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CHIEF COUNSEL

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
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INTERNAL REVENUE SERVICE NATIONAL OFFICE CHIEF COUNSEL ADVICE

MEMORANDUM FOR ASSOCIATE AREA COUNSEL, AREA 3
(LARGE AND MIDSIZE BUSINESS)
CC:LM:MCT:PHI
ATTN: RICHARD H. GANNON
SPECIAL LITIGATION ATTORNEY

FROM: Assistant Chief Counsel (Administrative Provisions and Judicial Practice) CC:PA:APJP

SUBJECT: Consent to Extend Time to Assess

This Chief Counsel Advice responds to your memorandum dated May 1, 2001. In accordance with I.R.C. § 6110(k)(3), this Chief Counsel Advice should not be cited as precedent.

LEGEND

Target =

Successor Corporation =

Parent 1 =

Parent 2 =

Assistant Controller =

CFO =

Date 1 =

Date 2 =

Date 3 =

Date 4 =

Date 5 =

ISSUE

Whether Forms 872 (consents to extend the period of limitations) executed after Target's merger into Successor Corporation are considered valid if the Forms 872 improperly bore only Target's name and made no reference to Successor Corporation as successor in interest to Target.

CONCLUSION

The Forms 872 are valid under equitable principles, in particular, contract reformation based on mutual mistake.

FACTS

The Service is conducting an examination of Target for several years. The subject of the present advice is calendar year 1996. Target was a U.S. subsidiary of Parent 1, a corporation. Both Target and Parent 1 were engaged in the business of .

Parent 1 entered into a reorganization agreement with, among other parties, Parent 2, a company incorporated in Delaware. Successor Corporation, a subsidiary of Parent 2, has long been engaged in the . Target merged into Successor Corporation, effective on Date 1. Under Delaware law, Target's corporate existence ceased on Date 1 and Successor Corporation became liable for Target's debts. DEL. CODE ANN. tit. 8, §259(a) (1974 & Supp. 2000).

The Service received notice that the merger had taken place on or about Date 2 when Target filed its final return for the short period ending Date 1. Enclosed with the return was a copy of the merger agreement and certificate of merger to the return. The examination team was apparently aware of the merger at the time it solicited the consents in issue.

The period of limitations for assessing a deficiency with respect to Target's 1996 tax year was due to expire on September 15, 2000, three years after the filing of the 1996 return, as provided by I.R.C. § 6501(a). During the course of the examination of Target's 1996 tax return, Target and the IRS executed three Forms 872 in 2000. Although the Forms 872 were executed after the merger, they were executed in Target's name. The first two Forms 872, signed by Assistant Controller on Dates 3 and 4, purported to extend the period of limitations to December 31, 2000. The last Form 872, signed by CFO on Date 5, purported to extend the period of limitations to June 30, 2001.

LAW AND ANALYSIS

As a preliminary matter, we note that Successor Corporation is primarily liable for Target's 1996 tax liability and has the power to extend the period of limitation for its own direct liability, just as its predecessor, Target, would have had. Pleasonton Gravel Co. v. Commissioner, 85 T.C. 839, 853 (1985). The sole issue for decision is whether the Forms 872, Consent to Extend the Time to Assess Tax, were valid. Although the Forms 872 were signed in the name of Target, we conclude that the principle of contract reformation stated in Woods v. Commissioner, 92 T.C. 776 (1989) applies. Thus, the Forms 872 are deemed to have been executed in the name of Successor Corporation as successor in interest to Target. Our conclusion that the Forms 872 were valid is also supported by other cases not decided on the basis of contract reformation in which courts have construed defectively drafted Forms 872 so as to give effect to the intent of the parties.

Under § 6501(a), the period of limitations for assessing an income tax liability generally expires three years after the date the return is filed. However, an exception to this rule is provided by § 6501(c)(4):

> Where, before the expiration of the time prescribed in this section for the assessment of any tax imposed by this title . . . both the Secretary and the taxpayer have consented in writing to its assessment after such time, the tax may be assessed at any time prior to the expiration of the period agreed upon.

Reformation is an equitable remedy used to reform written contracts to reflect the real agreement between the parties when, because of mutual mistake, the writing does not embody the contract as actually made. BLACK'S LAW DICTIONARY, 1285 (7th ed. 1999). See Rocanville Corp. v. Natural Gas Pipeline Co., 823 F.2d 92, 94 (5th Cir. 1987). Although a Form 872 is not a contract, contract principles are relevant because § 6501(c)(4) requires that the parties reach a "written agreement" concerning any extension. The term "agreement" means a manifestation of mutual assent. Piarulle v. Commissioner, 80 T.C. 1035, 1042 (1983). It is the objective manifestation of mutual assent as evidenced by the parties' conduct that determines whether they have made an agreement. Kronish v. Commissioner, 90 T.C. 684, 693 (1988).

The Tax Court has the equitable power to reform a consent to conform to the parties' intention. Woods v. Commissioner, supra. In Woods, the consents contained mistakes in the taxpayer's name and EIN. The name provided on the form was "Solar Environments, Inc." rather than "Solar Equipment, Inc." and the EIN was shown as "43-1156200" rather than "43-1156196." The Tax Court permitted the document to be reformed because the incorrect language was the product of a mutual mistake. The Tax Court noted that reformation is not precluded merely because the mistake originated with the IRS. The Tax Court stated that in

order to reform a Form 872 there must be "clear and convincing evidence" as to the parties' intent.

