



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

OFFICE OF
CHIEF COUNSEL

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INTERNAL REVENUE SERVICE NATIONAL OFFICE FIELD SERVICE ADVICE

DATED: May 12, 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 May 22, 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:

Action 1 =
Action 2 =
Action 3 =
Action 4 =
k =
l =
m =
n =
o =
p =
q =
r =

t =
US Corp. =

FSC1	=	
FSC2	=	
Date A	=	<i>last day of fiscal year</i>
Date B	=	<i>FSC1 dissolution date</i>
Date C	=	<i>FSC2 date of incorporation</i>
Date D	=	<i>FSC1 refund transferred to FSC2</i>
Date E	=	<i>examination begins</i>
Date F	=	<i>FSC1 winding-up period ends</i>
Date G	=	<i>notices of liability and deficiency</i>
Date H	=	<i>last assessment date, FSC1 (as extended)</i>
Date I	=	<i>Date H plus six months</i>
Date J	=	<i>Emergency Petition</i>
Date K	=	<i>Court Order</i>
Date L	=	<i>protective refund claims filed</i>
Date M	=	<i>Date B plus four years</i>
Merchandise	=	
Month A	=	
Officer	=	
Statute	=	
Jurisdiction 1	=	
Jurisdiction 2	=	
Year 1	=	
Year 2	=	
Year 3	=	
Year 4	=	

ISSUES:

1. Whether certain extensions executed after the dissolution of a foreign sales corporation (FSC) were effective to extend the periods of limitation for assessment or refund applicable to the FSC.
2. Whether the Service may assess additional tax against the transferees of a FSC, based on the tax liability of the dissolved FSC.
3. Whether the transferees of the FSC may claim refunds with respect to taxes paid by the FSC.
4. Whether the court-appointed receiver for the dissolved FSC was entitled to file protective claims for refund of taxes paid by the FSC.

5. Whether the notices of deficiency to the U.S. related supplier are valid, if neither the FSC nor its transferees are entitled to claim refunds for the years at issue.

CONCLUSIONS:

1. Extensions of the statutes of limitation executed by the dissolved FSC during the post-dissolution period were valid, including those that extended the period of limitations to a date beyond the end of the winding-up period under local law.
2. The Service may assess additional tax against transferees of the dissolved FSC with respect to the tax liability of the FSC.
3. The transferees, as transferees, may not claim refunds of taxes originally paid by the dissolved FSC.
4. The court-appointed receiver for the dissolved FSC was authorized to file a protective claim for refund of tax paid by the FSC.
5. Because the court-appointed receiver was authorized to file a protective claim for refund of taxes paid by the FSC, it is not necessary to determine whether the notice of deficiency would be valid in the event that no party was authorized to file a refund claim.

FACTS:

US Corp. is a U.S. taxpayer. FSC1 was a wholly-owned subsidiary of US Corp. FSC1 elected to be treated as a foreign sales corporation (FSC) pursuant to section 922(a). US Corp. and FSC1 filed U.S. income tax returns on the basis of a fiscal year ending Date A. The tax years at issue correspond to Years 1-4.

On Date B, FSC1 dissolved pursuant to the law of Jurisdiction 1 and distributed its assets, worth \$k, to US Corp. On Date C, US Corp. incorporated FSC2 pursuant to the law of Jurisdiction 2. An income tax refund of \$l due on FSC1's final return was transferred to FSC2 on or about Date D. FSC2 made an election to be treated as a FSC pursuant to I.R.C. § 922(a).

In early Date E, the Service examined FSC1's Years 1-4. The Service and FSC1 executed consent agreements to extend the period for assessment (Forms 872) for Years 1-4. The consents were signed on behalf of FSC1 by Officer. Officer acted based on the law of

Jurisdiction 1, which specifies a fixed-period winding-up period after dissolution of a corporation. The winding-up period applicable to FSC1 expired on Date F.

The Service issued a notice of deficiency to US Corp. with respect to Years 1-3, denying deductions of FSC commissions and dividends-received deductions for Merchandise, and determining other adjustments. The notice of deficiency, dated Date G, sought additional tax in the following amounts: \$m (Year 1), \$n (Year 2), and \$o (Year 3). No notice of deficiency was issued with respect to Year 4, as US Corp. incurred a net operating loss in that year. In Actions 1 and 2, the taxpayers challenged the notices of deficiency.

As an alternative to the primary theory (above), based on examination adjustments the Service determined deficiencies with respect to FSC1. On Date G, the Service issued notices of liability to US Corp. and FSC2 in their capacity as transferees of FSC1, for the following periods and amounts: \$p (Year 1), \$q (Year 2), \$r (Year 3), and \$s (Year 4).

