

Office of Chief Counsel  
Internal Revenue Service

**memorandum**

CC:NER:MAN:TL-N-5081-00

PLDarcy

date:

to: Territory Manager Robert Skiba  
Attn: Mr. Robert Satz  
Ms. Barbara Jagiello

from: District Counsel, Manhattan

subject:

[REDACTED]  
Taxable years ended [REDACTED], [REDACTED], [REDACTED]

[REDACTED], [REDACTED], and [REDACTED]

[REDACTED]  
Taxable years ended [REDACTED], [REDACTED], [REDACTED]

[REDACTED], [REDACTED], and [REDACTED]

[REDACTED]  
Taxable years ended [REDACTED], [REDACTED], [REDACTED]

[REDACTED] and [REDACTED]

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This memorandum is in response to your request for advice concerning the proper entity to execute consents to extend the statute of limitations on assessment on behalf of [REDACTED]

[REDACTED] and [REDACTED] for the taxable years stated above.

**ISSUES:**

1. Who may enter into consents to extend the statute of limitations on assessment on behalf of [REDACTED] for the taxable years ended [REDACTED], [REDACTED], and [REDACTED]?

2. What specific language should be used on the consents to extend the statute of limitations on assessment of [REDACTED] for the taxable years ended [REDACTED], [REDACTED], and [REDACTED]?

3. What is the proper entity to enter into consents to extend the statute of limitations on assessment on behalf of [REDACTED] for the taxable years ended [REDACTED], [REDACTED], and [REDACTED]?

4. What specific language should be used on the consents to extend the statute of limitations on assessment of [REDACTED] for the taxable years ended [REDACTED], [REDACTED], and [REDACTED]?

5. What is the proper entity to enter into consents to extend the statute of limitations on assessment on behalf of [REDACTED] for the taxable years ended [REDACTED], [REDACTED], and [REDACTED]?

6. What specific language should be used on the consents to extend the statute of limitations on assessment of [REDACTED] for the taxable years ended [REDACTED], [REDACTED], and [REDACTED]?

**FACTS:**

A. [REDACTED]

The Examination Division is currently auditing the taxable years ended [REDACTED], [REDACTED], and [REDACTED] of [REDACTED] (" [REDACTED] "), a banking corporation organized under the laws of Canada. For all the periods at issue, [REDACTED] filed Forms 1120-F as a result of its activities in the United States.

On [REDACTED], [REDACTED]'s Board of Directors passed a resolution that granted authority in certain persons to execute instruments for and on behalf of [REDACTED]. This resolution stated:

1. General execution of instruments on behalf of [REDACTED]:

Deeds, transfers, contracts, obligations, proxies and other documents and instruments may be signed for or on behalf of [REDACTED], with or without the corporate seal:

- (a) by any two of the Chairman and Chief Executive Officer, a Vice-Chairman, a Vice-President, a General Manager, an Assistant General Manager, a Managing Director or an Executive Director of the Bank;
- (b) by any two of a Chairman, a Chief Executive Officer, a Vice-Chairman, a President, a Vice-President, a Managing Director, an Executive Director, a General Manager or an Assistant General Manager of an indirect or direct wholly-owned subsidiary of [REDACTED], signing in the capacity of an authorized signatory of the Bank and not in the capacity of an officer of the Bank; or
- (c) by any two of the persons identified in 1(a) and 1(b); or
- (d) by any one of the persons identified in 1(a) and (b), together with the corporate Secretary or an Assistant Secretary of [REDACTED].

On [REDACTED], a Senior Vice President of [REDACTED] and [REDACTED]'s Assistant Secretary executed a Power of Attorney stating:

The undersigned, being duly elected officers of [REDACTED] do hereby make, constitute and appoint [REDACTED] an attorney-in-fact to perform each and all of the following acts on behalf of [REDACTED]:

To negotiate, make, execute, acknowledge, deliver, file and record any and all tax related documents on behalf of [REDACTED] in the United States including, but not limited to tax returns, tax audits and settlements and any other tax related documents or instruments, and

To make such representations and warranties in the name of and on behalf of [REDACTED] as she may deem necessary,



said authorization has not been rescinded or repealed and is in full force and effect.

