Office of Chief Counsel
Internal Revenue Service

memorandum

CC:LM:[redacted]:Postf 134328-02
[redacted]

date: AUG 15 2002

to: [redacted]
Revenue Agent, LMSB
[redacted]

[redacted]
Revenue Agent, LMSB
[redacted]

from: Associate Area Counsel (LMSB), [redacted], CC:LM:[redacted]

subject: [redacted], **EIN** [redacted]
Extension of Time Under Statute of Limitations for Partnership [redacted]
Tax Years: [redacted], [redacted]

This memorandum responds to your request for assistance dated June 19, 2002. This memorandum should not be cited as precedent.

This memorandum is revised to include the comments from National Office. These comments are located in an additional section at the end of the memorandum.

ISSUES

1. How should the NBAP and FPAA be addressed?

2. Is the Form 871-I signed by the taxpayer sufficient to extend time under the statute of limitations for assessment where the partnership is dissolved and the taxpayer was only indirectly a general partner through its subsidiary partnership, which also dissolved?

CONCLUSIONS

1. Both the NBAP and the FPAA should be addressed generically to the Tax Matters Partner, [redacted], at the partnership's address.

2. Form 871-I extends time to assess partnership items shown on a partner's return. The Form 871-I signed by [redacted] on [redacted] is sufficient to extend time for the items arising from [redacted], the partnership, but only for those returns within the period shown on the Form 871-I. [redacted]'s Form 871-I encompasses the periods ending [redacted] [redacted]

[redacted] and [redacted]. [redacted] also filed a return for the period ending [redacted] a shortened year. If the Service desires to extend time to assess items arising from [redacted]'s [redacted] return, an additional Form 871-I should be sought from [redacted] encompassing that time period.

FACTS

Our advice is contingent on the accuracy of the information that the Internal Revenue Service has supplied. If any information is uncovered that is inconsistent with the facts recited in this memorandum, you should not rely on this memorandum and you should seek further advice from this office.

In [redacted], [redacted] ([redacted]), the taxpayer, acquired [redacted], a [redacted] publicly traded company, via a stock for stock transaction under Canadian law. [redacted] did not become the [redacted]% owner of [redacted]. Rather, pursuant to the purchase, each common share of [redacted] stock was converted into a new class of [redacted] stock that could be exchanged for an equivalent number of [redacted] shares. After the sale, any remaining common stock shareholders of [redacted] held a new class of stock in [redacted] that could be exchanged for [redacted] shares (the "exchangeable shares"). Upon request, [redacted] would issue shares in exchange for the exchangeable shares.

[redacted] then wished to sell [redacted]. To facilitate the sale, [redacted] formed several new entities including a subsidiary corporation, a US Partnership ([redacted]) and a [redacted] unlimited liability company, [redacted] ([redacted]). By way of a merger of [redacted] into a subsidiary shell company, [redacted] became the owner of [redacted]. The [redacted] shareholders holding exchangeable shares received [redacted] shares. [redacted] elected pass-through treatment for U.S. tax purposes.

[redacted] issued Schedules K-1 for the periods ending [redacted] and [redacted], to each of its partners: [redacted] and "Nominee for Exchangeable Shareholders, C/O [redacted] Tax Department" (the "nominee"). The nominee represented the owners of the exchangeable shares. Schedules K-1 for the nominee show the nominee as a limited partner and as having no capital and no loss interest in [redacted]. It shows a "formula" percentage interest in profits. The term "formula" is not defined.

Schedules K-1 for [redacted] also show [redacted] as a limited partner. Its profit, loss and capital percentages are all shown as [redacted]%. The partners of [redacted] are [redacted] and its subsidiary corporation. [redacted] and its subsidiary file consolidated returns. On its Forms 1065 for the periods ending [redacted] and [redacted], [redacted] designated [redacted] as its tax matters partner.[1]

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[1] It does not appear, at least from the Form 1065 and the K-1s that [redacted] qualified to be selected by [redacted] as a TMP because it does not appear that [redacted] was a

In [redacted], [redacted] and [redacted] filed final Forms 1065 and dissolved.

