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## STATEMENT OF AUDIT PROCEDURE

### CHANGES TO THE CORPORATE TAXPAYER: GUIDELINES FOR AUDITORS

#### INTRODUCTION

This Statement of Audit Procedure (SAP) provides guidelines to auditors on issues that arise when there are changes to a corporate taxpayer including (1) how to properly identify the taxpayer on statutory notices and (2) who are the proper persons authorized to sign waivers and other documents on behalf of the taxpayer.

#### SCOPE

The guidelines apply to the various corporate changes and related terms specifically defined in Appendix A attached. This SAP does **not** address: (1) situations where a taxpayer is a debtor in a voluntary or involuntary bankruptcy proceeding (where the taxpayer is under federal bankruptcy court jurisdiction, our ability to assess or collect taxes is governed by federal bankruptcy laws); (2) The possible liability of transferees for any tax liabilities of the taxpayer; and (3) changes involving combined groups filing a combined report or return.

#### GUIDELINES

##### **A. General Guidelines**

At the start of an audit, auditors will need to know if any corporate changes have occurred during or after the audit period. Auditors will ask about any such changes at the time of the initial audit contact. The first audit letter should contain questions on these matters. See Appendix B (annexed) for sample questions to be included in an **Information Document Request (IDR)**.

##### **B. Specific Guidelines**

- For purposes of these guidelines, "Y" will refer to the original corporate taxpayer, and "X" to the successor entity.

- In a merger or consolidation, the surviving or consolidated corporation may adopt the name of one of the merged or consolidating corporations. Auditors should determine if this has occurred and make every effort to distinguish the two corporations with the same name from each other in correspondence, statutory notices, waivers and other documents.
- Notices and other correspondence should be sent to the address indicated in the specific guideline unless the taxpayer has provided a different address in response to sample question 8 on Appendix B (annexed). Copies of any correspondence or notices should also be sent to any authorized representative designated by the taxpayer.

## APPENDIX A: DEFINITIONS

### Background

In a **merger**, one or more corporations combine with another existing corporation (**surviving corporation**) as authorized by a state law. As part of the merger, the other corporation or corporations (**merged corporation** or **corporations**) cease to exist, and the surviving corporation receives title to all assets and assumes all liabilities of the merged corporation or corporations. The surviving corporation is not a new taxpayer and retains the same Employer Identification Number (EIN) as it had before the merger.

A **consolidation** is similar to a merger except that a state law permits two or more corporations combine into a newly created corporation (**consolidated corporation**). The previously existing corporations (**consolidating corporations**) cease to exist, and the consolidated corporation obtains title to all assets and assumes all liabilities of the consolidating corporations. The consolidated corporation is a new taxpayer and must obtain a new EIN.

An **“F” reorganization** is a tax-free reorganization under I.R.C. § 368(a)(1)(F) which is considered “a mere change in identity, form or place of incorporation of one corporation, however effected.” An “F” reorganization is usually used when an existing corporation changes its state of incorporation (by setting up a new corporation in a different state) and then merges into that new corporation or transfers its assets to that new corporation. The new corporation’s EIN, shareholders, officers, directors, assets, liabilities and line of business will be the same as the old corporation. The new corporation will often have the same name. The “F” reorganization is, in reality, a continuation of the old corporation in a different form or under the laws of a different state. Since the object of an “F” reorganization is quite different than the ordinary merger or asset transfer situation, it is viewed differently. (See “Sale or Transfer of Assets.”) The new corporation in an “F” reorganization is not considered a new taxpayer and retains the same EIN.

In a **sale or transfer of assets**, the taxpayer sells or transfers all or substantially all of its assets to another entity (usually in exchange for cash, stock or other consideration) in a transaction that is outside the ordinary course of the taxpayer’s business. The taxpayer may continue to exist as a separate entity, or the taxpayer may dissolve and ultimately cease to exist. (See “Dissolution.”) As a general rule, the transferee entity will not be liable for the transferor’s tax liabilities. However, in some circumstances, the transferee entity will be liable.

**Dissolution** is a procedure under the laws of the state of incorporation in which a corporation will “wind up” its affairs and ultimately terminate its existence. The dissolution can be either at the request of the corporation (**voluntary dissolution**) or through a judicially supervised proceeding on the petition of other persons (**involuntary dissolution**). In a **voluntary dissolution**, the corporation must file documentation with the appropriate official of the state of incorporation, usually the Secretary of State for such state. A judicial proceeding is usually not necessary. In general, the corporation is required to liquidate its assets, pay off its liabilities, and distribute any remaining assets to its shareholders. This “winding up” is generally done by the corporate officers in a **voluntary dissolution**, and by a judicially appointed fiduciary in an **involuntary dissolution**.

Under the law of most states, including New York, a corporation in dissolution continues to exist for the purposes of winding up its affairs and paying its creditors. The corporation's dissolution does not legally terminate its liabilities, including its tax liabilities. However, in practice, dissolution may well affect the Department's ability to collect from the taxpayer.

