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 GWENDOLYN C. WALKER
CC:LM:RFP:ATL

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

SUBJECT:

This Field Service Advice responds to your memorandum dated August 11, 2000. Field Service Advice is not binding on Examination or Appeals and is not a final case determination. This document is not to be used or cited as precedent.

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TL-N-3614-00

LEGEND

OldCorpA =
NewcoX =
NewcoY =
Sub1 =
Sub2 =
Sub3 =
Sub4 =
Sub5 =
Sub6 =
Sub7 =
Sub8 =
Sub9 =
Sub10 =
Sub11 =
Sub12 =
Sub13 =
Sub14 =

Year 1 =
Year 2 =
Year 3 =
Year 4 =
Year 5 =
Year 6 =
Year 7 =

Date =

P =
Q =
R =
S =
T =

Address =

NewName =
New CorpA =

PLR =

ISSUES

(1) Are the Forms 872 executed by P on March 27, Year 5, December 15, Year 5, and February 10, Year 7, with regard to the OldCorpA and Subsidiaries consolidated group's Year 1 return valid?

(2) Should the Service obtain Forms 977 and 2045 from transferees, if any.

CONCLUSIONS

(1) We believe that the Forms 872 executed by P on March 27, Year 5, December 15, Year 5, and February 10, Year 7, are valid.

(2) We believe that the Service should, before Date, obtain Forms 977 and 2045 from Sub9 and from NewName transferees.

FACTS

In Year 1, OldCorpA, a calendar year taxpayer, was the common parent of a large consolidated group consisting (among others) of Sub1; Sub2; Sub3; Sub4; Sub5; Sub6; Sub7; Sub8; Sub 9; Sub10; Sub11; Sub12; and Sub13. As common parent, OldCorpA filed the consolidated return for the group for that year.[1]

On or around July 21, Year 4, Sub8 changed its name to NewName and Sub10, and Sub3, merged with and into NewName.

On October 20, Year 4, several events occurred. First, OldCorpA created two new subsidiaries: NewcoX and NewcoY by transferring to them the stock of its subsidiaries in exchange for their stock. This restructuring effected a separation of its subsidiaries along business lines. OldCorpA transferred to NewcoX, among others, the stock of NewName, Sub12, and Sub14 (which had joined the consolidated group in Year 3). OldCorpA transferred to NewcoY, among others, the stock of Sub9, Sub1, Sub4, Sub6, Sub2, and Sub5. NewcoY then retransferred to Sub9 the stock of (among others) Sub1, Sub4, Sub6, Sub2, and Sub5. NewcoX then retransferred to NewName the stock of (among others) Sub12, and Sub14.

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[1]OldCorpA also filed consolidated returns for the group for Year 2 and Year 3. Field counsel raised the same issues with regard to these years as well. We note, however, that Year 2 is not a deficiency year. Year 3 does not present a problem because a statutory notice of deficiency was sent within the 3-year limitations period. Therefore, we are only responding to the issues raised by field counsel as they relate to Year 1.

OldCorpA then spun off the stock of NewcoY to its shareholders and merged with and into NewcoX

Sometime after October 20, Year 4, NewcoY, changed its name to NewCorpA, thereby taking the same name as OldCorpA. Several months later, Sub12, a wholly owned subsidiary of NewName, merged with and into NewName.

On March 27, Year 5, December 15, Year 5, and February 10, Year 7, P signed Forms 872 with regard to the OldCorpA and Subsidiaries consolidated group's Year 1 return. When he signed these forms, P was no longer an officer of OldCorpA, which had merged out of existence, but he was an officer of NewCorpA.

Sometime shortly before April 15, Year 7, P, as an officer of NewCorpA, filed a protective claim for refund with regard to OldCorpA's tax Year 2. On April 13, Year 7, the Service issued a statutory notice of deficiency to NewcoX, as successor to OldCorpA and as alternative agent to the former members of the OldCorpA and Subsidiaries consolidated group for the group's Year 1 return. NewcoX, as alternative agent, filed a timely petition in the Tax Court for Year 1.

LAW AND ANALYSIS

Issue 1. The Forms 872 executed by P on March 27, Year 5, December 15, Year 5, and February 10, Year 7 are valid.

