Office of Chief Counsel
Internal Revenue Service
Memorandum

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to: Jan Ginter, Internal Revenue Agent, LMSB Group #1529, Heavy Manufacturing & Transportation

from: Eric R. Skinner
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subject: **, Consent to Extend Statute of Limitations on Assessment; Execution of Waiver of Restrictions on Assessment. UIL Nos. 6501.08-17, 1502.77-00, 1502.77-01.**

This memorandum responds to your request for assistance dated February 1, 2006 regarding the proper party to execute a consent to extend the statute of limitations (Form 872) and to sign a Waiver of Restrictions on Assessment & Collection of Deficiency in Tax & Acceptance of Overassessment (Form 870). This memorandum should not be cited as precedent.

LEGEND

A =
B =
C =
D =
E =
Year1 =
Year2 =
Date1 =

ISSUE

Which entity signs on the consolidated group's behalf Forms 870 and 872 relating to pre-merger taxable years after the old common parent, , merged into a new corporation, , and thereafter ceased to exist?

CONCLUSIONS

The answer depends on the taxable year at issue.

1. Because one of the pre-merger taxable years, , is subject to section 1.1502-77A of the Income Tax Regulations, and because the old common parent, failed to designate an agent to act on the consolidated group's behalf, the Service must deal with each member of the consolidated group on its own account. Each such entity must sign a separate Form 870 and Form 872, unless the group members designate an agent to act on their behalf.

2. The other pre-merger taxable year, , is subject to the new section 1.1502-77 Income Tax Regulations. Under the new regulations, is the default substitute agent and may sign Forms 870 and 872 as agent for the consolidated group.

FACTS

was the common parent for an affiliated group of corporations that filed consolidated U.S. Corporate Income Tax Returns (Forms 1120) with its affiliates for the taxable years . During these taxable years, was a petitioner in a bankruptcy reorganization under Chapter 11 of the Bankruptcy Code.

As part of bankruptcy reorganization, it was the target in a taxable reorganization transaction that occurred on . Pursuant to the bankruptcy reorganization, the bankruptcy nominees formed three corporations: , , and . is a wholly-owned subsidiary of , which is a wholly-owned subsidiary of . contributed a certain number of shares of its common stock and a certain number of warrants to in exchange for all of common stock. in turn contributed the stock and warrants to in exchange for all of outstanding stock.

merged into , with as the surviving corporation. In this transaction, distributed the common stock, the warrants, and preferred voting shares to creditors. The loan proceeds from new creditors were distributed in satisfaction of debt. This distribution of stock, warrants, and loan proceeds was in full satisfaction of all claims in bankruptcy. The parties treated the transaction as a taxable sale of assets and maintain that it did not qualify as a tax-free reorganization under section 368 of the

Internal Revenue Code. thereafter ceased to exist; its stock was cancelled and its original shareholders did not receive any consideration for their shares.

Pursuant to the merger, represents it is responsible for payment of liabilities because it became the surviving common parent for affiliated group. Neither nor the surviving members of the affiliated group designated an agent to act on behalf of the group. After the merger transaction, changed its name to . files a consolidated tax return with and (including former affiliated group).

DISCUSSION & ANALYSIS

In general, the statute of limitations on assessment expires three years from the date the tax return for such tax is filed. I.R.C. § 6501(a). Section 6501(c)(4), however, provides that the Secretary and the taxpayer may agree in writing to extend the statute of limitations using Form 872 ("Consent to Extend Time to Assess Tax").

In the case of a consolidated group, guidance as to the appropriate entity to sign Form 872 or Form 870 is found in the consolidated return regulations. Where a taxpayer files a return as a member of a consolidated group, the regulations generally provide that the common parent is the sole agent authorized to act in its own name for each member of the group in all matters relating to the income tax liability for the consolidated return year. Treas. Reg. § 1.1502-77(a); Treas. Reg. § 1.1502-77A(a). The common parent remains the sole agent for the group during any year that it is 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. Treas. Reg. § 1.1502-77(a)(4); Treas. Reg. § 1.1502-77A(a). The regulations also provide guidance regarding situations where the common parent ceases to exist, but the answer is different for each of the taxable years involved in your question.