[redacted], [redacted] and the nominee all use the same address: [redacted].

On [redacted], [redacted] signed a Form 872-I extending time under the statute of limitations for assessment of income taxes including income taxes attributable to items of a partnership for the tax periods ending June 30, [redacted], June 30, [redacted] and June 30, [redacted].

DISCUSSION

The Service wishes to extend time under the statute of limitation for assessment for items arising from the partnership [redacted]. [redacted]'s return shows a large loss arising from the sale of [redacted], passing through [redacted] and [redacted] to [redacted].

Under TEFRA requirements, consent to extend time under the statute of limitation for assessment can be obtained from either the tax matters partner (TMP) or anyone designated by the partnership. Treas. Reg. § 301.6229(b)-1(a). Here, both [redacted] and its TMP, [redacted], have dissolved. When a TMP dissolves, its designation as TMP expires. Treas. Reg. § 301.6231(a)(7)-1(l)(iii). Because both [redacted] and [redacted] have dissolved, the Service can look to neither the TMP nor the partnership to sign an extension for time under the statute.

TEFRA requirements are applicable to [redacted]. See I.R.C. § 6231(a)(1). [redacted] lists two entities as its partners - [redacted] and nominee. Both of these entities are pass through partners. I.R.C. § 6231(a)(9). [redacted] is a partnership. A nominee, by definition, is a pass through entity. Id. Because its partners are entities other than those described in I.R.C. § 6231(a)(1)(B), [redacted] does not qualify for the exception to TEFRA for small partnerships.

In situations where a partnership does not designate a TMP, the Service may choose a TMP for the partnership. I.R.C. § 6231(a)(7); Treas. Reg. § 301.6231(a)(7)-1(m)(1)(ii). In choosing a TMP, the Service is to choose from among the general partners unless it is

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general partner. The Schedule K-1 specifically states [redacted] is a limited partner. To be TMP, a partner must have been a general partner in the partnership at some time during the taxable year for which the designation was made or be a general partner at the time the designation is made. Treas. Reg. § 301.6231(a)(7)-1(b). [redacted] was not a traditional partnership but rather an unlimited liability corporation. No rules regarding general partner status specifically apply to such entities. For limited liability corporations, member-managers are treated as general partners. A member is any person who owns an interest in the LLC. A member-manager is a member who makes management decisions. Treas. Reg. § 301.6231(a)(7)-2. It is not clear that [redacted] made any management decisions for [redacted]. Rather, it appears more likely that [redacted] made all management decisions for all entities discussed in this memorandum.

impracticable to do so. I.R.C. § 6231(a)(7); Treas. Reg. § 301.6231(a)(7)-1(p)(3)(ii). [redacted] either had no general partner or its only general partner, [redacted] is dissolved. Because the Service could not choose a general partner, as one no longer exists, the Service may choose a partner that is not a general partner.

The criteria considered in choosing a partner other than a general partner to be TMP are: (i) The general knowledge of the partner in tax matters and the administrative operation of the partnership, (ii) The partner's access to the books and records of the partnership, (iii) The profits interest held by the partner, (iv) The views of the partners having a majority interest in the partnership regarding the selection, (v) Whether the partner is a partner of the partnership at the time the tax matters partner selection is made, and, (vi) Whether the partner is a United States person. Treas. Reg. § 301.6231(a)(7)-1(q)(2).

