Office of Chief Counsel
Internal Revenue Service

memorandum

CC:LM:RFP:CHI:2:TL-N-5970-00
JPJankowski

date: January 11, 2001

to: Art Simon, LMSB Team Manager, Group 1721

from: JOHN P. JANKOWSKI
Special Litigation Assistant

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subject: [redacted], **Successor by Merger to** [redacted]
Request for Legal Advice and Assistance

The purpose of this memorandum is to respond to your expedited request for legal advice and assistance relating to the proper wording to be used in the preparation of one or more Consent(s) To Extend The Time to Assess Tax (Form 872), for the above-noted LMSB (ISP/CEP) Large Case taxpayer. **We understand that the relevant statutes of limitations for the tax years** [redacted] **and** [redacted] **will expire on or after** [redacted].

These same matters arise from the former Illinois District Director's ongoing CEP & ISP Large Case examination of [redacted] for relevant tax periods, including those ending in [redacted] and [redacted]. The assistance provided by the undersigned is in accordance with the former Large Case Coordination Procedures, for all significant advice provided in non-docketed (LMSB) large cases. The undersigned is currently assigned to provide you with assistance on this case under the Attorney-Advisor Program.

The question posed was previously coordinated with the National Office by Chicago SLA Rogelio Villageliu, in March of 1995. At that time, Mr. Jerry M. Schwartzman (CC:DOM:FS:CORP) confirmed that the appropriate language to use was as follows:

> "[redacted] *"

At the bottom of page 1 of Form 872, next to a reciprocal to the above-noted asterisk, state:

> **" * With respect to the consolidated tax liability of** [redacted]

[redacted] for the tax periods ending [redacted] and [redacted]."

Mr. Schwartzman further recommended that the signature section of the Form 872 should be captioned "[redacted] **as agent for the members of the** [redacted]." He also reiterated that the person signing on behalf of [redacted] (hereinafter "[redacted]") be an officer of [redacted] with appropriate authority to bind the taxpayer.

Issue

What corporate entity is the proper party to extend the statute of limitations for the [redacted] consolidated group's taxable years [redacted] and [redacted]?

Conclusion

[redacted], a viable and legal entity, remains the corporate party with the actual and apparent authority to execute a Form 872 for the [redacted] consolidated group for the tax years ending [redacted] and [redacted]. Accordingly, the same language noted above, should be used in your solicitation of one or more new consents for the tax periods ending [redacted] and [redacted]. For the sake of brevity, we will hereinafter summarize the relevant facts surrounding the corporate restructuring transaction(s) that [redacted] has undertaken over the last decade.

Facts

At relevant times, [redacted], [redacted] company, was the common parent of a consolidated group of affiliated companies, including each of the calendar years [redacted] through [redacted]. [redacted] had both common and preferred shares outstanding, in addition to a class of convertible preferred stock and some warrants. In [redacted], the [redacted] group reorganized through a so-called "flip". In executing the flip, [redacted] formed a wholly owned subsidiary named [redacted], which formed a wholly owned subsidiary, [redacted], [redacted] subsequently merged into and with [redacted], with [redacted] surviving the merger. All the outstanding common stock of [redacted] was simultaneously converted into [redacted] common stock ([redacted]'s preferred, convertible preferred and warrants were not converted); [redacted]'s [redacted] stock was canceled; and [redacted] became a wholly owned subsidiary of [redacted]. In a private letter ruling issued to this taxpayer, the Service ruled that the [redacted] group

will continue with [redacted] as the new common parent under Treas. Reg. §1.1502-75(d)(2)(ii) (downstream transfer) and Rev. Rul. 82-152, 1982-2 C.B. 205. This ruling was based in part on the taxpayer's representation that [redacted] will own at least 80 percent of the vote and value of the [redacted] stock after the transaction. No contrary facts have been developed to date.

More recently, on or about [redacted], [redacted] participated in a formal corporate restructuring with [redacted]. [redacted], a [redacted], was incorporated in Pennsylvania. Pursuant to the "Second Amended and Restated Agreement and Plan of Exchange and Merger dated [redacted], as amended and restated as of [redacted]" (hereinafter "Merger Agreement"), [redacted], [redacted] and [redacted], a Pennsylvania corporate subsidiary of [redacted], entered into a stock exchange and merger agreement. The Merger Agreement provided for two transactions, the first was a common stock exchange between [redacted] and [redacted], wherein [redacted] became a wholly owned subsidiary of [redacted]. The second transaction involved the merger of [redacted] with and into [redacted], wherein the separate existence of [redacted] ended and its wholly owned subsidiary [redacted] became a wholly owned subsidiary of [redacted].

Discussion

Treas. Reg. §1.1502-77(a) provides that the common parent is the agent for the members of the group. This agency continues as long as the common parent remains in existence under state law. Treas. Reg. §1.1502-77(a); Craigie, Inc. v. Commissioner, 84 T.C. 466 (1985); Southern Pacific Co. v. Commissioner, 84 T.C. 395 (1985).

For taxable years for which the return is due (without extensions) after September 7, 1988, Temp. Treas. Reg. §1.1502-77T provides alternative agents for the members of a group when the common parent ceases to be the common parent. This temporary regulation applies for purposes of executing extensions of the statute of limitations and for issuing notices of deficiency. Temp. Treas. Reg. §§1.1502-77T(a)(2) and (a)(3).

Under Temp. Treas. Reg. §1.1502-77T(a)(4)(i), the common parent for all or any part of the taxable year to which the notice or waiver applies is the alternative agent for the members of the group.

Therefore, under both Treas. Reg. §1.1502-77(a) and Temp. Treas. Reg. §1.1502-77T(a)(4)(i), [redacted] remains the agent for the members of its consolidated group, including the group's [redacted] and [redacted] taxable years. Cf., Union Oil Company of California v.

Commissioner, 101 T.C. 130 (1993) (taxable years prior to effective date of Temp. Treas. Reg. §1.1502-77T). [redacted] would also be the proper agent for the members of the group under Treas. Reg. §1.1502-77(a) even if [redacted] did not own 80 percent of the vote and value of the [redacted] stock after the [redacted] flip, so that the transaction did not qualify as a downstream transfer within the meaning of Treas. Reg. §1.1502-75(d)(2)(ii). In that case, the [redacted] group would continue with [redacted] as the common parent because it would remain the highest tier, domestic corporation in the old affiliated group.

Accordingly, [redacted] remains the proper corporate entity to extend the limitations period on behalf of the members of its consolidated group for [redacted]'s [redacted] and [redacted] taxable years. Further, the corporate name on the signature section (on the back of the waiver - Form 872) should be captioned "[redacted] as agent for the members of the [redacted]."

In accordance with the former Large Case (LMSB) coordination procedures with the National Office, this written legal advisory is being treated as a non-significant advice request(NSR). We are submitting this advisory opinion for post review and anticipate a 10-day response from the National Office. As you know, the response can supplement, modify and/or reject the advice contained herein. **Accordingly, please take no action on the advice contained herein, until such National Office response is received by the undersigned. You will be promptly notified of any exceptions or modifications recommended to the advice contained herein.** In the interim, should you have any questions regarding this memorandum or our recommendations, please contact the undersigned at (312) 886-9225, Extension 319.

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