Office of Chief Counsel
Internal Revenue Service

memorandum

date: Sept. 27, 2001

to: Carol Mitchell
IRS Team Coordinator
Boise, Idaho

from: William A. McCarthy
LMSB Attorney (Area 5)
Seattle, WA

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subject: [redacted]
Statute Extensions ([redacted]
Case #: POSTF-151813-01

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

ISSUES

1. How should the taxpayer(s) be identified on the Form 872s (statute extensions) for the periods ended [redacted], [redacted], [redacted] & [redacted]?

2. If the common parent of a consolidated group has filed for Chapter 11 bankruptcy protection, who is authorized to execute the Form 872s for the group?

3. Is the statute of limitations for making an assessment suspended while the common parent is in bankruptcy?

CONCLUSIONS

1. The taxpayer(s) on the Form 872s should be described as follows (the underlined portion may be relegated to a footnote if space is limited):

[redacted]: [redacted], formerly [redacted], formerly [redacted], successor to [redacted], common parent of the [redacted] consolidated group

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[redacted], [redacted] & [redacted]:

[redacted] formerly [redacted] (same EIN), common parent of the [redacted] consolidated group

See generally IRM 22.6.2 (1/1/00). In recommending the foregoing language, we assume that -- (i) it is your desire to extend the statute as to the [redacted] subsidiaries for [redacted] and as to the [redacted] subsidiaries for the remaining periods, and (ii) the alternative agent provisions of Temp. Treas. Reg. § 1.1502-77T apply.

2. The common parent retains authority to execute the Form 872s when it is in bankruptcy.

3. The filing of a bankruptcy petition does not by itself result in a suspension of the period for making an assessment.

FACTS

[redacted], filed a Chapter 11 bankruptcy petition on [redacted] and, while in bankruptcy, was acquired by [redacted] via a Type "A" reorganization. See I.R.C. § 368(a)(1)(A). The acquisition date was [redacted]. Immediately after the acquisition, [redacted] changed its name to [redacted]. [redacted] was later dissolved. The subsidiaries of [redacted] remained subsidiaries of [redacted].

The [redacted] return was filed on behalf of "[redacted]. The box marked "final return" was checked. The [redacted] return was filed on behalf of "[redacted]" with the new EIN.

In [redacted] of [redacted], [redacted] changed its name to [redacted]. [redacted] filed for Chapter 11 bankruptcy protection on [redacted].

The periods covered by the returns are as follows: [redacted]

ANALYSIS

A. Identifying the proper taxpayer(s) on the Form 872s

With regard to [redacted], the authority for [redacted] to execute the Form 872 on behalf of [redacted] may be found in Temp. Treas. Reg. § 1.1502-77T(a)(4). Under -77T(a)(4), [redacted] has the requisite authority if it was a "successor to the former common parent [i.e., [redacted]] in a transaction to which section 381(a) applies." The fact that the merger was accomplished with a Type "A" reorganization strongly suggests that section[1] 381(a) applied. Please let me know if this was not the case.

Further, for purpose of this memo, we assume [redacted] succeeded to the potential federal tax obligations of [redacted] either under state law (Delaware) or pursuant to the merger agreement. This assumption comports with both the "successor in interest" language in your memo as well as information you have provided in connection with other requests for advice.[2] Please let me know if this is not the case as we might recommend other forms (e.g., transferee liability forms)

B. Bankruptcy does not divest the common parent of authority to execute Form 872s

In general, the common parent of a consolidated group is the sole agent of the group and is authorized to act in its own name in all matters relating to the tax liability for the consolidated return year. See Treas. Reg. § 1.1502-77(a). Thus, the common parent is the proper party to sign consents, including Form 872s, for all members of the group. Moreover, the bankruptcy of the common parent does not terminate its status as sole agent of the group. See J & S Carburetor Co. v. Commissioner, 93 T.C. 166, 169 (1989); IRM 22.6.16.7.

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[1] Unless otherwise indicated, all "section" references are to the Internal Revenue Code.

[2] See, e.g., Second Amended Disclosure Statement, dated [redacted], p. 45 ("[A]ll liabilities and obligations of [redacted] and [redacted] ... will be liabilities and obligations of the [redacted].").

C. No tolling of the statute of limitations

Section 6503(h) suspends the statute of limitations for making an assessment if the Service is prohibited from making an assessment as a result of a Chapter 11 petition. However, since 1994, the automatic stay which goes into effect as of the filing of the bankruptcy petition does not prohibit the making of a tax assessment. See Bank. Code § 362(b)(9)(D). Hence, the filing of a bankruptcy petition by [redacted] does not result in a suspension of the period for making an assessment.

Please give me a call at (206)220-5951 if you believe any of the facts stated above are incorrect or if you have any suggestions or questions.

William A. McCarthy
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(206) 220-5951

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

OFFICE OF
CHIEF COUNSEL

MEMORANDUM FOR William A McCarthy
LMSB Attorney (Area 5)
Seattle, WA

FROM: Michael Wilder, Senior Technician Reviewer (Corporate)

SUBJECT: [redacted]

Facts: As stated in the Non-docketed Significant Advice Request.

Issue/Questions:

1. How should the taxpayer(s) be identified on the Form 872s (statute extensions) for the periods ended [redacted] and [redacted]?

We have reviewed the District Counsel's advice as stated on the Non docketed Significant Advice Request. We agree in part with Districts Counsel's conclusions.

We agree that [redacted] is a "successor" to [redacted] under state law (assuming a valid A reorganization) and thus succeeds to [redacted]'s several liability for the consolidated tax of [redacted] for the years XXXX, XXXX, XXXX, XXXX. Therefore, [redacted] is the proper party to execute the Form 872 for [redacted] for the tax years XXXX, XXXX, XXXX, XXXX.

We recommend that the Form 872 be captioned as follows: [redacted], (E.I.N. XX-XXXXXXX), formerly [redacted], formerly [redacted], successor in interest to [redacted] (E.I.N. XX-XXXXXXX)*

Then at the bottom of the page on the Form 872, the following language should be added: *This is with respect to the consolidated tax liability of [redacted] (E.I.N. XX-XXXXXXX) for the taxable years, XXXX, XXXX, XXXX, and XXXX.

The signature block on page 2 of the Form 872 should be signed as follows: [redacted] (E.I.N. XX-XXXXXXX), formerly [redacted], formerly [redacted], as successor to [redacted]. The block should be signed by a current officer of [redacted].

We recommend that Counsel make sure that [redacted] is still in existence on the date that the Form 872 is secured from them.