Office of Chief Counsel
Internal Revenue Service

memorandum

CC:LM:FS:LI:POSTF-167906-01
REGole

date: 1/3/02

to: Large and Mid-Size Business Division
Territory Manager (Group [redacted] - Financial Services)
Attn: [redacted], Team Leader

from: Associate Area Counsel (CC:LMSB:FS:LI)

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subject: [redacted]
EIN: [redacted]
UIL: 441.05-00

This is in response to your December 14, 2001 request for assistance. This advice should not be cited as precedent.

ISSUE

Whether a Form 872 "Consent to Extend the Time to Assess Tax" should use a calendar period or a fiscal period?

CONCLUSION

We recommend that the Form 872 identify the covered period as the tax year beginning [redacted] and ending [redacted].

FACTS

The facts, as we understand them to be, are as follows:

The Examination Team is currently auditing the above-referenced taxpayer. It has requested our assistance in the drafting of a Form 872 to protect the period for assessment and collection of income taxes. The taxpayer's annual report indicates that the taxpayer had a 53 week year ending [redacted]. However, the taxpayer has been inconsistent in the identification of its tax year.

The taxpayer filed a Form 1120 U.S. Corporation Income Tax Return on [redacted]. The Form 1120 does not include a

beginning or ending tax year. Therefore the Form 1120 represents the taxpayer as a calendar year taxpayer. The taxpayer represents that it attached a cover letter with its consolidated income tax return at the time it was filed. A copy of the letter was subsequently provided to the Examination Team, but is not attached to the filed tax return. The letter states:

> Enclosed please find Form 1120 Consolidated Federal Income Tax Return for the above named companies for the tax year ended [redacted].

A Form 7004, Application for Automatic Extension of Time to File Corporation Income Tax Return is likewise inconsistent. The taxpayer checked the box that it was a calendar taxpayer. However, attached to the Form 7004 is "Statement 1." Statement 1 states that it is for the tax year ended [redacted]. You have requested our advice as to whether the taxable period on the Forms 872 should be the calendar year ended [redacted] or the taxable period ended [redacted].

DISCUSSION

Code section 441(a) provides generally that taxable income shall be computed on the basis of a taxpayer's "taxable year." A taxable year means "the taxpayer's annual accounting period, if it is a calendar year or a fiscal year." I.R.C. § 441(b). A fiscal year is either a 12 month period ending in any month other than December or a 52 to 53 week year as defined in I.R.C. § 441(f). I.R.C. § 441(e). A taxpayer may elect a 52-53 week fiscal year as follows:

> General Rule--A taxpayer who, in keeping his books, regularly computes his income on the basis of an annual period which varies from 52 to 53 weeks and ends always on the same day of the week and ends always -
>
> (A) on whatever date such same day of the week last occurs in a calendar month, or
>
> (B) on whatever date such same day of the week falls which is nearest to the last day of a calendar month,
>
> may (in accordance with the regulations prescribed under paragraph (3)) elect to compute his taxable income for purposes of this subtitle on the basis of such annual period....

I.R.C. 441(f)(1).

A taxpayer is required to file its tax returns in accordance with its annual record keeping. I.R.C. §§ 441(a) and (b). It appears from the annual report that the taxpayer maintains its books and records on the basis of a 52-53 week year.[1] We recommend that you verify that the taxpayer's record keeping system followed a 52-53 week year as indicated in the annual report. Our remaining conclusions are based upon the assumption that the taxpayer followed a 52-53 week fiscal year. Assuming that the taxpayer maintained a 52-53 week year, the taxpayer was obligated to file its tax returns on this basis. Furthermore, the Tax Court has no jurisdiction to determine a deficiency for any taxable year other than a taxpayer's correct taxable year. Century Data Systems Inc. v. Commissioner, 80 T.C. 529 (1983), citing Brooklyn City Railroad Co. v. Commissioner, 27 B.T.A. 77 (1932), aff'd. 72 F.2d 274 (2d Cir. 1934); Atlas Oil and Refining Corp. v. Commissioner, 17 T.C. 733 (1951)(The Tax Court had no jurisdiction over incorrect taxable years[2]).

Although the taxpayer appears to be a fiscal year taxpayer maintaining its books on a 52-53 week year, it made inconsistent representations that it was a calendar year taxpayer on its Forms 1120 and 7004. These inconsistent representations do not render the taxpayer a calendar year taxpayer. See Rev. Rul. 58-256, 1958-1 C.B. 215 (The taxpayer's federal income tax liability should be determined based upon the taxpayer's annual record keeping rather than erroneously filed returns).

According to the taxpayer's annual reports, it follows a 52-53 week year. Assuming that you verify the correctness of this information, any deficiency should be determined on the basis of such taxable period. Consequently, the Form 872 should protect the statute of limitations for the proper taxable period. Therefore we recommend that the Form 872 identify the taxable period as the period beginning on [redacted] and ending [redacted].

Under routine procedures this advice will be forwarded to our National Office for review. Accordingly, we recommend that

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[1] We note, that a taxpayer that does not keep its books, or have an annual accounting period must use a calendar year. I.R.C. § 441(g).

[2] Compare Miles Production Company v. Commissioner, 96 T.C. 595 (1991)(The Tax Court distinguished Atlas Oil and Century Data, supra, and concluded that jurisdiction was proper over taxpayer's windfall profit tax years where the deficiencies were traceable to proper tax periods).

you do not take any further action with respect to the proposed Form 872 until you receive further direction from our office. Any questions regarding this opinion should be referred to Rose Gole at (516) 688-1702.

DISCLOSURE STATEMENT

This writing may contain privileged information. Any unauthorized disclosure of this writing may have an adverse affect on privileges, such as the attorney client privilege. If disclosure becomes necessary, please contact this office for our views.

Any questions regarding this opinion should be referred to Rose Gole at (516) 688-1702.

JODY TANCER
Associate Area Counsel
Long Island

By: _____
ROSE E. GOLE
Attorney