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DEPARTMENT OF THE TREASURY
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INTERNAL REVENUE SERVICE NATIONAL OFFICE FIELD SERVICE ADVICE

DATED: March 19, 1999

MEMORANDUM FOR:

FROM: Jacob Feldman, Field Service Special Counsel
Office of Associate Chief Counsel (International)

SUBJECT:

This Field Service Advice responds to your memorandum dated June 17, 1998. Field Service Advice is not binding on Examination or Appeals and is not a final case determination. This document is not to be used or cited as precedent.

LEGEND:

k =
l =
Corp. A =
Corp. B =
Corp. C =
Country =
City A =
Date A =
Date B =
Date C =
Date D =
Date E =
Date F =

Date G =
Date H =
Date I =
Date J =
Date K =
Month A =
Month B =
Officer =

Jurisdiction =
Year 1 =
Year 2 =
Year 3 =

ISSUES:

1. Whether the periods of limitation were properly extended for a foreign sales corporation (FSC), where certain extensions were executed after the date of dissolution of the FSC.

2. Whether transferees of a dissolved FSC may claim refunds of taxes paid by the FSC.

3. Whether the Service can make adjustments to the U.S. related supplier's FSC commission expenses if the statute of limitations for assessment has already expired with respect to the FSC.

CONCLUSIONS:

1. Extensions of the periods of limitations, as executed by the FSC during the post-dissolution period, and similar extensions executed by the transferees of the FSC, validly extended the periods of limitation for assessment for the years at issue.

2. Under the facts of this case, the transferees of the FSC may claim refunds of taxes paid by the FSC.

3. Because the period of limitation for assessment was validly extended by the FSC and by its transferees, and remains open with respect to the transferees, we need not address this issue.

FACTS:

Corp. A is a U.S. taxpayer with headquarters in City A. Corp. B was a wholly-owned subsidiary of Corp. A. Corp. B elected to be treated as a foreign sales corporation (FSC) within the meaning of section 922(a). Corp. A and Corp. B filed U.S. income tax returns on the basis of a fiscal year ending Date A. The tax years at issue correspond to Years 1-3.

On Date B, Corp. B dissolved pursuant to the corporation laws of Jurisdiction and distributed its assets, worth $k, to Corp. A. On Date C, Corp. A incorporated Corp. C pursuant to the laws of Country. An income tax refund in the amount of $l due on Corp. B's final return was transferred to Corp. C on or about Date D. Corp. C made an election to be treated as a FSC pursuant to I.R.C. § 927(f).

The Service and Corp. B subsequently executed consent agreements to extend the period of limitation for assessment (Forms 872) for Years 1-3. The consents were signed on behalf of Corp. B by Officer. Officer acted on behalf of Corp. B after Date B based on the law of Jurisdiction, which provides for a three-year winding-up period after a corporation's date of dissolution. The three-year winding-up period applicable to Corp. B expired on Date E.

In calculating foreign trading gross receipts, Corp. A and Corp. B made certain determinations which are challenged by the Service. The Service intends to issue a notice of deficiency to Corp. A, which will deny deductions of FSC commissions and dividends-received deductions, and will determine other necessary adjustments.

On Date F, in its capacity as transferee, Corp. A filed "Protective Claims for Refund" with respect to Years 1-3 of Corp. B. These protective refund claims were filed on the basis of notices of deficiency issued to Corp. B with respect to prior taxable years. The claims stated that, in the event that the Service issues statutory notices of deficiency with respect to Years 1-3, Corp. A will be entitled to a refund of certain taxes paid by Corp. B.

In general, if the Service denies FSC commission deductions claimed by the U.S. related supplier, the FSC (or its transferees) would seek refunds of taxes paid by it. Thus, the statutes of limitations applicable to the FSC and its transferees are relevant in this case, as they may limit the ability of the FSC-transferees to obtain refunds based on a notice of deficiency issued with respect to Corp. A, the U.S. related supplier. To evaluate fully the applicable periods of limitation, it is necessary to review the various extensions executed by the dissolved FSC and by its transferees.

Extensions executed prior to dissolution of Corp. B

Prior to Corp. B's dissolution on Date B, Officer and the Service entered into agreements to extend the statute of limitations with respect to Corp. B's Years 1-3.

