Michael Verne

From: [redacted]
Sent: Wednesday, January 22, 2003 2:04 PM
To: Michael Verne
Subject: 801.15/802.50 question

802.50
802.51
801.15

Dear Mike:

First off, I've never asked you a question via e-mail before so want to make sure you're okay with this format. If you'd prefer to stick with phone calls please just give me a call [redacted] and we'll discuss. In any event I promise not to start riddling you with e-mails ...

My question relates to the interplay between 802.50 and 801.15, as discussed in Interpretation 263 in the old PNPM. That interpretation was proposed to be changed in the draft updates that I saw (recall I was involved in connection with updating the LLC interpretations), so as to read as follows:

263. Applicable Rules: 802.50; 801.15

Issue: To what extent are asset acquisitions of both foreign and U.S. assets, aggregated for purposes of determining whether notification is required?

Facts: Suppose that X, a U.S. company, will acquire all of Y's assets and that the size-of-person and commerce tests are met. Y's assets consist of:

A U.S. plant, valued at $10 million which generated $10 million in revenues in the most
recent fiscal year.

A foreign plant, valued at $20 million, which had no sales into the U.S. in the most
recent fiscal year.

Another foreign plant, valued at $40 million, which had $45 million in sales into the U.S. in the most recent fiscal year.

Analysis: 802.50(a) provides that "The acquisition of assets located outside the United States shall be exempt from the requirements of the act unless the foreign assets the acquiring person would hold as a result of the acquisition generated sales in or into the U.S. exceeding $50 million during the acquired person's most recent fiscal year, combined with such sales to date since the end of that fiscal year."

The combined sales into the U.S. of the two foreign plants total $45 million and therefore do not exceed the limitation of 802.50(a) and are exempt under that section.

801.15(b) states that assets exempt under 802.50(a) will not be held as a result of the acquisition unless the limitation in that section, the $50 million in sales into the U.S., would be exceeded as a result of the acquisition. Since the only other component of the transaction is the acquisition of assets located in the U.S., the U.S. sales attributable to those assets would not be aggregated with the sales into the U.S. of the foreign assets, therefore the limitation in 802.50(a) is not exceeded, and the foreign assets are not held as a result of the acquisition.

Since the only assets held as a result of the acquisition are valued at only $10 million, the size-of-transaction test is not satisfied and the transaction is not reportable.

My questions are:

1. Does the above interpretation represent the current view of the PNO staff, or does the interpretation printed in the existing PNPM still stand? The difference, as I'm sure you realize, lies between the text which I italicized above vs. the original text.

2. Assuming this is the current view, would the same analysis apply under 802.51 if all the hypothetical acquisitions were voting securities instead of assets?

3. If this is the current view, I'm unclear how to reconcile it with Example 4 to 801.15. I realize this question is a bit more open-ended so to avoid you having to write any sort of lengthy e-mail, feel free to call me on this one.

Thanks Mike.

Best regards,

[redacted]

ADVISE THAT THIS IS OUR POSITION. U.S. SALES ATTRIBUTABLE TO U.S. ASSETS OR ISSUERS ARE NOT INCLUDED IN DETERMINING WHETHER THE $50 mm LIMITATION IN 802.50 OR 802.51 IS EXCEEDED. IN RECONCILING THIS WITH EXAMPLE 4 IN 801.15, WHAT IS IMPLIED BUT NOT STATED IN THIS EXAMPLE IS THAT THE THIRD MINE IS ALSO LOCATED OUTSIDE OF THE U.S.

B. Michaelson 1/23/03

[redacted]