Office of Chief Counsel
Internal Revenue Service

memorandum

CC:LM:MCT:WAS:RCH:POSTF-155169-01
CMDRees

date: OCT 22 2001

to: TED SHAUGHNESSY, Team Manager

from: CHERYL M.D. REES
Senior Attorney (LMSB)

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subject: [redacted]
Preparation of Form 872

This is in response to the request for advice that you forwarded to us on October 5, 2001.

ISSUES

1. Whether the Consents to Extend the Time to Assess Tax, Forms 872, signed on behalf of [redacted] on [redacted] and on behalf of the Secretary on [redacted] validly extend the statutes for assessment of the taxpayer's liabilities for its taxable years ending [redacted] and [redacted].

2. Whether [redacted] is now the proper party to execute a Form 872 further extending the statutes that apply to the taxpayer's taxable years ending [redacted] and [redacted].

3. Whether the following language should be used to describe the proper party to execute the Form 872 for the taxpayer's [redacted] and [redacted] taxable years: "[redacted] of [redacted]. (formerly [redacted])."

4. Whether [redacted] is the proper party to file claims for refund and receive any refunds that may be due regarding [redacted] and [redacted] taxable years.

CONCLUSIONS

1. It is our opinion that the two Consents to extend the statutes of limitations that have already been signed validly extend the statutes to which they pertain [redacted, (b)(7)a, (b)(5)(AC)]

2. It is our opinion that [redacted], as successor to [redacted] and as alternative agent for members of the [redacted] consolidated group, is now the proper party to execute a Form 872 further extending the statutes that apply to the taxpayer's taxable years ending [redacted] and [redacted].

3. It is our opinion that the following language should be used to describe the proper party to execute the Form 872 for [redacted] and [redacted] taxable years:

> [redacted]. (EIN xx-xxxxxxx), as successor to [redacted], and as alternative agent for members of the [redacted] consolidated group.*

An asterisk should then be placed at the bottom of the first page of the Form 872 and the following inserted:

> *This is with respect to the consolidated return liability of the [redacted] (EIN xx-xxxxxxx) consolidated group for the tax years ended [redacted] and [redacted].

4. It is our opinion that, depending upon the current status of the former members of the [redacted] consolidated group, each entity that was a member of the group and [redacted]. should designate an agent pursuant to Treasury Regulation § 1.1502-77(d).

FACTS

You are examining the consolidated returns filed by [redacted] for their taxable years ending [redacted] and [redacted]. We do not know the dates on which the returns were filed or the names of the members of the consolidated group. According to the representative of [redacted] (who was once an employee of [redacted]), on [redacted], [redacted] was "acquired" by [redacted], a domestic corporation that was owned by [redacted], a Canadian corporation. We do not know what became of any of the other entities that formed the original consolidated group although we believe that some of them continued in existence. Furthermore, we do not know whether any part of the new organization was an affiliated group that filed a consolidated return.

The representative of [redacted] submitted an

unsigned copy of a [redacted] Agreement And Plan Of Merger Among [redacted] and [redacted] [hereinafter referred to as the Agreement], dated [redacted]. [redacted] [hereinafter referred to as Parent] is a Canadian Corporation. [redacted] [hereinafter referred to as the Purchaser] was incorporated under the laws of the state of Michigan and was a wholly-owned subsidiary of [redacted]. [redacted] [hereinafter referred to as the taxpayer or [redacted]] was also incorporated under the laws of the state of Michigan.

The Agreement stipulated that the merger was to take place in accordance with the Michigan Business Corporation Act. Except where provisions of the contract mandated that Michigan Law govern, the contract was designed to be governed by the laws of the State of New York. Notices required to be sent under the agreement, however, were to be sent to the Parent or Purchaser in [redacted], Connecticut and to [redacted] in [redacted] Massachusetts.

Under the Agreement, the Purchaser was required to make a cash tender offer for all outstanding shares of common stock, no par value, of the taxpayer. The Purchaser's obligation to purchase shares was contingent upon the condition that at least [redacted]% of the outstanding shares were tendered to it.

