Office of Chief Counsel
Internal Revenue Service

memorandum

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GRShuler

date: NOV 21 2000

to: Sidney Saewitz, Team Manager, LM:RFP:1521
Cincinnati, Ohio

from: Associate Area Counsel, Cincinnati

subject: [redacted]
EIN: [redacted]
Advisory Opinion on Consent to Extend the Statutory Period of Limitations for Assessment

DISCLOSURE STATEMENT

This advice constitutes return information subject to I.R.C. § 6103. This advice contains confidential information subject to 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 taxpayers 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 judgment of the office with jurisdiction over the case.

By a memorandum dated October 24, 2000, you requested assistance on several issues relating to [redacted] This memorandum addresses the issues associated with obtaining a signed consent to extend the statutory period of limitations for assessment.

ISSUES

1. Does [redacted] continue to have the authority to extend the statutory period of limitations for assessment for members of its consolidated group which are no longer its subsidiaries?

2. Who has the authority to sign the Form 872?

CONCLUSIONS

1. When a parent corporation and its subsidiary corporations join in the filing of a consolidated return, a consent to extend the statutory period of limitations for assessment properly executed on the behalf of the parent corporation is also applicable to the members of the consolidated group, even if they are no longer its subsidiaries, as long as the parent itself continues to exist.

2. Under Ohio law, an officer of the corporation has the authority to sign a Form 872. A Form 872 may also be signed by an individual who has been delegated such responsibility by the board of directors, and whose delegation remains effective.

FACTS

The facts as we understand them follow. On [redacted], the board of directors of [redacted] ("[redacted]"), an Ohio corporation, adopted a resolution authorizing [redacted], an officer of a subsidiary corporation, to "act as a signee for documents on behalf of the Corporation." [redacted] filed a consolidated tax return for itself and its subsidiaries for the tax year ending [redacted]. That return was signed by [redacted]. [redacted] also was granted authority to act on behalf of [redacted] and its subsidiaries, by way of a Form 2848, Power of Attorney and Declaration of Representative, for the tax year ending [redacted].

The statutory period of limitations for assessment for the tax year ending [redacted] expires on [redacted]. The tax year ending [redacted] is under examination, and you do not expect to complete that examination by [redacted].

[redacted] alleges that at some time prior to [redacted], it transferred all the stock of its subsidiaries to the [redacted] in exchange for [redacted] percent of the stock in the [redacted]. The tax return of [redacted]

for the taxable year [redacted] does not include any information about the disposition of the subsidiaries. In addition, [redacted] has declined to provide corporate minutes that would confirm these transactions. Based on the allegation, though, it appears that, after [redacted], [redacted] was the parent of [redacted] which, in turned owned the former [redacted] subsidiaries. Recently, [redacted] informed the revenue agent that the [redacted] was being sold to [redacted], a wholly owned subsidiary of the German company [redacted]. The nature of the sale is unknown but believed to be a stock sale. As a result of the sale, [redacted] will no longer be associated with [redacted]. His employment with the subsidiary will also cease.

[redacted] continues to operate. As of this date, [redacted] has not filed a Certificate of Merger, Certificate of Consolidation, or Certificate of Dissolution with the Ohio Secretary of State. A Form 872, Consent to Extend the Time to Assess Tax, has been provided to [redacted] to extend the statutory period of limitations for assessment for the tax year ending [redacted]. Although [redacted] has indicated that it will not sign a Form 872, you have asked for our advice. Presumably, you will use this advice if [redacted] decides to sign a Form 872 after all.

ANALYSIS

Before the time expires for assessment of any tax, the Internal Revenue Service and the taxpayer may agree to extend the period of limitations for assessment. I.R.C. § 6501(b)(4). Form 872, Consent to Extend the Time to Assess Tax, may be used to extend the period of assessment to a specific date. The tax must be assessed (or a notice of deficiency issued) within the period of time agreed upon. This period may be extended by subsequent written agreements made within that period. Treas. Reg. § 301.6501(c)-(1)(d).

Parent Corporations and Subsidiaries

One Form 872 may be obtained to cover a parent corporation and any or all of its subsidiary corporations. Rev. Proc. 72-38, 1972-2 C.B. 813 sets forth the requirements for a single consent when the parent corporation and its subsidiary corporations file separate returns. Where, as here, a parent corporation and its subsidiary corporation join in the filing of a consolidated return, Treas. Reg. § 1.1502-77(c) contains the relevant procedures which the Service should follow. See Alumax, Inc. v. Commissioner, 109 T.C. 133 (1997), aff'd, 165 F.3d 822 (11th Cir. 1999).

