Office of Chief Counsel
Internal Revenue Service

memorandum

CC:LM:MCT:CLE:TL-N-2773-01
RSBloom

date: June 11, 2001

to: LM:MCT:1704
Attn: Michael Babij

from: Associate Area Counsel, LM:MCT:CLE

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subject: **Adv. Opinion: Consent Name and Signatory**
Taxpayer: [redacted]
Years: [redacted] & [redacted]
Statute Expires: [redacted]

As was stated in our memorandum dated May 25, 2001, our advice was being reviewed by the National Office. The National Office has completed its review and, in essence, agrees with our advice. However, it was suggested that the taxpayer's name as it is to appear on the Form 872 should be as follows:

> [redacted] (EIN: [redacted], as agent for the members of the [redacted] consolidated group*

Following the asterisk at the bottom of the Form 872, should be the following:

> *This is with respect to the [redacted] consolidated group for the [redacted] and [redacted] taxable years.

The Form 872 should be signed by an authorized officer of [redacted] under the corporate name "[redacted], as agent for the members of the [redacted] consolidated group."

As a final matter, we recommend that you pay strict attention to the rules set forth in the Internal Revenue Manual (IRM). Specifically, IRM 121.2.22.3 requires use of Letter 907 (DO) to solicit the Form 872, and IRM 121.2.22.4.2 requires 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 as directed. When the signed Form 872 is received from the taxpayer, the authorized manager should promptly sign and date it in accordance with Treas. Reg. § 301.6501(c)-1(d) and IRM

121.2.22.3. The manager must also update the statute of limitations in the continuous case management statute control file and properly annotate Form 895 or equivalent. See IRM 4531.2 and 4534. This includes Form 5348. In the event a Form 872 becomes separated from the file or lost, these other documents would become invaluable to establish the agreement.

Furthermore, please note that § 3461 of the Restructuring and Reform Act of 1998, codified in I.R.C. § 6501(c)(4)(B), requires the Internal Revenue Service to advise taxpayers of their right to refuse to extend the statute of limitations on assessment, or in the alternative to limit an extension to particular issues or for specific periods of time, each time that the Internal Revenue Service requests that the taxpayer extend the limitations period. To satisfy this requirement, Publication 1035, "Extending the Tax Assessment Period," must be given to the taxpayer when you solicit the statute extension.

This memorandum should not be cited as precedent. 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. Also, if you have any questions regarding the above, please fell free to contact the undersigned at 216-522-3380 (ext. 3108).

JOSEPH F. MASELLI
Area Counsel
(Heavy Manufacturing, Construction and Transportation)

By:_____
RICHARD S. BLOOM
Associate Area Counsel
(Large and Mid-Size Business)

Office of Chief Counsel
Internal Revenue Service

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CC:LM:MCT:CLE:TL-N-2773-01
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Attn: Michael Babij

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subject: **Adv. Opinion: Consent Name and Signatory**
Taxpayer: [redacted]
Years: [redacted] & [redacted]
Statute Expires: [redacted]

This memorandum responds to your request for assistance dated April 25, 2001. This memorandum should not be cited as precedent. As requested, we have reviewed the following facts to determine, for purposes of further extending the statute of limitations for assessment, the proper entity to execute the consent. This memorandum is subject to 10-day post review by our National Office and, therefore, is subject to modification.

ISSUES

1) What entity's name should appear as the taxpayer on the Form 872 to extend the time to assess tax for the years [redacted] and [redacted] of [redacted].

2) What entity's authorized officer should sign the Form 872 for the years [redacted] and [redacted] of [redacted].

CONCLUSIONS

1) The proper language to describe the taxpayer on the Form 872 is "[redacted] as alternative agent under Temp. Reg. section 1.1502-77T for the members of the [redacted] group*." For sake of clarity, the foregoing name should be asterisked, as indicated, and at the bottom of the consent the following language should be inserted: "*With regard to the consolidated tax liability of the [redacted] (EIN: [redacted]) [redacted] consolidated return group for the group's taxable years [redacted] and [redacted]."

2) An authorized officer of [redacted] should sign the Form 872 under the corporate name "[redacted] as alternative agent for the members of the [redacted] group."

FACTS

For the calendar years [redacted] and [redacted], [redacted] [hereinafter sometimes referred to as "[redacted]"], as parent, filed consolidated income tax returns. The [redacted] and [redacted] returns were filed on or about [redacted] and [redacted], respectively. On [redacted], [redacted] acquired all the stock of [redacted] through a public tender offering. [redacted] became part of [redacted]'s consolidated group; its income was reported on [redacted]'s [redacted] consolidated income tax return. On [redacted], [redacted] transferred its [redacted] stock to [redacted], one of [redacted]'s subsidiaries. [redacted] changed its name to [redacted]. Through a public offering, [redacted]% of [redacted] stock was sold on [redacted]. In [redacted], the remaining [redacted]% of the stock of [redacted] was distributed in a tax-free spin off. [redacted] still exists as a separate corporation.