The effect of the merger is described at [redacted] of the Agreement:

> As a result of the Merger, the separate corporate existence of Purchaser shall cease and the Company [redacted] shall continue as the surviving corporation of the Merger (the "Surviving Corporation"). At the Effective Time, the effect of the Merger shall be as provided in the applicable provisions of Michigan Law. Without limiting the generality of the foregoing, and subject thereto, at the Effective Time, all the property, rights, privileges, powers and franchises of the Company and Purchaser shall vest in the Surviving Corporation, and all debts, liabilities, obligations, restrictions, disabilities and duties of the Company and Purchaser shall become the debts, liabilities, obligations, restrictions, disabilities and duties of the Surviving Corporation.

As of the Effective Time, the Articles of Incorporation or the Purchaser were to become the Articles of Incorporation of the Surviving Corporation until they were amended except that the provision for the name of the corporation was to be amended to read, "[redacted]." Generally, the By-laws, directors

and officers of the Purchaser were to be the initial By-laws, directors and officers of the Surviving Corporation.

The shares of the various corporations were to be converted as follows at the Effective Time:

1. Each share of the taxpayer held in the treasury of the taxpayer and each share owned by the Purchaser, Parent or any direct or indirect wholly-owned subsidiary of the Parent or of the taxpayer immediately prior to the Effective Time was canceled without any conversion thereof and without payment or distribution with respect thereto.

2. All other issued and outstanding shares of the taxpayer (except for dissenting shares) were canceled and converted automatically into the right to receive an amount equal to the Merger Consideration payable without interest.

3. Each share of common stock, no par value, of the Purchaser that was issued and outstanding immediately prior to the Effective Time was converted into and exchanged for one validly issued, fully paid and nonassessable share of common stock, no par value, of the Surviving Corporation.

4. Special provisions were made for compensation for Dissenting Shares, as defined by the Agreement and for the treatment of Employee Stock Options.

The taxpayer's stock transfer books were to be permanently closed as of the close of business on the day of the Effective Time. As of the date of the Agreement, the authorized capital stock of [redacted] consisted of [redacted] shares of common stock and [redacted] shares of preferred stock, par value $[redacted] per share (none of the shares of preferred stock were outstanding).

The Agreement never mentions entities named [redacted], a Delaware corporation, or [redacted], a Canadian corporation. Nonetheless, the representative of [redacted] previously submitted a paragraph that described the reorganization that took place on [redacted], [redacted] in different terms: "[redacted] . . . was acquired on [redacted] by [redacted] ("[redacted]"), a Delaware corporation. [redacted] was owned by [redacted] ("[redacted]"), a Canadian corporation." The hand-drawn structure chart that accompanied the explanation does not mention [redacted] that was the true parent according to the Agreement.

On [redacted], the Vice President of [redacted] signed

Forms 872 for [redacted] that were executed on behalf of the Secretary on [redacted]. On those Forms 872, that related to [redacted]'s [redacted] and [redacted] taxable years, the taxpayer was described as "[redacted], Subsidiary of [redacted] (Formerly [redacted]."

According to the representative of [redacted], on [redacted], a multi-transaction reorganization took place. The original group did not designate an agent. [redacted] contributed the stock of [redacted] to [redacted]. [redacted]. Shares of [redacted] were "further contributed down the chain of companies until [redacted] was a brother/sister company to [redacted]. [redacted]. [redacted] then merged into [redacted] with [redacted] surviving. After that merger, the taxpayer was a brother/sister company with [redacted]. ([redacted]). [redacted] then merged into [redacted] with [redacted] surviving. Again, we do not know what became of any other entities from the original group.

We do not know how the corporations evolved from those described in the Agreement that defined the first reorganization to those mentioned in either of the present representative's descriptions. They have submitted very little documentation in support of their assertions.[1] They have provided only a copy of the Certificate of Merger of [redacted] and [redacted]. They have not provided a copy of the Agreement of Merger that would explain the parties' agreements as to the mechanics of the merger or any documents regarding the other transactions that took place on [redacted].

