DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
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OFFICE OF CHIEF COUNSEL

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INTERNAL REVENUE SERVICE NATIONAL OFFICE FIELD SERVICE ADVICE

MEMORANDUM FOR SPECIAL LITIGATION ASSISTANT CC:

FROM: Jasper L. Cummings, Jr.
Associate Chief Counsel CC:CORP

SUBJECT: Who is the Proper Party to Extend the Statute of Limitations for Taxpayer's Consolidated Group for the Group's Taxable Years Ended 9312 and 9408

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LEGEND:

Taxpayer 1 –
Taxpayer 2 –
Corp A –
Corp B –
Corp C –
Corp D –
Corp A Mergco –
Corp B Mergco –
Merger Sub –
New Name A –

New Name B –

New Name C –

LLC 1 –
LLC 2 –

Individual A –
Year 1 –
Year 2 –
Year 3 –
Year 4 –
Year 5 –
Date A –
Date B –
Date C –
Date D –
Date E –
Date F –

ISSUES:

1. Whether the consent, which was signed by the Individual A, an officer of Corp A, on Date D, 3 days after Corp A merged with and into LLC 1, is valid.

2. Who is the proper party to extend the statute of limitations with regard to –

   a. Taxpayer 1 for its taxable Year 1 and short Year 2.

   b. Taxpayer 2 for taxable Years 1, 3, 4 and 5.

3. Should the Service seek transferee liability under I.R.C. § 6901 against the transferee-successor.

CONCLUSIONS:

1. Yes. We believe that there is a very strong likelihood that the Form 872 is valid and enforceable against LLC 1, the successor under primary legal liability theories, as well as under the doctrines of equitable reformation and ratification.

2. **a. Taxpayer 1** – The Service should obtain 3 consents, one each from LLC 1, LLC 2, and Corp D. LLC 1 may execute the consent as successor to New Name A (formerly Corp A). LLC 1 is primarily liable as a successor under Delaware law to New Name A for the latter's pre-merger liabilities, including New Name A's several liability for the consolidated tax of Taxpayer 1 for taxable Year 1 and short Year 2. LLC 2 and Corp D may execute their respective consents as alternative agents for the surviving former members of Taxpayer 1.

   You should identify the taxpayer on the front page of the Forms 872 obtained from the following entities as follows:

   LLC 1

   *[LLC 1](no EIN) as successor to [New Name A] (EIN: XX-XXXXXXX), formerly Corp A**

   Put an asterisk after the words "Corp A" and then another asterisk at the bottom of the Form 872 followed by –

   **This is with respect to [Corp A's] several liability for the consolidated federal income tax of the [Corp A] and*

Subsidiaries consolidated group for the group's taxable years ending [Year 1 and short Year 2]

LLC 2

*[LLC 2], formerly [New Name C] (EIN: XX-XXXXXXX), as alternative agent for the [Corp A] (EIN: XX-XXXXXXX) and Subsidiaries consolidated group**

Put an asterisk after the word "group" and then another asterisk at the bottom of the Form 872 followed by –

**This is with respect to the consolidated federal income tax of the [Corp A] and Subsidiaries consolidated group for the group's taxable years ending [Year 1 and short Year 2]*

Corp D

*[Corp D] (EIN: XX-XXXXXXX) as alternative agent for the [Corp A] (EIN: XX-XXXXXXX) and Subsidiaries consolidated group**

Put an asterisk after the word "group" and then another asterisk at the bottom of the Form 872 followed by –

**This is with respect to the consolidated federal income tax of the [Corp A] and Subsidiaries consolidated group for the group's taxable years ending [Year 1 and short Year 2]*

b. Taxpayer 2 – The Service should obtain a total of 6 consents. Of the 6 consents, 3 of them should be executed by a current officer of LLC 2 on behalf of LLC 2. The remaining 3 consents should be executed by a current officer of Corp D on behalf of Corp D.

With respect to the consents you obtain from LLC 2, 1 of the 3 consents will extend the statute of limitations with regard to Taxpayer 2's taxable Year 1, the year New Name B (then known as Corp B) was the common parent. The other 2 consents involve Years 3, 4 and 5, years when LLC 2 (then known as New Name C) was the common parent. Of these 2, you should obtain a Form 872 covering solely Year

3 (separate from Years 4 and 5) because Year 3 involves potential tax liabilities arising from various partnerships in which a member of Taxpayer 2 (specifically, New Name C as common parent) was a partner.