I. Taxable Year

was the common parent for the taxable year . Because no longer exists, you have asked which entity is the proper party to execute Forms 872 or 870 relating to this taxable year. This taxable year, because it began before June 28, 2002, is subject to the old consolidated return regulations. Treas. Reg. § 1.1502-77(h)(2).

The old regulations explicitly provide that a waiver of the statute of limitations given by any alternative or substitute agent is deemed to be given by the agent of the group. Treas. Reg. § 1.1502-77A(e)(3). Under section 1.1502-77A(d), if the common parent contemplates dissolution or for any reason expects it is about to terminate, it should notify the Commissioner of such fact and designate a substitute agent. If the common parent fails to designate a substitute agent, the remaining group members may

designate an agent. Treas. Reg. § 1.1502-77A(d). If the members do not designate a substitute agent, the Commissioner must deal with all of the members individually. Id.

The old regulations also provide a list of alternative agents, with whom the Commissioner may deal directly as agent for the group. Section 1.1502-77A(e)(4)(i) denotes "the common parent of the group for all or any part of the year to which the notice or waiver applies" as one possible alternative agent. In this case, is the common parent for "all or any part of the year to which the notice or waiver applies." But because has ceased to exist, it cannot act as an alternative agent.

Section 1.1502-77A(e)(4)(ii) allows "a successor to the former common parent in a transaction to which section 381(a) applies" to be alternative agent for the group. Section 381(a) relates to certain tax-free reorganizations and certain subsidiary liquidations. The facts of this case do not indicate that the merger qualifies for treatment under this section.

Under section 1.1502-77A(e)(4)(iii), the alternative agent is designated by the group. It appears that the group members have not yet designated any alternative agent.

Finally, section 1.1502-77A(e)(4)(iv) provides that "if the group remains in existence under section 1.1502-75(d)(2) [an "F" reorganization or downstream merger] or (3) [a reverse acquisition], the common parent of the group at the time of the notice is mailed or the waiver given" is the alternative agent. This transaction was not an "F" reorganization because it was not a mere change in corporate identity; it was not a downstream merger because the members of the consolidated group did not succeed to assets.

In addition, this transaction was not a reverse acquisition. A reverse acquisition occurs when the "first corporation" or any member of its consolidated group acquires 80 percent of the stock or substantially all of the assets of the "second corporation" in exchange for stock of the first corporation. The stockholders of the second corporation, as a result of owning such stock before the merger, own after the acquisition more than 50 percent of the fair market value of the outstanding stock of the first corporation. Thereafter, the group for which the first corporation was common parent ceases to exist as of the date of the acquisition, and the group for which the second corporation was common parent remains in existence, except the first corporation is the new common parent. Here, is the first corporation because it acquired substantially all of assets in a taxable sale. However, none of stockholders received any consideration. The stockholders had their stock retired, and therefore, this transaction was not a reverse acquisition.

Ultimately, the old regulations do not provide any automatic substitute agent. The Commissioner must deal with each member of the consolidated group on its own account with respect to its tax liability unless all the group's members designate a new

agent, pursuant to section 1.1502-77A(d), to act on their behalf. If the Commissioner must deal with each member of the consolidated group separately, the caption on Forms 872 and 870 should read as the name and EIN of the member, followed by an asterisk. At the bottom of the page, write: "*This is with respect to [name's] several liability for the consolidated tax of the and Subsidiaries consolidated group."

Should the group members wish to designate an agent to act on their behalf, they may do so by following the procedures of Rev. Proc. 2002-43, 2002-2 C.B. 99. The substitute agent must be a corporation that was a member of the group for the consolidated return year at issue, . Treas. Reg. § 1.1502-77A(e)(4)(iii); Rev. Proc. 2002-43, 2002-2 C.B. 99; § 8.01. See section 8 of the revenue procedure for additional information regarding the remaining procedures. If any foreign members of the group made an election and meet the requirements of I.R.C. section 1504(d) (Canadian and Mexican companies) to be included in the group for the applicable consolidated return year, these companies also need to be included in the selection and designation of a substitute agent.