According to the Certificate of Merger, [redacted] merged with [redacted]., a Delaware corporation. [redacted]. was the surviving corporation. [redacted]'s Certificate of Incorporation continued in full force as the Certificate of Incorporation of the surviving corporation. The Certificate also states that "the issued and outstanding shares of common stock of [[redacted] were] converted into [redacted] share of common stock of the surviving corporation" and the issued and outstanding Class A Preferred Stock of [redacted] was converted into [redacted] shares of Series B Preferred Stock of the surviving corporation.

The statute of limitations on assessment regarding [redacted] s

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[1] This is disconcerting in view of the discrepancies between their assertions regarding the first reorganization and the provisions of the operative document that generated the reorganization.

[redacted] and [redacted] taxable years will run on [redacted] and you desire to enter into a Consent to Extend the Time To Assess Tax, Form 872, further extending the statute for each year. Also, the representative of [redacted] wants to file a claim for refund regarding [redacted]'s [redacted] or [redacted] taxable year and wants to know the proper party to file the claim. They believe that the claim should be filed by [redacted] and that it would also be the proper party to receive the claimed refund.

ANALYSIS

Applicable Law (Issues 1 through 3)

Generally, the common parent of a consolidated group, as the sole agent for the consolidated group, is the proper party to sign consents, including a Form 872 waiver to extend the period of limitations for all members in the consolidated group. Treas. Reg. § 1.1502-77(a). When the common parent is acquired or otherwise transmuted so that it is no longer the common parent of its former consolidated group, questions arise as to who is the proper party to execute a Form 872 for the original consolidated group in regard to pre-acquisition years. See, Union Oil Co. of California v. Commissioner, 101 T.C. 130 (1993); FSA 200132036 (June 19, 2001); FSA 200125031 (March 19, 2001); FSA 199917015 (January 15, 1999).

For any given taxable year, the entity that is the common parent for that year continues as the agent for the group regarding any procedural matters that may arise in connection with the group's consolidated tax liability for that year. Interlake Corp., et al. v. Commissioner, 112 T.C. 103(1999); Southern Pac. Co. v. Commissioner, 84 T.C. 395, 401 (1985). This is true so long as that entity remains in existence even though it may no longer be the common parent. Treas. Reg. §§ 1.1502-77(a)and 1.1502-77T(a)(4)(i).

Treasury Regulation § 1.1502-77T provides a list of alternative agents, each of which may act as the agent for a consolidated group if the common parent of the group ceases to be the common parent regardless of whether the group remains in existence under Treasury Regulation § 1.1502-75(d). Pursuant to the regulation, the alternative agents may act on behalf of the consolidated group in two circumstances. First, they are the corporations to which notices of deficiency should be sent. Second, they are the corporations with the authority to give waivers of statutes of limitations. See Treas. Reg. § 1.1502-77T(a). There is nothing in the wording of the temporary regulation that empowers the alternative agents to file claims

for refund on behalf of the consolidated group or receive any refunds that are due the consolidated group for years during which they filed consolidated returns. Id.

Pursuant to Treasury Regulation § 1.1502-77T (a)(4), the following entities may give a waiver of the statute of limitations or receive a statutory notice of deficiency with respect to the consolidated group:

> (i) The common parent of the group for all or any part of the year to which the notice or waiver applies,
>
> (ii) A successor to the former common parent in a transaction to which section 381(a) applies,
>
> (iii) The agent designated by the group under § 1.1502-77(d), or
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> (iv) If the group remains in existence under § 1.1502-75(d)(2) or (3), the common parent of the group at the time the notice is mailed or the waiver given.

Treas. Reg. § 1.1502-77T(a)(4).

Finally, pursuant to Treasury Regulation § 1.1502-77(d), if the territory manager has reason to believe that the existence of the common parent has terminated and no writing designating a new agent for the group has been approved by the territory manager, he may deal directly with any member of the group in respect of its liability if he deems it advisable. Treas. Reg. § 1.1502-77(d).

