

Office of Chief Counsel
Internal Revenue Service
memorandum

CC:LM:CTM:LA:2

RLKave

date: July 17, 2001

to: (b)(7)c
Team Manager

from: Roger L. Kave
Attorney (LMSB)

subject: [REDACTED]
Consolidated Return and TEFRA Partnership Statute Extensions

This memorandum responds to your request for assistance.
This memorandum should not be cited as precedent.

ISSUES

1. What entity is the proper party to execute consent(s) to extend the time to assess tax for the [REDACTED] and Includible Subsidiaries taxable years ending prior to the consolidated groups acquisition by [REDACTED] ["consolidated return consent(s)"]?

2. What entities are the proper parties to execute consents to extend the time to assess tax in regard to partnership items for TEFRA partnerships owned directly or indirectly by [REDACTED] and/or its subsidiaries ["TEFRA consent(s)"]?

3. What Internal Revenue Service Form should be used for the consolidated return consent(s)?

4. What Internal Revenue Service Form(s) should be used for the TEFRA consent(s)?

5. What is the proper language to be used on the consolidated return consent(s)?

6. Who can sign the consolidated return consent(s)?

7. Who can sign the TEFRA consent(s)?

CONCLUSIONS

1. [REDACTED] is the proper party to execute the consolidated return consent(s).

2. The proper parties to execute partnership level TEFRA consents are:

- o Both [REDACTED] and the Tax Matters Partner [TMP] are the proper parties to execute partnership level TEFRA consent(s) for partnerships in which [REDACTED] consolidated group members are TMPs. (See *Example under Law and Analysis*).
- o [REDACTED] can sign on its own behalf, as TMP, for [REDACTED] (the partnership in which [REDACTED] is the TMP).
- o The TMP is the proper party to execute partnership level TEFRA consents, if the TMP is itself a subsidiary of [REDACTED] which is not part of the consolidated group. (See *Example under Law and Analysis*).
- o Where, the TMP of a first tier partnership (i.e. [REDACTED]) is also a partnership (i.e. [REDACTED]), the second tier partnership's TMP signs the first tier partnership's TEFRA consent in a representative capacity. (See *Example under Law and Analysis*).

The proper parties to execute partner level TEFRA consents are:

- o [REDACTED] is the proper party to execute partner level TEFRA consent(s) for partnerships in which [REDACTED] consolidated group members are partners.
- o If the TEFRA partner is a [REDACTED] corporate subsidiary which is not a member of the [REDACTED] consolidated group, then the subject partner should sign the consent. The partner would be signing in the partner's own behalf and not as a TMP.

3. Form 872-I, Investor Level Consent to Extend the Time to Assess Tax and Tax Attributable to Items of a Partnership [Form 872-I], is the proper form to be used for the consolidated return consent(s).

4. A separate Form 872-P, Consent to Extend the Time to

Assess Tax Attributable to Items of a Partnership [Form 872-P], is required for each TEFRA partnership for which a partnership level statute extension is sought. The name of the partnership for which the consent is sought should be stated on the line provided at the top of the form.

Because, for taxable years ending after August 5, 1997, a C corporation partner will not prevent a partnership from meeting the small partnership exception to the TEFRA rules, you will not need to obtain Forms 872-P for taxable years in which [REDACTED]'s partnerships newly qualify for the exception. If newly qualifying partnerships have not specifically elected to be covered by the TEFRA partnership provisions, the affected partners' statutes must be protected.

The Form 872-I executed for the [REDACTED] consolidated group's non-TEFRA income tax will also suffice as a partner level TEFRA consent for consolidated group members.

A separate Form 872-I should be used for each entity that is not a member of the consolidated group but for which a partner level TEFRA consent is required. The name of the partner for which the consent is sought should be stated on the "taxpayer" line at the top of the form.

