Office of Chief Counsel
Internal Revenue Service

memorandum

CC:LM:MCT:CLE:PIT:TL-N-3275-01
MAYost

date: JUL 30 2001

to: Dan Callahan, Team Manager, LMSB:NR:1486

from: Associate Area Counsel, LM:MCT:CLE:PIT

bject: [redacted]

On review of our prior advice to you dated July 11, 2001, our National Office agreed with our analysis that the [redacted]'s assessment limitation period may not be extended any further at this time, since the taxpayer is dissolved and there is no longer any person with the capacity to sign a Form 872.

In a subsequent E-mail, our National Office suggested that our prior advice should discuss some additional points with regard to the potential transferee liability of [redacted]s shareholders. One point (which we discussed over the phone) pertained to whether an assessment was necessary against [redacted] before transferee liability could be pursued against the shareholders. The National Office indicated that in this case, involving a dissolved corporate transferor with no assets (so collection against the transferor would be futile), that an assessment against the transferor was not necessary to proceed against the transferees under I.R.C. § 6901 procedures. In this regard, the National Office recommended that we add the following paragraph to our prior memorandum:

> "When collection would be futile against the taxpayer primarily liable (the transferor) for the tax debt under examination, as in this case, it is <u>not</u> necessary (though still ordinarily recommended) that the Service make a timely assessment of the tax debt against a transferor before it may use the procedures allowed by I.R.C. 6901 to obtain a timely assessment of the transferor's tax debt against a transferee. <u>Commissioner v. Kuckenberg</u>, 309 F.2d 202, 206 (9th Cir. 1962); <u>Flynn v. Commissioner</u>, 77 F.2d 180, 183 (5th Cir. 1935); <u>Espinosa v. Commissioner</u>, T.C. Memo 2000-66, 2000 Tax Ct. Memo LEXIS 73, 18-26."

Another point with respect to the potential transferee liability of [redacted]'s former shareholders that the National Office

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thought worth mentioning was the fact that Subchapter D of the Federal Debt Collection Procedure Act provided an additional primary source of substantive transferee liability law to be considered, besides the trust fund doctrine and Texas' Uniform Fraudulent Transfer Act that we discussed in our memorandum. The pertinent sections of the Federal Debt Collection Procedure Act are at 28 U.S.C. §§ 3301 thru 3308. A discussion of the foregoing statute is also in I.R.M. § 5.17.14 (10-31-2000). The statute provides five potential grounds in 28 U.S.C. § 3304 for setting aside transfers that are fraudulent as to debts owed the United States, including tax debts. Although the various limitations periods set forth in 28 U.S.C. § 3306(b) for these five fraudulent transfer provisions may already have expired for many other types of federal debts, these limiting provisions do not curtail or limit the rights of the United States under the Internal Revenue Code to collect federal tax debts or collect amounts collectible in the same manner as taxes (e.g., under I.R.C. § 6901). 28 U.S.C. § 3003(b)(1); I.R.M. § 5.17.14.2.8(2).

If you have any questions, please call Attorney Michael A. Yost, Jr. at (412) 644-3441.

Richard S. Bloom
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By: Michael A. Yost Jr.
MICHAEL A. YOST, JR.
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Office of Chief Counsel
Internal Revenue Service

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subject: **Extension of Statute of Limitations**
[redacted]
U.I.L. Nos. 6501.08-10 and 6901.02-00

This memorandum responds to your request for assistance dated May 9, 2001. The advice rendered in this memorandum is conditioned on the accuracy of the facts presented to us. This memorandum should not be cited as precedent. It is also subject to 10-day post review in the National Office and, therefore, is subject to modification.

ISSUE

Can a consent to extend the statute of limitations be secured for [redacted], a corporation which was dissolved under applicable state law on [redacted]? If so, who can sign the consent?

CONCLUSIONS

Since the three-year, winding-up period provided under applicable Delaware law following the taxpayer's dissolution has expired, any consent executed now on behalf of the taxpayer would be ineffective to extend the statutory period for assessment.

We recommend, however, that you consider and protect the statute of limitations with respect to the potential transferee liability of the former shareholders of the dissolved taxpayer.