Issue 1

The existing Forms 872[2] were executed subsequent to the first reorganization and prior to the second reorganization. On page [redacted] of the Agreement regarding the first reorganization, the three parties thereto agreed that [redacted] would continue as the surviving corporation as a result of the merger. So long as this is the same information that was filed with the State of Michigan at the time of the merger, it is clear that [redacted] remained in existence. [redacted, (b)(7)a, (b)(5)(AC)]

[redacted]

[2] Since we do not know when the [redacted] and [redacted] returns were filed, we do not know whether the Forms 872 were timely executed. For purposes of this memorandum, we will assume that they were.

[redacted]

If [redacted] was the surviving corporation, it remained in existence on [redacted] when the Forms 872 were signed. Since [redacted] was the common parent in [redacted] and [redacted] and we assume that it remained in existence at the time of the execution of the first two Forms 872, it was the proper entity to sign the Forms 872 under either Treasury Regulation § 1.1502-77(a) or Treasury Regulation § 1.1502-77T(a)(4)(i).

In contrast to information you were given earlier, it appears that [redacted] was a subsidiary of only [redacted], a Canadian corporation. It is, thus, possible that [redacted] remained the common parent of the consolidated group after the first reorganization. If so, it would have been the proper party to sign the waiver because it was the common parent. Interlake Corp., et al. v. Commissioner, 112 T.C. 103(1999); Southern Pac. Co. v. Commissioner, 84 T.C. 395, 401 (1985).

[redacted]

Issue 2

Because, after the second reorganization, [redacted] was no longer the common parent of the group and no longer existed, we must turn to the list of alternative agents set forth in Treasury Regulation § 1.1502-77T to determine whether one is available.

(i) The common parent of the group for all or any part of the year to which the notice or waiver applies.

Since [redacted] no longer exists and it was the common parent for all of [redacted] and [redacted], subsection (a)(4)(i) does not provide

an alternative agent.

(ii) A successor to the former common parent in a transaction to which section 381(a) applies.

I.R.C. § 381(a) applies to an acquisition of assets of a corporation by another corporation in a distribution to such other corporation to which I.R.C. § 332 (relating to liquidations of subsidiaries) applies; or in a transfer to which I.R.C. § 361 (relating to nonrecognition of gain or loss to corporations) applies, but only if the transfer is in connection with a reorganization described in subparagraphs (A), (C), (D), (F) or (G) of I.R.C. § 368(a)(1). I.R.C. § 381(a).

Based on the facts we now have, it appears that the transactions entered into by [redacted] and [redacted] on [redacted], were ones to which I.R.C., § 361 applies and which were part of a reorganization described in I.R.C. § 368(a)(1)(A). Since that is the case, I.R.C. § 381(a) applies and [redacted], the successor to [redacted], the former common parent, is an alternative agent for the consolidated group for purposes of Treasury Regulation § 1.1502-77T.

(iii) The agent designated by the group under § 1.1502-77(d).

Since [redacted] did not designate an agent, subsection (a)(4)(iii) does not apply to the facts herein.

(iv) If the group remains in existence under Treasury Regulation § 1.1502-75(d)(2) or (3), the common parent of the group at the time the notice is mailed or the waiver given.

We do not have sufficient facts to determine whether the consolidated group remains in existence under the provisions of Treasury Regulation § 1.1502-75(d)(2) or (3). It does look, however, as if, even if the consolidated group did not terminate on [redacted], it did terminate on [redacted]. Therefore, we do not anticipate that subsections (d)(2) or (3) would apply.

Thus, [redacted] may serve as the alternative agent for the consolidated group for purposes of signing the waiver you seek.

Finally, because [redacted] no longer exists and the group did not designate an agent, Treasury Regulation § 1.1502-77(d) will allow you to deal directly with each remaining member of the

group as it existed in [redacted] and [redacted], should you choose to do so.

