

Office of Chief Counsel
Internal Revenue Service

memorandum

CC:NER:NED:BOS:TL-N-1107-99
HPBonner

date: **AUG 03 1999**

to: District Director, New England District
Attention: Group Manager Glen DiTulio

from: District Counsel, New England District, Boston

subject: [REDACTED]

This refers to the memorandum from your office requesting advice with respect to extension of the period of limitations for assessment of tax of the income tax liability of [REDACTED] for the calendar year ended [REDACTED].

ISSUES

1. What are the appropriate forms to be secured, i.e. Form 2045, transferee Agreement; Form 977 consent to extend time Assessment Against a Transferee; and/or Form 872, consent to Extend Time to assess Tax?
2. What is the proper language for the above forms?
3. Who should execute the forms?
4. Are there any other procedures available to protect the government's interest?

CONCLUSIONS

1. [REDACTED] was the common parent for the consolidated return year [REDACTED]. [REDACTED] were acquired by [REDACTED] on [REDACTED] as the result of a merger between Sub, a wholly owned subsidiary of [REDACTED], and [REDACTED]. [REDACTED] survived that merger and remained in existence as a wholly owned subsidiary of [REDACTED] until [REDACTED]. On [REDACTED] [REDACTED] merged [REDACTED] and its subsidiaries into itself pursuant to Delaware law. [REDACTED] survived that merger. Therefore, a consent, Form 872, to extend

the time to assess income tax against [REDACTED] for [REDACTED] should be sought from [REDACTED].

2. The caption of the consent, Form 872, should read "[REDACTED] successor in interest to [REDACTED] *". At the bottom of the page on the Form 872, the following language should be added: *This is respect to the consolidated tax liability of [REDACTED] for the taxable year [REDACTED].

3. The signature block on page 2 of the Form 872 should be signed as follows: [REDACTED] as successor to [REDACTED]. The consent should be executed by a current authorized officer of [REDACTED].

4. Transferee liability exists on the part of [REDACTED] with respect to the [REDACTED] income tax liability of [REDACTED].

FACTS

[REDACTED] filed a consolidated income tax return for [REDACTED]. The period of limitations for assessment of tax for [REDACTED] will expire on [REDACTED].

On [REDACTED], a Delaware corporation, was acquired by [REDACTED], also a Delaware corporation, as the result of a merger between Sub, a wholly owned subsidiary of [REDACTED] which was created for the sole purpose of merging with and into [REDACTED], and [REDACTED]. [REDACTED] survived the merger and remained a wholly owned subsidiary of [REDACTED] until [REDACTED].

On [REDACTED], the Board of Directors of [REDACTED] unanimously resolved to merge [REDACTED] and its subsidiaries (the "Merging Corporations") into [REDACTED] and to assume all of the Merging Corporations' liabilities and obligations pursuant to the provisions of 8 Del. C. Sec. 253 (a). [REDACTED] and its subsidiaries were merged into [REDACTED] pursuant to a Certificate of Ownership and Merger executed on [REDACTED] by [REDACTED], Executive Vice President, CFO, and Secretary of [REDACTED]. [REDACTED] is the name of the surviving corporation of that merger.

[REDACTED] is now a wholly owned subsidiary of [REDACTED], a Delaware corporation, as the result of a merger with [REDACTED], a wholly owned subsidiary of [REDACTED] which was merged into [REDACTED] on [REDACTED] pursuant to Delaware law. [REDACTED] is the surviving corporation of that merger.

DISCUSSION

Under Delaware state law, two or more corporations may be merged into a single corporation, which may be any one of the constituent corporations; or may consolidate into a new corporation formed by the consolidation. 8 Del. C. Sec. 251(a). The corporation surviving after a merger or consolidation is called the "surviving" or "resulting" corporation. 8 Del. C. Sec. 251(b), et seq. Even if a merger agreement does not specifically state that the obligations of a merged corporation survive in its successors or assigns, it is Delaware public policy that the obligations of a corporation extinguished in a merger survive as obligations of the surviving corporation. Western Air Lines v. Allegheny Air Lines, 313 A.2d 145 (1973).

In this case, [REDACTED] merged into [REDACTED] on [REDACTED] pursuant to 8 Del. C. Sec. 253 (a) which provides that the parent of a wholly owned subsidiary or subsidiaries may merge the subsidiary or subsidiaries into itself and assume all of its or their obligations by executing, acknowledging and filing with the Secretary of State of Delaware a certificate of ownership and merger. [REDACTED] assumed all the liabilities of [REDACTED] and subsidiaries pursuant to the resolution of merger unanimously adopted by its Board of directors on [REDACTED] as set forth in the Certificate of Ownership and Merger executed on [REDACTED] by [REDACTED] and filed with the Secretary of State of Delaware on [REDACTED]. Thus, [REDACTED] is the successor to [REDACTED] and, therefore, the proper party to give a waiver, Form 872, extending the period of limitations for assessment of tax with respect to the income tax liability of the consolidated group, [REDACTED], for [REDACTED].

[REDACTED] successor in interest to [REDACTED] should be shown on the consent, Form 872, as the taxpayer consenting to the extension of time to assess tax for the calendar year [REDACTED]. On the bottom of the form, you should add the following: *This is respect to the consolidated tax liability of

[REDACTED]
[REDACTED] for the taxable year [REDACTED].

The signature block on page 2 of the Form 872 should be signed as follows: [REDACTED] as successor to [REDACTED] corporation. The consent should be executed by a current authorized officer of [REDACTED] Rev. Rul. 83-41, 1983-1 C.B. 349 clarified and amplified, Rev. Rul. 84-165, 1984-2 C.B. 305.

[REDACTED] is a transferee of the assets of [REDACTED] and subsidiaries as the result of the statutory merger of [REDACTED] and [REDACTED] (the other members of the consolidated group for [REDACTED]) into it. Therefore, we also recommend that you attempt to obtain Form 2045, Transferee Agreement, and Form 977, Consent to Extend Time to Assess Liability at Law or in Equity for Income, Gift or Estate Tax Against a Transferee or Fiduciary, from [REDACTED] with respect to the [REDACTED] consolidated income tax liability of [REDACTED]. They should be executed by an authorized officer of [REDACTED].

In the event that you are unable to obtain a consent from [REDACTED], a notice of transferee liability should be issued to [REDACTED] prior to [REDACTED].


In the event that [REDACTED] is subsequently merged into [REDACTED], you should give consideration at that time to securing a form 977 and a Form 2045 from [REDACTED] as well.

We recommend that you make sure that [REDACTED] is still in existence on the date that the Form 872 is secured from it.

If you need additional assistance, do not hesitate to contact
Hugh P. Bonner at (617) 565-7903.

MAUREEN T. O'BRIEN
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By:


HUGH P. BONNER
Attorney