Office of Chief Counsel
Internal Revenue Service

memorandum

CC:LM:MCT:CLE:TL-N-4317-01
RSBloom

date: July 31, 2001

to: LMSB:MCT:1707
Independence, OH
Attn: Terri L. Andrews

from: Associate Area Counsel, LM:MCT:CLE

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subject: **Advisory Opinion: Validity of Consent**
Taxpayer: [redacted]
EIN: [redacted]
Year: [redacted]

This memorandum responds to your request for assistance dated July 3, 2001. This memorandum should not be cited as precedent. As requested, we have reviewed the following facts to determine whether the proposed Form 872 is valid to extend the statute of limitations. This memorandum is subject to 10-day post review by our National Office and, therefore, is subject to modification.

ISSUES

1) Whether the Vice President/General Counsel of the taxpayer can properly execute a Form 872 on behalf of the taxpayer and its subsidiaries while the taxpayer is in a Chapter 11 bankruptcy.

2) Whether a Form 872, covering the several tax liability of a parent corporation and its subsidiaries from a consolidated income tax return, must have a rider attached listing by name and EIN the individual subsidiaries.

CONCLUSIONS

1) Provided a trustee has not been appointed to operate the taxpayer during the Chapter 11 bankruptcy, the Vice President/General Counsel of the taxpayer can properly execute a Form 872.

2) A rider should not normally be attached to a Form 872 which is being used to only extend the time to assess the several

tax liability of a parent corporation and its subsidiaries from a consolidated income tax return.

FACTS

The taxpayer filed a consolidated Form 1120 for the calendar year [redacted] with [redacted] subsidiaries. The taxpayer was identified on the return as [redacted]. The return was received by the Service Center on [redacted]; therefore, your memorandum states that the return has a normal statute of [redacted].[1] To extend the statute of limitations on assessment, Letter 907 and Form 872 were mailed to the taxpayer on [redacted]. The proposed Form 872, in the name of [redacted] and [redacted] Subsidiaries, extends the statute for the year [redacted] to [redacted]. The form states "See Exhibit A (Rider for Form 872) Attached." Exhibit A reflects, among other things, the names, EINs and addresses of the [redacted] subsidiaries which filed the consolidated return being examined.

On [redacted], the taxpayer filed a voluntary petition for bankruptcy with the U.S. Bankruptcy Court for the [redacted] seeking relief under Chapter 11 (Case No. [redacted]). To date, no trustee has been appointed to operate the business of the taxpayer; the business continues to be operated by the taxpayer. On [redacted], [redacted], Vice President/General Counsel of the taxpayer, signed the Form 872 and returned it to the Service.

LAW and ANALYSIS

Under the consolidated return regulations, the common parent of a consolidated group is the sole agent for each subsidiary in the group. Treas. Reg. Sec. 1.1502-77(a). Thus, generally, the common parent is the proper party to sign consents, including the Form 872 waiver to extend the period of limitations, for all members in the group. Generally, the common parent for a particular consolidated return year remains the common parent agent for purposes of extending the period of limitations with respect to the year even though that corporation is no longer the common parent of that group when some action, such as an

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[1]Since the front page of the return reflects the signature date of [redacted], we strongly suggest that, before you rely upon the [redacted] statute date, you verify that the taxpayer did not receive an extension to [redacted] to file and/or the envelope attached to the return does not have a post-mark date of [redacted], or earlier. The earliest statute date may be [redacted].

extension, needs to be taken for that year. There are exceptions to this general rule (e.g., the common parent is not in existence at the time such action is necessary). However, there is no exception to the general rule for situations in which the common parent is in bankruptcy. The bankruptcy of the common parent does not effect the agency relationship under the consolidated return regulations. Pursuant to I.R.C. Sec. 1399, no separate taxable entity is created when a corporation files a bankruptcy petition. Therefore, the corporation in bankruptcy, the common parent, has not undergone any change and is the same entity. The common parent is the proper party to execute the Form 872.

The consent (waiver) should be prepared in the name of the parent corporation as shown on the consolidated return. The consolidated return in issue was in the name of [redacted]. However, the name on the consent should also reference the affiliated companies. It can be argued that a consent executed only in the parent's name does not bind the subsidiaries regardless of the fact that they filed a consolidated return. See J.A. Folger v. Commissioner, 27 B.T.A. 1 (1932). Therefore, the consent should be in the name of [redacted]. Such a consent suffices to cover all companies included in the consolidated income tax return. One consent may also be used to extend the statute of the parent corporation and any or all its subsidiary corporations **that filed separate returns**. For one consent to cover the parent and subsidiaries in the case of separately-filed returns, a rider containing specified information must be made a part of the consent. See Rev. Proc. 69-8, 1969-1 C.B. 399; Rev. Proc. 72-38, 1972-2 C.B. 813; and Rev. Proc. 82-6, 1982-1 C.B. 409; see also IRM 121.2 Statute of Limitations Handbook, 22.6.2.2 Parent and Subsidiary Corporations. Since the matter at hand does not involve separately-filed returns of the parent corporation and the subsidiary corporations, no rider is needed to the consent (waiver). Although we do not believe the inclusion of the rider will invalidate a consent for the parent corporation and its subsidiaries with respect to a consolidated income tax return, we recommend that, since time permits, you obtain a revised consent as described above for the case at hand.

A waiver of the statute of limitations must be executed by an authorized officer of the corporation. Any officer, who is authorized to sign a corporate income tax return, may also sign a consent to extend the time to assess tax (waiver), whether or not that person was the same individual who signed the return. Rev. Rul. 83-41, 1983-1 C.B. 349. I.R.C. Sec. 6062 provides that corporate returns with respect to income can be signed by any officer authorized to act in such capacity. Officers who are

explicitly listed with signing authority under section 6062 include the president, vice-president, treasurer, assistant treasurer and chief accounting officer.

[redacted], Vice-President/General Counsel of the parent corporation, had authority to sign the consent (waiver) unless the corporation's bankruptcy filing terminated such authority. Pursuant to Bankruptcy Code Sec. 323(a), a trustee in a bankruptcy case is the representative of the estate of the debtor. Bankruptcy Code Sec. 1107(a) provides, with certain exceptions not relevant here, that a debtor in possession shall have all the rights and powers, and shall perform all the functions and duties, of a trustee. In a Chapter 11 proceeding in which a trustee is not appointed, the debtor in possession is the representative of the estate. In this case, a trustee has not been appointed. The debtor in possession retained the authority to manage the debtor's affairs. Therefore, an officer of the common parent has the power to represent the common parent debtor and execute the consent (waiver).

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
(Heavy Manufacturing, Construction and Transportation:Edison)

By:_____
RICHARD S. BLOOM
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