Office of Chief Counsel
Internal Revenue Service

memorandum

CC:WR:SCA:LN:TL-N-4011-99
JMMarr

date: AUG 9 1999

to: Ethelyn McDaniel, Case Manager, Examination Division CE:1105, and Patricia Lozano, Team Coordinator, Long Beach POD CE 1105

from: Joyce M. Marr, Attorney
June Y. Bass, Assistant District Counsel
Southern California District Counsel, Laguna Niguel

subject: [redacted]
Tax Years [redacted], [redacted], and [redacted]
TIN: [redacted]
Request for Advisory Opinion concerning Extension of the Statute of Limitations

DISCLOSURE STATEMENT

This advice constitutes return information subject to I.R.C. § 6103. This advice contains confidential information subject to attorney-client and deliberative process privileges and if prepared in contemplation of litigation, subject to the attorney work product privilege. Accordingly, the Examination or Appeals recipient of this document may provide it only to those persons whose official tax administration duties with respect to this case require such disclosure. In no event may this document be provided to Examination, Appeals, or other persons beyond those specifically indicated in this statement. This advice may not be disclosed to taxpayers or their representatives.

This advice is not binding on Examination or Appeals and is not a final case determination. Such advice is advisory and does not resolve Service position on an issue or provide the basis for closing a case. The determination of the Service in the case is to be made through the exercise of the independent judgment of the office with jurisdiction over the case.

This responds to your June 7, 1999, memorandum. You asked for our advice concerning the proper language to be used on statements to designate [redacted] as the representative of the former affiliated group pursuant to Treas. Reg. § 1.1502-77(d), since [redacted], which was the common parent of an affiliated group of corporations filing returns on a consolidated basis, was

dissolved in [redacted]. When you first contacted us regarding your request for assistance, we requested an organizational chart showing the corporate structure following the [redacted] restructuring which took place. To date, you have been unable to obtain a new organizational chart from the taxpayer. However, on July 7, 1999, you told Joyce Marr of this office at a planning meeting that the taxpayer was drafting language to be used for purposes of the designation statements which you would forward to us for our review. Affixed hereto is a copy of a proposed designation statement which you forwarded to us via telefax on July 26, 1999, as well as a copy of the same document which we have marked with modifications which we recommend.

CONCLUSION AND RECOMMENDATIONS

The language proposed by the remaining members of the former affiliated group, with minor modifications which we have noted on a copy of the proposed designation statement affixed hereto, is acceptable. In so concluding, we have relied on the facts presented to us as stated below. If clarifying factual information is received from the taxpayer which indicates that [redacted]'s assets were transferred to a subsidiary in a downstream transfer as described in Treas. Reg. § 1.1502-75(d)(2)(ii), please contact this office for further guidance.

FACTS

Unless specifically noted, we have relied upon facts presented to us orally and in writing by the Examination Division. We have suggested, as indicated below, that you obtain clarifying information. Our advice might be different if the facts were different. Nevertheless, due to the impending statutory deadline, we provide advice, based on the facts as they appear to be. If the facts which we recite in this memorandum ultimately prove to be inconsistent with your understanding of the facts or you receive clarification in the future and there is still time on the statute, please contact this office immediately and do not rely on this memorandum.

The Service is currently examining the consolidated returns of [redacted] an affiliated group, for its [redacted], [redacted], and [redacted] taxable years. You have verbally indicated that the statutes of limitations on assessment will expire on [redacted]. We will assume this is true, since we did not receive copies of any tax returns or previously executed consents to extend the statute of limitations with your request.

During the years being examined, [redacted] was a wholly-owned subsidiary of [redacted]. It is your understanding that [redacted], which was the U.S. Parent (a holding company) of the affiliated group under audit, was dissolved in [redacted] and its assets transferred to one of its subsidiaries. The taxpayer has promised to forward you the certificate of dissolution for [redacted] filed with the State of Delaware. In addition, you were requesting legal documentation from the taxpayer concerning the transfer of assets.

At the planning meeting held on July 7, 1999, the former case manager, Erwin Walker, indicated that since the dissolution of [redacted] took place, each of [redacted]'s former subsidiaries is now separately owned by [redacted], the [redacted] parent. This should be clarified. It could be that a downstream transfer occurred.[1] We will assume for purposes of this memorandum that the corporate structure was as described at the planning meeting and that the affiliated group ceased to exist when [redacted] was dissolved.

The remaining members of the former affiliated group have notified you that they wish to designate [redacted], a member of the affiliated group to act as the group's agent in [redacted]'s stead[2] and requested that the Service review the language they have drafted to include in the statements to effect this designation. According to Statements affixed to Exam's request for advice dated June 7, 1999, which were part of the taxpayer's consolidated returns for the years under audit, [redacted] was a member of the affiliated group for such years.

DISCUSSION

I.R.C. § 1502 provides that the consolidated return regulations promulgated by the Service shall govern the determination, computation, and assessment of tax of an affiliated group of corporations making a consolidated return and its constituent corporations. Treas. Reg. §§ 1.1502-77 and -77T provide the basic rules for determining how a statute is extended by agreement for a consolidated return year.

Generally, the common parent of an affiliated group filing a consolidate return is the agent for the group in just about all tax procedural matters, including signing a statutory extension for the tax year involved. Treas. Reg. § 1.1502-77(a). When, as here, the common parent no longer exists, the common parent

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[1] See Treas. Reg. § 1.1502-75(d)(2)(ii).

