



OFFICE OF
CHIEF COUNSEL

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

MEMORANDUM FOR DISTRICT COUNSEL, SALT LAKE CITY
CC:W:SLC

FROM: Acting Assistant Chief Counsel (Income Tax & Accounting)
CC:DOM:IT&A

SUBJECT: Significant Service Center Advise

This responds to your request for Significant Advice in connection with a question posed by the Ogden Service Center.

ISSUE

Whether an acquiring corporation, a party to a corporate reorganization, can substitute itself as the reporting agent for the former customers of a target corporation for federal employment tax deposits ("FTDs")?

CONCLUSION

The determination of whether an acquiring corporation, a party to a corporate reorganization, can substitute itself as the reporting agent for the former customers of a target corporation for FTDs is not a matter determined solely by the fact that a reorganization has occurred. The type of reorganization is critical in determining the ultimate answer to the question posed. In those reorganizations where the corporation holding the reporting agent authorizations continues in existence after the reorganization (i.e. reorganizations under §§ 368(a)(1) (B), (E), and (F) of the Internal Revenue Code as well as some divisive reorganizations under § 368(a)(1)(D)), no substitution is necessary and the corporation can continue to act within the authority granted in the Form 8655 authorization. However, in those

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reorganizations where the corporation holding the reporting agent authorization ceases its corporate existence after the reorganization (i.e. reorganizations under § 368(a)(1) (A), (C), and (G) as well as non-divisive D reorganizations under § 368(a)(1)(D)), no substitution is permitted and the resulting corporation must obtain new Form 8655 authorizations. Any communication with the acquiring corporation by the Service is prohibited absent the execution of new Form 8655's authorizing such communication.

FACTS

Target, a domestic corporation, is the authorized reporting agent to make required FTDs for its customers. Target's customers each executed valid Form 8655, Reporting Agent Authorization for Magnetic Tape/Electronic Filers authorizations, permitting Target to: (1) sign and file Federal employment tax returns transmitted electronically, (2) make FTDs for the customer, and (3) receive copies of notices, correspondence, transcripts, deposit frequency information or other information with respect to FTD's made by Target. Acquiring, a domestic corporation, desires to acquire Target's assets, including Target's customers, and assume Target's Form 8655 reporting agent status in a tax-free corporate reorganization.

DISCUSSION

Background

Form 8655¹ permits a taxpayer to appoint a reporting agent, "to sign and file Federal employment tax returns transmitted electronically and/or submitted on magnetic tape and/or make Federal tax deposits (FTDs) for the . . . taxpayer." Form 8655 may also be used to authorize the reporting agent; (1) ; "as a designee of the taxpayer to receive copies of notices, correspondence, transcripts, or other information with respect to employment tax returns filed by the designee"; and (2) "as a designee of the taxpayer to receive copies of notices, correspondence, transcripts, deposit frequency information or other information with respect to federal tax deposits made by the designee."

In order to fully address the issues raised in your request it is necessary to divide this discussion into three components: (1) retention of certain corporate characteristics by the surviving corporation in a corporate reorganization; (2) the delegation of authority granted to reporting agents in Form 8655; and (3) the disclosure consent contained on the Form 8655.

¹ Rev. October 1995.

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1. Retention of certain corporate characteristics by the surviving corporation in a corporate reorganization

In order to fully address your question of whether the Form 8655 authorizations survive a corporate reorganization, we have attempted to provide you with advice concerning all types of reorganizations governed by § 368(a)(1). Section 368(a)(1) provides seven distinct types of corporate reorganizations. The rules regarding corporate reorganizations are complex. This discussion will be limited in scope to the basic forms of corporate reorganizations.

(a) Reorganization's that do not affect the Form 8655 authorizations

Certain reorganizations do not affect the Form 8655 authorizations as the underlying corporate structure is unaffected. The following reorganizations result in a continuation of the existing corporate structure. Accordingly, the reorganizations discussed below do not necessitate the execution of new Form 8655's for the reorganized corporation.

Section 368(a)(1)(B) provides for a corporate reorganization in which the target corporation's stock is exchanged solely for the voting stock of the acquiring corporation or in exchange for the voting stock of a corporation in control of the acquiring corporation ("a B reorganization"). Since a B reorganization contemplates that the target corporation will remain in existence as a corporate subsidiary of the acquiring corporation the target corporation will continue to be able to act as the reporting agent under Form 8655. However, the acquiring corporation cannot substitute itself as the reporting agent under Form 8655. If the acquiring corporation desires to act directly as the reporting agent for the target corporation's customers, it must obtain new Form 8655's from the target corporation's customers appointing the acquiring corporation as the customer's new reporting agent.

