OFFICE OF
CHIEF COUNSEL

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224
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INTERNAL REVENUE SERVICE NATIONAL OFFICE FIELD SERVICE ADVICE

MEMORANDUM FOR DISTRICT COUNSEL

Attn: Attorney

FROM: Deborah Butler
Assistant Chief Counsel (Field Service) CC:DOM:FS

SUBJECT: Agent For The Group

This Field Service Advice responds to your memorandum dated July 19, 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:

COMPANY A =
COMPANY B =
Year 1 =
Year 3 =
Year 2 =
a =
COMPANY C =
COMPANY D =

PERSON 1 =

State 1 =

PERSON 2 =

ISSUE(S):

1 Who is the proper party to sign the Form 872 for the Year 3 and Year 1 tax years for COMPANY A & Subsidiaries?

2 Who is the proper party to sign other documents and receive notices on behalf of COMPANY A & Subsidiaries for the Year 3 and Year 1 tax years?

3 Whether the power of attorney, which refers to the taxpayer as COMPANY A & Subsidiaries, is valid?

CONCLUSION:

1 COMPANY D (formerly COMPANY C) is the proper party to sign the Form 872 for the Year 3 and Year 1 tax years of COMPANY A & Subsidiaries.

2 COMPANY D, as an alternative agent under Temp. Reg. § 1.1502-77T(a)(4)(ii), should receive the statutory notice of deficiency on behalf of the former Company A & Subsidiaries group for the tax years Year 3 and Year 1. With regard to any other correspondence, the Service should either deal separately with each remaining member of the former COMPANY A & Subsidiaries consolidated group, or have these remaining members designate an agent.

3 The power of attorney, which refers to the taxpayer as COMPANY A & Subsidiaries is invalid.

FACTS:

In Year 2, COMPANY A was the common parent of one consolidated group. COMPANY B was the common parent of a second consolidated group. COMPANY C was a newly formed wholly owned subsidiary of COMPANY B. Pursuant to an agreement and plan of merger, COMPANY A merged into COMPANY C in an I.R.C. § 368(a)(2)(D) reorganization. As a result of the merger, the former shareholders of COMPANY A owned a% of COMPANY B stock. COMPANY C survived as a wholly owned subsidiary of COMPANY B. COMPANY C changed its name to COMPANY

D. The former shareholders of COMPANY A received cash and stock of COMPANY B, as a result of formerly owning their shares of COMPANY A. COMPANY B continued to file a consolidated return. The subsidiaries of COMPANY A became subsidiaries of COMPANY C Corporation. (now called COMPANY D)

A Form 2048, Power of Attorney and Declaration of Representative, was submitted to the Service naming Person 1 representative for the taxpayer, COMPANY A & Subsidiaries, for the years Year 1 and Year 2. The Form 2048 was executed by PERSON 2, who was the V.P. and C.F.O. of COMPANY B. PERSON 1 is the Director of Corporate Taxes at the same company. On the Form 2048, Person 1's address is the same as that stated above for COMPANY A.

LAW AND ANALYSIS

LAW

Generally, the common parent is the sole agent for each member of the consolidated group, duly authorized to act in its own name, in all matters relating to the tax liability for the consolidated return year. Moreover, the common parent is generally the proper party to sign consents and receive all correspondence. Treas. Reg. § 1.1502-77(a).

Under Treas. Reg. § 1.1502-77(d) if the common parent corporation contemplates dissolution, or is about to be dissolved, or if for any other reason its existence is about to terminate, it must notify the district director with whom the consolidated return is filed of such fact and designate another member as agent to act in its place. If the notice is not given (or not approved), the remaining members can designate another member to act as such agent. Until a notice in writing designating a new agent has been approved by such district director, any notice of deficiency or other communication mailed to the common parent shall be considered as been properly mailed to the agent of the group; or if such district director has reason to believe the existence of the common parent has terminated, he may deal directly with any member in respect of its liability.

