Office of Chief Counsel
Internal Revenue Service

memorandum

CC:NER:MAN:TL-N-2646-00
DARosen

date:

to: Director, LMSB Financial Services & Healthcare (Manhattan)
Attn: Revenue Agent Rosa Chiu, Team 1466

from: District Counsel, Manhattan (CC:NER:MAN)

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subject: [redacted]
Tax Years: [redacted] and [redacted]
(Form 872 [Income])

Consents to Extend the Statute of Limitations on Assessment
U.I.L. Nos. 1399.00-00, 1502.77-00, 6012.05-02, 6501.08-08, 6501.08-17,

DISCLOSURE STATEMENT

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THIS ADVICE IS RENDERED ON THE BASIS THAT ALL REPRESENTATIONS AND FACTS IN THIS MEMORANDUM ARE CORRECT. WE RECOMMEND THAT YOU VERIFY THIS INFORMATION. IF ANY OF THE REPRESENTATIONS AND/OR FACTS ARE INCORRECT OR CANNOT BE SUBSTANTIATED, OUR ADVICE MAY NEED TO BE MODIFIED.

INTRODUCTION

This memorandum is in response to your request for advice concerning the proper entity to execute consents to extend the statute of limitations on assessment for the above-referenced taxpayer, as well as the proper language to be used in the consents. **The earliest date that the statute of limitations on assessment will expire with respect to the above-referenced taxpayer is [redacted].**

This memorandum is subject to National Office review and

approval. Accordingly, the advice herein stated should be considered preliminary, and should not be acted upon until we contact you concerning National Office comments. We will so contact you within two weeks of the date of this memorandum.

FACTS

For the tax years in issue, [redacted], incorporated under the laws of the state of New York, was the common parent of an affiliated group of corporations and filed consolidated U.S. Corporate Income Tax Returns (Forms 1120) with its affiliates.

On [redacted], [redacted] filed a voluntary petition under Chapter 11 of the United States Bankruptcy Code ("Bankruptcy Code"). Subsequently, on [redacted], the bankruptcy was converted to a Chapter 7. By an Order dated [redacted], the United States Bankruptcy Court for the [redacted] appointed [redacted] to serve as [redacted]'s interim trustee. To date, [redacted] continues to serve as trustee.

ISSUES

1. What specific language should be used on the consents to extend the statute of limitations on assessment for the taxpayer [redacted] for the tax years [redacted] and [redacted]?

2. Who is the proper individual to execute consents, on behalf of the taxpayer, to extend the statute of limitations on assessment for the taxpayer [redacted], an affiliated group, for the tax years [redacted] and [redacted]?

DISCUSSION

Extending the Limitations Period on Assessment - Introduction

In general, the statute of limitations on assessment expires three years from the date the tax return for such tax is filed. I.R.C. § 6501(a). I.R.C. § 6501(c)(4), however, provides an exception to the general three year statute of limitations on assessment. In accordance with this exception, the Secretary and the taxpayer may consent in writing to an agreement to extend the statute of limitations on assessment of any tax except estate tax. In the case of Chapter 1 taxes (income taxes) attributable to individuals or corporations, Form 872, Consent to Extend the Time to Assess Tax, is used to extend the statute of limitations on assessment.

The Consolidated Return Regulations

In the case of a consolidated group, guidance as to the appropriate entity to enter into a consent to extend the statute of limitations on assessment can be found in the consolidated return regulations. Treas. Reg. § 1.1502-1 et seq. Pursuant to the consolidated return regulations, the common parent is the sole agent for each member of the group, duly authorized to act in its own name in all matters relating to the income tax liability for the consolidated return year. Treas. Reg. § 1.1502-77(a). The common parent in its name will give waivers and any waiver so given shall be considered as having been given or executed by each such subsidiary. Treas. Reg. § 1.1502-77(a). Unless there is an agreement to the contrary, an agreement entered into by the common parent extending the time within which an assessment of income tax may be made for the consolidated return year shall be applicable to each corporation which was a member of the group during any part of such taxable year. Treas. Reg. § 1.1502-77(c).