Extensions executed during three-year winding-up period

During the entire winding-up period from Date B to Date E, Officer possessed authority, pursuant to Jurisdiction law, to execute extensions of the statute of limitations on behalf of the dissolved corporation. In Month A, Officer executed agreements extending the period of limitation for Years 1-3 to Date G. These agreements validly extended the period of limitation for assessment to Date G. In Month B, Officer executed agreements extending the period of limitation for Years 1-3 to Date H. These agreements validly extended the period of limitation.

Subsequent extensions executed by transferees of Corp. B

On Date I, Corp. A and Corp. C entered into agreements, in their capacity as transferees of Corp. B, to extend the period of limitation for assessment with respect to the tax liability of Corp. B for Years 1-3 to Date J.

LAW AND ANALYSIS

The Commissioner may collect unpaid income taxes of a transferor of assets from a transferee or successor transferee of those assets. I.R.C. § 6901(a), (c); Commissioner v. Stern, 357 U.S. 39, 42 (1958). State law determines the extent of a transferee's liability. Stern, 357 U.S. at 45. The term "transferee" includes shareholders of a dissolved corporation. Treas. Reg. § 301.6901-1(b). The Commissioner bears the burden of proof that the taxpayer is liable as a transferee under local law or in equity. I.R.C. § 6902(a), T.C. Rule 142(d). The petitioner has the burden of proof that the transferor is not liable for tax or additions to tax pursuant to I.R.C. § 6902(a).

Section 6901(c)(1) of the Code provides that the period of limitation for assessment with respect to a transferee extends for one year after the expiration of the period of limitation with respect to the transferor.

Section 6901(d) provides as follows:

(d) Extension by Agreement. –

(1) Extension of time for assessment. – If before the expiration of the time prescribed in subsection (c) for the assessment of the liability, the

> Secretary and the transferee or fiduciary have both consented in writing to its assessment after such time, the liability may be assessed at any time prior to the expiration of the period agreed upon. The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon. For the purpose of determining the period of limitation on credit or refund to the transferee or fiduciary of overpayments of tax made by such transferee or fiduciary or overpayments of tax made by the transferor of which the transferee or fiduciary is legally entitled to credit or refund, such agreement and any extension thereof shall be deemed an agreement and extension thereof referred to in section 6511(c).
>
> (2) Extension of time for credit or refund. – If the agreement is executed after the expiration of the period of limitation for assessment against the taxpayer with reference to whom the liability of such transferee or fiduciary arises, then in applying the limitations under section 6511(c) on the amount of the credit or refund, the period specified in section 6511(b)(2) shall be increased by the period from the date of such expiration to the date of the agreement.

Section 6511(c) provides that, if the period of limitation on assessment is extended by agreement, the period for filing a claim for refund or credit is extended until six months after the period of limitation on assessment, as extended, expires.

The rules applicable to redeterminations of FSC commissions for tax years beginning before January 1, 1998, are contained in Temp. Treas. Reg. § 1.925(a)-1T(e)(4), which states:

> (4) *Subsequent determination of transfer price, rental income or commission.* The FSC and its related supplier would ordinarily determine under section 925 and this section the transfer price or rental payment payable by the FSC or the commission payable to the FSC for a transaction before the FSC files its return for the taxable year of the transaction. After the FSC has filed its return, a redetermination of those amounts by the Commissioner may only be made if specifically permitted by a Code provision or regulations under the Code. Such a redetermination would include a redetermination by reason of an adjustment under section 482 and the regulations under that section or section 861 and § 1.861-8 which affects the amounts which entered into the determination. In addition, a redetermination may be made by the FSC and related supplier if their taxable years are still open under the statute of limitations for making claims for refund under section 6511 if they determine that a different transfer pricing method or grouping of transactions may be more beneficial. Also, the FSC and related supplier may redetermine the amount of foreign trading gross receipts and the amount of the costs and

> expenses that are used to determine the FSC's and related supplier's profits under the transfer pricing methods. Any redetermination shall affect both the FSC and the related supplier. The FSC and the related supplier may not redetermine that the FSC was operating as a commission FSC rather than a buy-sell FSC, and vice versa.

Temp. Treas. Reg. § 1.925(a)-1T(e)(4).