Each member of the group is severally liable for the entire tax of the group. Treas. Reg. § 1.1502-6(a).

Treas. Reg. § 1.1502-77T, which applies only to waivers and stat notices, provides for alternative agents and applies if the corporation that is the common parent of the group ceases to be a common parent, whether or not the group remains in existence. Under Treas. Reg. § 1.1502-77T(a)(2), a notice of deficiency may be mailed to an alternative agent described in Treas. Reg. § 1.1502-77T(a)(4).

Under Treas. Reg. § 1.1502-77T(a)(3), a waiver of the statute of limitations for the former COMPANY A group can be given by any of the alternative agent corporations referred to in Treas. Reg. 1.1502-77(T)(a)(4). Under Treas. Reg. 1.1502-77T(a)(4)(ii), the alternative agents for the group include "a successor to the former common parent in a transaction to which I.R.C. 381(a) applies".

Under I.R.C. 381(a), in the case of an acquisition of assets of a corporation by another corporation in a transfer to which section 361 applies, but only if the transfer is in connection with a reorganization described in subparagraph (A), (C), (D), (F), or (G) of section 368(a)(1), the acquiring corporation shall succeed to and take into account, as of the date of the transfer, specified items of the transferor corporation.

In order for the transaction to qualify under section 368(a)(1)(A) by reason of the application of section 368(a)(2)(D), one corporation (the acquiring corporation) must acquire substantially all the properties of another corporation (the acquired corporation) partly or entirely in exchange for stock of a corporation which is in control of the acquiring corporation (the controlling corporation), provided that (i) the transaction would have qualified under section 368(a)(1)(A), if the merger had been into the controlling corporation, and (ii) no stock of the acquiring corporation is used in the transaction. The foregoing test of whether the transaction would have qualified under section 368(a)(1)(A), if the merger had been into the controlling corporation, means that the general requirements of a reorganization under 368(a)(1)(A) (such as a business purpose, continuity of interest, and continuity of business enterprise) must be met in addition to the special requirements of section 368(a)(2)(D). Treas. Reg. § 1.368-2(b)(2).

ANALYSIS

The proper party to sign the Form 872-Issue 1

The issue here is who is the proper party to sign the Form 872 for COMPANY A and Subsidiaries for the Year 3 and Year 1 tax years.

Generally, the common parent is the sole agent for each member of the consolidated group, duly authorized to act in its own name, in all matters relating to the tax liability for the consolidated return year. In addition, the common parent is generally the proper party to sign consents and receive all correspondence. Treas. Reg. § 1.1502-77(a).

However, COMPANY A, the common parent of COMPANY A & Subsidiaries, is no longer in existence. COMPANY A merged into COMPANY C in an I.R.C. § 368(a)(2)(D) reorganization.

Treas. Reg. § 1.1502-77, in the case of executing waivers and receiving notices of deficiency, provides for alternative agents and applies if the corporation that is the common parent (COMPANY A) of the group ceases to be the common parent, whether or not the group remains in existence.

Under Treas. Reg. 1.1502-77T(a)(4)(ii), the alternative agents for the group include "a successor to the former common parent in a transaction to which I.R.C. 381(a) applies". Under I.R.C. 381(a), in the case of an acquisition of assets of a corporation by another corporation in a transfer to which section 361 applies, but only if the transfer is in connection with a reorganization described in subparagraph (A), (C), (D), (F), or (G) of section 368(a)(1), the acquiring corporation shall succeed to and take into account, as of the date of the transfer, specified items of the transferor corporation.

One of the requirements for a transaction to qualify under I.R.C. 368(a)(2)(D) is that the transaction would have qualified under section 368(a)(1)(A), if the merger had been into the controlling corporation. This requirement means that the general requirements of a reorganization under section 368(a)(1)(A) (such as a business purpose, continuity of business enterprise, and continuity of interest) must be met in addition to the special requirements of section 368(a)(2)(D). Treas. Reg. § 1.368-2(b)(2).