LLC 2 may execute the consent covering taxable Year 1 both as successor by merger to New Name B (formerly Corp B) and as alternative agent for the surviving former members of Taxpayer 2. LLC 2 is primarily liable as a successor under Delaware law to New Name B for the latter's pre-merger liabilities, including New Name B's several liability for the consolidated tax of Taxpayer 2 for taxable Years 1, 3, 4 and 5. LLC 2 is also an alternative agent under Temp. Reg. § 1.1502-77T(a)(4)(ii) to Taxpayer 2 for taxable Year 1, and therefore may also execute the consents as alternative agent under Temp. Reg. § 1.1502-77T(a)(4)(ii) for the surviving former members of Taxpayer 2. The taxpayer should be identified on the front page of this Form 872 as follows:

LLC 2 for Year 1

> [LLC 2], formerly [New Name C] (EIN: XX-XXXXXXX), as successor to [New Name B] (EIN: XX-XXXXXXX) (formerly [Corp B]) and as alternative agent for the [Corp B] (EIN: XX-XXXXXXX) and Subsidiaries consolidated group*

Put an asterisk after the word "group" and then another asterisk at the bottom of the Form 872 followed by –

> **This is with respect to the consolidated federal income tax of the [Corp B] (EIN: XX-XXXXXXX) and Subsidiaries consolidated group for the group's taxable year ending [Year 1]*

LLC 2 may execute the consent covering taxable Years 3, 4 and 5 as alternative agent for the surviving former members of Taxpayer 2.[1]

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[1]Although technically LLC 2 is a successor to New Name B for these years as well as Year 1, we do not have to concern ourselves with such successor liability in Years 3, 4 and 5 because LLC 2, then known as New Name C, was a member of Taxpayer 2 in those years and therefore is severally liable in its own right for the entire consolidated tax of Taxpayer 2 arising in those years. Further, we also do not have to concern ourselves with LLC 2's status as alternative agent under Temp. Reg.

The taxpayer should be identified on the front page of this Form 872 as follows:

LLC 2 for Year 3

*[LLC 2], formerly [New Name C] (EIN: XX-XXXXXXX), and Subsidiaries consolidated group**

Put an asterisk after the word "group" and then another asterisk at the bottom of the Form 872 followed by –

**This is with respect to the federal income tax of the [New Name C] (EIN: XX-XXXXXXX) and Subsidiaries consolidated group for the group's taxable year ending [Year 3]*

LLC 2 for Year 4 and Year 5

*[LLC 2], formerly [New Name C] (EIN: XX-XXXXXXX), and Subsidiaries consolidated group**

Put an asterisk after the word "group" and then another asterisk at the bottom of the Form 872 followed by –

**This is with respect to the federal income tax of the [New Name C] (EIN: XX-XXXXXXX) and Subsidiaries consolidated group for the group's taxable years ending [Year 4 and Year 5]*

The remaining 3 of the 6 consents should be executed by a current officer of Corp D on behalf of Corp D. As noted above, a separate Form 872 should be obtained with regard to Taxpayer 2's Year 1, the year New Name B (then known as Corp B) was the common parent. The other 2 consents covering Years 3, 4 and 5, years when LLC 2 (then known as New Name C) was the common parent of Taxpayer 2. The Form 872 covering Year 3 has been separated from Years 4 and 5 because Year 3 also involves potential partnership liabilities.

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§ 1.1502-77T-(a)(4)(ii), because it was the common parent in those years so it is an alternative agent under Temp. Reg. § 1.1502-77T(a)(4)(I).

Corp D should execute the Forms 872 as alternative agent under Temp. Reg. § 1.1502-77T(a)(4)(ii) to the surviving former members of Taxpayer 2. Corp D is a successor to LLC 2 and is a "successor to a successor" to New Name B. The taxpayer should be identified on the front page of these Forms 872 as follows:

Corp D for Year 1

*[Corp D] (EIN: XX-XXXXXXX) as alternative agent for the [Corp B] (EIN: XX-XXXXXXX) and Subsidiaries consolidated group**

Put an asterisk after the word "group" and then another asterisk at the bottom of the Form 872 followed by –

**This is with respect to the consolidated federal income tax of the [Corp B] (EIN: XX-XXXXXXX) and Subsidiaries consolidated group for the group's taxable year ending [Year 1]*

Corp D for Year 3

*[Corp D] (EIN: XX-XXXXXXX) as alternative agent for the [New Name C] (EIN: XX-XXXXXXX) and Subsidiaries consolidated group**

Put an asterisk after the word "group" and then another asterisk at the bottom of the Form 872 followed by –

**This is with respect to the consolidated federal income tax of the [New Name C] (EIN: XX-XXXXXXX) and Subsidiaries consolidated group for the group's taxable year ending [Year 3]*

Corp D for Year 4 and Year 5

*[Corp D] (EIN: XX-XXXXXXX) as alternative agent for the [New Name C] (EIN: XX-XXXXXXX) and Subsidiaries consolidated group**

Put an asterisk after the word "group" and then another asterisk at the bottom of the Form 872 followed by –

**This is with respect to the consolidated federal income tax of the [New Name C] (EIN: XX-XXXXXXX) and Subsidiaries consolidated group for the group's taxable years ending [Year 4 and Year 5]*

3. No. There is no need to rely on transferee liability as the Form 872 extending the statute of limitations to September 15, 2000, is valid and enforceable.