The regulation requires, in the case of an adjustment initiated by the Commissioner, that the redetermination be "permitted" by the Code or regulations. Temp. Treas. Reg. § 1.925(a)-1T(e)(4); see also Union Carbide Corp. v. Commissioner, 110 T.C. 375 (1998). No other substantive restrictions apply to a FSC redetermination initiated by the Commissioner.

The authority of a corporate officer to act for a dissolved corporation in tax matters derives from the law of the state or territory of incorporation. United States v. Krueger, 121 F.2d 842, 845 (3rd Cir. 1941), cert. denied, 314 U.S. 677 (1942). Corp. B was organized pursuant to the law of Jurisdiction, which affords a corporate officer authority to act during a three-year period after the date of corporate dissolution, for the limited purpose of winding up the corporation's affairs. The legislative history of this provision indicates that it was modeled on Delaware law, which is virtually identical to Jurisdiction law.

In a case involving Delaware law, the Board of Tax Appeals held that the officer of a dissolved corporation had authority to extend the period of limitation to a date beyond the end of the three-year winding-up period, provided that the extension was executed within the three-year period. H.D. Walbridge & Co. v. Commissioner, 25 B.T.A. 1109 (1932). Compare Union Shipbuilding Co. v. Commissioner, 43 B.T.A. 1143, 1145 (1941) (extension executed after expiration of three-year winding-up period specified by Delaware law is invalid). Applying these precedents to the present case involving Jurisdiction law, each of the extensions executed by Officer during the three-year post-dissolution period was valid, including extensions executed in Month B, which extended the period of limitation for assessment to a date beyond the end of the three-year winding-up period (to Date H). However, any extensions executed outside the three-year period were not valid and did not extend the period of limitation for assessment.

In certain cases, a valid extension of the period of limitation may be executed after the winding-up period has expired, provided that the dissolved corporation was the subject of a tax "action or proceeding" which actually commenced during the winding-up period. E.g., Ann C. Field v. Commissioner, 32 T.C. 187, 206-07 (1959), aff'd, 286 F.2d 960 (6th Cir. 1960), cert. denied, 366 U.S. 949 (1961) (applying Michigan law). In the present case, however, Officer validly extended the period of limitation to Date H. Thus, it is not necessary to determine whether a tax "proceeding" was commenced with respect to Corp. B during the three-year winding-up period.

Section 6901(d) authorized the transferees to extend the period of limitation for assessment with respect to the tax liability of Corp. B. Pursuant to this provision, Corp. A and Corp. C extended the period of limitation for Corp. B's Years 1-3 to Date J. Section 6901(d) provides that, by entering into these agreements, Corp. A and Corp. C also extended the period in which they might claim refunds of taxes paid by Corp. B. The period in which such refund claims may be filed, pursuant to I.R.C. § 6901(d)(2), extends for an additional six months after Date J, or until Date K.

In summary, the taxpayers (or the FSC-transferees) validly extended the period of limitation for assessment with respect to both the FSC and the U.S. related supplier for Years 1-3. Statutory notices of deficiency to Corp. A for Years 1-3 based on denial of FSC commission deductions and related adjustments, will therefore comply with Temp. Treas. Reg. § 1.925(a)-1T(e)(4), provided that such notices are issued prior to expiration of the statute of limitations for assessment with respect to Corp. A. A notice of deficiency to Corp. A denying FSC commission deductions would also entitle Corp. A and Corp. C to claim (as transferees) refunds with respect to taxes paid by Corp. B -- had they not in fact done so by filing protective refund claims on Date F.

You inquired regarding the Service's authority to adjust the FSC commission expenses claimed by Corp. A in the event that the statute of limitations for assessment with respect to Corp. B had expired. As noted above, the transferees of Corp. B extended the period of limitation for assessment with respect to their tax liability as transferees of Corp. B, by executing valid extensions prior to expiration of the period of limitation applicable to Corp. B. Thus, the period of limitation for assessment applicable to the transferees, as extended, remains open through Date J. Accordingly, it is not necessary to address this issue.

We also note that the protective refund claims filed on Date F preserved the rights of Corp. A and Corp. C to obtain administrative refunds of taxes paid by Corp. B. The Service may grant such refunds administratively, notwithstanding limitations on the ability of the U.S. Tax Court to grant refunds of taxes paid by Corp. B, in the event that petitions are ultimately filed in that court to contest notices of deficiency issued in this case.

If you have any further questions, please call Branch 6 at (202) 874-1490.

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(International)