OFFICE OF
CHIEF COUNSEL

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

August 27, 1999

CC:DOM:FS:CORP
TL-N-2738-99
Number: **199948005**
Release Date: 12/3/1999
UILC: 1502.77-00

INTERNAL REVENUE SERVICE NATIONAL OFFICE FIELD SERVICE ADVICE

MEMORANDUM FOR DISTRICT COUNSEL CC:
ATTN:

FROM: Deborah A. Butler
Assistant Chief Counsel CC:DOM:FS

SUBJECT: Agent for the Consolidated Group

This Field Service Advice responds to your memorandum dated June 22, 1999. Field Service Advice is not binding on Examination or Appeals and is not a final case determination. This document is not to be cited as precedent.

LEGEND:

Corp A =
Corp B =
Sub 1 =
Consolidated Group =
Year 1 =
Year 2 =
Date =
Business =

ISSUES:

1. Who is the proper party to execute a Form 872 (Consent to Extend the Time to Assess Tax) with respect to the Consolidated Group for the group=s Year 1 tax year and Year 2 short tax year ending on Date.

2. What is the proper language to use on the Form 872 extending the time to assess the tax of the Consolidated Group for the Year 1 tax year and Year 2 short tax year ending on Date.

3. Who should sign the Form 872 on behalf of the proper corporate agent for the Consolidated Group.

4. What documents should the Service secure to insure that the Form 872 is valid.

CONCLUSIONS:

1. Corp A is the proper party to execute a Form 872 with respect to the Consolidated Group extending the statute of limitations on assessment for the Year 1 tax year and the Year 2 short tax year ending on Date.

2. The proper language to describe the taxpayer on the Form 872 is ACorp A and Subsidiaries.@

3. A Current Officer of Corp A should execute the Form 872 for Corp A on behalf of the former members of the Consolidated Group.

4. The Service should obtain and review the merger agreement, the State=s corporate records, and Group=s latest bylaws and most recent corporate minutes.

FACTS:

Corp A was the common parent agent of the Consolidated Group. As the common parent, Corp A filed the consolidated corporate income tax returns for the Consolidated Group for the group=s Year 1 tax year and Year 2 short tax year ending on Date. This consolidated group consisted of many member subsidiaries.

Corp A and Corp B, a common parent agent for a separate consolidated group of affiliated corporations, entered into an agreement whereby Corp A would sell and Corp B would buy Corp A=s Business. Sometime prior to the end of Year 2, in preparing to execute the agreement, Corp A transferred certain subsidiaries to

Sub 1, its wholly-owned subsidiary, and then spun off Sub 1 to its shareholders. Shortly thereafter, a subsidiary of Corp B merged into Corp A, with Corp A surviving the merger. Corp A then changed its name.

The Consolidated Group=s consolidated returns for the Year 1 tax year and the Year 2 short tax year ending on Date are currently under examination. Noting that Corp A and Sub 1 are still in existence, District Counsel inquires as to whether Corp A or Sub 1 is the proper party to execute a Form 872 (Consent to Extend the Time to Assess Tax) with respect to the Consolidated Group for the group=s Year 1 tax year and Year 2 short tax year ending on Date. In addition, District Counsel asks whether the holding in Interlake Corp. v. Commissioner, 112 T.C. 103 (1999), affects our resolution of this issue.

LAW AND ANALYSIS:

Generally, the common parent, with certain exceptions not applicable here, is the sole agent for each member of the group, duly authorized to act in its own name in all matters relating to the tax liability for the consolidated return year. Treas. Reg. ' 1.1502-77(a). The common parent in its name will give waivers, and any waiver so given, shall be considered as having also been given or executed by each such subsidiary. Id. Thus, generally the common parent is the proper party to sign consents, including Forms 872, for all members of the group. Id. Where the common parent remains in existence, even if it is no longer the common parent, it remains the agent for the group with regard to years in which it was the common parent of the group. Id.; Southern Pacific Co. v. Commissioner, 84 T.C. 395, 401 (1985).

Treas. Reg. ' 1.1502-6(a) provides that the common parent and each subsidiary which was a member of the consolidated group during any part of the consolidated return year shall be severally liable for the entire consolidated tax for such year.

Temp. Reg. ' 1.1502-77T, which was promulgated in 1988 by the Service to supplement Treas. Reg. ' 1.1502-77, modifies the Aexclusive agent@ rule of Treas. Reg. ' 1.1502-77(a). Where a common parent corporation ceases to be the common parent of a group, whether or not the group remains in existence, Temp. Reg. ' 1.1502-77T(a)(4) provides Aalternative agents@ for the affiliated group, but only for purposes of mailing notices of deficiency and for executing waivers of the statute of limitations. Any one or more of the following corporations may act as Aalternative agents@ for the group:

> Temp. Reg. ' 1.1502-77T(a)(4) Alternative Agents. . . .

