



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:

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

SUBJECT: Proper Party to File Refund Claims for Consolidated Taxable Year

This Field Service Advice responds to your memorandum dated May 12, 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:

Parent =
Sub 1 =
State X =
State Y =
B =
Date B =

Date C =
Date D =
Date E =
Date F =
Date G =
Date H =
Date J =
Year T =
Amount P =

ISSUE: Who is the proper party to file a claim with the Service seeking a refund of a former member-s taxes paid in a consolidated tax return year based on a net operating loss arising in a subsequent separate return year.

CONCLUSION: The common parent is the proper party to file a claim with the Service seeking a refund of taxes paid in a consolidated tax return year based on a net operating loss arising in a subsequent separate return year.

FACTS: Parent, a State X corporation, filed a consolidated tax return for the fiscal year ending Date B in its role as common parent on behalf of the members of the consolidated tax return group, which included Sub 1, a State Y corporation and # B other first-tier wholly-owned subsidiaries. Sometime thereafter, the group underwent ownership changes which resulted in the filing of separate returns for the fiscal years ending Date C.

Sub 1 generated a net operating loss (NOL) during Year T which was reflected on Sub 1 -s separate return filed for its fiscal tax year ending Date C. Although Sub 1 obtained an extension for filing its return for the year ending Date C until Date D, Sub 1 did not file the return until Date E.

On Date F, Sub 1 filed an amended return for the consolidated tax return group-s year ending Date B claiming a refund with respect to its Date C NOL carryback. Sub 1 filed the amended return for the year ending Date B in its own name and using its own EIN.

On Date G, State X revoked Parent-s (the former common parent-s) charter for failure to pay state Amount P. Parent is still in existence but is no longer an operating entity. District

Counsel has indicated that Parent can obtain reinstatement of its charter by paying the Amount P due.

On Date H, the Service disallowed the refund claim, issuing the notice of disallowance to Parent, as common parent, and using Parent's EIN. According to the disclosure on the notice of disallowance, it was the Service's position that Parent did not supply sufficient information to establish entitlement to a refund.

On Date J, Sub 1 provided the Service with information to substantiate the disallowed claim. Since the two year period of I.R.C. ' 6532 was about to expire, Sub 1 and the Service entered into an agreement to extend the I.R.C. ' 6532 two year period for filing a refund suit. In the waiver, the Service specifically reserved the right to raise any defenses available to it, including that the wrong party filed the amended return.

The former subsidiaries, including Sub 1, are in bankruptcy.

LAW AND ANALYSIS

I.R.C. ' 1501 grants members of an affiliated group the privilege of filing a consolidated return. Affiliated corporations may file a consolidated return only upon the condition that they consent to be bound by all of the consolidated return regulations.

In joining in the filing of a consolidated return, each corporation consents to the designation of an agent to act for members of the affiliated group. See Treas. Reg. ' 1.1502-77(a). Under Treas. Reg. ' 1.1502-77(a), the common parent of the consolidated group is the agent for the group and it alone has authority to file refund claims with regard to consolidated return years. Only the common parent can file consolidated returns, enter into closing agreements and compromises, make elections, file waivers, file protests, execute extensions, file refund claims, give bonds, receive notices of deficiency, receive a notice and demand for tax payment, and file petitions in the Tax Court.

There are a few exceptions, none of which are applicable under the circumstances, where the common parent is not the agent of the consolidated tax return group for the year in question. See Treas. Reg. ' ' 1.1502-77(a), 1.1502-77T, and 1.1502-75(d).

In Southern Pacific Co. v. Commissioner, 84 T.C. 395, 404, (1985) the Tax Court concluded that in a reverse acquisition the new common parent, not the designated successor agent, was the proper party to receive the statutory notice of deficiency for pre-merger years because the new common parent succeeded the old common parent as agent for the affiliated group with respect to years both before and after the reverse acquisition. The Tax Court held that a central feature of the provisions of the consolidated return regulations is the role of the common parent as the agent for the affiliated group with

respect to all procedural matters. For any given year in which a consolidated return is filed, the entity that is the common parent for that particular year is thereafter the agent with respect to any procedural matters that may arise in connection with the group's tax liability for that year. See Southern Pacific Co. v. Commissioner, 84 T.C. at 401.

For the year ending Date B, Parent was the common parent of the consolidated tax return group. By its terms, Treas. Reg. ' 1.1502-77(a) contemplates that only Parent, as the common parent, has authority to act as agent for the affiliated group with respect to the group's consolidated income tax liability. Parent should have filed the refund claim because it was still in existence, it still had its charter, and it was still operating at the time Sub 1 filed the claim.

CASE DEVELOPMENT, HAZARDS AND OTHER CONSIDERATIONS:

We note that CC:DOM:FS:PROC is providing a response to your request for Field Service Advice dated June 2, 1998 with respect to related issues including whether the signature of Sub 1 on the refund claim for the group's consolidated tax year is subject to waiver by the Service if the Service actively considers the claim on the merits.

Litigation Hazard-

Taxpayers may question whether Parent, as agent for the group, effectively existed at the time the claim for a refund was denied by the Service.

The Service has a strong position to assert the Parent was effectively in existence at the time the claim for a refund was denied. According to the facts as we understand them to be, the Parent was, without qualification, in existence at the time the claim for a refund was filed. The Parent's charter was subsequently revoked. Nothing in the facts submitted suggests the Service was aware, at a later date when it denied the claim for a refund, that the Parent's charter had been revoked. It is also our understanding that the Parent could have procured its charter back by paying Amount P but failed to do so. Therefore, the Parent was effectively the agent for the group.

If you have any further questions, please call (202) 622-7880.

Deborah A. Butler
Assistant Chief Counsel

By: _____

ARTURO ESTRADA

5

Acting Branch Chief (Corporate)
CC:DOM:FS:CORP

Attachment (1): One Page Diagram of Parent Consolidated Tax Return
Group for the year ending Date B

cc:
ASSISTANT REGIONAL COUNSEL

ASSISTANT REGIONAL