Internal Revenue Service

Department of the Treasury
Washington, DC 20224

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Person To Contact:
, ID No.
Telephone Number:

In Re:

Refer Reply To:
CC:CORP:1 – PLR-117517-04
Date:
July 28, 2004

Legend

Parent =

Subsidiary 1 =

Subsidiary 2 =

LP =

State A =

Dear

This letter responds to your letter dated March 23, 2004, requesting that the Commissioner make a determination, under § 1.1502-75(b)(2) of the Income Tax Regulations (the "Regulations"), that Subsidiary 1 and Subsidiary 2 have joined in the making of a consolidated return filed by Parent for calendar years 2001 and 2002. Additional information was submitted in letters dated April 21, 2004, May 24, 2004, and July 16, 2004. The information submitted for consideration is summarized below.

Parent is a calendar year taxpayer that uses the accrual method of accounting and was organized under the laws of State A.

Subsidiary 1, Subsidiary 2, and LP are calendar year taxpayers that use the accrual method of accounting.

Parent filed a consolidated tax return for the and tax years. In , Parent formed Subsidiary 1 and Subsidiary 2 as corporations. Additionally, LP was formed as a limited partnership with Subsidiary 1 owning a 99% limited partnership interest and Subsidiary 2 owning a 1% general partnership interest. All business activities of Parent, Subsidiary 1, and Subsidiary 2 were transferred to LP.

Although Subsidiary 1 and Subsidiary 2 had been formed as corporations, Parent's outside accountant was of the understanding that Subsidiary 1 and Subsidiary 2 had been formed as limited liability companies ("LLCs"). Accordingly, Parent's outside tax accountant filed a Form 8832, Entity Classification Election, on behalf of Parent for Subsidiary 1 and Subsidiary 2 to be treated as disregarded entities. Because Subsidiary 1 and Subsidiary 2 were formed as corporations, the Form 8832 was invalid upon their formation.

Furthermore, no Forms 1122, Authorization and Consent of Subsidiary Corporation to be Included in a Consolidated Income Tax Return, were executed by either Subsidiary 1 or Subsidiary 2 or filed with Parent's or return; and Subsidiary 1 and Subsidiary 2 were not included on either Parent's or Form 851, Affiliations Schedule. However, because Subsidiary 1 and Subsidiary 2 were treated by Parent's outside tax accountant as disregarded entities, the income and deductions of Subsidiary 1 and Subsidiary 2 were included, although not in proper form, in the Parent group's and consolidated return.

To correct the situation, Parent has filed (1) Forms 1065, U.S. Return of Partnership Income, for LP for the and tax years with Subsidiary 1 and Subsidiary 2 included as the partners, (2) an amended Form 1120X for , which includes Subsidiary 1 and Subsidiary 2 on the amended Form 851, and Forms 1122 for Subsidiary 1 and Subsidiary 2, and (3) an amended Form 1120X for , which includes Subsidiary 1 and Subsidiary 2 on the amended Form 851.

Parent has made the following representations:

(i) Subsidiary 1 and Subsidiary 2 did not file a separate return for their and tax years;

(ii) Subsidiary 1 and Subsidiary 2 were not included on Form 851 included with Parent's and consolidated return and the Forms 1122 for Subsidiary 1 and Subsidiary 2 were not filed with Parent's consolidated return because the Parent's outside accountant was not aware that Subsidiary 1 and Subsidiary 2 had been formed as corporations rather than as LLCs.

Section 1.1502-75(a)(1) of the Internal Revenue Code of 1986 (the "Code") provides, in part, that an affiliated group of corporations which did not file a consolidated return for the immediately preceding taxable year may file a consolidated return in lieu

of separate returns for the taxable year, provided that each corporation which has been a member of the group during any part of the taxable year for which the consolidated return is being filed consents, pursuant to § 1.1502-75(b) of the Regulations, to the regulations issued under § 1502 of the Code.

Section 1.1502-75(b)(1) of the Regulations provides that consent to the filing of a consolidated return is made by a member of an affiliated group that "joins" in the making of a consolidated return. This subsection of the regulations then provides that a corporation shall be deemed to have joined in the making of a consolidated return if it files a Form 1122 in the manner set forth in § 1.1502-75(h)(2).

If, however, a member has failed to file a Form 1122 in the manner set forth in § 1.1502-75(h)(2) of the Regulations, it may attempt to rely upon § 1.1502-75(b)(2) in order to satisfy the requirement of § 1.1502- 75(a)(1) that it consent to the regulations issued under § 1502. Section 1.1502-75(b)(2) states that the Commissioner may determine, under the facts and circumstances of a case, that a member of an affiliated group has joined in the making of a consolidated return by the group. The circumstances, among others, that the Commissioner will take into account in making this determination include the following:

(1) Whether or not the income and deductions of the member were included in the consolidated return;

(2) Whether or not a separate return was filed by the member for that taxable year; and

(3) Whether or not the member was included in the affiliations schedule, Form 851.

If the Commissioner determines under § 1.1502- 75(b)(2) of the Regulations that a member has joined in the making of a consolidated return, the member will be treated as if it had filed a Form 1122 for the year for which the consolidated return was filed for purposes of § 1.1502-75(h)(2).

Based solely on the information submitted and the representations made, it is held that, for purposes of section 1.1502-75(h)(2) of the Regulations, Parent is treated as if it filed Form 1122 on behalf of Subsidiary 1 and Subsidiary 2 with the consolidated return filed by Parent for the 2001 tax year. Thus, Subsidiary 1 and Subsidiary 2 joined in the making of the consolidated return filed by Parent for the and tax years (section 1.1502-75(b)(2)).

For purposes of issuing this ruling, we relied on certain statements and representations made under penalties of perjury. However, the Director should verify all essential facts.

This ruling is directed only to the taxpayers requesting it. Section 6110(k)(3) provides that it may not be used or cited as precedent.

A copy of this letter must be attached to any income tax return to which it is relevant.

In accordance with the Power of Attorney on file with this office, a copy of this letter is being sent to the taxpayer.

Sincerely,

_____

Victor L. Penico
Senior Counsel, Branch 1
Office of Associate Chief Counsel
(Corporate)