FACTS: Corp A, as common parent, filed the consolidated tax returns of Taxpayer 1 for taxable Year 1 and short Year 2. Corp B, as common parent, filed the consolidated tax returns of Taxpayer 2 for Taxable Year 1.

On Date A, Corp A and Corp B formed Corp C, which in turn formed Corp A Mergco and Corp B Mergco. On Date A, Corp A Mergco and Corp B Mergco merged with and into Corp A and Corp B, respectively. Corp A and Corp B survived these mergers, but became wholly-owned subsidiaries of Corp C. Corp A, Corp B and Corp C changed their names to New Name A, New Name B and New Name C, respectively.

On Date B, New Name C formed LLC 1 as a single-member limited liability company under the provisions of the Delaware Limited Liability Company Act ("Act")[2]. New Name C, LLC 1 and New Name A entered into an Agreement and Plan of Merger. On Date C, New Name A merged into LLC 1, which survived the merger. LLC 1 was, from its very start, a disregarded entity for federal tax purposes.[3] After the merger, LLC 1 owned the former members of Taxpayer 1.

The following paragraphs of the Agreement and Plan of Merger paralleled certain provisions of the Act:

> [Upon the effective date and time of the merger, . . . all debts, liabilities and duties of each of the business entities that have been merged shall thereafter attach to the surviving entity and may be enforced against it to the same extent as if such debts, liabilities and duties had been incurred or contracted by it.

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[2] See Del. Code Ann. tit. 6, §§ 18-101 through 18-1106 (1992).

[3] See Treas. Reg. § 301.7701-3.

On Date D, three days after the merger, Individual A (an officer of New Name A) executed a Form 872 extending the statutes of limitations on assessment of Taxpayer 1 for its taxable Year 1 and short Year 2.[4] Individual A states that on Date D, he did not know that the merger had already taken place. On Date D, Individual A was also an officer of both LLC 1 and New Name A.

Corp D, unrelated to either Taxpayer 1 or 2, formed Merger Sub solely for the purpose of merging into New Name C. Corp D, Merger Sub, and New Name C entered into an Agreement of Merger. On Date E, acting pursuant to this merger agreement, New Name B merged with and into New Name C, and Merger Sub merged with and into New Name C. New Name C survived these mergers, but became a wholly-owned subsidiary of Corp D.

Almost 1 year later, on Date F, New Name C converted to LLC 2, a single-member Delaware LLC[5] and became a disregarded entity. Relevant provisions of its limited liability company agreement document provide,

> In accordance with Section 18-214(g) [sic] of the [Delaware Limited Liability Company] Act, the [LLC 2] Company shall constitute a continuation of the existence of the Corporation, in the form of a Delaware limited liability company and, for all purposes of the laws of the State of Delaware, shall be deemed to be the same entity as the Corporation.
>
> * * * * *
>
> The manager is an agent of the Company for the purposes of its business. The act of the Manager binds the Company. No third party dealing with the Company will be required to ascertain whether the Manager is acting within the scope of the Manager's authority.
>
> * * * * *
>
> The Manager may . . . appoint officers of the Company (the "Officers") and assign in writing titles (including, without limitation, President, Vice President, Secretary and Treasurer) to any such person. Unless the Manager decides otherwise, if the title is one commonly used for officers of a business corporation formed under the Delaware General Corporation Law, the assignment of such title shall constitute the

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[4] The taxpayer on this form was identified as "New Name A, formerly Corp A, and Subsidiaries."

[5] Del. Code Ann. tit. 6, § 18-214 (1992).

> delegation to such person of the authorities and duties that are normally associated with that office, including, to the extent applicable, the power to bind the Company.

Corp D is the sole member of LLC 2. LLC 1 and LLC 2 are both in existence and the items of both are included in consolidated returns filed by Corp D.

LAW AND ANALYSIS:

Issue 1 – The Consent Executed on Date D is Valid.

You have asked whether the Form 872 executed by Individual A on March 8, 1999, is valid. We believe it is.