In your case, [redacted] filed a consolidated tax return for the tax year ending [redacted]. Waivers of the statutory periods of limitations for consolidated return period given by the parent corporation are deemed to be applicable, not only to each corporation which was a member of the affiliated group, but also to each corporation whose income was included in the consolidated return, even though it is subsequently determined that such corporation should have filed a separate return. Treas. Reg. § 1.1502-77(c).

After the return was filed for the tax year ending [redacted], the direct subsidiaries of [redacted] became the direct subsidiaries of another corporation ([redacted]) which itself was a subsidiary of [redacted]. Recently, [redacted] itself became a subsidiary of an unrelated corporation. As a result, as things now stand, the former direct subsidiaries of [redacted] are no longer even indirect subsidiaries of [redacted].

Under the consolidated return regulations, [redacted], so long as it exists, remains the agent for itself and its former subsidiaries, for such purposes as signing a Form 872 or receiving a notice of deficiency. Treas. Reg. § 1.1502-77(a). Accordingly, should [redacted] relent and agree to extend its own statutory period of limitations, it will be doing so as well for its former subsidiaries, for whom it remains, as to the consolidated return, their agent.

Authority to Sign the Form 872

Section 6061 provides that any return, statement, or document made under any internal revenue law must be signed in accordance with the applicable forms or regulations. The regulations under section 6504(c)(4) do not specify who may sign consents executed under that section. Although a corporation is a distinct legal entity, it is, by its very nature, incapable of acting for itself. Therefore, the validity of the Form 872 depends on who, under state law, has the authority to bind the parent corporation. See Sanderling, Inc. v. Commissioner, 66 T.C. 743 (1976), supplemental op., 67 T.C. 176 (1976), aff'd in part, 571 F.2d 174 (3rd Cir. 1978).

Under Ohio law, the board of directors manages the business and affairs of the corporation. Ohio Rev. Code Ann. § 1701.59 (Baldwin 1994). Corporations have the power to elect and appoint officers, employees, and agents and to prescribe their duties. Ohio Rev. Code Ann. § 1701.13 (Baldwin 1994). Directors are responsible for electing officers and determining the scope of their authority and the nature of their duties. Ohio Rev. Code Ann. § 1701.64(B)(1) (Baldwin 1994).

Generally, the officers of a corporation consist of a president, a secretary, a treasurer, and any such other officers as may be deemed necessary by the board of directors. Ohio Rev. Code Ann. § 1701.64(A) (Baldwin 1994). Officers perform the day-to-day duties in management as provided in the by-laws and have the authority to bind the corporation. Ohio Rev. Code Ann. § 1701.64(B) (Baldwin 1994).

Since the officers of the corporation are responsible for its operation, the signing of tax consents is considered to be within their power, even without additional specific authority from the board of directors. Philip Carey Mfg. v. Dean, 58 F.2d 737 (6th Cir. 1932), cert. denied, 287 U.S. 623 (1932); Piedmont Wagon Mfg. Co. v. United States, 6 F. Supp. 125, 129 (Ct. Cl. 1932). If the officer who signs the consent to extend the statutory period of limitations for assessment is the same person who signed the tax return, this fact is often taken as evidence of the authority to execute the consent. See Hammond v. Carthage Sulphite Pulp and Paper Co., 34 F.2d 155 (N.D. N.Y. 1928); Rev. Rul. 83-41, 1983-1 C.B. 349; Rev. Rul. 84-165, 1984-2 C.B. 305.

The consolidated tax return for the tax year ending [redacted] was signed by [redacted]. [redacted] was not an officer of [redacted]. Nevertheless, [redacted]'s board of directors delegated to him the authority to sign documents on behalf of [redacted] and reflected that delegated authority on a Form 2848, Power of Attorney and Declaration of Representative. This Form 2848 gave [redacted] the authority to sign a consent to extend the statutory period of collection.

[redacted] (b)(5)(AWP), (b)(7)a [redacted].

In future Forms 872, the taxpayer should be named as follows: For the year ended [redacted] Because only directors or officers can legally act on behalf of the corporation, the Form 872 should be signed by one of the directors or officers of the parent corporation or by an individual who has been delegated such responsibility by the board of directors. See Ohio Rev. Code Ann. § 1701.88(D) (Baldwin 1994).

This memorandum is subject to post-review by the Office of Chief Counsel, under CCDM (35)3(19)4. We will inform you of any modification of this advice.

If you have any questions, please contact the undersigned at (513) 684-3211.

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