Only if the primary theory were rejected by the reviewing court would the alternative notices of liability become effective. In that event, the Service would assess additional tax against US Corp. and FSC2 as transferees of FSC1.

In Actions 3 and 4, US Corp. and FSC2, as transferees, alleged that they were entitled to refunds of taxes paid by FSC1.

The FSC redeterminations in this case and their potential effect on FSC1 (or the transferees) and the U.S. related supplier may be summarized as follows:

<u>Service Theory</u>	<u>FSC (transferees)</u>	<u>Related Supplier</u>
Primary	refund	additional tax
Alternative	additional tax	refund

Extensions of Period of Limitation

The notices of deficiency and liability constitute FSC redeterminations within the meaning of Temp. Treas. Reg. § 1.925(a)-1T(e)(4). The ability of the Service to perform such redeterminations may depend on whether certain periods of limitation were properly extended. The relevant extensions in this case are reviewed below.

Extensions executed prior to FSC1 dissolution

Prior to the dissolution date (Date B), Officer and the Service entered into various agreements to extend the statute of limitations with respect to Years 1-4.

Extensions executed within FSC1 winding-up period

After Date B, and prior to the end of the winding-up period (Date F), Officer and the Service executed agreements to extend the statute of limitations for Years 1-4. From Date B to Date F, Officer had authority, pursuant to Jurisdiction 1 law, to execute extensions on behalf of the dissolved corporation. In Month A, Officer executed the last of several extension agreements, which extended the periods of limitation for Years 1-4 to Date H. This agreement also resulted in extension of the periods of limitations for refunds for FSC1, to a date six months after Date H, or Date I. I.R.C. § 6511(c).

Subsequent activity with respect to transferees

On Date G, the Service issued notices of transferee liability to US Corp. and FSC2 with respect to FSC1. The notices of transferee liability were issued less than one year after expiration of the basic period of limitation on assessment applicable to the transferor (FSC1) on Date F.

Appointment of Receiver and Filing of Protective Refund Claim

Actions 1-4 were commenced to contest the notices of deficiency and liability described above. Subsequently, on Date J, US Corp. filed an “Emergency Petition” in a court of Jurisdiction 1, requesting that it be appointed as a receiver for FSC1 for purposes of making refund claims to the Service. On Date K, a court of Jurisdiction 1 entered an Order granting the Emergency Petition, retroactive to the date of the Emergency Petition (Date J). On Date L, US Corp. filed “protective claims” for refund with the Service with respect to Years 1-3.

LAW AND ANALYSIS

The Commissioner may collect, from a transferee or successor transferee, unpaid income taxes of a transferor of 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).

Under the law of Jurisdiction 1, a dissolved corporation is deemed to continue in existence for a period of t years from the date of dissolution, for the limited purpose of winding up its affairs. During or after the winding-up period, creditors or shareholders may request that a Jurisdiction 1 court appoint trustees for the dissolved corporation, in order to perform unfinished business and to safeguard or dispose of corporate assets. See Statute.

Section 6402(a) authorizes the Service to refund an overpayment of tax to the person that paid the tax in the first instance.

Section 6511(c) provides that, if an agreement is made to extend the period of limitation on assessment, the period for filing a claim for refund or credit is extended until at least six months after the extended period of limitation on assessment expires.

Section 6901(c)(1) 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.

The rules governing 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) (emphasis added).

The regulation requires, in the case of a FSC redetermination initiated by the Service, 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. No. 28 (June 15, 1998).

Issue 1: Validity of Extensions Executed by FSC1

The authority of a corporate officer to act for a dissolved corporation in tax matters derives from the law of the state or jurisdiction of incorporation. United States v. Krueger, 121 F.2d 842, 845 (3rd Cir. 1941), cert. denied, 314 U.S. 677 (1942). FSC1 was organized pursuant to the law of Jurisdiction 1, which allows a corporate officer authority to act for a specified period of t years after the date of corporate dissolution, in order to wind up the corporation’s affairs. See Statute. The legislative history of this provision indicates that it was modeled on Delaware law, which contains virtually identical language. See 8 Del. Code § 278.

In a case involving a predecessor provision under 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 winding-up period, provided that the extension was executed within the period. H.D. Walbridge & Co. v. Commissioner, 25 B.T.A. 1109 (1932). Cf., Union Shipbuilding Co. v. Commissioner, 43 B.T.A. 1143, 1145 (1941) (extension executed after expiration of winding-up period specified by Delaware law is invalid).

