DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

OFFICE OF
CHIEF COUNSEL

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INTERNAL REVENUE SERVICE NATIONAL OFFICE FIELD SERVICE ADVICE

MEMORANDUM FOR RICHARD S. BLOOM
ASSOCIATE AREA COUNSEL (LMSB) LM:MCT,
CLEVELAND, OHIO

FROM: Debra Carlisle
Chief, Branch 5, CC:CORP:B05

SUBJECT: Request for Field Service Advice

This Chief Counsel Advice responds to your memorandum dated Date H. In accordance with Internal Revenue Code ("Code") § 6110(k)(3), this Chief Counsel Advice should not be cited as precedent.

LEGEND

Corp B =

Corp C =

Corp D =

Corp E =

Corp F =

taxable year A =

taxable year B =
taxable year C =
taxable year D =
taxable year E =
taxable year F =

Date A =
Date B =
Date C =
Date E =
Date F =
Date G =
Date H =
Date I =

State A =

ISSUES

1. For which entities should a Form 872 be executed?

2. Who is the appropriate person to execute the Form 872?

3. What is the proper language to use on the Form 872?

CONCLUSIONS

1. Entities for Which Form 872 Should be Executed

To ensure that the Internal Revenue Service ("Service") may assess deficiencies arising as a result of its audit of Corp C and Corp D for the year ended Date B, we recommend that the field obtain properly executed Forms 872 from Corp F, as successor in interest to both Corp C and Corp D. In addition, a Form 872 should be obtained from Corp E, as successor in interest to Corp B.

On the facts submitted by your office, we are unable to conclude with certainty, that the return filed by Corp C and Corp D is a consolidated return under Code § 1501 and Treasury Regulations §§ 1.1502 et. seq. The uncertainty arises from the fact that further details are needed regarding how Corp A converted to a stock bank. Significant is that in connection with this conversion came a new parent of Corp C, i.e. Corp B, and the new parent was not included in the purported

consolidated return filed by Corp C and Corp D.

The creation of a new parent is a significant event under the consolidated return rules because the presence of a new parent can cause a termination of the consolidated group. The presence of a new parent may also indicate that a reverse acquisition has occurred under § 1.1502-75(d)(3). A reverse acquisition can occur in connection with the conversion of a mutual savings and loan association to a stock bank.

If the reverse acquisition rules of § 1.1502-75(d)(3) apply, the Corp C and Corp D affiliated group would not terminate due to the presence of a new common parent, Corp B. Instead, the Corp C and Corp D affiliated group would continue, under § 1.1502-75(d)(3), with the new common parent, Corp B being required to join in the consolidated return filing for the open tax years, and could be compelled to do so on audit. In that event, successor liability would be based on the tax for the consolidated group consisting of Corp B, Corp C and Corp D under the alternative agent rule of § 1.1502-77T(4)(iv).

In effect, the reverse acquisition provision at § 1.1502-75(d)(3) is one of the means by which a new parent can enter an existing consolidated group and not cause a termination of that group. There would not be a termination of the group because the continuing filing requirement of § 1.1502-75(a)(2) would be imposed until permission is granted by the Commissioner, under § 1.1502-75(a)(3), to discontinue filing on a consolidated basis.

If a reverse acquisition did not occur, for example, if the former owners of Corp C do not own more than 50% of Corp B, a change of the common parent in this instance, under § 1.1502-75(d)(1), would have caused a termination of the Corp C and Corp D group as of the date of acquisition. Consequently, Corp C, Corp D and Corp B would be required to file separate returns until the new group (composed of Corp B, Corp C and Corp D) made a new election under § 1.1502-75 to file on a consolidated basis.

Since the facts regarding the formation of Corp B are not definite, we cannot conclude that a reverse acquisition occurred. Nor can we conclude that Corp B's ownership of Corp C caused a termination of what may have been a group already filing a consolidated return consisting of Corp C and Corp D. Accordingly, the most prudent approach under the circumstances is for the field to obtain Forms 872 from Corp F, as successor in interest to both Corp C and Corp D. In addition, the field should also obtain a Form 872 from Corp E, as successor in interest to Corp B.

2. <u>The Appropriate Person to Sign the Form 872</u>

In accordance with § 6062 of the Code and the treasury regulations thereunder, the Form 872 will need to be signed by the president, vice-president, treasurer, assistant treasurer, chief accounting officer, or any other officer duly authorized to so act for each corporation against which additional tax may be assessed. Assuming that the consolidated return regulations do not apply, the Form 872 should be signed on behalf of the successor in interest to each corporation.

3. The Forms 872 should be captioned as follows:

- Corp F, as successor in interest to, by merger with, Corp C. Put an asterisk after this captioning. At the bottom of the Form 872 write "*This is with respect to the consolidated and/or separate return liability for the taxable year ended Date B." Place the E.I.N. for Corp F in the E.I.N. box on the Form 872.