Issue 3

Since [redacted] did cease to exist and the transactions involved in the second reorganization fall within the provisions of Treasury Regulation § 1.1502-77T(a)(4)(ii), the name on the Form 872 should appear as follows:

> [redacted]. (EIN xx-xxxxxxx), as successor to [redacted], and as alternative agent for members of the [redacted] consolidated group.*

An asterisk should then be placed at the bottom of the first page of the Form 872 and the following inserted:

> *This is with respect to the consolidated return liability of the [redacted] (EIN xx-xxxxxxx) consolidated group for the tax years ended [redacted] and [redacted]

Issue 4

The question of which is the proper party to file a claim for refund for [redacted], [redacted] or [redacted] taxable years is not governed by the provisions of Treasury Regulation § 1.1502-77T. By its own terms, the Treasury Regulation only provides alternative agents that may give a waiver of the statute of limitations or receive a statutory notice of deficiency with respect to a consolidated group. See Treas. Reg. § 1.1502-77T. Thus, we must look elsewhere to determine what entity may file a claim for refund and receive payment of the refund of taxes paid by [redacted] for its [redacted] and [redacted] taxable years.

Pursuant to I.R.C. § 6402(a), the Secretary may credit the amount of an overpayment against any liability on the part of the person who made the overpayment. The excess of the overpayment must be refunded to the person who made the overpayment. I.R.C. § 6402(a). A claim for refund of an overpayment must be filed within the requisite time frame by "the taxpayer." I.R.C. § 6511. In I.R.C. § 7701(a)(14), we find the general definition of "taxpayer" to be "any person subject to any internal revenue tax." Therefore, we must determine who was liable for the tax liability of the consolidated group in order to determine who must file the claim for refund and to whom the Service must pay the refund.

In order to track the entities that were liable, we must turn to I.R.C. § 1501 and the regulations promulgated thereunder. In I.R.C. § 1501, Congress afforded an affiliated group of corporations the privilege of making a consolidated income tax return for any year during which they are affiliated if all of the affiliated corporations consent to the filing of a consolidated return. I.R.C. § 1502 vests the Secretary with authority to prescribe those regulations he deems necessary in order to ensure that the income tax liability of the affiliated group and each member thereof is clearly reflected.

Treasury Regulation § 1.1502-6 is the source of law regarding when the members of an affiliated group are jointly and severally liable for tax. Pursuant to that regulation, the common parent of the group and each subsidiary which was a member of the group during any part of a *consolidated return year* is severally liable for the tax for such year. Treas. Reg. § 1.1502-6(a). Thus, each entity that was a member of the consolidated group has a stake in claiming and receiving the refund for [redacted] or [redacted], years for which they filed consolidated returns.

Prior to [redacted], [redacted] would have been the exclusive agent for the consolidated group and would have been the proper party to file and receive any refund on behalf of the consolidated group. Unfortunately, there is no regulation that makes provision for an agent for the consolidated group for these purposes once [redacted] ceased to exist on [redacted]. Therefore, we need to determine the current status of each and eery member of the consolidated group.

Once this is done, the Service may solicit a designation of an agent from each of the remaining members of the consolidated group under the provisions of Treasury Regulation § 1.1502-77(d). If none of the original members are now in existence and they had not left the group before they ceased to exist, it is probably sufficient to have [redacted] file the claim and receive the refund as the successor of [redacted]. On the other hand, if all of the members remain in existence, they will need to appoint one of the original members of the group to serve as their agent.[3] See, Treas. Reg. § 1.1502-77(d). It would be best to have [redacted], as successor to [redacted], also make the same designation.

In any other factual scenario, it would be prudent to supply

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[3] This is true whether each entity remains associated with [redacted], is now standing alone or is now a member of some other group.

us with facts regarding each of the original members of the group so that we may analyze the facts to determine what entities should submit designations. If the procedures are not properly followed, the Government runs the risk of paying a refund to one entity only to learn that a different entity is entitled to the refund.

Due to the complexity of the issues herein, we are forwarding this memorandum to the National Office for post-review. Therefore, please do not implement the advice contained herein until [redacted] to afford the National Office time to review the advisory opinion. If you have questions, please contact me at (804) 916-3947.

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

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By:_____
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cc: John J. Molloy, Team Coordinator