Assuming the COMPANY A merger into COMPANY C qualifies as a reorganization under 368(a)(2)(D), it therefore qualifies as a reorganization under 368(a)(1)(A). A reorganization under 368(a)(1)(A) is a transaction referred to in I.R.C. 381(a). Therefore, because COMPANY C is the acquiring corporation in an "A" merger to which section 381 applies, it is the "successor to the former common parent (COMPANY A) in a transaction to which section 381 applies," and can act act as the alternative agent of the COMPANY A & Subsidiaries consolidated group for the tax years at issue, under Temp. Reg § 1.1502-77T(a)(4)(ii). In addition, under the State 1 merger statute (State 1 Stat. Ann. Section 21.197(721)), a successor is liable for all the debts of its predecessor. Therefore, COMPANY D (formerly COMPANY C) is a proper party to sign the Form 872 for the COMPANY A & Subsidiaries consolidated group, for the tax years Year 3 and Year 1.

If COMPANY D signs the Form 872, as an alternative agent under Treas. Reg. § 1.1502-77T(a)(4)(ii), it will bind itself and any remaining members of the COMPANY A & Subsidiaries return group for the Year 3 and Year 1 consolidated tax liability of the COMPANY A & Subsidiaries return group. Therefore, COMPANY D is the proper party to sign the Form 872 for the tax years in question.

In your memo you have stated that the district director could secure an extension of the statute of limitations from each of the remaining members of the COMPANY A & Subsidiaries Consolidated group for the tax years in question. In the instant case,

there is no need for the district director to secure an extension from each of the remaining members of the former COMPANY A & Subsidiaries Consolidated group for the tax years in question. If COMPANY D signs the Form 872, as an alternative agent under Temp. Reg. § 1.1502-77T(a)(4)(ii), it will bind itself and any remaining members of the COMPANY A & Subsidiaries return group for the Year 3 and Year 1 consolidated tax liability of the COMPANY A & Subsidiaries return group. Furthermore, COMPANY D succeeded to the COMPANY A Assets. Therefore, it would be probably be financially able to satisfy the tax deficiency of the COMPANY A consolidated group for the tax years Year 3 and Year 1 by itself.

If a consent is not obtained from COMPANY D, under Treas. Reg. § 1.1502-77(T)(a)(3), the Service might lose its ability to hold COMPANY D liable for the consolidated tax liability of the COMPANY A & Subsidiaries return group for the tax years Year 3 and Year 1.

The Service has authority to deal directly with each member of the former Company A consolidated group. Each member of the group is severally liable for the entire tax of the group. Treas. Reg. § 1.1502-6(a).

In your memo you have made an argument that, since COMPANY B is the successor parent corporation (as opposed to the successor to the assets of COMPANY A) in a transaction qualifying under I.R.C. § 381(a), it should be treated as the “successor” to COMPANY A (the “former common parent” of the COMPANY A & Subsidiaries consolidated group), and therefore a Form 872 should be obtained from it, with respect to the consolidated tax liability of the COMPANY A & Subsidiaries group for the tax years Year 3 and Year 1.

Obtaining the Form 872 from COMPANY B is erroneous. COMPANY B has not succeeded to the assets or the liabilities of COMPANY A. Therefore, it could not be liable for the tax liability of COMPANY A. Nor is it an alternative agent under Temp. Reg. § 1.1502-77T. It was not a successor of the old common parent Company A. It was not the new common parent of the continuing group, since the Company A group did not continue, due to there being no reverse acquisition or downstream merger. Further, COMPANY B was not a member of the COMPANY A and Subsidiaries group, so it can’t be a designated agent (Under Treas. Reg. 1.1502-77(d)).

Thus, by signing the Form 872, COMPANY B cannot bind the remaining members of COMPANY A & Subsidiaries, for the consolidated tax liability of COMPANY A & Subsidiaries, for the taxable years Year 3 and Year 1.