(i) The common parent of the group for all or any part of the year to which the notice or waiver applies,

(ii) A successor to the former common parent in a transaction to which ' 381(a) applies,

(iii) The agent designated by the group under section 1.1502-77(d), or

(iv) If the group remains in existence under section 1.1502-75(d)(2) or (3), the common parent of the group at the time the notice is mailed or the waiver given.

Temp. Reg. ' 1.1502-77T is effective for taxable years for which the due date (without extensions) for filing the consolidated return is after September 7, 1988. Temp. Reg. ' 1.1502-77T(b). Simultaneous with the promulgation of the temporary regulation, the Service amended Treas. Reg. ' 1.1502-77 by adding paragraph (e), cross referencing to Temp. Reg. ' 1.1502-77T.

1. Corp A Is the Agent for the Consolidated Group

The crucial issue in this Field Service Advice is whether Corp A or Sub 1 is the proper party to extend the statute of limitations with respect to the Consolidated Group for the group=s Year 1 tax year and Year 2 short tax year ending on Date. Temp. Reg. ' 1.1502-77T governs here. It applies to this case because:
(a) Corp A, the common parent corporation of the Consolidated Group, has ceased to be the common parent; and (2) the statutes of limitations that District Counsel seeks to extend are for taxable years for which the due date (without extensions) for filing of the consolidated return is after September 7, 1988.

Temp. Reg. ' 1.1502-77T(a)(4)(i) provides as an Aalternative agent@ the common parent of the group for all or any part of the year to which the notice or waiver applies. Corp A was the common parent of the Consolidated Group for the years to which the notice or waiver applies. Corp A is still in existence, even though it has undergone a name change. Therefore, Corp A is the proper party to execute a Form 872 (Consent to Extend the Time to Assess Tax) with respect to the Consolidated Group for the group=s Year 1 tax year and Year 2 short tax year ending on Date. Only one Form 872, covering the two years at issue, need be obtained.

The other subparagraphs of Temp. Reg. ' 1.1502-77T(a)(4) are inapplicable. Subparagraph (a)(4)(ii), which provides as an alternative agent a successor to the former common parent in a transaction in which I.R.C. ' 381(a) applies, is inapplicable because

Corp A survived the merger and has no successor. Subparagraph (a)(4)(ii), which provides as an alternative agent the agent designated by the group under Treas. Reg. ' 1.1502-77(d), is inapplicable because Corp A has not dissolved nor does it appear that it contemplates dissolution, contrary to the requirement of Treas. Reg. ' 1.1502-77(d).

Nor do we believe that subparagraph (a)(4)(iv), which provides as an alternative agent the common parent of the group at the time the waiver is given where the group remains in existence following a reverse acquisition or downstream transfer, is applicable to the facts of this case. The facts do not show that a downstream transfer occurred. We note that Corp A=s merger with Corp B=s subsidiary may have constituted a reverse acquisition, but the facts presented to us do not lead to such a conclusion. It is hard for us to imagine that, given the size of Corp B, the shareholders of Corp A received in exchange for their Corp A shares over 50% of Corp B=s outstanding stock. Second, the Consolidated Group filed a Year 2 short year tax return, thus indicating that the group ceased to exist. In a reverse acquisition, the acquired consolidated group continues in existence. See Treas. Reg. ' 1.1502-75(d)(3). Therefore, for purposes of our analysis here, we assume that the merger did not constitute a reverse acquisition. Please confirm that this is so.[1]

The holding of Interlake Corporation does not alter our analysis of the above issue. The present case is distinguishable from Interlake in that Interlake involved tax years **prior to the effective date of Temp. Reg. ' 1.1502-77T.** The temporary regulation was, therefore, not applicable to the facts of that case. It is clearly applicable here, however. Accordingly, we do not believe that the holding of Interlake has any relevance in this case.[2]

2. The Proper Language to Use on Form 872

You should caption the Form 872 to read as follows: ACorp A and Subsidiaries.@

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[1]Even if the merger constituted a reverse acquisition, Corp A would still be an Aalternative agent@ under Temp. Reg. ' 1.1502-77T(a)(4)(i). A reverse acquisition would actuate Temp. Reg. ' 1.1502-77T(a)(4)(iv), and Corp B would be an alternative agent also. In such a situation, the Service could obtain a Form 872 from either Corp A or Corp B.

[2]Interlake involved other facts also not present in our case: (1) a reverse acquisition or downstream merger; (2) a tentative refund adjustment governed by Treas. Reg. ' 1.1502-78; (3) a consolidated group that continued in existence; and (4) the common parent (rather than a first-tier subsidiary) was spun off from the original/historic group. We think these other facts also distinguish Interlake from this case.