5. The proper language to use for the name of the taxpayer on the Form 872-I for the consolidated return consent(s) is "[REDACTED] (EIN: [REDACTED] and Includible Subsidiaries*" Put an asterisk immediately thereafter (as shown). At the bottom of the page, the following language should be added (including the asterisk):

*This is with respect to the consolidated federal income tax of the [REDACTED] consolidated group for the group's taxable years ending [date], [date], [date], and [date].

6. The Form 872-I consolidated return consent(s) must be signed by a current duly authorized officer of [REDACTED]. Any other Forms 872-I required for subsidiaries of [REDACTED] that are not part of the [REDACTED] consolidated group would be signed by a duly authorized officer of the subject corporation.

7. The Forms 872-P should be signed by the parties as discussed in conclusion 2, above, for partnership level consents.

Although the format of last years TEFRA consents deviated from the conclusions above, the above format should be used for

the new consents. We further recommend that you allow us to review all the subject consents prior to being given to the taxpayer for execution.

FACTS

Since our conclusions are dependent upon the following factual recitation, it is imperative that you verify the following stated facts.

Consolidated Return Consents

You have requested assistance in preparing consolidated return consents for the pre acquisition years of [redacted] consolidated group ["the old [redacted]"]. The ultimate result of the acquisition was that both [redacted] (common parent of the old [redacted]) and [redacted] ["old [redacted]"] (common parent of the old [redacted]) became wholly owned subsidiaries of a newly formed common parent (newly named [redacted]).

The [redacted] Reorganization

On [redacted], in preparation of an offer to buy [redacted] stock, [redacted] was formed as a wholly-owned subsidiary of [redacted]. [redacted] had two wholly-owned subsidiaries, [redacted] and [redacted].

On [redacted], [redacted] was merged with and into old [redacted], with old [redacted] as the surviving corporation and a wholly-owned subsidiary of [redacted], the new holding company. On the effective date of the merger [redacted] changed its name from [redacted] to "[redacted] [redacted]", [new [redacted]] and old [redacted] changed its name from [redacted] to "[redacted] [redacted]".

All of old [redacted]'s capital stock was converted into capital stock of new [redacted]. The outstanding shares of old [redacted] common stock were automatically deemed to be outstanding shares of new [redacted] common stock with no exchange of certificates and new [redacted] common stock has the same rights, preferences and privileges as the old [redacted] common stock. The new [redacted] common stock is publicly traded and listed on the NYSE.

Upon completion of the [redacted] reorganization: (1) the

directors and officers of old [REDACTED] became the directors and officers of both [REDACTED] and new [REDACTED]; (2) the certificate of incorporation of old [REDACTED] was amended as of the effective time of the reorganization to change [REDACTED]'s name to "[REDACTED];" (3) the bylaws of old [REDACTED] at the effective time of the reorganization became the bylaws of [REDACTED]; (4) the certificate of incorporation and bylaws of new [REDACTED] contain provisions identical to the certificate of incorporation and bylaws of old [REDACTED] except that new [REDACTED]'s ([REDACTED]'s) name was changed to "[REDACTED];" and (5) the terms and conditions of the capital stock of new [REDACTED] are determined by [REDACTED]'s certificate of incorporation, which is identical in all material respects with the certificate of incorporation of old [REDACTED].

The [REDACTED] Acquisition

On [REDACTED], [REDACTED] (new [REDACTED] purchased approximately [REDACTED]% of the outstanding shares of common stock of [REDACTED] and approximately [REDACTED]% of the preferred stock of [REDACTED]. The purchase was mainly for cash with some exchange of new [REDACTED] common and preferred stock for [REDACTED] common and preferred. Following [REDACTED]'s purchase of [REDACTED] stock, [REDACTED] merged with and into [REDACTED] for the purpose of acquiring the remaining outstanding shares of [REDACTED] common and preferred stock (it is believed that a second "acquisition" subsidiary was also formed and merged into [REDACTED] for the purpose of obtaining the remaining [REDACTED] preferred stock). [REDACTED] survived the mergers as a wholly owned subsidiary of new [REDACTED].

The bylaws of [REDACTED] at the effective time of the [REDACTED] merger became the bylaws of [REDACTED] as the corporation surviving the [REDACTED] merger.