The common parent remains the agent for the members of the group for any year during which it was the common parent, whether or not consolidated returns are filed in subsequent years and whether or not one or more subsidiaries have become or have ceased to be members of the group. See Treas. Reg. § 1.1502-77(a); Southern Pacific v. Commissioner, 84 T.C. 395, 401 (1985). Accordingly, as a general rule, the common parent remains the proper party to extend the statute of limitations for any taxable year for which it was the common parent, as long as it remains in existence.

Common Parent in Bankruptcy

Although there are certain exceptions to the general rule set forth above, none apply to a common parent in bankruptcy. Under the provisions of I.R.C. § 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 both before and after the bankruptcy petition is filed. In addition, a common parent's pending bankruptcy does not affect the "sole agency rule" under the consolidated return regulations. See J&S Carburetor v. Commissioner, 93 T.C. 166, 169 (1989).

In the instant case, since none of the exceptions to the general rule apply, [redacted], the common parent, would be the proper party to execute Forms 872 on behalf of the affiliated group for its tax years [redacted] and [redacted].

Language for Caption

The caption on the Forms 872 should read as follows:

"[redacted]*"

In addition, at the bottom of the page, the following language should be added with respect to each of the tax years in issue:

"*This is with respect to the consolidated tax liability of the [redacted] consolidated group [redacted] for the tax year ____."

Individual to Execute Consents

The regulations under I.R.C. § 6501(c)(4) do not specify who may sign consents to extend the statute of limitations for assessing income tax. Accordingly, the rules applicable to the execution of an original return have been deemed to apply to the execution of a consent to extend the time to make an assessment. Rev. Rul. 83-41, 1983-1 C.B. 399, clarified and amplified, Rev. Rul. 84-165, 1984-2 C.B. 305.

Pursuant to 11 U.S.C. § 323(a), a trustee in a bankruptcy case is the representative of the estate of the debtor. Where a trustee has been appointed in a corporate bankruptcy, I.R.C. § 6012(b)(3) provides that the trustee "shall make the return of income for such corporation in the same manner and form as corporations are required to make such returns." Since the rules applicable to the execution of an original return also apply to a consent to extend the statute of limitations, any such consent may be signed by the trustee. Rev. Rul. 84-165, 1984-2 C.B. 305. [redacted], appointed as trustee of [redacted], would thus be authorized to execute the consents on behalf of the common parent.

PROCEDURAL CONSIDERATIONS

Please note that Section 3461 of the Restructuring and Reform Act of 1998, codified in I.R.C. § 6501(c)(4)(B), requires the Service to advise taxpayers of their right to refuse to extend the statute of limitations on assessment, or in the alternative to limit an extension to particular issues or for specific periods of time, each time that the Service requests that the taxpayer extend the limitations period. To satisfy this requirement, you may provide Publication 1035, "Extending the Tax Assessment Period," to the taxpayers when you solicit the consents. Alternatively, you may advise the taxpayers orally or in some other written form of the I.R.C. § 6501(c)(4)(B) requirement. In any event, you should document your actions in this regard in the case files.

In addition to the recommendations made herein, we further recommend that you pay strict attention to the rules set forth in the IRM. Specifically, IRM 4541.1(2) requires use of Letter 907(DO) to solicit a Form 872, and IRM 4541.1(8) requires use of Letter 929(DO) to return a signed Form 872 to the taxpayer. Dated copies of both letters should be retained in the case file(s) as directed. When the signed Forms 872 are received from the taxpayer the responsible manager should promptly sign and date them in accordance with Treasury Regulation § 301.6501(c)-1(d) and IRM 4541.5(2). The manager must also update the respective statutes of limitations in the continuous case management statute control files and properly annotate Form 895 or equivalent. See IRM 4531.2 and 4534. This includes Form 5348. In the event a Form 872 becomes separated from the file or lost, these other documents would become invaluable to establish the agreement.

If you have any questions, please contact the attorney assigned to this matter, Daniel A. Rosen, at (212) 264-5473, extension 262.

LINDA R. DETTERY
District Counsel

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PETER J. LABELLE
Assistant District Counsel

Noted:

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