P was an officer of OldCorpA, and he is currently an officer of NewCorpA. He could have executed valid Forms 872 in that capacity if OldCorpA had been in existence on those dates. However, OldCorpA merged into NewcoX on October 20, Year 4, and thereafter ceased to exist. P is not an officer of NewcoX, the alternative agent under Temp. Reg. § 1.1502-77T(a)(4)(ii). Therefore, he does not appear to have authority under the consolidated return regulations to extend the statute of limitations with regard to the surviving members of the OldCorpA and Subsidiaries consolidated group. Furthermore, the Forms 872 signed by P do not bind NewCorpA. NewCorpA was not a member of the OldCorpA and Subsidiaries group in Year 1 and, therefore, it is not severally liable for the group's Year 1 tax. See Treas. Reg. § 1.1502-6.

However, we believe that the Forms 872 are valid based on the following common law agency grounds:

Ratification. Ratification is the *after-the-fact* express or implied adoption or confirmation by one person, with knowledge of all material matters, of an act

performed on his behalf by another who lacked all authority to do so. Ratification serves to authorize an action which was preauthorized when taken.

The Appeals Office received a Form 2848, Power of Attorney (POA), one month prior to April 15, Year 7. This POA authorizes P to deal with the Service with regard to the OldCorpA and Subsidiaries consolidated group's tax for Year 1, Year 2 and Year 3. The POA was signed by R, who appears to be an officer of NewcoX, the alternative agent under Temp. Reg. § 1.1502-77T(a)(4)(ii). As alternative agent, NewcoX has the authority to act on behalf of the former members.

Agent of an agent. There is a deemed actual and apparent authority for P to act on behalf of NewcoX, the alternative agent under Temp. Reg. § 1.1502-77T(a)(4)(ii). An April 21, Year 7, memorandum to T, a Service Appeals officer, from S, a Service Examinations officer, contains the following statement:

> Q stated that there was (or had been) an arrangement between NewcoX in which P would handle any subsequent tax matters that arose. It was my impression that this arrangement (or agreement) was informal and not in writing (I may have asked if there was a writing, but I cannot say for sure).

Q is an officer of NewCorpA, but it is unknown what role he had, if any, in OldCorpA. Nevertheless, it appears that there may have been a tax sharing or a tax representation agreement between NewcoX and NewNameA. In Alumax v. Commissioner, 109 T.C. 133, 196-199 (1997), the Tax Court found that a tax sharing agreement was sufficient to establish agency based on the principle of an "agent of an agent."

The Form 2848 (Power of Attorney) executed by R, an officer of NewcoX, authorized P to act as agent for NewcoX. We believe that this may be sufficient to establish the principle of "agent of an agent" in this case. NewcoX has indicated, at least verbally (and by way of a belated power of attorney), that P has the authority to act on behalf of NewcoX, the alternative agent.

The "agent of an agent" argument is based solely on general agency law and not on the proper interpretation of any particular provision of the consolidated return regulations. In this regard, we note that the Tax Court has, on more than one occasion, looked outside the consolidated return regulations to general principles of state agency law to determine agency issues relevant to consolidated groups filing consolidated returns. See, for example, Alumax v. Commissioner, 109 T.C. 133, 196-199 (1997); Lone Star Life Insurance Company v. Commissioner, T.C. Memo. 1997-465. We see no difference between the present situation and one in

which a standalone taxpayer corporation engages another corporation to act as its agent. We believe that the issue presented here could just as likely have arisen in a situations that did not involve the filing of a consolidated return.

Estoppel. P handled this case throughout the Examination process and the Appeals process. He never informed Appeals or Exam that OldCorpA merged out of existence in October 20, Year 4 and that NewCorpA (for which he currently works) is a totally different company. The Appeals Officer asserts that P deceived the Service in executing a previous Power of Attorney form, and the subsequent Forms 872, all showing the taxpayer as OldCorpA and Subsidiaries, and listing the EIN number of OldCorpA. See Union Texas International Corporation v. Commissioner, 110 T.C. 321(1998).

CASE DEVELOPMENT, HAZARDS AND OTHER CONSIDERATIONS

Although there is a case for estoppel, it appears to be a weak one at best. It is arguably difficult to see where the Service was deceived. P had been working with the Service during the entire audit and appeals process. He executed documents for OldCorpA, which is the name of the corporation for which he was then working, it also happened to be the name adopted by NewCorpA. The caption contained the following address: Address. This address apparently is the post office address of both OldCorpA and NewCorpA. True, the documents had the EIN of OldCorpA, however, the petitioner can argue that the caption of these documents should show the Taxpayer, which in this case is OldCorpA and Subsidiaries. Further, on the signature page, above P's signature is the typed description, "CorpA and Subsidiaries." Noticeably absent is any EIN number. Finally, on the signature line, P's title is set forth (i.e., the title he holds with NewCorpA), which was not the same title that he had as an officer of OldCorpA (i.e., the title set forth on the consolidated return for Year 1). Petitioner can therefore validly argue that these different titles should have alerted the Service that it had the wrong entity executing the Forms 872. Petitioner can further argue that P properly signed the Form 872 as the an officer of NewCorpA, thinking that the taxpayer, OldCorpA, was correctly identified on the front of the form.