The other partner is the nominee for the individuals holding transferrable shares. Although the Schedule K-1 of [redacted] does not specifically identify the identity of the nominee it appears likely to be [redacted] as the Schedule K-1 issued to the nominee is addressed: [redacted]. [redacted] is also the address for [redacted]

Indirect partners also satisfy the term "partner" for purposes of I.R.C. § 6231(a)(2). [redacted] and its subsidiary are partners in [redacted], which is a partner in [redacted] and its subsidiary are therefore indirect partners of [redacted]. The individuals holding transferable shares are similarly indirect partners in [redacted] through their nominee. See I.R.C. § 6231(a)(10). Because indirect partners are not general partners in the source partnership, the partnership cannot choose an indirect partner as the TMP. The Service, however, could choose such a partner to be the TMP where it is impracticable to choose a general partner. I.R.C. § 6231(a)(7); Treas. Reg. § 301.6231(a)(7)-1(p)(3)(ii).

Although the Service had the ability to appoint a TMP, it is not required to make a TMP designation. Tempest Assoc. v. Commissioner, 94 T.C. 794 (1990); Seneca v. Commissioner, 92 T.C. 363 (1989) aff'd 899 F.2d 1225 (9th Cir. 1990); Computer Programs Lambda, Ltd. v. Commissioner, 90 T.C. 1124, 1127-28 (1988)(Lambda II). In actuality, it may be more appropriate not to designate a TMP. Making a TMP designation can come with some risk that the TMP chosen has a conflict or is otherwise ineligible. See e.g., Transpac Drilling Venture 1982-12 v. Commissioner, 147 F.3d 221 (2nd Cir. 1998) (extensions of time signed by TMPs subject to criminal investigation invalid as criminal investigation created a conflict of interest).

FPAA & NBAP:

The failure to designate a TMP does not affect the Service's ability to issue a Notice of Final Partnership Administrative Adjustment (FPAA). For example, in Seneca, a partnership's only general partner was disqualified as its TMP when a bankruptcy case was initiated against the partner. The Service did not designate a new TMP and issued an FPAA addressed

generically to the partnership's TMP. The partners argued the FPAA was invalid because the partnership had no TMP and the Service had failed to appoint one. Id. at 366. The Tax Court held that the Service has no mandatory duty to appoint a TMP for a partnership where there is no general partner. Id. Rather, the power to appoint a TMP is given to the Service in order to assist the Service in carrying out the administrative responsibilities of partnership proceedings. Id. at 367. If no prejudice results to the rights of the remaining partners from the lack of a TMP, then the Service is not compelled to appoint one. Id. In Seneca, the lack of a TMP had no adverse effect on the petitioning partners. The notice partners timely received the FPAA. The FPAA contained detailed instructions on when and how those partners could seek judicial review and a phone number to call if the partners had any questions. Id. at 367.

Similar to Seneca, [redacted] had only one general partner.[2] [redacted]'s general partner lost its designation as TMP when it dissolved. [redacted]'s other partners, both direct and indirect are [redacted], [redacted]'s subsidiary, the nominee ([redacted]) and the individuals owning the exchangeable shares. According to the Schedules K-1 for the nominee, the individuals owning the exchangeable shares did not have a profit, loss or capital interest.[3] Their individual tax returns would not be affected by any changes the Service would potentially make to [redacted]'s return. So, it is unlikely any of them would suffer prejudice if they did not receive notice.

In addition, [redacted], as nominee for the individuals owning the exchangeable shares, is required to furnish notices it receives to the indirect partners holding interests in the profits or losses of the partnership, within [redacted] days of [redacted] receiving the notice. I.R.C. § 6223(h)(1). In the event any holders of exchangeable shares did have an interest in the profits or losses of the [redacted], notice should be provided to them by [redacted].

An FPAA addressed generically to [redacted]'s TMP at the partnership's address is sufficient. It is helpful that [redacted]'s address is also the address of [redacted], the nominee and [redacted]. All affected parties should receive the necessary notice when the notice is sent to [redacted].

Similarly, the Notice of Beginning of Administrative Proceeding should be addressed generically. Letter 1787 is the standard letter NBAP. The standard letter should be addressed generically to Tax Matters Partner, [redacted], at [redacted]'s address. It does not appear that [redacted] has any notice partners.

