

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

### **INTRODUCTION**

This Statement of Audit Procedure (SAP) provides guidelines to auditors on issues raised by various changes to a corporate taxpayer with regard to the proper identification of the taxpayer on statutory notices and identifying 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 situations where the taxpayer is involved as a debtor in a voluntary or involuntary bankruptcy proceeding. In such cases, the taxpayer is under the jurisdiction of the federal bankruptcy courts and our ability to assess or collect taxes is governed by federal bankruptcy laws. In addition, this SAP does not address the possible liability of transferees for any tax liabilities of the taxpayer. Finally, this SAP does not address changes involving combined groups which are required or permitted to file a combined report or return.

### **GUIDELINES**

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

At the beginning of an audit, the auditors will need to know if any corporate changes have occurred either during or after the audit period. Accordingly, the auditors will need to ask about any such changes at the time of the initial contact regarding the audit. The first audit letter should contain a questionnaire 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 be used to refer to the original corporate taxpayer, and “X” will be used to refer 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 ascertain whether this circumstance has occurred and make every effort to distinguish the two corporations having 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.

### **Merger or Consolidation**

Where the taxpayer has merged or consolidated into another corporation, all correspondence, notices and waivers and other documents (“notices et al.”) should be directed to “X as successor in interest to Y.” Notices et al. should be sent to the last known address of X. A copy should also be sent to the last known address of Y. An officer of X should execute waivers and other documents (“waivers etc.”). If another corporation has merged into the taxpayer so that the taxpayer is the surviving corporation, all notices et al. should continue to be addressed to the taxpayer Y, at its last known address, and an officer of Y should execute waivers etc.

### **“F” Reorganization and Name Change**

Where the taxpayer has engaged in a transaction which constitutes an “F” reorganization through a merger, transfer of assets or otherwise, all notices et al. should be directed to the taxpayer Y. An officer of Y should execute waivers etc. If the taxpayer has changed its name, either as a result of the “F” reorganization or through a change of corporate name procedure, the notices et al. should be directed to the taxpayer “Y now known as (or N/K/A) X”. In any of these situations, notices et al 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, all notices et al. should continue to be directed to the taxpayer, Y, at its last known address, and an officer of Y should execute waivers etc., provided the taxpayer has not dissolved. (See “Dissolution”, below.) In certain instances, the Department may be able to pursue the transferee for the unpaid taxes of the taxpayer-transferor. Accordingly, auditors should report all asset transfer transactions to their supervisors.

### **Dissolution**

Where the taxpayer is a New York corporation in voluntary dissolution, its officers will have the power to sign waivers etc., **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 to oversee the dissolution. In addition, all notices et al. 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 Branch Chief for the branch handling the audit, in consultation with the Deputy Commissioner for Audit, will decide whether to contact the Office of Legal Affairs in cases where a sale or transfer of assets or a dissolution has occurred.

## **APPENDIX A: DEFINITIONS**

### **Merger or Consolidation**

In a **merger**, one or more corporations combine with another existing corporation (**surviving corporation**) in a procedure authorized under a state corporation statute. Pursuant to the statute, the other corporation or corporations (**merged corporation or corporations**) cease to exist. Further, 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, in a consolidation, two or more corporations combine into one, newly created corporation (**consolidated corporation**) in a procedure authorized under a state corporation statute. The previously existing corporations (**consolidating corporations**) cease to exist as a result of the procedure, 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.

### **“F” Reorganization**

An **“F” reorganization** is a tax-free reorganization under I.R.C. § 368(a)(1)(F) which involves “a mere change in identity, form or place of incorporation of one corporation, however effected.” Typically, an “F” reorganization involves a situation where an existing corporation changes its state of incorporation by setting up a new corporation in the new state and then either merging into the new corporation, or transferring its assets to the new corporation. The new corporation’s EIN, shareholders, officers, directors, assets, liabilities and line of business will be the same as the old corporation. In addition, the new corporation will often have the same name as well. Hence, the “F” reorganization is, in reality, a continuation of the old corporation in a different form or under the laws of a different state. Accordingly, the object of an “F” reorganization is quite different than the ordinary merger or asset transfer situation, even though one of these types of transactions will be used to effectuate the “F” reorganization. For this reason, the “F” reorganization should be viewed as a type of transaction that is different from the merger, consolidation or asset transfer. (See “Sale or Transfer of Assets.”) The new corporation in an “F” reorganization is not considered a new taxpayer and retains the same EIN.

## **Dissolution**

**Dissolution** is a statutory procedure under the laws of the state of incorporation, pursuant to 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 in **voluntary dissolution** is supposed to liquidate its assets, pay off its liabilities, and distribute any remaining assets to its shareholders. Ordinarily, this process is done by the corporate officers in a **voluntary dissolution**, and through a judicially appointed fiduciary in the case of 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. Moreover, 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.

## **Name Change and Stock Sale**

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

## **Sale or Transfer of Assets**

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.

## APPENDIX B

### Sample Questions for IDR

At any time since the beginning of the earliest 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 such merger or consolidation, the names and EINs of the other participating corporations, and the name and address of the surviving or consolidated corporation resulting from the merger or consolidation.
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 such 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’s total assets.
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 it, the state of incorporation, the current status of the dissolution, and 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 such proceedings, their current status and a summary of the facts and circumstances of such proceedings, including the state of the incorporation and any court where such 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.

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 known address of the taxpayer].