Section 368(a)(1)(E) provides that the term reorganization also means a recapitalization ("an E reorganization"). Section 1.368-2(e) of the income tax regulations defines a recapitalization as an exchange by a corporation of one corporate obligation or equity, such as bonds or preferred stock, for another corporate obligation or equity, such as common stock.

Section 368(a)(1)(F) provides that the term reorganization also means, "a mere change in identity, form, or place of organization of one corporation, however effected," ("an F reorganization").

Since the underlying corporate structure in a B, E, and F reorganization is unaffected there is no need to obtain new Form 8655's from the corporation's customers.

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A reorganization pursuant to § 368(a)(1)(D) can be structured in two basic ways: (1) a divisive D reorganization; and (2) a non-divisive D reorganization. While both may be characterized as a D reorganization; each may result in a different outcome for purposes of determining if the Form 8655 authorizations survive the transaction. A non-divisive D reorganization, as discussed in section (b) below, is an asset transfer that results in the termination of the target corporation's existence and, accordingly, the loss of the Form 8655 authorizations.

Divisive D reorganizations may have a different result depending on which surviving corporation retains the Form 8655 authorizations. Divisive D reorganizations are characterized by the division of one corporation into two corporations each owned by members of the same shareholder group. If the corporation named in the Form 8655 authorizations survives the corporate reorganization and retains the reporting agent function of the corporation, it may continue to serve as the reporting agent for those customers who previously executed Form 8655 authorizations. However, if the reporting agent function is transferred to a new corporation, that corporation must obtain new Form 8655 authorizations as more fully discussed in section (b) below.

(b) Reorganizations that do affect the Form 8655 authorizations

Reorganizations under §§ 368(a)(1) (A),(C), and (G) involve the transfer of assets of the target corporation. The result is that the target corporation goes out of existence. The same result is also achieved in non-divisive D reorganizations.

A non-divisive D reorganization is characterized by the transfer of substantially all of the assets of the target corporation to the acquiring corporation in exchange for the acquiring corporation's stock. The target corporation then liquidates and distributes the stock of the acquiring corporation to the target corporation's shareholders. The end result is that the corporation that formerly held the Form 8655 authorizations (i.e. the target corporation) ceases to exist.

Reorganizations under §§ 368(a)(1) (A),(C), and (G), as well as non-divisive D reorganizations, do not result in a continuation of the corporation which formerly held the Form 8655 authorizations. Instead, a new corporation succeeds to the interests of the target corporation. In order to determine if the Form 8655 authorizations transfer from the target corporation to the acquiring corporation it is necessary to review § 381.

Section 381 provides that,

[i]n the case of the acquisition of assets of a corporation by another corporation –

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(1) in a distribution to such other corporation to which section 332 (relating to liquidations of subsidiaries) applies or

(2) in a transfer to which section 361 (relating to nonrecognition of gain or loss to corporations) 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 close of the day of distribution or transfer, the items described in subsection (c) of the distributor or transferor corporation, subject to the conditions and limitations specified in subsection (b) and (c).

(emphasis added.) Section 381(c) lists 22 corporate items which an acquiring corporation obtains from the target corporation in an asset reorganization. Section 381(c) neither refers to: (1) delegated powers under an authorization, (2) reporting agent authority granted under Form 8655, nor (3) any similar authority. Accordingly, the authority granted in Form 8655 is not a corporate characteristic of a target corporation that an acquiring corporation obtains in an asset reorganization under §§ 368(a)(1) (A), (C), (D), or (G).

2. The delegation of authority granted to reporting agents in Form 8655

Since the Form 8655 authority is not a corporate characteristic contemplated by § 381(c), and is, therefore, not automatically transferred to the acquiring corporation upon a § 368 (A), (C), (G) or non-divisive D reorganization, it is necessary to determine if Form 8655 itself confers any power upon the reporting agent to substitute or delegate the authority granted in Form 8655 to another entity, such as an acquiring corporation in a reorganization.

While Form 8655 grants certain rights to a third-party, it is not a power of attorney for purposes of the administrative practice and procedure regulations. However, its similarities to a Form 2848 power of attorney make an examination of the administrative practice and procedure regulations useful in this discussion.

Section 601.501(b)(9) of the administrative practice and procedure regulations defines the term, "Power of attorney" as, "[a] document signed by the taxpayer, as principal, by which an individual is appointed as attorney-in-fact to perform certain specified act(s) or kinds of act(s) on behalf of the principal."