Issue 2: Should We Obtain Forms 977 from Transferees?

The answer, in short, is yes. Assuming that the Forms 872 for Year 1 tax year are not valid, the statute of limitations with regard to that year would have expired on September 15, Year 5. Section 6901(c)(2) gives the Service two extra years (in addition to the normal 3-year statute of limitations) to assess against a transferee of a transferee. With regard to tax owed for Year 1, the 2-year "transferee of a transferee" period expires on Date. To ensure protection of the statute of

limitations, the Service must obtain Forms 977 from Sub9 and from NewName or issue notices of transferee liability to those corporations before Date.[2]

Sub9 is a "transferee of a transferee" because it received assets that were originally owned by OldCorpA and that were subsequently transferred by OldCorpA to NewcoY, which in turn transferred the assets once more to Sub9 These assets include (among others): the stock of Sub1, Sub2, Sub4, Sub5, and Sub6. All of these corporations were members of the OldCorpA group in the group's Year 1 tax year.

NewName is a "transferee of a transferee" because it received the stock of Sub14 (a company that joined the OldCorpA group in Year 3). Sub14 was originally owned by OldCorpA and transferred by OldCorpA to NewcoX, which in turn transferred the Sub14 stock once more to NewName. Also, NewName is a "transferee of a transferee" with regard to the stock of Sub12, which was originally owned by OldCorpA and was transferred by OldCorpA to NewcoX and retransferred to NewName. That status as a "transferee of a transferee" was not affected when Sub12 later merged into NewName, which then became a transferee with respect to the assets of Sub12 [3]

CASE DEVELOPMENT, HAZARDS AND OTHER CONSIDERATIONS

Note that there is a potential danger in seeking transferee liability. Sub9 and NewName, are primarily liable for the Year 1 consolidated tax because they were both members of the consolidated group for the Year 1 year. These two corporations could argue that they are primarily liable and, therefore, cannot also be 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

[2]Please note that I.R.C. § 6901(c)(2) provides that the Service must assess the liability against the transferee of a transferee within one year from the expiration of the period of limitations against the preceding transferee, but not later than three years from expiration of the period of limitations for assessment against the initial transferor.

[3]Note that NewName, would not be a transferee of a transferee if, in Year 1, Sub12, was already its subsidiary. However, according to the facts recited in PLR, NewcoX planned to contribute the stock of Sub12 to NewName as part of the Year 4 restructuring. This indicates that Sub12 was not a subsidiary of NewName (formerly Sub8) in Year 1.

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 (5the Cir. 1967), cert. denied, 389 U.S. 842 (1967) (notwithstanding state merger law, there was a transfer of assets; transferee liability upheld).

However, this case can be distinguished from Oswego Falls Corp. The documents effecting the merger of Sub10, Sub12, and Sub3 into NewName all indicate that NewName assumed the liabilities of these constituent corporations. Also, the document effecting the merger of OldCorpA into NewcoX indicates that NewcoX assumed the liabilities of OldCorpA. The Tax Court, in Southern Pacific v. Commissioner, 84 T.C. 367 (1985), found that where the surviving corporation agrees to be liable for the liabilities of the merged corporation or if state law imposes the merged corporation's liabilities on the surviving corporation, the surviving corporation, in addition to being liable as a successor of the merged corporation, may also be liable as a transferee of the merged corporation. In our case, these corporations not only are primarily liable but also assume liability as transferees.

Further, although NewName and Sub9 are primarily liable in their own right, they also received the stock of various companies by transfer, not by merger. This also distinguishes these corporations from the Oswego Falls Corp. situation. Thus, NewName and Sub9 are liable as transferees independent of their primary liability for the Year 1 tax year. Oswego Falls Corp. was a situation where both primary liability and transferee liability arose out of the same transaction, i.e., a merger. Here, New name and Sub9 are both primarily liable because they were members of the OldCorpA group in Year 1, and only subsequently did they become liable as transferees with regard to the Year 1 tax year.

Please call if you have any further questions.

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cc: