity can elect its classification for federal income tax purposes. An eligible entity with a single owner may elect to be classified as either an association or to be disregarded as an entity separate from its owner.

Section 301.7701-2(c)(2) of the Procedure and Administration Regulations provides that a business entity that is a single owner and that is not a corporation under § 301.7701-2(b) is disregarded as an entity separate from its owner for all federal tax purposes.

Generally, the employer is responsible for employment taxes. For federal tax purposes, the common law rules for determining the identity of the employer ordinarily apply. These rules provide that the person for whom services are performed is generally considered the employer for employment tax purposes. An employer is required to withhold applicable taxes from employees' wages and turn them over, pay employer taxes, make timely tax deposits, file employment tax returns, and issue wage statements to employees.

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[1] An entity Classification Election, Form 8832, was not provided to our office, but based on our discussion with Team Coordinator [redacted] it is our understanding a Form 8832 was likely filed by the taxpayer. Based on this discussion, it is our further understanding the LLC was formed pursuant to Delaware law.

Section 301.7701-2(c)(2) causes the owner of the disregarded entity to be treated as the employer of the disregarded entity's employees for federal employment tax. Accordingly, the owner is generally responsible for complying with all the employment tax obligations related to the employees.

Pursuant to Notice 99-6, I.R.B. 1999-3, the reporting and payment of employment taxes with respect to a disregarded entity may be made in one of the following two ways:

> 1) Calculation, reporting, and payment of all employment tax obligations with respect to employees of a disregarded entity by its owner (as though the employees of the disregarded entity are employed directly by the owner) and under the owner's name and taxpayer identification number; or
>
> 2) Separate calculation, reporting, and payment of all employment tax obligations by each state law entity with respect to employees under its own name and taxpayer identification number.

Notice 99-6 further provides that if the second method mentioned above is chosen, the owner retains the ultimate responsibility for the employment tax obligations incurred with respect to employees of the disregarded entity.

As the owner of LLC, [redacted] is liable for LLC's employment taxes. However, the liabilities for [redacted] and [redacted] precede the formation of LLC, and the above-referenced Delaware law obligates LLC for these liabilities. Based on our research, and the authority cited above, it is not clear whether these pre-existing tax liabilities (which are passed to LLC by operation of state law) would be taxable to LLC's owner. Accordingly, we recommend a Form SS-10 be obtained from each [redacted] and LLC. We further recommend the SS-10 include language showing [redacted] and LLC are signing the consent as successors in interest to [redacted], e.g., "[redacted] Corporation, as successor in interest to [redacted] Corporation, EIN: [redacted]."

Please note that Delegation Order No. 42, (updated October 2, 2000 to reflect reorganizational changes), provides the authority to execute consents on behalf of the Service is delegated, among others, to LMSB Directors of Field Operations. Also, as may be relevant here, Delegation Order No. 42, provides the authority to execute the consent may be redelegated to LMSB Team Managers.

This advice is subject to post review by our National Office and should not be relied upon for 30 days.

We hope this fully addresses your concerns regarding this issue. Should you have any questions or require any further assistance, please do not hesitate to contact the undersigned at ([redacted])[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.

Associate Area Counsel
(Large and Mid-Size Business)

By:_____
[redacted]
Attorney (LMSB)