



OFFICE OF
CHIEF COUNSEL

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224
October 25, 1999

Number: **200006015**
Release Date: 2/11/2000
CC:DOM:FS:CORP
TL-N-4767-99
UILC: 1502.77-00
6901.00-00

INTERNAL REVENUE SERVICE NATIONAL OFFICE FIELD SERVICE ADVICE

MEMORANDUM FOR

DISTRICT COUNSEL

Attn:

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

SUBJECT: Extension of Statute

This Field Service Advice responds to your memorandum dated September 1, 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	=
COMPANY C	=
COMPANY D	=
COMPANY E	=
State A	=
State B	=
Date 1	=
Date 2	=
Date 3	=
#b	=

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#a	=
#c	=
X	=
#d	=

ISSUE(S):

- 1 Who is the proper party to sign the Form 872 for the #a and #b tax years, for COMPANY A?
- 2 Should the Service obtain Form 977 from COMPANY E (formerly COMPANY C)?

CONCLUSION:

- 1 COMPANY E (formerly COMPANY C) is the proper party to sign the Form 872 for the #a and #b tax years for COMPANY A.
- 2 The Service should not obtain Form 977 from COMPANY E. (formerly COMPANY C)

FACTS:

For the calendar years #a and #b, COMPANY A, a State A Corporation, timely filed U.S. Corporation Income tax returns as a stand alone corporation. In Date 3 the Service obtained a Consent to Extend Time to assess Tax (Form 872) from COMPANY A, which extended the period of limitations for assessment for the year #a to Date 1.

For the calendar year #c, COMPANY B, a State B corporation, and subsidiaries filed a consolidated income tax return. COMPANY C, a State A Corporation and a subsidiary of COMPANY B, joined in the consolidated return as a member of the consolidated group.

On Date 2 COMPANY B acquired all of the outstanding common stock of the COMPANY A, a State A state chartered bank, through the merger of an indirect wholly-owned subsidiary, Company D, with and into Company A with Company A Surviving.

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Also on Date 2, COMPANY C and X entered into an Employment agreement pursuant to which X would be employed as President and Chief Executive Officer of COMPANY C, which would be the surviving entity, after the merger of Company A with and into COMPANY C.

Immediately thereafter, Company A merged into COMPANY C. COMPANY C then changed its name to COMPANY E.

LAW AND ANALYSIS:

LAW

Treas. Reg. § 1.1502-77T provides for alternative agents and applies if the corporation that is the common parent 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”.

State A Corp. Code § #d provides as follows: Upon merger pursuant to this chapter, the separate existence of the disappearing corporations ceases, and the surviving corporation shall succeed, without other transfer, to all rights and property of each of the disappearing corporations and shall be subject to all the debts and liabilities of each in the same manner as if the surviving corporation had itself incurred them.

The Service holds that the surviving or resulting corporation in a merger or consolidation under state law may validly sign an extension agreement on behalf of the transferor (predecessor) corporation for a period before the transfer. Rev. Rul. 59-399, 1959-2 C.B. 488.

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 for the #a and #b tax years.

When COMPANY A merged into COMPANY E (formerly known as COMPANY C) COMPANY E, under State A law, succeeded to and became primarily liable for the

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tax liabilities of COMPANY A.

Therefore, the Form 872 should be secured in the name of COMPANY E (formerly COMPANY C) as successor in interest, by way of merger, to COMPANY A. State A Corp. Code § #d

We agree that Temp. Reg. 1.1502-77T does not apply to our fact situation. The original tax liability at issue is that of COMPANY A. The year of the original tax liability, COMPANY A was a stand alone corporation. Therefore, the consolidated return regulations do not apply.

When COMPANY A merged into COMPANY E, COMPANY E solely assumed COMPANY A's tax liability for the #a and #b tax year. The liability in question is not that of any consolidated group, because for the tax years in question, COMPANY A was a stand alone corporation.

We recommend that the Form 872 be captioned as follows: COMPANY E (E.I.N.: XX-XXXXXXX), (formerly COMPANY C), successor in interest to COMPANY A (E.I.N.:)*.

We agree, that at the bottom page on the Form 872, the following language should be added, *This is respect to the tax liabilities of COMPANY A for the tax years #a and #b.

The signature block on page 2 of the Form 872 should be signed as follows:

COMPANY E as successor to COMPANY A. We agree that the signature block should be signed by an officer of COMPANY E.

In the block on Form 872 labeled SSN or E.I.N. the E.I.N. of COMPANY E should be entered.

We recommend that Counsel make sure that COMPANY E is still in existence when the Form 872 is secured from them.

Should the Form 977 be procured-Issue 2

The issue here is whether the Form 977 (Consent to Extend the Time to Assess Liability at Law or in Equity from Income, Gift, and Estate Tax Against a Transferee or Fiduciary) be signed by COMPANY E (formerly COMPANY C).

In this case, State A Corp. Code § #d provides that the surviving corporation shall

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be subject to all debts and liabilities of the transferor in the same manner as if the surviving corporation had itself incurred them.

In the case of a merger, our general practice is to recommend that Form 977 be obtained for protective purposes. This is because there is often a choice of law question involved, and the transferor corporation is part of a consolidated group. In addition, under Treas. Reg. § 301.6901-1(b), COMPANY E (formerly COMPANY C is secondarily liable as a transferee, because a transferee at law includes a successor of a corporation.

In this case, the merger agreement makes it clear that State A Law governs. In addition, the transferor corporation was a stand alone corporation and therefore Treas. Reg. § 1.1502-77T does not apply. Accordingly, in this case, we concur with the field's conclusion that it is not necessary to secure a Form 977 here.

CASE DEVELOPMENT, HAZARDS AND OTHER CONSIDERATIONS:

There is no need to secure a Form 872 from the parent of the successor corporation (COMPANY E). This parent has no tax liability for its subsidiary's assumed liabilities. In order to be liable for the tax liability in question, the parent would have to succeed to COMPANY E's assumed tax liability. This would require a merger of COMPANY E into its parent. According to the facts, there was no such merger.

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

Deborah Butler
Assistant Chief Counsel (Field
Service)

By: _____

ARTURO ESTRADA
Branch Chief
Field Service Corporate