Two forms 872, Consents to Extend the Time to Assess Tax, which consecutively extended the time to assess tax to [redacted], were executed by [redacted] and the Service. The first consent, which related to both the [redacted] and [redacted] taxable years and was fully executed on [redacted], extended the time to assess to [redacted]. The second consent, which also related to both the [redacted] and [redacted] taxable years and was fully executed on [redacted], extended the time to assess to [redacted]. Both consents reflect the taxpayer's name as "[redacted]" and both were executed under the corporate name "[redacted]." [redacted]'s EIN was typed at the top right hand corner of both forms 872. The first consent was signed on behalf of the taxpayer by [redacted], Vice President and Chief Financial Officer. The second consent was signed by [redacted], Vice President - Taxes.

LAW and ANALYSIS

I.R.C. § 1501 grants affiliated groups of corporations the privilege of filing returns on a consolidated basis. If consolidated returns are filed, the members of the group consent to be bound by the legislative regulations promulgated pursuant to the authority in I.R.C. § 1502.

Under Treas. Reg. § 1.1502-77(a), the common parent of the consolidated group is the sole agent for each subsidiary in the group and duly authorized to act in its own name in all matters relating to the consolidated tax liability of the group. The common parent remains the agent for the members of the group for any years during which it was the common parent, whether or not consolidated returns are filed in subsequent years and whether or not one or more subsidiaries have become or have ceased to be members of the group at any time. An agreement entered into by the common parent extending the time within which an assessment may be made in respect of the tax for a consolidated return year shall be applicable to each corporation which was a member of the group during any part of such taxable year. Treas. Reg. § 1.1502-77(c).

In 1988, the Service issued temporary regulations under I.R.C. § 1502.[1] Temp. Treas. Reg. § 1.1502-77T(a) provides alternative agents to act for the group when the corporation that is the common parent of the group ceases to be the common parent. A waiver of the statute of limitations with respect to the group (of which the common parent ceased to be the common parent) given by any one or more of the alternative agents is deemed to be given by the agent of the group. Temp. Treas. Reg. § 1.1502-77T(a)(3). The temporary regulations list the following alternative agents:

(i) the common parent of the group for all or any part of the year to which the waiver applies;

(ii) a successor to the former common parent in a transaction to which section 381(a) applies;

(iii) the agent designated by the group under § 1.1502-77(d); and

(iv) if the group remains in existence under § 1.1502-75(d)(2) or (3), the common parent of the group at the time the waiver is given.

Temp. Treas. Reg. § 1.1502-77T(a)(4).

Although [redacted] still exists as a separate corporate entity, it ceased to be the common parent of the affiliated group. However, under Temp. Treas. Reg. § 1.1502-77T(a)(4)(i), [redacted], as the common parent for all or any part of the years [redacted] and [redacted], is the alternative agent for the group. As alternative agent, [redacted] can execute a waiver of the statute of limitations for the entire affiliated group. As with any waiver of the

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[1]The temporary regulations apply to waivers of the statute of limitations for taxable years for which the due date (without extensions) of the consolidated return is after September 7, 1988. Temp. Treas. Reg. § 1.1502-77T(b).

statute of limitations, it must be executed by an authorized officer of the corporation. Any officer, who is authorized to sign a corporate income tax return, may also sign a consent to extend the time to assess tax (waiver), whether or not that person was the same individual who signed the return. Rev. Rul. 83-41, 1983-1 C.B. 349. I.R.C. § 6062 provides that corporate returns with respect to income can be signed by any officer authorized to act in such capacity. Officers who are explicitly listed with signing authority under section 6062 include the president, vice-president, treasurer, assistant treasurer and chief accounting officer.

We note that the prior two consents (waivers) were executed in the name of "[redacted]" rather than "[redacted] as alternative agent under Temp. Treas. Reg. section 1.1502-77T for the members of the [redacted] group" as suggested above. Despite the differences in the taxpayer name on the consents, we believe the prior consents are valid and can be relied upon to extend the statute of limitations. It appears clear from the face of the waivers that the parties intended to extend the period of limitations for the [redacted] and [redacted] taxable years of the [redacted] affiliated group. The EIN appearing in the upper right hand corner of the Forms 872 was that of [redacted]. The taxpayer name was [redacted] and the Forms 872 were signed by the Vice President and Chief Financial Officer / Vice President - Taxes under the corporate name [redacted].[2] Consequently, the consents were signed by an appropriate officer who had actual authority to bind [redacted] and the affiliated group. The omission of the alternative agent language should be considered no more than a drafting error or mutual mistake which is subject to reformation, and it certainly should not be fatal to the consents. See San Francisco Wesco Polymers, Inc. v. Commissioner, T.C. Memo. 1999-146.

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[2]We are assuming that both [redacted] and [redacted], the individuals signing as Vice President and Chief Financial Officer / Vice President - Taxes, actually held such positions with [redacted] at the time they signed the respective Form 872. If, in fact, either or both were not an authorized officer of [redacted] at the time she/he signed the respective consent, this matter must be further analyzed and should, therefore, be re-referred to our office for further consideration.

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. Also, if you have any questions regarding the above, please fell free to contact the undersigned at 216-522-3380 (ext. 3108).

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