C. [REDACTED] (EIN: [REDACTED])

The Examination Division is currently auditing the taxable years ended [REDACTED], [REDACTED], [REDACTED] and [REDACTED] of [REDACTED] (" [REDACTED] Markets"), a corporation organized under the laws of Delaware, and its former consolidated subsidiaries. During the taxable year ended [REDACTED], [REDACTED] was known as [REDACTED]. During the taxable year ended [REDACTED], [REDACTED] was the parent of a consolidated group.

During the taxable year ended [REDACTED], [REDACTED] changed its name to [REDACTED] (EIN: [REDACTED]). For the taxable years ended [REDACTED] and [REDACTED], [REDACTED] remained the parent of the consolidated group. On [REDACTED], [REDACTED] changed its name to [REDACTED] (EIN: [REDACTED]). As a result of a recent name change, [REDACTED] is now known as [REDACTED] (EIN: [REDACTED]).

[REDACTED] is no longer the common parent of the United States consolidated group. [REDACTED] is now a subsidiary of [REDACTED]<sup>1</sup>, [REDACTED], [REDACTED] and [REDACTED] all have the same employee identification number of [REDACTED]. The names on each of the consolidated Forms 1120 filed can be summarized as follows:

<u>Period</u>	<u>Name</u>	<u>EIN</u>
[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]

<sup>1</sup> We never determined how [REDACTED] became a subsidiary of [REDACTED]. However, under any possible scenario, we conclude that [REDACTED] remains the proper party to execute the Form 872.

[REDACTED] [REDACTED] [REDACTED]

On [REDACTED], the Board of Directors of [REDACTED] elected [REDACTED] as Executive Director of [REDACTED] and granted her the authority "to sign on behalf of [REDACTED] and to execute and deliver any and all contracts, agreements, documents, or other instruments in the name of and on behalf of [REDACTED]." On [REDACTED], the Secretary of [REDACTED] provided the Examination Team a document entitled "[REDACTED] SECRETARY CERTIFICATE," which states:

I, [REDACTED], do hereby certify that I am the duly elected Secretary of [REDACTED], a Delaware corporation (the "corporation") with its principal place of business at [REDACTED], and do hereby certify that as Secretary I am duly authorized to execute and deliver this certificate on behalf of the corporation and do further certify that [REDACTED], Executive Director, is authorized to sign on behalf of the corporation and said authorization has not been rescinded or repealed and is in full force and effect.

**DISCUSSION:**

In general, the statute of limitations on assessment expires three years from the date the tax return for such tax is filed. I.R.C. § 6501(a). Section 6501(c)(4), however, provides an exception to the general three year statute of limitations on assessment. In accordance with this exception, the Secretary and the taxpayer may consent in writing to an agreement to extend the statute of limitations on assessment of any tax except estate tax. The Form 872, Consent to Extend the Time to Assess Tax, is the form generally used by the Service to extend the statute of limitation on assessment.

**A. [REDACTED]**

[REDACTED] must execute a Form 872 on its own behalf and does not require any special language. However, the regulations under section 6501(c)(4) do not specify who may sign the Form 872 on behalf of a corporation. The Service will apply the rules applicable to the execution of the original returns to the execution of consents to extend the time to make an assessment. Rev. Rul. 83-41, 1983-1 C.B. 399, clarified and amplified, Rev.

Rul. 84-165, 1984-2 C.B. 305. In the case of corporate returns, section 6062 provides that a corporation's income tax returns must be signed by the president, vice-president, treasurer, assistant treasurer, chief accounting officer or any other officer duly authorized to act. Under the provisions of Treas. Reg. § 1.6062-1, returns that are required to be made by corporations under the provisions of subtitle A or subtitle F of the Internal Revenue Code with respect to any tax imposed by subtitle A (which includes corporate income taxes) shall be signed by the president, vice-president, treasurer, assistant treasurer, chief accounting officer, or any other officer duly authorized to sign such returns.

