GOVERNMENT OF PUERTO RICO
DEPARMENT OF LABOR & HUMAN RESOURCES

October 1, 1999

Re: Inquiry No. 14688

This is in reply to your inquiry in regard to Act No. 74 of June 21, 1956, as amended, known as the Puerto Rico Employment Security Act ("PRESA"); and to Act No. 139 of June 30, 1968, known as the Disability Benefits Act ("DBA"). The purpose of your inquiry is to "request a ruling in connection with the unemployment and disability insurance wage base limitations covered by a predecessor employer with respect to a successor employer in case of a statutory merger under [the aforementioned acts]."

The proposed merger involves two wholly-owned subsidiaries of a Delaware corporation that is not in doing business in Puerto Rico. With regard to the proposed merger, you state the following:

> The Department of [the] Treasury, in a letter dated December 21, 1998, ruled that the Merger constitutes a reorganization within the meaning of Section 1112(g)(1)(A) of the Code and that no gain or loss shall be recognized by the parties to the reorganization on the transfer of property and stock according to Section 1112(b)(4) and 1112(k) of the Code.

In effect, one corporation will absorb the other, with the surviving corporation continuing to conduct the same operations and retaining all the employees of the absorbed corporation. The purpose of your letter is to request the Department of Labor's advice for purposes of computing the unemployment and disability insurance wage base limitations of the resultant entity under the PRESA and the DBA. In an effort to clarify the issues involved, you provide the following discussion:

Background

Section 8(b)(2) of the PRESA provides that each employer must pay contributions on the first $7,000 in wages paid by the employer during each calendar year. Section 8(a) of the DBA provides that each employer must pay an annual tax on the first $9,000 of wages paid to each employee during the calendar year. Pursuant to Section 8(b), the employee must pay a tax on the first $9,000 of his wages during the calendar. [A footnote indicates that pursuant to Section 5 of the DBA, the resultant entity has established a private plan to pay its employees the benefits required under the DBA.]

The Department of Labor recently ruled in a similar situation [Inquiry No. 14556 of January 20, 1999] that the payments made by the predecessor employer should be taken into account in computing the $7,000 and $9,000 unemployment and disability insurance wage. For Federal Unemployment Tax Act purposes, the Internal Revenue Service has also concluded that where a corporation is absorbed by another corporation in a statutory merger, the resultant corporation should be regarded as the same taxpayer and the same employer. See enclosed copy of Rev. Rul. 62-60, 1962-1 C.B. 186.

Based on the foregoing, you request the Department's ruling on the issue of whether wage payments made by the absorbed corporation should be taken into account by the resultant corporation when computing the $7,000 and $9,000 unemployment and disability insurance wage base limitations, respectively, of employees transferred from the absorbed corporation to the resultant corporation.

In stating your case, you cite the U.S. Internal Revenue Service's ruling in Rev. Rul. 62-60, 1962-1 C.B. 186, which provides the following:

> Where a corporation is absorbed by another corporation in a statutory merger or consolidation, the resultant entity is regarded as the same taxpayer and same employer as the absorbed corporation for Federal Unemployment Tax Act purposes. Thus, if the required 20-week period of employment exits [sic] the resultant corporation is subject to the Federal unemployment tax with respect to the premerger or preconsolidation employment of individual[s] by the absorbed corporation. Similarly, the resultant corporation is entitled to the credits against such tax provided by section 3302 of the Act with respect to such employment. [citations omitted]

The above IRS ruling also states that in cases involving statutory mergers or consolidations in the past the IRS has treated the absorbed corporation as distinct from the resultant entity for Federal employment tax purposes, but adds the following:

> Upon reconsideration, the Service has concluded that where a corporation is absorbed by another corporation in a statutory merger or consolidation the

> resultant corporation should be regarded as the same taxpayer and the same employer for Federal unemployment tax purposes. [citations omitted]
>
> Accordingly, it is held that in the case of a statutory merger or consolidation the resultant entity is subject to the tax imposed by the Federal Unemployment Tax Act by reason of the premerger or preconsolidations absorbed. That is to say, if individual[s] are employed in the business for the appropriate 20-week period during the calendar year, liability for the Federal unemployment tax is incurred by the resultant corporation whether it employed them for 20 weeks or that period was divided between the absorbed corporation and the resultant corporation.
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> The effect of the foregoing is to impute the employment, by the absorbed corporation, to the resultant corporation, in which the corporate life of the absorbed corporation is deemed to continue. Accordingly, the credits against the Federal unemployment tax provided by section 3302 of the 1954 Code for contributions made by the absorbed corporation into State unemployment funds with respect to such employment are allowable to the resultant corporation.
>
> The above conclusion [that] the resultant corporation resulting from a statutory merger or consolidation is the same employer and taxpayer as the absorbed corporation, is also applicable for purposes of the taxes imposed under the Federal Insurance Contributions Act and the Withholding of Income Tax at Source on Wages [citations omitted].

The above cited IRS ruling also notes that "[s]ection 3302(e) does not apply to a corporation acquiring the trade or business and employees of another corporation in a statutory merger or consolidation since, as indicate[d] herein, there is no predecessor/successor relationship in a statutory merger or consolidation[,] but one continuing taxpayer or employer."

As you are aware, the Courts in Puerto Rico are not bound by Federal cases or rulings, but parallel Federal cases and rulings are considered persuasive and as such are accorded substantial weight in interpreting the equivalent provisions of analogous Puerto Rico laws. The fact that Puerto Rico is part of the Federal-State Employment Security System makes a compelling case for conforming to the Federal counterpart. It is also noted that the above IRS ruling refers specifically to unemployment taxes, which is therefore relevant to the PRESA, but makes no mention of the DBA. Nevertheless, in our response to Inquiry No. 14556 we concluded that a successor employer was entitled to credit for payments made by the predecessor employer for both PRESA and DBA. Consistency requires us to reach the same conclusion with respect to the resultant corporation in a statutory merger

or consolidation pursuant to Rev. Rul. 62-60, 1962-1 C.B. 186. It is thus our determination that payments made by the absorbed corporation should be taken into account in computing the $7,000 and $9,000 unemployment and disability insurance wage base limitations, respectively of the resultant corporation.

We trust the foregoing adequately responds to your inquiry.

Cordially,

María C. Marina Durán
Solicitor of Labor