Statute Extension:

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[2] As discussed, it is not entirely clear that [redacted] ever had a general partner.

[3] As described in the Facts section, the Schedule K-1 shows "formula" for profit interest. It is unknown what this means. The Schedule K-1 for [redacted], however, shows it having [redacted]% interest in profit, loss and capital. Unless "formula" means zero, the Schedules K-1 are inconsistent.

In order to examine [redacted] and potentially adjust items on [redacted]'s consolidated return that arise from transactions [redacted] engaged in, the Service needs to obtain an agreement to extend time for the partnership items appearing on [redacted]'s return. [redacted] signed a Form 872-I extending time under the statute of limitations for the periods ending June 30, [redacted] June 30, [redacted] and June 30, [redacted]. This Form specifically includes partnership items. It applies, however, only to the individual partner's return.

The statute of limitations for partnership items, I.R.C. § 6229(a), allows assessment of any tax "with respect to any person which is attributable to any partnership item (or affected item) for a partnership taxable year" before the date which is three years after the later of the date on which the partnership return was filed or the last day for filing such return for such year. This statute may be extended by agreement, with respect to any partner, by an agreement between the partner and the Service or, with respect to all partners, by an agreement between the Service and the TMP, or other person authorized by the partnership to enter into such an agreement. I.R.C. § 6229(b)(1).

The return of an individual partner is also governed by the statute of limitations of I.R.C. § 6501(a) that requires assessments be made within three years after the return was filed.

If the Service desires to extend time under the statute of limitations for all of the partners, it must obtain a consent for the partnership signed by the TMP or other individual so authorized by the partnership. Or, the Service could obtain an extension specifically including partnership items, such as Form 872-I, from each individual partner. [redacted] does not have a TMP. Unless the Service appoints one, if it wished to extend time under the statute of limitations for all the partners, it would need to obtain individual consents from each partner.

Here, the only partner, direct or indirect, potentially affected by adjustments to [redacted]'s return is [redacted]. Appointing a TMP is unnecessary because an extension is only needed for one of the partners. Appointing a TMP would not aid the Service administratively and could complicate the matter as it may lead to the inference that a separate statute extension form must be signed for the partnership. Although it is not recommended that the Service appoint a TMP, if the Service decided to choose a TMP, the only reasonable choice would be [redacted] [redacted] is likely both a partner as the probable nominee for the individuals owning exchangeable shares and an indirect partner through its ownership of [redacted] [redacted] meets the criteria of Treasury Regulation § 301.6231(a)(7)-1(q)(2) because it has the general knowledge of the tax matters and administrative operation of the partnership; it has the partnership books and records; it held a profit interest through its subsidiary partnership, [redacted]; its subsidiary partnership had the majority interest in the partnership; and, its subsidiary partnership was formerly the TMP.

The Form 872-I signed by [redacted] only applies to the periods ending June 30, [redacted] June 30, [redacted] and June 30, [redacted]. The returns filed by [redacted] are for the periods ending June

30, [redacted] and [redacted].[4] If the Service wishes to extend time under the statute of limitations for items showing on [redacted]'s return but arising from [redacted]'s [redacted] return for the period ending [redacted], the Service should request that [redacted] sign a Form 872-I that encompasses that period.

Comments from National Office:

We agree with your ultimate conclusion that the Forms 872-I, executed by [redacted], as a partner, are effective, and that an extension for the partnership is not necessary. We would recommend, however, a revision of the analysis, as described below.

Assuming that [redacted] was a TEFRA partnership, and [redacted] was a limited partner, then the designation of [redacted] was ineffective. Under Treas. Reg. § 301.6231(a)(7)-1(b)(i), a designated TMP must have been a general partner in the partnership at some time during the taxable year for which the designation was made. Assuming [redacted] was a general partner, its status as TMP ended upon its dissolution in [redacted]. Treas. Reg. § 301.6231(a)(7)-1(l)(iii). Under Treas. Reg. § 301.6231(a)(7)-1(m)(2), the general partner having the largest profits interest becomes the TMP. Because it was impracticable to apply this rule (no general partner remained), then the Service may select [redacted], an indirect partner, as the TMP under Treas. Reg. § 301.6231(a)(7)(1)(p)(2) for [redacted]'s tax year ending [redacted].