Section 601.501 of the Statement of Procedural Rules ("SPR") permits a taxpayer to grant power of attorney to another person. Such a grant of authority must be enumerated in a power of attorney, which must set forth, in relevant part, (1) the name and mailing address of the taxpayer; (2) tax identification number of the taxpayer; (3) name and mailing address of the recognized representative(s); (4) description of the matter(s) for which representation is authorized which, if applicable, must include the type of tax involved, the federal tax form number, and the specific year(s)/period(s) involved; and (5) a clear expression of the taxpayer's intention concerning the scope of authority granted to the recognized representative(s). SPR § 601.502(a). The requirements of SPR § 601.502(a) are satisfied by a properly completed Form 2848, Power of Attorney and Declaration of Representative. Treas. Reg. § 601.503(b)(1).

██████████ is an employee of ██████████'s subsidiaries, not ██████████. The ██████████ Power of Attorney submitted by ██████████ fails to include some of the information required by SPR § 601.502(a). However, the attorney-in-fact can cure this defect by executing a Form 2848 (on behalf of the taxpayer) which includes the missing information. Treas. Reg. § 601.503(b)(3). Attaching a Form 2848 to a copy of the original power of attorney will validate the original power of attorney (and will be treated in all circumstances as one signed and filed by the taxpayer) provided the following conditions are satisfied:

- (i) The original power of attorney contemplates authorization to handle, among other things, Federal tax matters (e.g., the power of attorney contains language to the effect that the attorney-in-fact has the authority to perform any and all acts).

- (ii) The attorney-in-fact attaches a statement (signed under penalty of perjury) to the Form 2848 which states that the original power of attorney is valid under the laws of the governing jurisdiction (i.e., Canada).

Treas. Reg. § 601.503(b)(3)(i)-(ii).

Accordingly, [REDACTED] may execute any Forms 872 on behalf of [REDACTED], if she attaches a Form 2848 to the [REDACTED] Power of Attorney and a statement (signed under penalty of perjury) to the Form 2848 which states that the original power of attorney is valid under the laws of Canada.

B. [REDACTED] and [REDACTED]

1. [REDACTED] Authority

On [REDACTED], the Board of Directors of [REDACTED] and [REDACTED] elected [REDACTED] as Executive Director of both [REDACTED] and [REDACTED]. The Board of Directors of [REDACTED] and [REDACTED] also state as Executive Director, [REDACTED] is authorized to sign on behalf of [REDACTED] and [REDACTED], and to execute and deliver any and all contracts, agreements, documents, or other instruments in the name of and on behalf of [REDACTED] and [REDACTED].

A Lexis search of Delaware's corporate laws does not reveal whether or not an "Executive Director" is an "officer" with the authority to bind the Delaware corporation for which he or she works. However, based on the grant of authority given to [REDACTED], she appears to be an officer duly authorized to act on behalf of [REDACTED] and [REDACTED]. In any event, there is ample Delaware case law to support the position that [REDACTED] has authority to extend the statute of limitations on assessment for [REDACTED] and [REDACTED].

When a Delaware corporation holds out to the public that a specific person has authority to act on an issue, that person has the apparent authority to act with respect to that issue. Colish v. Brandywine Raceway Ass'n, 119 A.2d 887 (1955). When a corporation allows a person to manage certain affairs, that person has implied power to bind the corporation with respect to those affairs. Hessler v. Farrell, 226 A.2d 708 (1967). For the years at issue, both [REDACTED] and [REDACTED] have clearly indicated that [REDACTED] is authorized to deal with the Internal Revenue Service on all substantive and procedural tax issues. [REDACTED]



██████ is ██████'s and ██████' top tax person. We therefore conclude that ██████ has both implicit and explicit authority to execute the Forms 872 on behalf of ██████ and ██████.

