Office of Chief Counsel
Internal Revenue Service

memorandum

CC:LM:HMT:CLE:POSTF-166267-01
RSBloom

date: March 8, 2002

to: LMSB:NR:[redacted]
[redacted]
Attn: [redacted], [redacted] and [redacted]

from: Associate Area Counsel, LM:HMT:CLE

subject: **Statute Extension (Form 872-F)**
[redacted] Inc. and [redacted]
[redacted] Audit Cycle

By memorandum dated December 12, 2001, you requested advice regarding the proper wording to be used for the name line on Form 872-F for 2 partners of the [redacted]. Your request states that the Form 872-F must be executed by [redacted]. By facsimile transmission on February 22, 2002, we were provided the necessary restructuring information regarding the 2 partners in question. The advice given herein is general in nature due to the fact that you have been unable to provide detailed information.[1] This memorandum should not be cited as precedent. Please note that this memorandum of advice is subject to 10-day post review by our National Office and, therefore, is subject to modification.

ISSUE

Whether a Form 872-F can be executed to extend the time for a partner to claim a refund or credit with respect to adjustments which were either determined in an FPAA or previously agreed upon by execution of a Form 870-P.

CONCLUSION

Execution of Form 872-F will not extend the time in which the partner has to claim a refund or credit with respect to

[1]We have not been provided copies of the relevant underlying documentation (e.g., FPAA, Forms 870-P); therefore, you should verify the facts as stated herein. If there is any inaccuracy in the facts, please bring such to our attention immediately since any factual deviation may change the advice given herein.

adjustments which were either determined in an FPAA or previously agreed upon by execution of a Form 870-P. Rather, a claim for refund should be filed with respect to the partnership or converted adjustments.

FACTS

[redacted] Inc. (EIN: [redacted]) and [redacted]. (EIN: [redacted]), among others, were partners in [redacted] (EIN: [redacted]) [hereinafter "[redacted]"]. You have orally advised that, for [redacted] years [redacted] and [redacted], a notice of Final Partnership Administrative Adjustment (FPAA) was issued. No petition to any court was filed with respect to the FPAA. The two partners in question ([redacted] and [redacted]) both executed a Form 870-P, Agreement to Assessment and Collection of Deficiency in Tax for Partnership Adjustments.[2] The partnership adjustments did not result in any deficiency for the two partners; rather, they resulted in increased losses and/or credits.

During the years [redacted] and [redacted], [redacted]. was a subsidiary of [redacted] (EIN: [redacted]) and filed a consolidated income tax return, with [redacted] as common parent. In [redacted], [redacted] changed its name to [redacted]. In [redacted], [redacted] changed its name to [redacted] ([redacted]) Inc.

During the years [redacted] and [redacted], [redacted] Inc. was a subsidiary of [redacted] Inc. (EIN: [redacted]) and filed a consolidated income tax return, with [redacted] as common parent. In [redacted], [redacted] merged into [redacted], with [redacted] surviving.

On [redacted], [redacted] Inc. changed its name to [redacted] Inc. On [redacted], [redacted] Inc. acquired [redacted] in a reverse acquisition. Thus, [redacted] Inc. became the common parent of [redacted] group.

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[2]**These facts (an FPAA was issued, no petition to court was filed, and Forms 870-P were executed) are critical and must be verified.**

LAW and ANALYSIS

Form 872-F is the designated form for consents to extend the time to assess tax attributable to items of a partnership or S corporation that have converted under section 6231(b) of the Internal Revenue Code. When a Form 870-P, Agreement To Assessment And Collection Of Deficiency In Tax For Partnership Adjustments, is executed by both the taxpayer and the Service, the partnership items of the partner (taxpayer) for the partnership taxable year to which the Form 870-P relates become nonpartnership items. I.R.C. § 6231(b)(1)(C). The Form 870-P provides, in part, that the Service and the taxpayer "agree to the determination of partnership items of the partnership for the years shown on the attached schedule of adjustments." Once the items become nonpartnership items, the Service has 1 year to assess the tax attributable to such items. I.R.C. § 6229(f)(1). This 1-year assessment period can be extended by agreement. Form 872-F is used for such purpose. However, Form 872-F is not the proper form for extending the 1 additional year allowed for assessment which begins after an FPAA is issued to the Tax Matters Partner and no petition is filed therefrom with the Tax Court during the 150 days following the FPAA's issuance. I.R.C. §§ 6225(a) and 6229(d). In such case, the partnership items were not converted to nonpartnership items under section 6231(b).

In the situation at hand, there are no deficiencies attributable to partnership items to be assessed. Rather, there are potential overpayments.[3] Therefore, Form 872-F is inappropriate and will not serve to keep the statute open for the partners'/taxpayers' claims. However, section 6230(c)(1)(B) provides the following:

> (1) **In general**. A partner may file a claim for refund on the grounds that-
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> > (B) the Secretary failed to allow a credit or to make a refund to the partner in the amount of the overpayment attributable to the application to the partner of a settlement, a final partnership administrative adjustment, or the decision of a court in an action brought under section 6226 or section 6228(a).

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[3]They are potential because other adjustments may more than offset the partnership or converted adjustments; the examination of the relevant corporate returns is not complete.

Therefore, in the case at hand, the partners can file a claim for refund[4] based upon the settlement or the FPAA determination. The claims must be filed within 2 years after whichever of the following days is appropriate:
1) the day on which the settlement is entered into; or
2) the day on which the period during which an action could be brought with respect to the FPAA (generally the 150th day after the issuance of the FPAA). Section 6230(c)(2)(B).
Consequently, for purposes of determining the statutory period in which the claims must be filed, it will be necessary to determine the actual facts regarding the FPAA and Forms 870-P.

Once the claims for refund are filed, the normal statutory period for bringing suit under section 6532(a) apply. I.R.C. § 6230(c)(3). No suit may be filed until expiration of 6 months from the date of filing the claim unless the Service renders a decision thereon within such time, nor after the expiration of 2 years from the date of mailing by certified or registered mail a notice of disallowance. Thus, if the Service does nothing with respect to the claims for refund after they are filed, they remain valid indefinitely.

In this case, the two partners in question were both subsidiary corporations that had filed consolidated Federal income tax returns for the years in issue. As such, Treas. Reg. § 1.1502-77 provides that "[t]he 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." In fact, the regulation specifically states that "[t]he common parent will file claims for refund or credit." Therefore, the claim for refund for the partner [redacted]. would have to be filed by [redacted] and the claim for refund for the partner [redacted]. would have to be filed by [redacted] Inc., formerly [redacted] Inc.[5]

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[4]This is an actual claim for refund on a Form 1120X, rather than a request for administrative adjustment (AAR) on Form 8082.

[5]It should be verified that the two parent corporations ([redacted] and [redacted] Inc.) have not gone out of existence.

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. Also, if you have any questions regarding the above, please feel free to contact the undersigned at 216-522-3380 (ext. 3108).

JOSEPH F. MASELLI
Area Counsel (Area 2)

By:_____
RICHARD S. BLOOM
Associate Area Counsel
(Large and Mid-Size Business)