- Corp F, as successor in interest to, by merger with, Corp D. Put an asterisk after this captioning. At the bottom of the Form 872 write "*This is with respect to the consolidated and/or separate return liability for the taxable year ended Date B." Place the E.I.N. for Corp F in the E.I.N. box on the Form 872.

- Corp E, as successor in interest to, by merger with, Corp B. Put an asterisk after this captioning. At the bottom of the Form 872 write "*This is with respect to the consolidated and/or separate return liability for the taxable year ended Date B." Place the E.I.N. for Corp E in the E.I.N. box on the Form 872.

- Additional Information: At the time the Form 872 is presented to the taxpayer for execution, please notify the taxpayer that the taxpayer may: 1) refuse to extend the period of limitations; or 2) limit the extension to particular issues or to a particular period of time. Code § 6501(c)(4)(B). The statutory notice requirement under § 6501(c)(4)(B) generally applies to requests to extend the period of limitations made after December 31, 1999.

- If you have not already done so, we recommend that you verify the E.I.N.s of the respective corporations to be shown on all of the Forms 872.

- Please note that Internal Revenue Manual ("IRM")121.2.22.3 requires use of Letter 907(DO) to solicit the Form 872, and IRM 121.2.22.4.3 requires the use of Letter 929 (DO) to return the signed Form 872 to the taxpayer. Dated copies of both letters should be retained in the case file. In the event a Form 872 becomes separated from the file or lost, these documents will help to establish the agreement.

FACTS

In Date F, Corp B was incorporated under the laws of the state of State A in connection with Corp A's conversion from a mutual savings and loan association to a stock savings bank. The stock bank was named Corp C. In connection with the transaction, Corp B became a holding company and parent of Corp C owning 100% of its stock.

Corp C owned a subsidiary known as Corp D. Corp D was incorporated in State A on Date C. Corp D generated no revenues or expenses during tax years ended taxable year A, taxable year B and the short year ended Date B.

From the documentation submitted, it is not known whether federal income tax returns were filed on a consolidated or separate company basis for Corp D or for Corp C, for tax years ended before taxable year C. Prior to Date A, Corp C was the mutual savings and loan association known as Corp A.

From its incorporation in Date F through the tax year ended Date B, Corp B filed its federal income tax returns on a stand alone basis.

Two merger documents were identified. One document is dated Date G, and is between Corp B and Corp E. A second document is dated Date B, and is between Corp C and Corp F. The documents provide that:

1) The merger between Corp B and Corp E was intended to qualify as a reorganization under § 368(a)(1)(A); 2) Corp B would merge with Corp E and Corp E would be the surviving entity with Corp B ceasing to exist; 3) Corp C would merge into Corp F (a wholly owned subsidiary of Corp E) and would subsequently cease to exist with Corp F surviving; and 4) the merger of Corp C into Corp F would be governed by State A law. No reference was found regarding whether the merger of Corp C into Corp F was intended to qualify under § 368(a)(1)(A).

The Date B, document between Corp C and Corp F further provides that: 1) all shares of Corp F issued and outstanding immediately before the merger of the two would remain outstanding and unchanged after the merger became effective; 2)

no additional shares of Corp F stock would be issued; and 3) the shares of Corp C outstanding stock immediately prior to the merger would be canceled and the holder (Corp B) would receive no shares of Corp F or other consideration in exchange.

Pursuant to these documents, the mergers were carried out on Date B. For taxable years ended taxable year C through Date B, Corp C and Corp D combined their returns and filed as though they were filing on a consolidated basis. Corp C claimed a net operating loss of approximately $ on its final return for the short period ended Date B. On Date E, a Form 1139, Corporation Application for Tentative Refund, was filed on behalf of Corp C seeking refunds for taxable years ended taxable year A and taxable year B arising from the carryback of a portion of the $ net operating loss claimed on the final return of Corp C for the short period ended Date B. The Commissioner paid the tax years taxable year D and taxable year E refund claims. On Date I, as a consequence of the merger, Corp D was dissolved.

The Service has determined that it will only examine the consolidated return of Corp C and Corp D for the short period ending Date B. The examination is part of an audit on Corp E for the taxable year E and the taxable year F.

LAW AND ANALYSIS

1. Reverse Acquisitions

In order to determine who is the proper party to sign the Forms 872, it must be determined whether Corp A and Corp D were filing a consolidated return prior to Date F and whether a reverse acquisition occurred. If such a determination cannot be made, then the parties who would be the successor corporations on a separate entity basis should sign the Forms 872.