Place an asterisk immediately after the word ASubsidiaries.@ At the bottom of the first page of Form 872, place another asterisk and right after it type:

> This is with respect to the consolidated return liability of the Consolidated Group for the group=s Year 1 tax year and Year 2 short tax year ending on Date.

The signature block on the second page of Form 872 should read:

> [name of current officer]
> [title of officer]
> Corp A

3. A Current Officer of Corp A Should Execute the Form 872

The Form 872 should be executed by an authorized officer of Corp A. I.R.C. ' 6501(c)(4) provides that the Service and a taxpayer may consent in writing to an extension of the time for making an assessment if the consent is executed before the expiration of the normal period of assessment or the extension date agreed upon in a prior extension agreement between the parties.

Code ' 6061 provides that any return, statement or other document made under any internal revenue law must be signed in accordance with the applicable forms or regulations.

The regulations under I.R.C. ' 6501(c)(4) do not specify who may sign consents. Accordingly, the Service will apply the rules applicable to the execution of the original returns to the execution of consents to extend the time to make an assessment. Rev. Rul. 83-41, 1983-1 C.B. 399, clarified and amplified, Rev. Rul. 84-165, 1984-2 C.B. 305.

In the case of corporate returns, section 6062 provides that a corporation's income tax return must be signed by the president, vice-president, treasurer, assistant treasurer, chief accounting officer or any other officer duly authorized to act. The fact that an individual's name is signed on the return is prima facie evidence that the individual is authorized to sign the return. I.R.C. ' 6064. Accordingly, any such officer of Corp A may sign the Form 872.

4. Documents that the Service Should Obtain to Insure the Validity of the Form 872

The Service should obtain and review the merger agreement. It should indicate which corporation would survive the merger and whether or not the transaction would constitute a

reverse acquisition. The Service should also check the State=s corporate records to ensure that Corp A still exists, although under the new name. Since a current officer of Corp A must execute the Form 872, the Service should review Corp A=s latest bylaws and most recent corporate minutes to determine the identity of Corp A=s current officers.

In summary, the Form 872 regarding the tax liabilities of the Consolidated Group should be obtained from Corp A. Any and all statutory notices of deficiency regarding the Consolidated Group should be sent to Corp A.

CASE DEVELOPMENT, HAZARDS AND OTHER CONSIDERATIONS:

Interlake could pose a problem in this case if a court used the Interlake reasoning to invalidate Temp. Reg. ' 1.1502-77T(a)(4)(i). Although this possibility exists, we think it is remote. Further, we strongly believe that Temp. Reg. ' 1.1502-77T(a)(4)(i) will withstand a court challenge to its validity. The consolidated regulations, including Temp. Reg. ' 1.1502-77T, are legislative regulations. I.R.C. ' 1502 authorizes the Secretary to prescribe such regulations as may be deemed necessary so that the tax liability of an affiliated group may be returned, determined, computed, assessed, collected, and adjusted in such a manner as to clearly reflect the income tax liability. The Secretary issued the consolidated regulations pursuant to this grant of authority. Amorient, Inc. v. Commissioner, 103 T.C. 161 (1994). Legislative regulations are those for which the Service is specifically authorized by the Code to prescribe the operation rules. Generally, legislative regulations have the force and effect of law. Legislative regulations have been invalidated only where the legislative regulations: (1) have been promulgated without publication in conformance with the Administrative Procedure Act (American Standard, Inc. v. United States, 220 Ct. Cl. 411, 602 F.2d 256 (1979)); (2) exceed the scope of the Commissioner=s delegated power (Panama Refining Co. v. Ryan, 293 U.S. 388 (1935)); (3) are contrary to law (M.E. Blatt Company v. United States, 305 U.S. 267 (1938)); or are unreasonable. We do not believe any of the above listed reasons for invalidating regulations apply to Temp. Reg. ' 1.1502-77T(a)(4)(i). Furthermore, it is hard for us to imagine that, in light of the scope of the common parent=s agency authority set forth in Treas. Reg. ' 1.1502-77(a), a court would find it unreasonable for the Service to obtain a Form 872 from the old common parent in a role as the Aalternative agent@ for the group.

Even if Temp. Reg. ' 1.1502-77T were to be held invalid and Interlake were construed to be relevant to the facts of this case, any consent executed by Corp A would still be valid against Corp A, as a single entity. As a surviving member of the Consolidated Group, Corp A is severally liable under Treas. Reg. ' 1.1502-6 for the entire amount of the consolidated tax owed by the Consolidated Group for the group=s Year 1 tax year and Year

2 short tax year ending on Date. Thus, we see little or no risk to the Service in having Corp A execute the Form 872.

If you have any further questions, please call (202) 622-7930.

Deborah A. Butler
Assistant Chief Counsel
By: STEVEN J. HANKIN
Special Counsel
Associate Chief Counsel (Domestic)

cc:CC:SER (TL)
CC:SER:(LC)