The regulations under I.R.C. § 6501(c)(4) do not specify who may sign consents executed under that section. Accordingly, the Service applies the rules applicable to the execution of the original returns to the execution of consents to extend the time to make an assessment. Rev. Rul. 83-41, 1983-1 C.B. 399, clarified and amplified, Rev. Rul. 84-165, 1984-2 C.B. 305. In the case of corporate returns, I.R.C. § 6062 provides that a corporation's income tax returns must be signed by the president, vice-president, treasurer, assistant treasurer, chief accounting officer or any other officer duly authorized to act. Individual A, at the time he signed the Form 872, Consent to Extend the Time to Assess Tax, was an officer of New Name A and LLC 1. Individual A was listed as an Assistant Vice President on the formation documents for LLC 1. At the time he signed for New Name A as their authorized representative, he was instead Assistant Vice President of the company which was the successor of New Name A. It was New Name C's general practice for Individual A to be an officer of New Name C's various subsidiaries so that he could sign returns, claims, consents, and other tax documents. For both organizations (i.e., New Name A and LLC 1) during their respective existence, Individual A was authorized to sign the consent in question.

Even if Individual A did not have actual authority to sign the Form 872, he had inherent authority, holding himself out as the officer having the authority to deal with the Service and to sign tax documents. As "Vice President-Tax", and taking his actions into account, it would be difficult for the Service to have understood anyone else to have had the authority to sign consents. No actions were taken on Individual A's part to suggest otherwise.

At the very least, Individual A knew the merger was approaching and probably intended to bind whichever organization was in existence at the time he signed the extension. Obtaining a ratification of the Form 872 from Individual A (or his

equivalent in LLC 1 as it now exists) would corroborate that. Equitable reformation might also be an option, as the consent does not represent the agreement of the parties due to a mistake in execution. See Woods v. Commissioner, 92 T.C. 776 (1989).

Because Individual A was or would have been authorized to sign the Form 872 for either organization and because LLC 1 is the same organization as New Name A, we believe the Form 872 executed by Individual A on Date D should be valid.

Issue 2 – LLC 1, LLC 2 and Corp D are the Proper Parties to Execute Forms 872

Treas. Reg. § 1.1502-77(a) provides that the common parent, with certain exceptions not applicable here, is the sole agent for each member of the group, duly authorized to act in its own name in all matters relating to the tax liability for the consolidated return year. The common parent in its name will give waivers, and any waiver so given, shall be considered as having also been given or executed by each such subsidiary. Thus, the common parent is the proper party to sign consents, including the Form 872 waiver to extend the period of limitations, for all members in the group. Id. The common parent and each subsidiary which was a member of the consolidated group during any part of the consolidated return year is severally liable for the tax for such year. Treas. Reg. § 1.1502-6(a).

Temp. Reg. § 1.1502-77T, captioned “Alternative Agents of the group (temporary),” applies to waivers for taxable years for which the due date (without extensions) of the consolidated return is after September 7, 1988. Temp. Reg. § 1.1502-77T(b). In this case, the due dates of the consolidated returns at issue for Taxpayer 1 and Taxpayer 2 are all after September 7, 1988. The issue is who are the proper parties to consent to extending the statutes of limitations on assessment with regard to Taxpayers 1 and 2. Neither New Name A nor New Name B are in existence. LLC 1 and LLC 2 remain in existence.

Temp. Reg. § 1.1502-77T(a)(3) provides that a waiver of the statute of limitations with respect to a consolidated group, given by any one or more corporations referred to in paragraph (a)(4) is deemed to be given by the agent of the group. Temp. Reg. § 1.1502-77T(a)(4) lists the following alternative agents to act on behalf of the group: (I) the common parent of the group for all or any part of the year to which the notice or waiver applies, (ii) a successor to the former common parent in a transaction to which section 381 (a) applies, (iii) the agent designated by the group under Treas. Reg. § 1.1502- 77(d), or (iv) if the group remains in existence under Treas. Reg. § 1.1502-75(d)(2) or (3), the common parent of the group at the time the notice is mailed or the waiver given.

a. Forms 872 to extend the statute of limitations with regard to Taxpayer 1.