Upon the purchase of [REDACTED] common stock, new [REDACTED] [REDACTED] was entitled to designate a number of [REDACTED] directors constituting at least a majority of the [REDACTED] board.

It does not appear that the former [REDACTED] shareholders owned more than [REDACTED]% of the stock of new [REDACTED] after the [REDACTED] acquisition.

The [REDACTED] consolidated tax returns for the tax years to be extended name "[REDACTED] and Includible Subsidiaries" as the taxpayer. After the [REDACTED] acquisition, [REDACTED]'s EIN remained [REDACTED].

TEFRA Consents

You have also requested assistance in preparing TEFRA consents for the following eight partnerships:

<u>Partnership</u>	<u>Years</u>		
[REDACTED];	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED];	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED];	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED];	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED];	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED];	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED];	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED];	[REDACTED]	[REDACTED]	[REDACTED]

Except for [REDACTED], [REDACTED] owns, directly and indirectly thru its subsidiaries, [REDACTED]% of the other seven partnerships. The tax matters partners for [REDACTED] [REDACTED] [REDACTED] and [REDACTED] are domestic and foreign subsidiaries of [REDACTED]. The tax matters partner for [REDACTED] is [REDACTED] itself.

[REDACTED] is owned [REDACTED]% by [REDACTED] (a partnership) and [REDACTED]% by [REDACTED] (a foreign corporation). [REDACTED] is the TMP of [REDACTED].¹ [REDACTED] is the TMP of [REDACTED].

Prior TEFRA Consents

Last year you obtained individual TEFRA consents on Forms 872, Consent to Extend the Time to Assess Tax [Form 872] which listed the following partnerships as "taxpayers" and were signed

¹Originally, [REDACTED] incorrectly designated [REDACTED] as its TMP on its partnership return. You have informed us that [REDACTED] is actually the TMP of [REDACTED] and has since been properly designated as the TMP.

by the following TMPs:

<u>Taxpayer</u>	<u>Signed By</u>
[REDACTED] ✓	[REDACTED] on behalf of [REDACTED]
[REDACTED] ✓	[REDACTED] Secretary ✓
[REDACTED]	[REDACTED] Director of Taxes
[REDACTED]	[REDACTED] Director of Taxes
[REDACTED]	[REDACTED] Director of Taxes
[REDACTED] ✓	[REDACTED] Director of Taxes ✓
[REDACTED]	[REDACTED] Director of Taxes **

** Formerly known as [REDACTED] ³

This is the first year that a statute extension will be obtained for [REDACTED] [REDACTED] is the TMP for [REDACTED].

Each of the prior year TEFRA consents contained the specific

² [REDACTED] was spelled as "[REDACTED]" on last years consent. The spelling for this years consent should be double checked to mirror the partnerships name on the partnership return.

³You have informed us that the change from [REDACTED] [REDACTED] to [REDACTED] was merely a name change.

partnership item language required by I.R.C. § 6229(b)(3) (i.e. the language which must be included on a partner level consent).

LAW AND ANALYSIS

Consolidated Return Consents

Treas. Reg. § 1.1502-77(a) provides in part that the common parent is the proper party to sign income tax consents for all members in the consolidated group.

Temp. Reg. § 1.1502-77T, captioned "Alternative agents of the group (temporary)," applies to consents if the corporation that is a common parent of a consolidated group, ceases to be the common parent, whether or not the group remains in existence under Treas. Reg. § 1.1502-75(d).

Temp. Reg. § 1.1502-77T(a)(3) provides that a waiver of the statute of limitations with respect to a consolidated group, given by any one or more corporations referred to in paragraph (a)(4) is deemed to be given by the agent of the group. Temp. Reg. § 1.1502-77T(a)(4) lists the following alternative agents to act on behalf of the group:

(i) the common parent of the group for all or any part of the year to which the notice or 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 Treas. Reg. § 1.1502-77(d); or

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

Because [REDACTED], the common parent of the old [REDACTED] group, remains in existence after the [REDACTED] acquisition, [REDACTED] remains the agent of the group in regard to the pre-acquisition years and is the proper party to sign the consolidated return consents. Treas. Reg. §§ 1.1502-77(a); 1.1502-77T(a)(4)(i).