In addition, for purposes of ease of administration, all statutory notices of deficiency with respect to the consolidated tax liability of the COMPANY A & Subsidiaries consolidated group for the tax years Year 3 and Year 1, should be sent to

COMPANY D, as successor of the former COMPANY A, and as the alternative agent for the former Company A group, under Temp. Reg. § 1.1502-77T(a)(4)(ii). Since COMPANY D will be signing the Form 872, it should also be responsible for receiving any notices of deficiency.

The Form 872 should read as follows: (Top of the Form 872) COMPANY D (E.I.N.: XX-XXXXX) (formerly COMPANY C) as successor in interest to COMPANY A (E.I.N.: XX-XXXXX) and as alternative agent for the COMPANY A (E.I.N.: XX-XXXXX) & Subsidiaries consolidated group.*

We recommend that on the front of the Form 872 the asterisk should refer to the following: *This is respect to the consolidated tax of COMPANY A (E.I.N.: XX-XXXXX) & Subsidiaries Consolidated return group for the taxable years Year 3 and Year 1.

In addition, the signature block on page 2 of the Form 872 should be signed as follows: COMPANY D as successor in interest to COMPANY A, formerly COMPANY C. The block should be signed by a current officer of COMPANY D

Please confirm that COMPANY D is still in existence at the time the Form 872 is signed.

<u>The proper party to sign and receive other documents-Issue 2</u>

Who is the proper party to sign documents (besides the Form 872) and receive notices on behalf of COMPANY A & Subsidiaries for the Year 3 and Year 1 tax years?

COMPANY D as an alternative agent under Temp. Reg. § 1.1502-77T(a)(4)(ii), has authority to receive the statutory notice of deficiency under Temp. Reg. § 1.1502-77T(a)(2), (In addition to having authority to sign the Form 872 under Temp. Reg. § 1.1502-77T(a)(3)) on behalf of the remaining members of the former COMPANY A & Subsidiaries group for the tax years Year 3 and Year 1. Therefore, COMPANY D is the proper party to receive the statutory notice of deficiency on behalf of COMPANY A & Subsidiaries for the taxable years Year 3 and Year 1.

With regard to any other correspondence, the Service should either deal with each subsidiary separately, or have the remaining members of the former COMPANY A & Subsidiaries consolidated group designate an agent to act for them. Pursuant to Treas. Reg. § 1.1502-77(d) the designated entity must have been a member of the group for the tax years to which the designation is to apply.

Generally under Treas. Reg. § 1.1502-77, all correspondence is usually carried on with the common parent. If the common parent is dissolved as in the present case,

any agent designated under Treas. Reg. § 1.1502-77(d) has the same authority as the original common parent to act for the group.

Similarly, if the district director deals with each subsidiary separately, each subsidiary can receive its own separate correspondence.

COMPANY D should also be a party to any settlement agreement with respect to the tax years in question.

Since COMPANY D succeeded to the tax liability of COMPANY A, COMPANY D is responsible for any tax liability of the COMPANY A & Subsidiaries consolidated group for the tax years Year 3 and Year 1. Therefore, COMPANY D should sign any settlement agreement in its successor capacity along with any agent designated by the remaining members of the COMPANY A & Subsidiaries consolidated group.

Power of Attorney-Issue 3

Does COMPANY A and Subsidiaries ("Company A") have the capacity to authorize a power of attorney on its behalf?

Corporate existence and capacity is determined by the law of the state of incorporation, *Oklahoma Natural Gas Company v. State of Oklahoma,* 273 U.S. 257 (1927); *Chicago T&T Co. v. Forty One Thirty Six Wilcox Bldg. Corp;* 302 U.S. 120 (1937).

In the instant case, Company A's state of incorporation is State 1, so the laws of that state must be examined to determine Company A's capacity. According to State 1 Stat. Ann. § 21.197 (721) (1999), when a merger has been effected, the separate existence of corporate parties to the plan of merger, except the surviving corporation, shall cease.