Subparagraph (a)(4)(I) does not apply here because New Name A, formerly Corp A, the common parent of Taxpayer 1 for the years to which these waivers apply, merged with and into LLC 1 on Date C and is no longer in existence. Subparagraph (a)(4)(iii) does not apply because there are no facts that show that a substitute agent for Taxpayer 1 was designated either by New Name A before it went out of existence or by the former members of Taxpayer 1. Finally, Subparagraph (a)(4)(iv) does not apply because the merger of New Name A with and into LLC 1 did not constitute a reverse acquisition.[6]

The only subparagraph applicable here is (a)(4)(ii), which lists as an alternative agent a successor to the former common parent in a transaction in which I.R.C. § 381(a) applies. Section 381(a) applies to an acquisition of assets of a corporation by another corporation in a distribution to such other corporation to which § 332 (relating to liquidations of subsidiaries) applies; or in a transfer to which *§* 361 (relating to nonrecognition of gain or loss to corporations) applies, but only if the transfer is in connection with a reorganization described in subparagraphs (A), (C), (D), (F), or (G) of § 368(a)(1).

On Date C, New Name A merged with and into LLC 1, a newly formed limited liability company that was classified for federal tax purposes as a disregarded entity under Treas. Reg. § 301.7701-3. Because LLC 1 is not a corporation for purposes of I.R.C. § 381(a), it cannot be considered a "successor" in a transaction qualifying under § 381(a) as required by Temp. Reg. §77T(a)(4)(ii), and therefore it cannot be an alternative agent under Temp. Reg. § 1.1502-77T(a)(4)(ii). However, a merger of New Name A into LLC 1 may constitute an A, C, or D reorganization under § 368(a) with New Name C (now called LLC 2), LLC 1's single member.[7] If so, then LLC 2, which at that time was still classified as a corporation for federal income tax purposes, would be the "successor" to New Name A in a transaction qualifying

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[6]This could not have constituted a reverse acquisition for the following reasons: (1) Taxpayer 1 (New Name A and Subsidiaries consolidated group) had terminated on Date A; and (2) the common parent of the new consolidated group, of which New Name A was a member at that time, was New Name C, formerly Corp C.

[7]Importantly, whether a merger of a corporation into a disregarded entity constitutes a § 368(a)(1)(A) merger of the corporation into the corporate member of the disregarded entity is an unresolved issue. See Prop. Treas. Reg. § 1.368-2(b)(2), REG-106186-98, 2000-23 I.R.B. 1226 (June 5, 2000). Therefore, you should determine whether the merger constitutes a C or acquisitive D reorganization under § 368(a).

under § 381(a). LLC 2 would therefore be an alternative agent under Temp. Reg. § 1.1502-77T(a)(4)(ii) for the surviving former members of Taxpayer 1 for its taxable Year 1 and short Year 2. The Form 872 should be captioned:

> *[LLC 2] (EIN: XX-XXXXXXX), formerly [New Name C], as alternative agent for the [Corp A] (EIN: XX-XXXXXXX) and Subsidiaries consolidated group**

Put an asterisk after the word "group" and put another asterisk at the bottom of the first page of the Form 872, and type:

> *This is with respect to the consolidated federal income tax of the [Corp A] and Subsidiaries consolidated group for the group's taxable years ended [Year 1 and short Year 2].*

The Form 872 should be signed by a current officer of LLC 2. In addition to his signature, the signature block should include his name (typed), his official title, and the name of LLC 2. I.R.C. § 6061.

At the time New Name A merged into LLC 1, LLC 2 was known as New Name C and was taxable as a corporation. It has recently converted to a Delaware limited liability company and a disregarded entity.[8] Therefore, to be failsafe, we recommend that you also obtain a Form 872 from Corp D as alternative agent for the Taxpayer 1 group. Corp D appears to be a "successor of a successor" to New Name A. As noted above, the merger of New Name A into LLC 1 may qualify as either an A, C, or D reorganization under § 368(a) (but see footnote 7). If so, then New Name C would be considered a successor to New Name A in a transaction to which § 381(a) applies. Also, New Name C's later conversion to a Delaware LLC may be treated for federal tax purposes as a deemed § 332 liquidation (another I.R.C. § 381(a) transaction). If so, Corp D, as the sole member of LLC 2, would be a successor to New Name C (now known as LLC 2), a transferor corporation in a transaction to which § 381(a) applies. Accordingly, Corp D would be an alternative agent under Temp. Reg. § 1.1502-77T(a)(4)(ii), as a "successor to a successor", to the surviving former members of Taxpayer 1 for its taxable Year 1 and short Year 2. Thus, the Form 872 should be captioned:

> *[Corp D] (EIN: XX-XXXXXXX) as alternative agent for the [Corp A] (EIN: XX-XXXXXXX) and Subsidiaries consolidated group**

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[8]We note that under Delaware law, a corporation that converts to an LLC is for all purposes the same entity that existed before the conversion. 6 Del. C. § 18-214(f).