[2] See Treas. Reg. § 1.1502-77(d).

may designate a successor agent (subject to the district director's approval), the remaining members of the group[3] may designate as a successor agent one of the remaining members (also subject to the district director's approval), or the district director may deal directly with any member of the group concerning its tax liability. Treas. Reg. § 1.1502-77(d).

It is sometimes difficult for the Service to identify the common parent of an affiliated group when there are mergers and other acquisitions. Therefore, the Service has provided rules for recognizing alternative agents. The rules are in Temp. Treas. Reg. § 1.1502-77T. The regulation applies if the common parent ceases to be the common parent, whether or not the group still exists. Temp. Treas. Reg. § 1.1502-77T(a).

The rules under which a group remains in existence under either Treas. Reg. § 1.1502-75(d)(2) or (3) are lengthy. Treas. Reg. § 1.1502-75(d)(2) speaks to situations in which the common parent is no longer in existence. Treas. Reg. § 1.1502-75(d)(2)(ii) involves downstream transfers.

Under Treas. Reg. § 1.1502-75(d)(2)(ii):

> The group shall be considered as remaining in existence notwithstanding that the common parent is no longer in existence if the members of the affiliated group succeed to and become the owners of substantially all of the assets of such former parent and there remains one or more chains of includible corporations connected through stock ownership with a common parent corporation which is an includible corporation and which was a member of the group prior to the date such former parent ceases to exist.

Pursuant to I.R.C. § 1504(b)(3), a foreign corporation, such as [redacted], is excepted from the definition of "includible corporation." Therefore, if the statement made at the July 7th planning meeting to the effect that each of [redacted]'s former subsidiaries is now separately owned by [redacted] is accurate, then Treas. Reg. § 1.1502-75(d)(2)(ii) is inapplicable in the instant case.

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[3] There is an issue concerning who the "remaining members" are. The Service generally takes the position that the "remaining members" are the corporations that were members of the group during the taxable years at issue, less any members that have subsequently gone out of existence.

If you receive documents from the taxpayer which show that a downstream transfer may have occurred, please notify this office as the designation of another member of the group to act as agent in [redacted]'s stead may be unnecessary. In Southern Pacific Transportation Co. v. Commissioner, 84 T.C. 395 (1985), the old common parent went out of existence in a reverse acquisition, a transaction similar to a downstream transfer and in which the old common parent is no longer the common parent, but the consolidated group continues. The continuing Southern Pacific group attempted to designate a newly formed subsidiary to act as the agent for the members of the group for pre-reverse acquisition years under Treas. Reg. § 1.1502-77(d). The district director did not give the approval, as required by the regulations, of that attempted designation. The district director issued a notice of deficiency to the new common parent as agent for the members of the continuing group for its pre-reverse acquisition years. When the new common parent attempted to have its Tax Court case (which was based on such notice of deficiency) dismissed for lack of jurisdiction on the basis that the notice had not been sent to the proper party, the court held that the notice had been properly sent to the new common parent as agent for the members of the continuing group for pre-acquisition years recognizing that the attempted designation was not properly made because the district director had not approved it. Under the holding in Southern Pacific, the Service may choose to deal with a new common parent as agent for the group when there is a downstream transfer, rather than accepting the designation of a new agent by the remaining group members. However, that position is subject to challenge. [redacted] (b)(7)a [redacted].

Designation Language

As indicated above, affixed hereto is a copy of the language proposed by the remaining members of the affiliated group to designate [redacted] as agent pursuant to Treas. Reg. § 1.1502-77(d), marked with modifications which we recommend be made. Below is a summary of the reasons for the recommended modifications.

The applicable regulation requires that the notice be given to the "district director" with whom the consolidated return is filed. Hence, we have recommended the addressee be the District Director in Laguna Niguel, rather than the Fresno Service Center.

[redacted]'s existence would have terminated when it was "dissolved" under State law, rather than when its assets were "liquidated," if they in fact were liquidated. Please verify that the date of dissolution was [redacted], when you receive the copy of the certificate of dissolution filed with the State of Delaware.

Finally, we have modified the last sentence of the proposed designation statement to track the language at Treas. Reg. § 1.1502-77(d).

PLEASE ENSURE THAT EACH OF THE REMAINING MEMBERS OF THE GROUP DESIGNATE [redacted] AS AGENT TO ACT IN [redacted]'S STEAD AND THAT THE DESIGNATION IS APPROVED BY THE DISTRICT DIRECTOR. IF THESE REQUIREMENTS ARE NOT MET, THE DESIGNATIONS WILL NOT BE VALID.

Proper Language to use on Form 872

The Form 872 should be captioned as follows:

[redacted] (EIN: [redacted]), as designated agent under Treas. Reg. § 1.1502-77(d), for the members of the [redacted] consolidated group

At the bottom of the page, the following language should be added (including the asterisk):

* This is with respect to the consolidated tax liability of the [redacted] consolidated return group for the taxable years ended December 31, [redacted], December 31, [redacted], and December 31, [redacted].

CONCLUSION

Based on the factual information provided to us, we are of the opinion that the language proposed by the remaining members of the former consolidated return group, with minor modifications which we have noted on a copy of the proposed designation statement affixed hereto, is acceptable. If clarifying factual information is received from the taxpayer which indicates that [redacted]'s assets were transferred to a subsidiary in a downstream transfer as described in Treas. Reg. § 1.1502-(d)(2)(ii), please contact this office immediately for further guidance.

Please contact the undersigned at (949) 360-2688 if you have any questions.

Joyce M. Marr

JOYCE M. MARR
Attorney

Attachments