We recommend that you use Form(s) 872-I for the consolidated return consent(s). See discussion below regarding TEFRA consents.

The proper language to use for the name of the taxpayer on the Forms 872-I is " [redacted] (EIN: [redacted] and Includible Subsidiaries*" Put an asterisk immediately thereafter (as shown). At the bottom of the page, the following language should be added (including the asterisk):

*This is with respect to the consolidated federal income tax of the [redacted] [redacted] consolidated group for the group's taxable years ending [date], [date], [date], and [date].

The regulations under I.R.C. § 6501(c)(4) do not specify who may sign consents executed under that section. Accordingly, the Service applies 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, I.R.C. § 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.

The consolidated return consent(s) must be signed by a current duly authorized officer of [redacted].

TEFRA Consents

There are two methods to extend a TEFRA partnership's general three-year period of limitations under I.R.C. § 6229(a). These methods are:

1. At the partnership level - I.R.C. § 6229(b)(1)(B); or
2. At the partner level - I.R.C. § 6229(b)(1)(A).

Partnership Level Consents

A consent to extend the period of limitations for the partnership executed at the partnership level extends the period of assessment for all partnership investors.⁴

⁴The TMP or other person authorized in writing by all general partners of the TEFRA partnership may extend the period of limitations for the assessment of partnership and affected items at the partnership level for all partners. *Temp. Treas. Reg. § 301.6229(b)-1T.*

Form 872-P is used to extend the statute of limitations at the partnership level. Because this form is used for an entity level statute extension, the name of the TEFRA partnership is entered in the space provided at the top the form (i.e. [REDACTED]). A separate Form 872-P is required for each TEFRA partnership for which an entity level statute extension is sought.

We suggest obtaining a Form 872-P for each TEFRA partnership that [REDACTED] or its subsidiaries have a direct or indirect interest.

Where the TMP is a [REDACTED] subsidiary which is included in [REDACTED]'s consolidated group, both [REDACTED] and the TMP should sign the entity level TEFRA consents. We recommend both signatures even if the same individual is the duly authorized officer of both signing entities.⁵

For example, with respect to [REDACTED] whose TMP is [REDACTED], we recommend that the signature block appear as follows (providing for two signatures):

[REDACTED] by [name of authorized representative for [REDACTED], title of authorized representative], on behalf of [REDACTED], Tax Matters Partner of [REDACTED].

[REDACTED] by [name of authorized representative for [REDACTED], title of authorized representative], Tax Matters Partner of [REDACTED].

[REDACTED] can sign on its own behalf, as TMP, for [REDACTED] (the partnership in which [REDACTED] is the TMP).

⁵The reason that we recommend that the parent sign all consents on behalf of its subsidiaries is because *Treas. Reg. § 1.1502-77* provides that the common parent shall be the "sole agent for each subsidiary in the group, duly authorized to act in its own name in all matters relating to the tax liability for the consolidated return year." Thus, under the regulations, the parent of a consolidated filing group acts on behalf of the group with respect to all tax matters. In this regard, it is the parent who must extend the period of limitations on behalf of the consolidated group with respect to the consolidated return. Such consent "shall be considered as having also been given or executed by each such subsidiary." *Id.*

If the TMP is a [REDACTED] subsidiary which is not a member of [REDACTED]'s consolidated group, then only the TMP should sign the consent. For example, in regard to the partnership [REDACTED], where the TMP is a foreign corporation ([REDACTED]), we recommend that a duly authorized representative of [REDACTED] sign as TMP as follows:

[REDACTED] by [name of authorized representative for [REDACTED] title of authorized representative], Tax Matters Partner of [REDACTED].

