Office of Chief Counsel
Internal Revenue Service

memorandum

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MTHammoud TL-N-3957-00

date: AUG 10 2000

to: Territory Manager, Retailers, Food & Pharmaceuticals LM:RFP
Sarolta Ficsor, Team Manager
Attn: Dave Evenson, Team Coordinator

from: District Counsel, Michigan District, Detroit

subject: Consent to Extend Statute of Limitations
[redacted]

This memorandum is in response to your recent request for our advice with regard to the above subject. Our advice is subject to post-review by our National Office.

DISCLOSURE STATEMENT

This advice constitutes return information subject to I.R.C. § 6103. This advice contains confidential information subject to the attorney-client and deliberative process privileges and if prepared in contemplation of litigation, subject to the attorney work product privilege. Accordingly, the Examination or Appeals recipient of this document may provide it only to those persons whose official tax administration duties with respect to this case require such disclosure. In no event may this document be provided to Examination, Appeals, or other persons beyond those specifically indicated in this statement. This advice may not be disclosed to the taxpayer(s) involved or their representatives.

This advice is not binding on Examination or Appeals and is not a final case determination. Such advice is advisory and does not resolve Service position on an issue or provide the basis for closing a case. The determination of the Service in the case is to be made through the exercise of the independent judgement of the office with jurisdiction over the case.

ISSUE

Whether [redacted], the former parent of a consolidated group, may currently execute a Consent to Extend the Time to Assess Tax, Form 872, for the consolidated group, when it has merged with another corporation and ceased to be the common parent, but remained in existence.

CONCLUSION

Since it remains in existence, [redacted], as the old common parent, may continue to act as the agent for the consolidated group, including executing waivers of statute of limitations, for those years it was the common parent. Temp. Reg. § 1.1502-77T(a)(4)(i). Accordingly, the consents executed by [redacted] in [redacted] are valid.

FACTS

The facts are as set forth in your correspondence to our office of June 26, 2000, and the Plan of Merger between the two subject corporations.

During the [redacted] and [redacted] tax years, the years currently under audit, [redacted], (hereinafter Taxpayer), a Delaware corporation, was the common parent of its consolidated group. In [redacted], a "merger of equals"[1] was consummated between Taxpayer and [redacted], (hereinafter [redacted]), a Delaware corporation, and [redacted] changed its name to [redacted], (hereinafter combined company). As a result of the merger, Taxpayer became a wholly owned subsidiary of [redacted] (combined company). The merger also resulted in Taxpayer's shareholders receiving [redacted]% of the combined company's stock, and [redacted]'s shareholders receiving [redacted]%.

Taxpayer remained in existence after the merger, maintaining the same corporate structure, officers, and Employer Identification Number (EIN). Taxpayer intends to file a final consolidated return as the parent for the period of [redacted] through [redacted], but will be part of the combined company's consolidated return for the period of [redacted] to [redacted].

In [redacted], the Examination Division for the Michigan

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[1] [redacted] purchased all the outstanding stock of [redacted], and the merger was treated for income tax purposes as a reorganization under I.R.C. § 368(a).

District obtained from Taxpayer and executed, a Consent to Extend the Time to Assess Tax, Form 872 for each of the [redacted] and [redacted] tax years.[2] For the taxpayer's name, the Form 872 reflected the following: "[redacted]." The Form was executed on behalf of the "[redacted] Consolidated Return" by its Executive Vice President and CFO.

The statute of limitations for the [redacted] tax year, the earliest year under audit, expires on [redacted]. Since the Forms 872 were executed after the merger, exam requested our advice with regard to their validity.

DISCUSSION AND ANALYSIS

As a general rule, the common parent of a consolidated group is the sole agent for each member of the group, duly authorized to act in its own name in all matters relating to the tax liability for the consolidated return year. Treas. Reg. § 1.1502-77(a). Accordingly, the common parent, in its own name, is the proper party to sign consents, including the Form 872 waiver to extend the period of limitations, for all members of the consolidated group.

An exception to this general rule is found in Temp. Reg. § 1.1502-77T, which provides for alternative agents in situations where a corporation that is the common parent of a consolidated group ceases to be the common parent. This temporary regulation applies 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, and thus, applies to the years at issue.

Pursuant to Temp. Reg. § 1.1502-77T(a)(3), a waiver of the statute of limitations relating to a consolidated group that is given by any one or more of the corporations listed in subparagraph (4) of the temporary regulation is deemed to be given by the agent of the group.

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[2] This was the second Form 872 executed by exam for the same time period. Exam had executed a Form 872 for each year previously on [redacted]. However, to comply with the newly enacted notice requirements under I.R.C. § 6501(c)(4)(B), exam solicited a second set of consents from Taxpayer and executed those consents in [redacted]. Both Forms 872 for each year are identical in every respect.

Pursuant to subparagraph (4)(i) of the temporary regulation, a "common parent of the group for all or any part of the year to which the ... waiver applies" qualifies as an alternative agent for the group.

Since Taxpayer in this case was the common parent during both the [redacted] and [redacted] tax years, the years covered in the Forms 872, and remains in existence, Taxpayer may execute the waivers as an alternative agent pursuant to Temp. Reg. 1.1502-77T(a)(4)(i). Accordingly, the Forms 872 already obtained from Taxpayer for these years, and executed by a duly authorized representative of Taxpayer, i.e., its chief financial officer, are valid.

We have coordinated this advice with our National Office, and it concurs with our conclusion.

We hope the foregoing fully addresses your concerns regarding this issue.

Should you have any questions or require further assistance, please feel free to contact the undersigned at (313) 237-6432.

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By: _____
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