In the present case, the IRS and persons authorized to execute Forms 872 on behalf of the taxpayer (Assistant Controller and CFO) intended to extend the period for assessment of tax for 1996. Thus, there was a meeting of the minds and written agreements were entered into. However, the Forms 872 did not reflect what was actually intended by the parties. The Forms 872 should have identified the taxpayer as "Successor Corporation, successor in interest to, by way of merger with, Target." See Rev. Rul. 59-399, 1959-2 C.B. 488, holding that the surviving or resulting corporation in a merger or consolidation under state law may validly sign an extension agreement on behalf of the predecessor corporation for a period before the transfer. As a result of a drafting error, each Form 872 bore the name of Target only. We believe the Tax Court would likely reform the writing to conform to the parties' intentions. Woods, supra. Reformation would require that the Service show by clear and convincing evidence that the parties intended the Forms 872 to extend the period of limitations for Target's liability for 1996. Id. at 789, n. 14. Thus, it would be helpful for the Service to contact the revenue agent who signed the Forms 872 on behalf of the Service to verify the parties' intention. Also, it would be helpful to conduct a review of information in the administrative file regarding the intent of the parties.

We recognize that in this case the error in drafting the Forms 872 was not a clerical error, typographical error, or scrivener's error of the type involved in Woods. Nonetheless, we think the validity of the Forms 872 should be defended because the principle of contract reformation is not limited to situations involving such errors. Thus, one court has stated:

> Before an instrument will be reformed, the proponent of the reformation has the burden of proving by clear and convincing evidence that a mistake mutual and common to both parties has been made. It must be clear that the instrument has done what neither party intended. If such a mistake is shown it is irrelevant whether it is a mistake of law or fact or merely a scrivener's error; all may be rectified in equity.

St. Louis County National Bank v. Maryland Casualty Co., 564 S.W.2d 920, 924 (Mo. Ct. App. 1978) (citations omitted) (emphasis added). This point is also made in FARNSWORTH ON CONTRACTS § 7.5 (2d ed. 2000):

> The classic case for reformation is a scrivener's or word processor's error. Reformation is available in the case of the omission of a term agreed on, the inclusion of a term not agreed on, or the incorrect reduction of a term to writing. However, reformation is not limited to these situations. If the mistake of the parties relates to the legal effect of the language that they have used, the writing may be reformed so

> that it will have the intended effect. Reformation is available even if the effect of the error is to make it appear that the parties never reached an enforceable agreement.

Your memorandum concerning this case refers to Paramount Warrior, Inc. v. Commissioner, T.C. Memo 1976-400, aff'd without published opinion, 608 F.2d 522 (5th Cir. 1979), in which contract reformation principles were not applied in a situation very similar to that presented here. We do not view Paramount Warrior as the controlling legal precedent because it was decided long before Woods.

In Paramount Warrior, "Warrior" was the successor corporation and "Pacific" was the target corporation. The Tax Court concluded that after the merger, no person could have had the authority to act on behalf of Pacific with respect to Pacific's pre-merger tax liabilities. In reaching this conclusion that Tax Court made the following observation:

> Respondent, at trial, specifically renounced any argument that the post-merger agreements extending the period of limitations, which were executed by Peizer in the name of Pacific, might be deemed to have been executed on behalf of Warrior in respect of the primary liability which devolved upon the latter by virtue of the merger.

Id. (emphasis added). In the present case, the argument that the IRS "specifically renounced" in Paramount Warrior should be made if Successor Corporation challenges the validity of the Forms 872. Woods provides legal authority to support the argument that the Forms 872 executed in the name of Target are deemed to have been executed by Successor Corporation in respect of its primary liability for Target's 1996 taxes.

Warner Colliers Co. v. United States, 63 F.2d 34 (6th Cir. 1933), provides additional support for upholding the validity of the consents. In that case, waivers of the statute of limitations were deemed valid, based on the parties' intent, even though improperly executed in the name of a corporation no longer in existence. The fundamental principle underlying Woods and Warner Colliers Co. is that consents should be construed to give effect to the intent of the parties. This principle is also illustrated by Mulford v. Commissioner, 66 F.2d 296 (3d Cir. 1933) (year to which the waiver applied was omitted from the consent form, but consent was nonetheless held to be valid). We therefore conclude that although the name of Successor Corporation was omitted from the consents, they should nonetheless be considered valid just as the omission of the year in Mulford did not invalidate the consent in that case. To conclude otherwise would be to render the Forms 872 meaningless. Clearly, "[a]n effective and not a futile act was intended." Mulford, 66 F.2d at 297 (citing Stange v. United States, 282 U.S. 270, 277 (1931)).

Finally, we note that the present case is distinguishable from Malone & Hyde, Inc. v. Commissioner, T.C. Memo. 1992-661. In that case, an accountant named on a power of attorney on behalf of a corporation that ceased to exist as a result of a merger executed a consent form to extend the period of limitations. The consent was held to be invalid because the power of attorney terminated when the merger occurred. The accountant was not an officer, director, or shareholder and had no authority to sign the consent form except to the extent permitted by the power of attorney. In the present case, by contrast, the Forms 872 were executed by parties who had authority to sign consents on behalf of Successor Corporation.

This writing may contain privileged information. Any unauthorized disclosure of this writing may have an adverse affect on privileges, such as the attorney client privilege. If disclosure becomes necessary, please contact this office for our views.

If you have any further questions, please contact Lisa R. Neuder at (202) 622-4940

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