If the group designates a substitute agent pursuant to section 1.1502-77A(d), the caption should read: "[name of designated agent], agent for the members of the and Subsidiaries consolidated group.*" At the bottom of the page, write: "*This is with respect to the consolidated tax liability of the and Subsidiaries consolidated group."

Finally, you may deal informally with any substitute agent for the group before the IRS approves the designation made pursuant to the revenue procedure, but you should not have the IRS execute any Form 872 until IRS approval of the designation is received. If you are approaching the expiration of the statute of limitations and have not yet received IRS approval regarding the group's designation, contact us for further advice.

II. Taxable Year

The new regulations apply to the short taxable year . Treas. Reg. § 1.1502-77(h)(i). was the common parent for the consolidated group during this return year but ceased to exist when acquired it. Because existence terminated under applicable state law, section 1.1502-77(d) governs the designation of a substitute agent for the group. Treas. Reg. § 1.1502-77(e)(1)(i).

First, the dissolved or terminated common parent may designate a substitute agent and notify the Commissioner. Treas. Reg. § 1.1502-77(d)(1). There is no evidence made any such designation or notified the Commissioner of any designation.

Second, if the dissolved or terminated common parent fails to designate a substitute agent, and if the old common parent has a single successor that is a domestic corporation, the successor corporation becomes the substitute agent for the group upon termination of the old common parent's existence. Treas. Reg. § 1.1502-77(d)(2). Under this rule, is the substitute agent for the group because failed to provide any designation and is a domestic corporation and the single successor to .

If the Commissioner has any reason to believe that is not a single successor to , the Commissioner may, at any time, designate a member of the group as substitute agent. Treas. Reg. § 1.1502-77(d)(3). If you have any doubts regarding whether is the single successor to , please contact us for further advice.

Based on the information you have provided, it appears that is the sole successor to the former common parent . Therefore, is the proper entity to sign any Form 872 or Form 870 relating to the taxable year for consolidated group. We recommend that the Form 872 and Form 870 be captioned as follows:

> " , as successor in interest to , and as agent for the members of the and Subsidiaries consolidated group.*"

In addition, the following language should be added to the bottom of the page: "*This is with respect to the consolidated tax liability of the and Subsidiaries consolidated group."

Although is the default substitute agent, it is required by sections 1.1502-77(d)(2)-(4) to notify the IRS of its status as default substitute agent. Until the IRS receives such notification, the IRS is not required to recognize as substitute agent. See section 9 of Rev. Proc. 2002-43 for the procedures for this required notification. Because no prior approval is required, however, you may deal directly with immediately upon its notification as specified in Rev. Proc. 2002-43.

Finally, the EIN of also should be entered in the upper right hand corner of each Form 872 and Form 870.

PROCEDURAL CONSIDERATIONS

We direct your attention to I.R.C. § 6501(c)(4)(B), which requires the Service to notify the taxpayer of the taxpayer's right to refuse to extend the period of limitations, or to limit such extension to particular issues or to a particular period of time, on each occasion that the taxpayer is requested to provide such consent. To satisfy this

requirement, IRM section 25.6.22.3 requires that you provide the taxpayer with Publication 1035, "Extending the Tax Assessment Period," along with Letter 907(DO) when soliciting the consent. Your actions in this regard should be well documented in the case file. We further recommend that you strictly adhere to the other rules set forth in the IRM regarding preparation of the consent forms, taxpayer notification, and Service processing. If the Form 872 becomes separated from the file or lost, this other correspondence, along with your notes in the file, would be invaluable to establishing the existence of an agreement.

DISCLOSURE STATEMENT

This writing may contain privileged information. It is our understanding that, with this office's consent, you shared the "Facts" portion of this memorandum with the taxpayer. Any other 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.

Please call if you have any further questions.

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By: _____
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