Applying these precedents to the present case, the extensions executed within the statutory winding-up period were valid, including the extensions executed in Month A, which extended the period of limitation for assessment to a date beyond the end of the winding-up period (to Date H). Although the statute of limitations for assessment of tax technically remained open until Date H, FSC1’s existence under Jurisdiction 1 law ended on Date F, upon expiration of the statutory winding-up period, because no tax proceeding (or other proceeding) had been initiated with respect to FSC1 during that period.

Issue 2: Notices of Liability to Transferees (Alternative Theory)

When the Service issued notices of liability (alternative theory) to FSC1’s transferees on Date G, the statute of limitations for assessment with respect to those transferees was still open. Given that FSC1 dissolved on Date B, pursuant to I.R.C. § 6901(c)(1) the periods of limitation for assessment with respect to the transferees were open until at least Date M, which is one year after the end of the three-year period of limitation on assessment

generally applicable to FSC1 (Date F), and were actually open until Date I, pursuant to valid extensions. The notices of transferee liability, which were issued approximately one week prior to Date M, were therefore timely within the meaning of the regulation, Temp. Treas. Reg. § 1.925(a)-1T(e)(4).

Because transferee liability is secondary rather than primary, the Service generally must make reasonable efforts to collect the tax from the transferor. Estate of Miller v. Commissioner, 42 T.C. 593 (1964). If the transferor is insolvent, however, attempts to collect taxes from the transferor would be futile, and the Service may proceed directly against the transferee. Gumm v. Commissioner, 93 T.C. 475 (1989); Coca-Cola Bottling Co. of Tucson, Inc. v. Commissioner, 37 T.C. 1006 (1962), aff'd, 334 F.2d 875 (9th Cir. 1964). In the present case, the transferees acknowledge receiving all known assets of FSC1 shortly after dissolution. If the Service were to prevail on its alternative theory, FSC1 (the only asset of which is the right to a potential tax refund if the Service prevails on its primary theory) would still have no assets. Thus, the Service acted correctly in issuing notices of liability to the transferees within the period specified by section 6901(c)(1).

Issue 3: Capacity of Transferees to File Refund Claims (Primary Theory)

You requested guidance regarding the ability of the transferees to request refunds in this case. We conclude that, although the transferees were not entitled to file refund claims, the court-appointed receiver of the transferor was eligible to make a protective refund claim on behalf of FSC1 (see Issue 4, below).

When the notices of deficiency were issued on Date G, the period of limitation for refunds for FSC1 was open. In fact, that period was open until Date I, pursuant to the Form 872 executed in Month A and the operation of section 6511(c). However, when the Service issued notices of deficiency to US Corp. on Date G, thereby giving rise to a potential refund claim as to FSC1, FSC1 no longer existed, because the winding-up period under Jurisdiction 1 law had already expired. Nor had a “tax proceeding” been commenced within the winding-up period, which would have allowed FSC1 to remain in existence pending the outcome of that proceeding. 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) (under Michigan law, issuance of notices of deficiency to corporation within statutory winding-up period warranted continuation of corporate existence). Under the law of Jurisdiction 1, FSC1 effectively ceased to exist for all purposes on Date F. Thus, it is necessary to determine whether any other party was entitled to make a refund claim on behalf of FSC1.

In this case, the transferees had no right to claim refunds of taxes paid by FSC1. Under section 6402(a), the Service is authorized to grant a refund only to the person who paid the tax in question. Given that neither US Corp. nor FSC2 paid these taxes, no Code

provision or regulation affords them a right to claim refunds on behalf of FSC1 in their capacity as transferees.

Issue 4: Capacity of Receiver to Claim Refunds on Behalf of FSC1 (Primary Theory)

Jurisdiction 1 law provides a mechanism for terminating the existence of a corporation and disposing of its assets. See Statute. Following the formal process of dissolution, a certificate of dissolution is issued. After the formal dissolution, the corporation continues in existence for a specified term for purposes of prosecuting and defending actions against it, and enabling it to settle and close its business, to divide its capital stock, and to dispose of and convey any corporate property. If any actions or proceedings are initiated prior to the dissolution or during the winding-up period, the corporate existence may continue beyond the period, solely for purposes of such actions and until any judgments, orders, or decrees are executed. During the winding-up period, the corporate directors serve as liquidating trustees, with the power to settle corporate affairs, to collect outstanding debts, to sell and convey property, and to divide the remaining assets among the corporate shareholders after paying the corporate debts. The corporation's ability to act ceases for all purposes at the end of the winding-up period.

The law of Jurisdiction 1 also allows certain additional actions to be taken on behalf of a dissolved corporation at the discretion of a court, either during or after the winding-up period. Specifically, a court of Jurisdiction 1, upon application by a creditor or stockholder, may at any time continue the directors as liquidating trustees, or may appoint one or more persons as receivers of such corporation. At the court's direction, the appointed receiver has authority to take charge of the corporate estate and effects, to collect the debts and property due and belonging to the corporation, to prosecute and defend all necessary actions, to appoint agents, and to do all other acts which might be done by the corporation.