Treas. Reg. § 1.1502-75(d)(1) provides the general rule that a consolidated group remains in existence if the common parent corporation (i.e., the highest-tier includible corporation) remains the common parent and at least one subsidiary remains affiliated with it. See § 1504. One of the exceptions to this general rule is the reverse acquisition rule in § 1.1502-75(d)(3). If there is a reverse acquisition, the acquired consolidated group continues, with a new common parent and the old common parent is no longer the common parent of the group.

A reverse acquisition within the meaning of § 1.1502-75(d)(3) occurs when:

1) any member of a consolidated group acquires stock of the common parent of another group (so that the acquired common parent would become a member of the acquiring group but for the application of this rule) or acquires substantially all of the assets of the common parent of another consolidated group; and

2) the former shareholders of the acquired corporation receive more than 50 percent in value of the stock of the common parent of the acquiring group in exchange for the stock or assets of the acquired group. Treas. Reg. § 1.1502-75(d)(3)(i).

If a transaction constitutes a reverse acquisition, any group of which the acquired corporation was the common parent immediately before the acquisition will be treated as remaining in existence (with the acquiring corporation becoming the common parent of the group). See § 1.1502-75(d)(3)(i). Where the acquired corporation was the common parent of a consolidated group, the taxable year of the acquired corporation (and of each member of the acquired group) will not terminate as a result of the acquisition.

The fact that Corp B, a holding company, is parent of Corp C following a mutual savings and loan association's conversion to a stock bank, suggests that a reverse acquisition may have occurred. If in the conversion, shareholders of Corp C obtained more than 50 percent of the fair market value of the outstanding stock of Corp B as a result of their owning Corp C, then a reverse acquisition occurred and Corp B is the acquiring company. Consequently, Corp B would be the new common parent of the continuing Corp C/Corp D group.[1]

2. Scope of Agency for the Corp B, Corp C/Corp D Group.

Treas. Reg. § 1.1502-77(a) provides that the common parent of a consolidated group is the sole agent for each subsidiary in the group. Thus,

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[1] Compare with Rev. Rul 69-163, 1969-1 C.B. 217, where the change of common parent in a transaction that was not a reverse acquisition resulted in termination of the old consolidated group placing the new group on a separate returns basis, absent the filing of a new consolidated return election.

ordinarily, the common parent is the proper party to receive a statutory notice of a deficiency for all members in the group. Treas. Reg. § 1.1502-77(a).

Generally, the common parent for a particular consolidated return year will remain the common parent agent for purposes of extending the period of limitations with respect to that year even though that corporation is no longer the common parent of that group when some action, such as executing an extension, needs to be taken for that year. This general rule does not apply when the common parent is not in existence at the time of the issuance of the statutory notice.[2] The common parent is considered to have gone out of existence when it formally dissolves or merges under state law into another corporation.

Under our facts, the only entity which would have become the common parent in the reverse acquisition is Corp B. Corp B will be out of existence as of the date of the proposed notice.

Under § 1.1502-77T(a)(4)(ii), the alternative agent for the group includes a successor to the former common parent in a transaction to which § 381(a) applies. Section 381(a) applies to an acquisition of assets of a corporation by another corporation in a distribution to the corporation to which § 332 (relating to liquidations of subsidiaries) applies; or in a transfer to which § 361 (relating to non recognition 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).

If it is determined that a reverse acquisition occurred here and that Corp B became the common parent of the group, and if it is further determined that Corp B merged into Corp E in a transaction subject to § 381(a), then Corp E is subject to the liability for members of the consolidated group consisting of Corp B, Corp C and Corp D, under § 1.1502-77T(a)(4)(ii), to the same extent that Corp B would have been liable. See § 1.1502-6.

On the other hand, if it is determined that Corp B became the parent of Corp C in a transaction other than through a reverse acquisition under §1.1502-75(d)(3), then a determination of successor liability on a separate return basis will be required. As such, successor liability resulting from Corp B's merger into Corp E

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[2] Where a reverse acquisition has occurred and the old common parent is no longer in existence, the alternative agent rule of § 1.1502-77T(4)(iv) will apply. However, the alternative agent rule of § 1.1502-77T(4)(iv) will not apply in this case because both the old and new common parents have merged out of existence.

would only include the tax liability from Corp B's separate return. Successor liability resulting from both Corp C and Corp D's mergers into Corp F would be similarly determined.

We note that you mention § 6501 regarding the statute of limitations for Corp C and Corp D returns. You do not, however, indicate when the statute will start to run. If you have questions regarding § 6501 and the effect of a properly executed consent on a year to which a net operating loss may apply, please contact CC:PA:APJP:B02. Last, whereas successor liability is defined in accordance with state law, the applicable state merger statute should be reviewed.

CASE DEVELOPMENT, HAZARDS AND OTHER CONSIDERATIONS

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

Should you have additional questions, please contact Lola L. Johnson at (202) 622-7550.

Associate Chief Counsel (Corporate)
By: DEBRA CARLISLE
Chief, Branch 5