A Partnership as TMP

Where the TMP of the source partnership ([REDACTED]) is also a partnership ([REDACTED]), the question arises, who can act for the second tier partnership in its capacity as the TMP of the source partnership.

If the second tier partnership designates its own TMP, we will accept that as an authorization to have that partner also act on behalf of the second tier as the TMP for the source partnership. If a statute extension is executed by a partner of the second tier partnership, the document must expressly provide that the partner is signing in a representative capacity.

Because [REDACTED] (a [REDACTED] corporate subsidiary) is the TMP of [REDACTED], (the TMP of [REDACTED]), we recommend that [REDACTED]'s Form 870-P be signed by a duly authorized officer of [REDACTED] as follows:

[REDACTED] by [name of authorized representative for [REDACTED] title of authorized representative], Tax Matters Partner, [REDACTED], Tax Matters Partner, [REDACTED].

Partner Level Consents

Partner(s) can extend their own period of limitations for the assessment of partnership and affected items. A partner level consent, extends the statute for only the specific partner entering into the consent agreement.

If a partner executes an extension for the partnership on his own behalf, the specific partnership item language required

by I.R.C. § 6229(b)(3) must be included on the "partner(s)" consent.⁶ Form 872-I contains the mandated language.

In addition to obtaining the individual partnership level consents discussed above, a Form 872-I partner level consent should be obtained from [REDACTED] and Includible Subsidiaries. The Form(s) 872-I to be used for the consolidated group consent(s) will also suffice as a partner level extension for consolidated group members. Obtaining consolidated group consent(s) on a Form 872-I will protect the statute of limitations from expiring on both known and unknown partnerships in which one of the group members is a partner.

A separate Form 872-I should be obtained for each [REDACTED] subsidiary which is not a member of the consolidated group but which may have an interest in a TEFRA partnership.

Exception for Small Partnerships

Small partnerships are not subject to the TEFRA unified proceedings unless they elect to be subject to them. For taxable years 1982 through 1996, I.R.C. § 6231(a)(1)(B)(i) defines a "small partnership" as a partnership in which:

- a. there are ten or fewer partners;
- b. each partner is a natural person (not a nonresident alien) or an estate; and
- c. each partner's share of each partnership item is the same as his or her share of every other partnership item.

For taxable years ending after August 5, 1997, I.R.C. § 6231(a)(1)(B) has been amended to provide that the same share requirement is no longer applicable and C corporations are allowed as partners in addition to natural persons.

The small partnership exception still does not apply to a partnership for a taxable year if any partner in the partnership during that taxable year is a pass-thru partner (i.e. a partnership). *Temp. Treas. Reg. § 301.6231(a)(1)-1T.*

The determination of whether a partnership meets the requirements for the exception for small partnerships is to be

⁶The section 6229(b)(3) mandated language is not appropriate on a partnership level consent (i.e. Form 872-P).

made with respect to each partnership taxable year.

Any partnership that meets the small partnership requirements is treated as a small partnership, unless it specifically elects to be treated under the TEFRA unified proceeding provisions. I.R.C. § 6231(a)(1)(B)(ii). The election is effective for the partnership taxable year to which the return relates and all subsequent partnership taxable years unless revoked with the consent of the Commissioner. *Id.*

Because, for taxable years ending after August 5, 1997, a C corporation partner will not prevent a partnership from meeting the small partnership exception to the TEFRA rules, you will not need to obtain Forms 872-P for taxable years in which [REDACTED]'s partnerships newly qualify for the exception. If newly qualifying partnerships have not specifically elected to be covered by the TEFRA partnership provisions, the affected partners' statutes must be protected.

CASE DEVELOPMENT, HAZARDS AND OTHER CONSIDERATIONS

Consents for the old [REDACTED]

(b)(5)(AC), (b)(7)a

(b)(5)(AC), (b)(7)a

(b)(5)(AC), (b)(7)a

TEFRA Consents

(b)(5)(AC) (b)(7)a



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.

If you have any questions, please do not hesitate to give me a call at (213) 894-3027.

ROGER L. KAVE
Attorney (LMSB)