In the instant case, the power of attorney named Company A as the principal, but was executed after Company A merged into COMPANY C. At the point of merger, Company A ceased to exist, thus it did not have the capacity to give legally operative consent, thus the power of attorney is invalid.

In addition, the Form 2848 is invalid because it was executed by an officer of COMPANY B, who presumably was not an officer of COMPANY D, let alone an officer of the former COMPANY A.

COMPANY D, formerly COMPANY C, as the successor of COMPANY A is the party for whom a Form 2048 should be executed by a current officer of that successor corporation.

CASE DEVELOPMENT, HAZARDS AND OTHER CONSIDERATIONS:

Litigating Hazards

In your memo, you have stated, that because COMPANY A went out of existence without making a designation, the "remaining members" of the former COMPANY A & Subsidiaries Consolidated return group could designate a new agent, to sign the Form 872 with respect to the Year 3 and Year 1 consolidated tax liability for the COMPANY A & Subsidiaries Consolidated return group. Treas. Reg. § 1.1502-77(d). This designation must be approved by the District Director.

However, for purposes of ease of administration. The Form 872 can be obtained from COMPANY D (formerly COMPANY C) as agent under Treas. Reg. § 1.1502-77T(a)(3), and as a successor to COMPANY A.

As a successor, under the State 1 merger statute (State 1. Stat. Ann. Section 21.197(721)(1999)), COMPANY D succeeds to the consolidated tax liability of COMPANY A for the tax years in question.

In addition, another reason for obtaining the Form 872 from COMPANY D is that COMPANY D (formerly COMPANY C) succeeded to the COMPANY A assets. Therefore, COMPANY D would probably be financially able to satisfy the tax deficiency of the COMPANY A & Subsidiaries consolidated group for the tax years Year 3 and Year 1.

The "remaining members" at least include all members of the group during the respective tax years at issue, less any members that have subsequently gone out of existence (or left the group). As a precautionary matter, the designated agent should be selected from one of the remaining members. Treas. Reg. § 1.1502-77(d).

COMPANY D was not a "remaining member" of the former COMPANY A & Subsidiaries Consolidated return group. Therefore, there is an argument that it cannot be a designated agent for purposes of signing the Form 872.

The Form 2848, as a general power, is improper. The grant of a power of attorney generally creates an agency relationship, but is negated where the principal does not have capacity to give legally operative consent. Production Credit Ass'n v. Kehl, 434 N.W. 2d 816, review denied, 439 N.W. 2d 140 (Wis. 1989).

In other words, if an individual lacks the power to enter into some legal relationship, then the individual also lacks the power to authorize an agent to enter into that relationship on its behalf. Miner v. N. Y.S. Dept. of Correctional Ser., 479 N.Y.S. 2d 703, judgment affirmed, 509 N.Y.S. 2d 778 (1986).

Future Considerations

In the future, if you intend to send the members of the group other documents other than the stat notice or if you intend to have the members of the group execute other documents other than the Waiver of the Statute of Limitations, then since you will have to deal with each member separately, it might make sense to have all the remaining members designate an agent (per Treas. Reg. 1.1502-77(d)) for all purposes to include the waivers and statutory notices of deficiency. This will avoid the situation where there is an alternative agent to act for the group for executing consents and receiving waivers, but for purposes of petitioning the Tax Court, the taxpayers will have to petition on a member by member basis.

If one of the remaining members is a designated agent (per Treas. Reg. § 1.1502-77(d)) to act for the group in executing the Form 872, then an authorized current officer of that corporation should execute the Form 872.

However, even if a new designated agent is selected to act for the members of the group, the Service should nevertheless also deal with COMPANY D in its capacity as the successor of COMPANY A.

If you have any further questions, please call Daniel Heins at 202 622-7930.

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By: _____
STEVEN HANKIN
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cc: Assistant Regional Counsel (LC)