2. The authority of ██████ and ██████ to bind their former consolidated group

In the case of a consolidated group, we can find guidance as to the appropriate entity to enter into a consent to extend the statute of limitations in the consolidated return regulations. Treas. Regs. § 1.1502-1 et seq. Pursuant to the consolidated return regulations, the common parent acts as the sole agent for each member of the group, duly authorized to act in its own name in all matters relating to the income tax liability for the consolidated return year. Treas. Reg. § 1.1502-77(a). The common parent in its own name can give waivers and any waiver so given shall be considered as having been given or executed by each such subsidiary. Treas. Reg. § 1.1502-77(a). An agreement entered by the common parent to extend the time within which to assess an income tax deficiency for the consolidated return year binds each member of the consolidated group during any part of such taxable year. Treas. Reg. § 1.1502-77(c).

The common parent remains the agent for the members of the group for any year 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. See Treas. Reg. § 1.1502-77(a); Southern Pacific v. Commissioner, 84 T.C. 395, 401 (1985). Accordingly, as a general rule, the common parent remains the proper party to extend the statute of limitations for any taxable year for which it was the common parent, as long as it remains in existence.

Accordingly, ██████ is the proper entity to extend the statute of limitations for the members of the former consolidated group during the taxable years ended ██████, ██████ and ██████.

██████. The form 872 should read as follows:

"██████ (E.I.N. ██████) \*"

In addition, at the bottom of the page, the following language should be added:

"\*This is with respect to the consolidated tax liability of ██████ (E.I.N. ██████)

[REDACTED] ) for the taxable years ended [REDACTED], [REDACTED] and [REDACTED], [REDACTED], [REDACTED] and [REDACTED]."

We further conclude [REDACTED] is the proper entity to extend the statute of limitations for the members of the consolidated group for the taxable years ended [REDACTED], [REDACTED] and [REDACTED]. The Form 872 for the taxable year ended [REDACTED], should read as follows:

" [REDACTED] (E.I.N. [REDACTED]) \*"

In addition, at the bottom of the page, the following language should be added:

"\*This is with respect to the consolidated tax liability of [REDACTED] (E.I.N. [REDACTED]) for the taxable year ended [REDACTED]."

The Form 872 for the taxable years ended [REDACTED], [REDACTED] and [REDACTED], should read as follows:

" [REDACTED] (E.I.N. [REDACTED]) \*"

In addition, at the bottom of the page, the following language should be added:

"\*This is with respect to the consolidated tax liability of [REDACTED] (E.I.N. [REDACTED]) for the taxable years ended [REDACTED], [REDACTED] and [REDACTED]."

### C. GENERAL MATTERS

As a final matter, we recommend that you pay strict attention to the rules set forth in the IRM. Specifically, IRM 4541.1(2) requires use of Letter 907(DO) to solicit the extension, and IRM 4541.1(8) requires use of Letter 929(DO) to return the signed extension to the taxpayer. Dated copies of both letters should be retained in the case file as directed. When the signed extension is received from the taxpayer, the responsible manager should promptly sign and date it in accordance with Treas. Reg. § 301.6501(c)-1(d) and IRM 4541.5(2). 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 an extension becomes separated from the file or lost, these other

documents would become invaluable to establish the agreement.

Furthermore, please note that Section 3461 of the Restructuring and Reform Act of 1998, codified in § 6501(c)(4)(B), requires 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, you may provide Pub. 1035, "Extending the Tax Assessment Period," to the taxpayer when you solicit the statute extension. Alternatively, you may advise the taxpayer orally or in some other written form of the § 6501(c)(4)(B) requirement. In any event, you should document your actions in this regard in the case file.

Should you have any questions regarding this matter, please contact Paul Darcy of our office at (212) 264-5473 ext. 256.

LINDA R. DETTERY  
District Counsel

By: \_\_\_\_\_  
PETER J. LABELLE  
Assistant District Counsel

Noted:

Linda R. Dettery  
District Counsel

cc: Paulette Segal  
Assistant Regional Counsel (LC) (by e-mail)

Mary Helen Weber  
Assistant Regional Counsel (LC) (by e-mail)

Michael P. Corrado  
Assistant Regional Counsel (TL) (by e-mail)

Theodore R. Leighton  
Assistant District Counsel (by e-mail)