



OFFICE OF
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DEPARTMENT OF THE TREASURY
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INTERNAL REVENUE SERVICE NATIONAL OFFICE FIELD SERVICE ADVICE

MEMORANDUM FOR RICHARD H. GANNON
SPECIAL LITIGATION ASSISTANT LM:MCT:PHI

FROM: Lawrence H. Schattner
Chief, Branch 2 (Collection Bankruptcy & Summonses)
CC:PA:CBS:BR2

SUBJECT: Taxpayer Liability as a Transferee

This Chief Counsel Advice responds to your memorandum asking our advise. In accordance with I.R.C. § 6110(k)(3), this Chief Counsel Advice should not be cited as precedent.

LEGEND

- A
- B
- C

ISSUES

Whether B, the surviving corporation of a merger of A and B, may be held responsible as a transferee for the tax liabilities of A, which ceased to exist as a separate corporation upon the merger.

CONCLUSIONS

B may not be held responsible as a transferee for A's tax liabilities.

FACTS

The focus of this case is A's tax liability for the tax year. Prior to the examination for this period, A operated as a wholly owned subsidiary of C. In or

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around [redacted], A moved its headquarters to the corporate offices of B. Once A moved to B's corporate offices, the two companies operated as one. In [redacted] C entered into a reorganization with a number of parties. As part of the reorganization, A merged into B. As a result of the merger and in accordance with the terms of the agreement, A ceased to exist as a separate entity. According to the terms of the merger

The merger shall have the effects specified in the [redacted] Law] and, upon the effectiveness of the Merger,... all rights of creditors and all liens upon any property of either Constituent Corporation shall thenceforth attach to the Surviving Corporation to the same extent as if such debts, liabilities and duties had been incurred or contracted by it.

LAW AND ANALYSIS

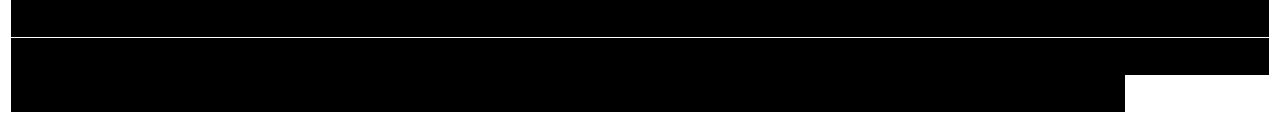
As you point out, generally, where state law makes a surviving corporation primarily liable for the debts of the disappearing corporation, the surviving corporation is the primary obligor and is not liable as a transferee of the disappearing corporation. *Saenger v. Commissioner*, 38 B.T.A. 1295 (1938); *Oswego Falls Corp. v. Commissioner*, 26 B.T.A. 60 (1932), *affd* 71 F.2d 673 (2d Cir. 1934), *Missile Systems Corporation of Texas v. Commissioner*, T.C. Memo 1964-212. The exception to this general rule is where the surviving party has agreed contractually to assume the debts of the disappearing party. Then the surviving party may be liable both as the primary obligor and as a transferee. *Turnbull, Inc. v. Commissioner*, 42 T.C. 582 (1964), *affd* 373 F.2d 91 (5th Cir. 1967).

CASE DEVELOPMENT, HAZARDS, AND OTHER CONSIDERATIONS

In the instant case, there is a provision in the merger agreement that discusses the liability of the surviving corporation for the disappearing corporation's debts. Your assessment of this provision is that it is simply restating in the agreement what the law already provides; that B will be primarily liability for A's debts under the law of the state. You do not believe that B is contractually assuming transferee liability.

The merger agreement provides that the debts of A shall attach to B to the same extent as if such debts, liabilities, and duties had been incurred or contracted by it. This language is also found in *Southern Pacific Transportation Company v. Commissioner*, 84 T.C. 387, 390 (1985), in which the court determined that the successor company had assumed the debts and was the transferee of the disappearing company. The language in Southern Pacific, however, is much more extensive and direct than the language in the instant case. In addition, the language in Southern Pacific is not introduced by language stating that the merger shall be governed by the law of the state of incorporation.

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LAWRENCE H. SCHATTNER
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