Put an asterisk after the word “group” and put another asterisk at the bottom of the first page of the Form 872, and type:

> *This is with respect to the consolidated federal income tax of the [Corp A] and Subsidiaries consolidated group for the group’s taxable years ended [Year 1 and short Year 2].*

The Form 872 should be signed by a current officer of Corp D. In addition to his signature, the signature block should include his name (typed), his official title, and the name of Corp D. I.R.C. §§ 6061 and 6062.

If the merger of New Name A into LLC 1 does not constitute a tax-free A, C, or D reorganization, then LLC 2 would not qualify as an alternative agent of Taxpayer 1. Also, if the conversion of New Name C into LLC 2 (i.e., into a Delaware LLC) is not treated as a § 332 liquidation, Corp D would not qualify as an alternative agent of Taxpayer 1. Therefore, as a safety precaution, you should obtain a Form 872 extending the statute of limitations on assessment as to Taxpayer 1 for its taxable Year 1 and short Year 2 from LLC 1 as a successor to New Name A under Delaware law.

LLC 1 is primarily liable as a successor under Section 18-209 of the Delaware Limited Liability Company Act for the all the debts and obligations of New Name A. New Name A, formerly Corp A, is severally liable for the entire amount of the federal income tax owed by Taxpayer 1 for its taxable Year 1 and short Year 2, years in which Corp A was a member of Taxpayer 1. Treas. Reg. § 1.1502-6. Thus, LLC 1 is primarily liable under Delaware law for New Name A’s several liability for the entire amount of the federal income tax owed by Taxpayer 1 for its taxable Year 1 and short Year 2.

If LLC 1 has sufficient assets to cover the full extent of Taxpayer 1’s tax liabilities[9], then whether or not the transactions described above qualify as transactions to which § 381(a) applies, any Form 872 obtained from LLC 1 as successor to New Name A would nonetheless be valid to extend the statute of limitations for Corp A’s Year 1 and short Year 2 returns. Accordingly, you should obtain Form 872 from LLC 1 should be captioned:

> *[LLC 1] as successor to [New Name A] (EIN: XX-XXXXXXX), formerly [Corp A]**

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[9]We note that LLC 1 still has as its subsidiaries many, if not most, of the surviving former members of Taxpayer 1.

Put an asterisk after "[Corp A]" and put another asterisk at the bottom of the first page of the Form 872, and type:

> *This is with respect to [Corp A's] several liability for the consolidated federal income tax of the [Corp A] and Subsidiaries consolidated group for the group's taxable years ended [Year 1 and short Year 2].*

The Form 872 should be signed by a current officer of LLC 1. In addition to his signature, the signature block should include his name (typed), his official title, and the name of LLC 1. I.R.C. § 6061.

b. Forms 872 to Extend the Statute of Limitations for Taxpayer 2.

Year 1. With regard to Year 1, subparagraph (a)(4)(I) does not apply because New Name B, formerly Corp B, the common parent of Taxpayer 2 for the year to which the waiver applies (i.e., Year 1), is no longer in existence. Subparagraph (a)(4)(iii) does not apply because there are no facts that show that a substitute agent for the Taxpayer 2 group was designated either by New Name B before it went out of existence, or by the former members of Taxpayer 2. Finally, subparagraph (a)(4)(iv) does not apply because the merger of New Name B with and into New Name C did not constitute a reverse acquisition.[10]

The only subparagraph applicable here is (a)(4)(ii), which lists as an alternative agent a successor to the former common parent in a transaction in which I.R.C. § 381(a) applies. Section 381(a) applies to an acquisition of assets of a corporation by another corporation in a distribution to such other corporation to which section 332 (relating to liquidations of subsidiaries) applies; or 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 subparagraphs (A), (C), (D), (F), or (G) of section 368(a)(1).

On Date A, Corp B Mergco merged with and into Corp B, and Corp B survived. The shareholders of Corp B received over 50% of the outstanding stock of Corp C (which simultaneously changed its name to New Name C) and Corp B (which simultaneously changed its name to New Name B) became a wholly-owned

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[10]This could not have constituted a reverse acquisition for the following reasons: (1) New Name B was no longer the common parent of Taxpayer 2 and had not been the common parent for almost 5 years; and (2) LLC 2 (then known as New Name C) merged out of existence in a second transaction that occurred on that same day. The only reverse acquisition that occurred in this case occurred on Date A, when Corp C (now known as LLC 2) became the new common parent of Taxpayer 2.

subsidiary of New Name C. This transaction constituted a reverse acquisition under § 1.1502-75(d)(3). Thus, Taxpayer 2 continued in existence with a new common parent. Taxpayer 2 continued in existence up until Date E, when New Name C became a wholly-owned subsidiary of Corp D. On that day, New Name B merged with and into Corp C, and Corp C survived. .

With regard to Taxpayer 2, New Name C (now known as LLC 2) was the common parent of Taxpayer 2 for its taxable years ended tax Years 3, 4 and 5. LLC 2 is also the alternative agent under Temp. Reg. § 1.1502-77T(a)(4)(iv) of Taxpayer 2 for its taxable years ended Years 3, 4 and 5. Furthermore, New Name B merged into LLC 2 at the time the latter was known as New Name C. Thus, New Name C is a successor under Delaware state law to New Name B and therefore it is liable for all of New Name B's debts and obligations, including its several liability for the consolidated tax of Taxpayer 2 for the years in which New Name B was a member. Years 3, 4 and 5. With regard to Years 3, 4 and 5, years in which New Name C (now known as LLC 2) was the common parent of Taxpayer 2, subparagraph (a)(4)(i) applies. LLC 2 (formerly New Name C) is still in existence and therefore can execute the Forms 872 extending the statute of limitations for Taxpayer 2.

Accordingly, the Form 872 obtained from LLC 2 should be captioned:

LLC 2 for Year 1

> [LLC 2], formerly [New Name C] (EIN: XX-XXXXXXX), as successor to [New Name B] (EIN: XX-XXXXXXX) (formerly [Corp B]) and as alternative agent for the [Corp B] (EIN: XX-XXXXXXX) and Subsidiaries consolidated group*

Put an asterisk after the word "group" and then at the bottom of the Form 872, type --

> **This is with respect to the consolidated federal income tax of the [Corp B] (EIN: XX-XXXXXXX) and Subsidiaries consolidated group for the group's taxable year ending [Year 1]*

LLC 2 for Year 3

> *[LLC 2], formerly [New Name C] (EIN: XX-XXXXXXX), and Subsidiaries consolidated group**

Put an asterisk after the word “group” and then at the bottom of the Form 872, type --

**This is with respect to the federal income tax of the [New Name C] (EIN: XX-XXXXXXX) and Subsidiaries consolidated group for the group’s taxable year ending [Year 3]*

LLC 2 for Year 4 and Year 5

*[LLC 2], formerly [New Name C] (EIN: XX-XXXXXXX), and Subsidiaries consolidated group**

Put an asterisk after the word “group” and then at the bottom of the Form 872, type --

**This is with respect to the federal income tax of the [New Name C] (EIN: XX-XXXXXXX) and Subsidiaries consolidated group for the group’s taxable years ending [Year 4 and Year 5]*

These Forms 872 should be signed by a current officer of *LLC 2*. In addition to his signature, the signature block should include his name (typed), his official title, and the name of *LLC 2*. I.R.C. § 6061.

You should also obtain a Form 872 from Corp D as alternative agent for Taxpayer 2 for taxable Years 1, 3, 4 and 5. It appears that Corp D is an alternative agent because it is: (1) a successor to a successor to New Name B for tax Year 1; and (2) a successor to New Name C (now known as LLC 2) for tax Years 3, 4 and 5. The merger of New Name B into New Name C most likely constitutes an A or C reorganization under § 368(a), or a liquidation under § 332, and thus New Name C is a transferor to common parent New Name B in a transaction to which § 381(a) applies. Then, New Name C's recent conversion to a Delaware limited liability company and a disregarded entity,[11] is treated for federal tax purposes as a deemed § 332 liquidation. If this is so, Corp D, its sole member and sole shareholder prior to its conversion, would be treated as a successor to New Name C (now known as LLC 2) in a transaction to which § 381(a) applies. Thus, Corp D is “a successor to a successor” (i.e., New Name C) and therefore is an alternative agent under Temp. Reg. § 1.1502-77T(a)(4)(ii). Accordingly, The Form 872 should be captioned:

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[11]See footnote 8.

Corp D for Year 1

*[Corp D] (EIN: XX-XXXXXXX) as alternative agent for the [Corp B] (EIN: XX-XXXXXXX) and Subsidiaries consolidated group**

Put an asterisk after the word “group” and then at the bottom of the Form 872, type --

**This is with respect to the consolidated federal income tax of the [Corp B] (EIN: XX-XXXXXXX) and Subsidiaries consolidated group for the group’s taxable year ending [Year 1]*

Corp D for Year 3

*[Corp D] (EIN: XX-XXXXXXX) as alternative agent for the [New Name C] (EIN: XX-XXXXXXX) and Subsidiaries consolidated group**

Put an asterisk after the word “group” and then at the bottom of the Form 872, type --

**This is with respect to the consolidated federal income tax of the [New Name C] (EIN: XX-XXXXXXX) and Subsidiaries consolidated group for the group’s taxable year ending [Year 3]*

Corp D for Year 4 and Year 5

*[Corp D] (EIN: XX-XXXXXXX) as alternative agent for the [New Name C] (EIN: XX-XXXXXXX) and Subsidiaries consolidated group**

Put an asterisk after the word “group” and then at the bottom of the Form 872, type --

**This is with respect to the consolidated federal income tax of the [New Name C] (EIN: XX-XXXXXXX) and Subsidiaries consolidated group for the group’s taxable years ending [Year 4 and Year 5]*

These Forms 872 should be signed by a current officer of Corp D. In addition to his signature, the signature block should include his name (typed), his official title, and the name of Corp D. I.R.C. §§ 6061 and 6062.

c. Issue 3 – Seeking Transferee Liability is Premature at this Time.

You have asked whether the Service should seek transferee liability under I.R.C. § 6901 against the transferee-successor. We conclude that the Service should not seek transferee liability at this time. There is no need to rely on transferee liability as the Form 872 extending the statute of limitations to September 15, 2000, is valid and enforceable.

As noted above, we believe that the Form 872, which was executed by Individual A on Date D, is valid and enforceable on successor liability grounds notwithstanding the fact that Individual A signed the Form 872 as an officer of Corp A three days after Corp A merged into LLC 1. The applicable certificate of merger plainly provides for successor liability as follows:

> [A]ll debts, liabilities and duties of each of the business entities that have been merged shall thereafter attach to the surviving entity and may be enforced against it to the same extent as if such debts, liabilities and duties had been incurred or contracted by it.

Agreement and Plan of Merger (New Name A / LLC 1) § 4 (Date C).

Given the very strong probability that the Form 872 is enforceable at law and equity, and given the likelihood that the Form 872 will be ratified by the successor, LLC 1, we believe that for purposes of litigation practice and strategy, it is unnecessary to seek to impose transferee liability on LLC 1 by having it execute Form 977 (Consent to Extend the Time to Assess Liability at Law or in Equity for Income, Gift, and Estate Tax Against a Transferee or Fiduciary) and Form 2045 (Transferee Agreement).

We also note that there is no need to seek transferee liability under I.R.C. § 6901 where it appears that LLC 1 is liable as a matter of law as a successor. I.R.C. § 6901 does not impose tax liability, but merely provides the Service with a procedure to enforce the existing liability of a transferee. See Commissioner v. Stern, 357 U.S. 39 (1958) (transferee liability is determined by reference to state law). The liability of a transferee may be assessed in the same manner, and is subject to the same provisions and limitations, as in the case of the liability of the taxpayer/transferor. I.R.C. § 6901.

Transferee liability is generally recognized as secondary rather than primary liability. Voss v. Wiseman. 234 F.2d 237 (10th Cir. 1956); United States v. Kensington Shipyard & Drydock Corp., 187 F.2d 709 (3d Cir. 1951). This principle underlies the general requirement that before the Service can recover from the transferee, it must first exhaust all other remedies against primary obligors to recover the tax. United States v. Russell, 241 F.2d 879 (1st Cir. 1957); Gatto v. Commissioner, 20 T.C. 830 (1953).

CASE DEVELOPMENT, HAZARDS AND OTHER CONSIDERATIONS

The above-cited merger agreement imposes primary liability on the surviving corporation as successor. On this basis, the surviving corporation could argue, and a court might conclude, that it is not secondarily liable as a transferee. See Commissioner v. Oswego Falls Corp., 71 F.2d 673 (2d Cir. 1934) (under state law, corporation formed by consolidation of three prior corporations is liable for all debts and liabilities of the consolidating corporations, including federal taxes, in the same manner as if incurred by it; the consolidated corporation is directly and primarily liable for the deficiencies in tax of its components as taxpayer, but is not secondarily liable as a transferee of assets until it is shown that the tax cannot be collected from the one primarily liable); but cf. Turnbull, Inc. v. Commissioner, 42 T.C. 582 (1964), aff'd, 373 F.2d 91 (5th Cir. 1967), cert. denied, 389 U.S. 842 (1967) (notwithstanding state merger law, there was a transfer of assets; transferee liability upheld). [redacted]

[redacted]

Please call if you have any further questions.

Jasper L. Cummings, Jr.

Associate Chief Counsel

By: _____
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Acting Senior Technician Reviewer
Associate Chief Counsel (Corporate)

Pat Donahue CC:
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