A **name change** is simply when an existing taxpayer changes its corporate name under the law of the state of its incorporation. The name change has no other effect on the corporate entity or its tax liability. NOTE: In transactions such as mergers and consolidations, the surviving or consolidated corporation may adopt the name of one of the merged or consolidating corporations. This situation is not a name change as used in this SAP.

A **stock sale**, in which a shareholder of the taxpayer sells shares of stock in the taxpayer corporation to either a new or existing shareholder has no direct impact on the corporate entity or on its tax liability.

## **Correspondence Instructions**

### **Merger or Consolidation**

All correspondence, notices, waivers and other documents sent to a taxpayer following a merger or consolidation should be directed to "X as successor in interest to Y." They must be sent to the last known address of X, and a copy should also be sent to the last known address of Y. An officer of X should sign waivers and other documents. If a corporation has merged into the taxpayer so that the taxpayer is the surviving corporation, all correspondence, notices and waivers should continue to be addressed to the taxpayer Y, at its last known address, and an officer of Y should sign waivers and other documents.

### **"F" Reorganization and Name Change**

If a taxpayer has participated in an "F" reorganization, all correspondence, notices and waivers should be directed to the taxpayer Y. An officer of Y should sign waivers and other documents. If the taxpayer has changed its name, either as a result of the "F" reorganization or through a change of corporate name procedure, correspondence, notices and waivers should be directed to the taxpayer "Y now known as (or N/K/A) X." and should be sent to Y's last known address.

### **Sale or Transfer of Assets**

Where the taxpayer has sold or transferred all or substantially all of its assets to another corporation, individual or entity, Correspondence, notices and waivers should continue to be directed to the taxpayer Y at its last known address, and an officer of Y should execute waivers and other documents unless the taxpayer has dissolved. (See "Dissolution," below.) Auditors

should report all asset transfer transactions to their supervisors because Finance may need to pursue the transferee for the unpaid taxes of the taxpayer-transferor.

### **Dissolution**

Where the taxpayer is a New York corporation in voluntary dissolution, its officers will have the power to sign waivers and other documents **if:** 1) there is no judicial proceeding pending regarding the dissolution, and 2) no trustee or other official has been appointed to safeguard the taxpayer's assets or oversee the dissolution. All correspondence, notices and waivers should be directed to the taxpayer corporation Y at its last known address. In all other situations, the auditors should consult with their supervisors regarding the sending of notices and other correspondence, and the execution of waivers and other documents.

**NOTE:** The Director of the unit handling the audit, in consultation with the Assistant Commissioner for Audit, will decide whether to contact Legal Affairs in cases where a sale, a transfer of assets or dissolution has occurred.

## APPENDIX B: SAMPLE QUESTIONS FOR IDR

At any time since the start of the first tax year of the audit period, has the taxpayer corporation:

1. been a party to any merger or consolidation? If yes, please indicate the date of the merger or consolidation, the names and EINs of the other participating corporations, and the name and address of the surviving or consolidated corporation that resulted.
2. participated in any transaction that qualifies as an “F” reorganization as described under section 368 (a)(1)(F) of the Internal Revenue Code? If yes, please indicate the date and the particular change in the name, form or place of incorporation involved in that transaction.
3. sold or transferred all or substantially all the assets of the corporation? If yes, please indicate the date or dates of these transactions, the assets sold, and the name and EIN of the person or entity to which these assets were sold. For purposes of this question and question 4, “substantially all” means eighty (80) percent or more of the fair market value of the taxpayer corporation?
4. purchased or otherwise acquired all or substantially all of the assets of another corporation? If yes, please indicate the date or dates of these transactions and the name and EIN of the corporation from which these assets were acquired.
5. changed its corporate name? If yes, please indicate the corporation’s new name and the effective date of the name change.
6. initiated proceedings for voluntary dissolution by filing or otherwise? If yes, please indicate the date of dissolution or of the filing for dissolution, the state of incorporation, the current status of the dissolution, and list the taxpayer corporation’s remaining assets and liabilities. Please also indicate the anticipated date of the completion of the winding up of the taxpayer corporation’s affairs, and the name and address of any officer, trustee, referee or other fiduciary charged with overseeing the dissolution, the sale of corporate assets or the satisfaction of liabilities.
7. been involved in any proceedings regarding its involuntary dissolution? If yes, please indicate the commencement date of those proceedings, their current status and a summary of the facts and circumstances, including the state of incorporation and any court where dissolution proceedings are or were pending. Please also indicate the name and address of any trustee, referee, or other fiduciary charged with overseeing the dissolution, the sale of corporate assets or the satisfaction of liabilities.
8. If the answer to any of the above questions is yes, please provide the address to which any statutory notices or other correspondence should be sent **if other than** (insert the last know address of the taxpayer).