Form 8655 authorizes the named reporting agent to perform certain acts on behalf of the taxpayer. The acts that Form 8655 permits the reporting agent to

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perform are limited to (1) signing and filing Federal employment tax returns transmitted electronically and/or submitted on magnetic tape, (2) making Federal tax deposits, (3) receiving copies of notices, correspondence, transcripts, or other information with respect to employment tax returns filed by the reporting agent and/or (4) receiving copies of notices, correspondence, transcripts deposit frequency information or other information with respect to federal tax deposits made by the reporting agent. Form 8655 is, therefore, analogous to a power of attorney. As such, the rules applicable to substitution of authority under § 601.505 (relating to the IRS Form 2848 Power of Attorney) provide insight into the issue of whether a reporting agent may substitute, or delegate, its Form 8655 reporting agent authority to another corporate entity.

Section 601.505 provides that, “[a]ny recognized representative appointed in a power of attorney may substitute or delegate authority under the power of attorney to another recognized representative if substitution or delegation is specifically permitted under the power of attorney.” Form 8655 does not provide for the substitution or delegation of the authority granted therein to another person or entity. Accordingly, a target corporation, a party to a corporate reorganization, cannot simply substitute or delegate the authority granted under Form 8655 to an acquiring corporation, a party to the same corporate reorganization, absent the express authorization by the taxpayer. The taxpayer’s express authorization can only be obtained by the execution of a new Form 8655.

3. The Disclosure Consent contained on the Form 8655

Section 6103(c) provides that:

The Secretary may, subject to such requirements and conditions as he may prescribe by regulations, disclose the return of any taxpayer or return information with respect to such taxpayer, to such person or persons as the taxpayer may designate in a request for or consent to such disclosure, or to any other person at the taxpayer’s request to the extent necessary to comply with a request for information or assistance made by the taxpayer to such other person. However, return information shall not be disclosed to such person or persons if the Secretary determines that such disclosure would seriously impair Federal tax administration.

Section 301.6103(c)-1(b) of the procedure and administration regulations provides, in pertinent part, that:

The taxpayer’s request for information or assistance must be in the form of a letter or other written document signed and dated by the taxpayer. The taxpayer must also indicate in the written request -- (1)

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The taxpayer's taxpayer identity information described in section 6103(b)(6); (2) **The identity of the person to whom disclosure is to be made**; and (3) Sufficient facts underlying the request for information or assistance to enable the Service to determine the nature and extent of the information or assistance requested and the returns or return information to be disclosed in order to comply with the taxpayer's request.

(Emphasis added.) As noted above, the Form 8655 contains language authorizing disclosures of notices and correspondence regarding employment tax returns and federal tax deposits. This is a valid consent authorizing disclosure to the reporting agent pursuant to section 6103(c) and § 301.6103(c)-1(b). The disclosure issue here is whether, after a statutory merger or other reorganization, the identity of the reporting agent remains the same.

Consistent with the conclusions reached above regarding reorganizations that do and do not fundamentally change the corporate structure, in those reorganizations where the corporation holding the reporting agent authorization ceases its corporate existence after the reorganization, the resulting corporation must obtain new Forms 8655 for disclosure purposes.² We believe this is the correct result as the taxpayer may never have foreseen nor intended the Service to communicate with the acquiring corporation when it authorized the Service to communicate with the target corporation. Further, there is nothing in the Form 8655 permitting the reporting agent to substitute or delegate that authority to any other person or entity including corporate successors to the reporting agent.³

While it may appear on the surface that the acquiring corporation in a reorganization under §§ 368(a)(1) (A), (C), (G) or a non-divisive D reorganization retains the power and/or authority granted a target corporation in a Form 8655 authorization, § 381 simply does not transfer such power or authority. Thus, where a corporate reorganization results in the termination of a corporation, previously appointed as a reporting agent on Form 8655, the successor corporation must obtain new Form 8655 authorizations from the customers of the target corporation before it can act as the reporting agent of the former target corporation's customers. Any communication with the acquiring corporation by the Service is

² I.R.C. § 381 also does not provide for the carryover or transfer of authority to receive tax information as the designee of a disclosure consent.

³ We do not address here whether the taxpayer could delegate the authority to substitute another corporation as a designee pursuant to consent.

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prohibited absent the execution of new Form 8655's authorizing such communication.

If you have any questions regarding this memorandum, please contact Marc C. Porter at (202) 622-4940.