FACTS

[redacted] ([redacted]), a Delaware corporation, is currently under examination for several years, including the years [redacted] through the short year ended [redacted]. The company had its principal office in Texas, [redacted].

[redacted]'s statute of limitations on assessment for the tax years [redacted] through [redacted] has been extended to [redacted]. The Form 872 was executed in [redacted]. The statute of limitations for [redacted]'s short year ended [redacted] will expire on [redacted]. You intend to solicit a consent from [redacted] to extend the statute of limitations to [redacted] for the tax years [redacted] through [redacted]. According to your memorandum, however, [redacted] was dissolved effective as of the close of business on [redacted]. A certificate of dissolution was filed with the Delaware Secretary of State on [redacted]. The assets of [redacted] with related liabilities were distributed to [redacted], a [redacted] company, in exchange for additional stock in that company. [redacted] then liquidated, making a liquidating distribution of the stock of [redacted], along with its remaining cash on hand, to its two equal shareholders, [redacted], a subsidiary of [redacted], and [redacted].

LAW AND ANALYSIS

The authority of a corporate officer to act for a dissolved corporation in tax matters derives from the law of the state of incorporation. United States v. Krueger, 121 F.2d 842, 845 (3rd Cir. 1941), cert. denied, 314 U.S. 677 (1941). Following its dissolution, [redacted] remained a viable corporate body under Delaware statutory law for three years for the limited purpose of winding up its affairs and thereafter for purposes of any action, suit or proceeding begun during the winding-up period. 8 Del. Code Ann. § 278 (1999). During this three-year period, the officers and directors of [redacted] were authorized to prosecute and defend suits, discharge liabilities, and distribute assets to its shareholders. Id.; see, Long Star Industries, Inc. v. Redwine, 757 F.2d 1544, 1549-1550 (5th Cir. 1985).

Execution of a form 872 to extend the statute of limitations on assessment was clearly within the scope of the authority of [redacted]'s officers and directors to wind up corporate affairs, as long as the consent was executed within the winding-up period. See, H.D. Walbridge & Co. v. Commissioner, 25 B.T.A. 1109 (1932); see also, Rev. Rul. 71-467, 1971-2 C.B. 411 (Connecticut dissolution law similar to that of Delaware); United States v. Krueger, 121 F.2d 842 (3rd Cir. 1941), cert. denied, 314 U.S. 677 (1941)(waiver of statute of limitation within the power to settle corporate affairs under New Jersey dissolution statute.) Conversely, a consent executed on behalf of [redacted] by one of its officers or directors after the expiration of the Delaware winding-up period would be ineffective. See, Union Shipbuilding Co. v. Commissioner, 43 B.T.A. 1143, 1145 (1941), acq., 1941-1

C.B. 11. Cf. Malone & Hyde, Inc. v. Commissioner, T.C. Memo 1992-661(A consent to extend the period of limitations signed by a power of attorney for a corporation was invalid where the corporation ceased to exist by merger under Delaware law prior to the execution of the consent.)

Although, as noted above, a corporation will continue to exist beyond its winding-up period under Delaware law for purposes of any action, suit or proceeding begun during such period, the execution of a consent does not constitute the commencement of an action, suit or proceeding. See, Badger Materials, Inc. v. Commissioner, 40 T.C. 1061, 1063 (1963)(Wisconsin law); Wheeler's Peachtree Pharmacy v. Commissioner, 35 T.C. 177 (1960), acq., 1961-2 C.B. 5 (Georgia law). Rather, it is the issuance of a notice of deficiency, Ross v. Venezuelan-American Independent Oil Producers Ass'n, Inc., 230 F. Supp. 701, 702 (D. Del. 1964), or possibly the filing of an offer in compromise after an assessment of tax, Field v. Commissioner, 32 T.C. 187 (1959), aff'd per curiam, 286 F.2d 960 (6th Cir. 1960), cert. denied, 366 U.S. 949 (1961), that constitute commencement of an action, suit or proceeding.

As the facts indicate, the three-year period provided by Delaware law for [redacted] to wind up its corporate affairs expired in [redacted]. Further, no action, suit or proceeding with respect to its federal tax liabilities was begun during the winding up period to prolong [redacted]'s corporate existence. Thus, any additional consents executed at this point would be ineffective to extend the statutory period for assessment.