Although no case law was identified interpreting this specific provision in Jurisdiction 1, the corresponding Delaware provision, 8 Del. Code § 279 (1994) has been interpreted to allow appointment of a receiver at any time, even after the winding-up period has expired. In In re Citadel Industries, Inc. v. Commissioner, 423 A.2d 500 (Del. Ch. 1980), for example, the court explained the scope of section 279 when it vacated an order under section 278 that purported to extend the existence of a dissolved corporation after the three year winding-up period had expired. Although the court could extend the winding-up period before the period ended, the corporate existence, once terminated, could not be reinstated by retroactively extending the winding-up period under section 278. However, the court concluded that appointment of a receiver under section 279 was appropriate even after the winding-up period had expired.

Section 279 provides a means for stockholders and creditors to obtain redress in cases where a dissolved corporation holds assets after the statutory winding-up period has

expired. In Addy v. Short, 89 A.2d 136 (Del. S. Ct. 1952), the Supreme Court of Delaware held that a receiver appointed for a dissolved corporation after expiration of the winding-up period could recover a reversionary interest in real property in favor of the corporation. Although the corporation itself could no longer carry on business, it remained in existence “to serve as a repository of title and as obligor of debts.” 89 A.2d at 140, quoting Wax v. Riverview Cemetery Co., 41 Del. 424, 436, 24 A.2d 431 (1942). The receiver in Addy recovered three acres of oceanfront property, by asserting the reversion on behalf of the shareholders of the defunct corporation.

Several other decisions support the use of section 279 under analogous circumstances. E.g., D’Angelo v. Petroleos Mexicanos, 373 F. Supp. 1076 (D. Del. 1974) (receiver may sue agency of foreign government to recover oil royalties and participation rights and to sequester property of the government under section 279 order, but needs clarification of the order from Court of Chancery before pursuing Federal district court suit); Harned v. Beacon Hill Real Estate Co., 80 A. 805 (Del. S. Ct. 1912) (under predecessor of section 279, appointment of receiver is appropriate if the corporation refuses, fails, or neglects to settle and close its business); Levin v. Fisk Rubber Corp., 52 A.2d 741 (Del. Ch. 1947) (appointment of receiver for dissolved corporation is within inherent power and discretion of an equity court). These decisions recognize that, although the dissolved corporation itself no longer exists, a receiver appointed upon request by a shareholder or a creditor may collect or dispose of the corporation’s assets.

Delaware law also authorizes the receiver of a dissolved corporation to initiate actions to recover property of the corporation, even after the corporation’s existence has terminated under state law. The law of Jurisdiction 1, which contains similar provisions, was in fact modeled directly upon the law of Delaware. By analogy to precedents interpreting Delaware law, appointment of US Corp. as receiver to claim refunds of taxes paid by FSC1 was an appropriate exercise of authority by the court of Jurisdiction 1, which should be recognized for Federal income tax purposes. US Corp. was the sole stockholder of FSC1, the taxes at issue were paid by FSC1, and any overpayments would be refundable to FSC1, if in fact the limitations period for claiming a refund of federal taxes has not expired. The period of limitation on assessments was properly extended to Date H by an officer of FSC1 (acting as a trustee) and by the Service during FSC1’s winding-up period, and the limitation period for claiming a refund on behalf of FSC1 will not expire until six months later, on Date I. Thus, the protective claims for refund filed on Date L preserved the right of US Corp., as receiver, to obtain a refund of taxes paid by FSC1, in the event that the Service prevails with respect to its primary theory in this case.

Issue 5: Validity of Notices of Deficiency to U.S. Related Supplier (Primary Theory)

The Service issued notices of deficiency to US Corp. (primary theory) on Date G, a date within the period of limitation for assessment (as extended) applicable to US Corp.

These notices, which asserted deficiencies in tax against US Corp. in its capacity as the U.S. related supplier of FSC1, satisfied the requirement in Temp. Treas. Reg. § 1.925(a)-1T(e)(4) that the FSC redetermination initiated by the Commissioner must be “permitted” by the Code or the regulations. Because we have determined (see Issue 4, above) that the receiver appointed by the court of Jurisdiction 1 was entitled to assert protective refund claims on behalf of FSC1, US Corp. may obtain a refund of taxes paid FSC1 in the event that the notices of deficiency under the primary theory are sustained. Accordingly, it is not necessary to determine, as a hypothetical matter, whether the notices of deficiency issued to US Corp. would be valid if no party were capable of asserting a refund claim with respect to taxes paid by FSC1.

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

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