Selecting a TMP to execute a Form 872 is unnecessary, however, if an extension is obtained from each individual partner. The period of limitations for a specific partner may be extended by an agreement between the IRS and the partner. I.R.C. § 6229(b)(1)(A). Because the nominee partner does not share in profits and losses for the years at issue, it may be unnecessary to obtain an extension from that partner if no adjustments are anticipated. As to [redacted], the two partners are [redacted] and a [redacted] subsidiary. The facts provided state that, for the years at issue, [redacted] was the common parent of a consolidated group, including the subsidiary. A common parent is the exclusive agent for the consolidated group with respect to all procedural matters, including the signing of extensions of time. Interlake Corp. v. Commissioner, 112 T.C. 103, 113 (1999); Treas. Reg. § 1.1502-77(a). Except for certain situations, which are not present here, the subsidiary does not have authority to act for, or to represent itself, in any matter relating to the tax liability for the consolidated return year. Treas. Reg. § 1.1502-11(a). Accordingly, the extension signed by [redacted] should extend the statute of limitations for the entire consolidated group.

(b)(7)a [redacted]. In addition, we agree that a Form 872-I should be obtained from [redacted] for the period ending

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[4] [redacted] is when [redacted] and [redacted] dissolved. The tax year would otherwise have ended on [redacted]. This is the [redacted] return.

[redacted].

Additional consideration:

The following is provided for your consideration.

Under section 6231(a)(1)(A), a partnership is defined as "any partnership required to file a return under section 6031(a). Section 6031(a) provides, in relevant part, that every partnership (as defined in section 761(a)) shall make a return for the taxable year. Section 7701 mirrors the definition of partnership under section 761(a). Under section 7701(a)(2) and 761(a), the term "partnership" includes a syndicate, group, pool, joint venture, or other unincorporated organization, through or by means of which any business, financial operation, or venture is carried on, and which is not, within the meaning of this title, a trust or estate or a corporation.

To determine whether a partnership has been formed, the court does not look simply to the stated intent of the parties; rather, it analyzes the terms of their agreement and their conduct. See Bergford v. Commissioner, 12 F.3d 166, 169 (9th Cir. 1993). A partnership for Federal income tax purposes is formed when the parties to a venture join together capital or services with the intent of conducting a business or enterprise and of sharing the profits and/or losses of the venture. Bussing v. Commissioner, 88 T.C. 449, 460 (1987). The absence of any agreement to share profits and losses is of critical significance in determining the existence of a partnership. See Kazdin v. Commissioner, T.C. Memo. 1969-75. Under section 6233, TEFRA procedures would still apply because a partnership return was filed. However, we recommend that the facts be examined to determine if a partnership truly existed. If the existence of the partnership is at issue, then we recommend coordination with the Passthroughs & Special Industries branch.

FPAA & NBAP:

We agree with your conclusion but would modify your analysis to include the following.

While the tax matters partner NBAP and FPAA may be addressed generically to "the Tax Matters Partner" at the partnership's address, the Service must also mail the NBAP and FPAA to each notice partner. I.R.C. § 6223(a). Thus, the NBAP and FPAA must be mailed to [redacted] and the nominee using the name and address on the Schedules K-1. I.R.S. § 6223(c)(1). Under section 6223(h)(1), these pass-thru partners are required to forward the notice

to the indirect partners, including [redacted], the [redacted] subsidiary, and the individuals owning the exchangeable shares.

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.

[redacted]
Associate Area Counsel
(Large and Mid-Size Business)

By [redacted]
Attorney (LMSB)