Alternatively, we recommend that you consider and protect the statute of limitations on the potential transferee liabilities of [redacted]'s former shareholders. I.R.C. § 6901(a) provides a procedure through which the Service may collect from a transferee of assets unpaid taxes owed by the transferor of the assets if a basis exists under applicable state law or equity for holding the transferee liable. Hagaman v. Commissioner, 100 T.C. 180, 183 (1993). The law of the state in which the transfer(s) occurred governs. Fibel V. Commissioner, 44 T.C. 647 (1965); Hicks v. Commissioner, T.C. Memo 1970-267 (1970), aff'd 73-2 U.S.T.C. ¶ 9526 (9th Cir. 1973). The Service has the burden of proof with respect to transferee liability. I.R.C. § 6902(a).

In the case of a shareholder, liability may arise in equity, based on court decisions applying the trust fund doctrine, or at law, based on state statutes (such as the Uniform Fraudulent Transfer Act), or on both. C.D. Construction Corp. v. Commissioner, 451 F.2d 470 (4th Cir. 1971).

In general, shareholders who receive liquidating distributions from a corporation that subsequently winds up its affairs and dissolves without paying its federal income tax liability have been held to be transferees under the trust fund doctrine. See, Dillman v. Commissioner, 64 T.C. 797 (1975); Neill v. Phinney, 245 F.2d 645 (5th Cir. 1957). The trust fund doctrine is an equitable principle that contemplates that assets of a dissolved corporation are held in "trust" for the benefit of the creditors of the corporation. In re Mortgage America Corp., 714 F.2d 1266 (5th Cir. 1983).

The trust fund doctrine is applicable both in Texas, Albert v. Commissioner, 56 T.C. 447 (1971) and cases cited therein, where [redacted] had its principal office and presumably made the liquidating distributions to its shareholders, and in Delaware, City Investing Co. Liquidating Trust v. Continental Casualty Co., 624 A.2d 1191, 1194 (1993) and In Re Rego Co., 623 A.2d 92, 95-96 (Del. Ch. 1992), where [redacted] was incorporated and under which law it was dissolved. See also, Borall Corp. v. Commissioner, 5 TCM 933 (1946)(Stockholders held liable as transferees where a distribution was one of a series of distributions in pursuance of complete liquidation which left the transferor-corporation insolvent.) Further, 8 Del. Code Ann. § 281 (1999) provides that on dissolution of a corporation the shareholders are entitled to the assets that remain after the payment or provision of all creditors' claims. This is the correlative of the trust fund theory.

In addition, the shareholders may also be liable as transferees under Texas' Uniform Fraudulent Transfer Act, since it appears that the liquidating distributions were made to [redacted]'s shareholders without [redacted] receiving equivalent value and [redacted] was insolvent at the time or rendered insolvent as a result of the distributions. See, Mark J. Hanna, P.C. v. Commissioner, T.C. Memo 1999-292.

Since [redacted]'s former shareholders may be liable as transferees, we recommend that you solicit a Form 2045 transferee agreement and a Form 977 consent to extend the time to assess transferee liability from each of the shareholders. You should not rely on Form 2045 alone to satisfy the Service's burden of proving transferee liability. Case law suggests that the execution of Form 2045 is not conclusive, but merely provides evidence of transferee liability. See, Southern Pacific Transportation Corp. v. Commissioner, 84 T.C. 367, 374 n.6 (1985). You should confirm that the transfers in liquidation occurred in Texas and were made without consideration or for less than adequate consideration to [redacted]'s former shareholders and that no provision was made by [redacted] for payment of potential federal tax liabilities. You should also determine the fair market value of the transferred property (which determines the limit of transferee liability).

It should also be noted that, under I.R.C. § 6901(c)(1), the period of limitation for assessment of transferee liability is within one year after the expiration of the period of limitation for assessment against the transferor. This period of limitation can be extended by agreement in writing under section 6901(d)(1). A state law imposing a shorter limitations period for transferee liability is not effective to shorten the period provided under I.R.C. § 6901 procedures. Dillman v. Commissioner, 64 T.C. 797 (1975).

This writing may contain privileged information. Any authorized 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.

If you have any questions, please call Attorney Michael A. Yost, Jr. at (412) 644-3441.

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