DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

OFFICE OF
CHIEF COUNSEL

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INTERNAL REVENUE SERVICE NATIONAL OFFICE LEGAL ADVICE

MEMORANDUM FOR BENJAMIN A. DE LUNA
ASSOCIATE AREA COUNSEL
CC:LM:RFP:JAX

FROM: Curt G. Wilson
Assistant Chief Counsel CC:PA:APJP

SUBJECT: Proper Signatory for Consents to Extend the Time to Assess Tax Attributable to Partnership Items

This Chief Counsel Advice responds to your memorandum dated March 29, 2002. In accordance with I.R.C. § 6110(k)(3), this Chief Counsel Advice should not be cited as precedent.

LEGEND

Partnership =
Partner 1 =
Partner 2 =
Subsidiary =
Parent Corporation =
Subsidiary 2 =
Limited Partnership =
Date 1 =
Date 2 =
Date 3 =
Date 4 =
Date 5 =
Date 6 =
Date 7 =
Date 8 =
Date 9 =

Tax year 1 =
Tax year 2 =
Tax year 3 =
Tax year 4 =
State 1 =
State 2 =
State 3 =
Corporate Officer =

ISSUES

1) Whether a Form 872-P, "Consent to Extend the Time to Assess Tax Attributable to Partnership Items," for Tax year 1, signed by an officer of the parent of the former Tax Matters Partner (TMP) is valid to extend the statute of limitations on assessment for all partners of Partnership.

2) Who is the tax matters partner for Tax year 2 through Tax year 4, inclusive, authorized to extend the statute of limitations for Partnership's partnership items.

CONCLUSIONS

1) When a partner merges into another entity, the surviving entity steps into the shoes of the partner and succeeds to the partner's interests in the partnership. Accordingly, it is likely that the Form 872-P is valid because it was executed by the successor-in-interest by merger of each of the partners in Partnership.

2) The Tax Matters Partner's designation terminated upon its merger into another entity. The other general partner was disqualified as TMP when it merged into another entity. Under these circumstances, the Service is authorized to select a TMP. We recommend that the Service consult with the taxpayer to seek its views on this matter.

FACTS

We rely on the facts you have provided.

Partnership is a partnership that was organized under State 1 law on Date 1. At all relevant periods, Partnership was subject to the provisions of I.R.C. §§ 6221 through 6232, inclusive (TEFRA). Partnership had two general partners, Partner 1 and Partner 2. Each partner had a 50% general partnership interest in Partnership. Partnership designated Partner 1 as TMP on its partnership returns for Tax year 1, Tax year 2, Tax year 3, and Tax year 4, as provided under regulations. Treas. Reg.

§ 301.6231(a)(7)-1(a). The partnership agreement named Partner 1 as its TMP, and gave Partner 1, a broad grant of power with respect to the partnership's tax affairs. Partnership dissolved in Date 2.

Partner 1 was a subsidiary of Subsidiary, which was a subsidiary of Parent Corporation. Parent Corporation was the parent of a consolidated group, which filed consolidated income tax returns. Partner 1 was a State 2 corporation. In Date 3, Partner 1 merged with Subsidiary, a State 3 corporation. Partner 1 was formally dissolved on Date 4.

On Date 9, Subsidiary adopted a corporate resolution giving Corporate Officer, as a vice president of Subsidiary, the authority to execute tax returns, extensions of the limitation periods, closing agreements, etc., on behalf of Subsidiary and its subsidiaries.

Partner 2, a limited partnership organized under State 1 state law, changed its name to Limited Partnership, then merged with Subsidiary 2 on Date 5. We believe Subsidiary 2 was the surviving entity. Subsidiary 2 is a subsidiary of Subsidiary.

Partnership's partnership return, Form 1065, for Tax year 1, was filed on Date 6. A Form 872-P, "Consent to Extend the Time to Assess Tax Attributable to Partnership Items," which extended the statute of limitations until Date 7, was executed on Date 8. Corporate Officer signed the Form 872-P as an authorized representative of Partner 1, the TMP of Partnership.

It is unclear from the facts we have been provided when the Service was advised that both partners in Partnership had merged out of existence.

LAW AND ANALYSIS

Issue 1:

In general, the period for assessing a tax attributable to any partnership item is three years following the date the partnership files its return for the year in question, or three years following the last day for filing the return, whichever period expires later. I.R.C. § 6229(a) . This period may be extended with respect to any partner by written agreement between the Service and the partner or "with respect to all partners, by an agreement entered into by the Service and the tax matters partner (or any other person authorized by the partnership in writing to enter into such an agreement)." I.R.C. § 6229(b)(1).

In the instant case, a Form 872-P, "Consent to Extend the Time to Assess Tax Attributable to Partnership Items," was executed for Partnership, by Corporate Officer, as an authorized representative of Partner 1, the TMP of Partnership. The consent was executed on Date 8. In Date 3, however, Partner 1 merged with Subsidiary, and was formally dissolved on Date 4.

Under Treas. Reg. § 301.6231(a)(7)-1(l)(1)(iii), the liquidation or dissolution of an entity terminates the TMP designation. Under I.R.C. § 6231(a)(7)(B) and Treas. Reg. § 301.6231(a)(7)-1(m)(2), if a partnership has not made a subsequent designation and the original designation has terminated, then the general partner having the largest profits interest in the partnership at the close of the taxable year is the tax matters partner. A designation under Treas. Reg. § 301.6231(a)(7)-1(m) remains in effect until a termination event occurs.

The merger and dissolution of Partner 1 terminated its TMP status, prior to the execution of the Form 872-P. Partnership neither designated another TMP, nor did it authorize any other person to enter into an agreement to extend the statute of limitations. See I.R.C. § 6629(b)(1)(B). Accordingly, Partner 2, the only other general partner at the close of the taxable year under audit, became the TMP. Partner 2, however, merged with Subsidiary 2 on Date 5, prior to the execution of the consent to extend the statute of limitations on assessment. Accordingly, its status as TMP also terminated.

Under the flush language of section 6231(a)(7), the Service has the authority to select a TMP when no general partner has been designated and when the default designation rules do not apply. See also Treas. Reg. § 301.6231(a)(7)-1(n). The Service is required to notify all notice partners of its selection. We conclude, under the facts of this case, that the Service was authorized to select a TMP. The Service, however, did not select a TMP for Tax year 1. For this reason, there is no TMP for Tax year 1.

A Form 872-P would be valid, however, if executed by each partner in the partnership. The two partners of Partnership, Partner 1 and Partner 2, merged with the other entities prior to the time the Form 872-P was executed. Thus, the issue is whether a successor-in-interest by merger has authority to bind the partnership.

Partner 1 was a State 2 corporation. Under State 2 state law, the separate existence of a constituent corporation ceases to exist when all the requisite formalities of a merger have been completed, at which time the surviving corporation takes on all the rights and assumed obligations of the constituent corporation as its own.

Partner 2 was a limited liability

partnership organized under State 1 law. Likewise, under State 1 law, a limited partnership ceases to exist after merger when all formalities have been completed, at which time the surviving entity takes on all the rights and assumed obligations of the surviving entity.

State 3 is the state of incorporation for Subsidiary and of organization for Subsidiary 2. To the extent that the laws of State 3 are applicable, the result is the same. Under State 3 law, when a merger occurs, the old business entity has its identity absorbed into that of the surviving entity. See

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In Date 2, when the requirements of merger were satisfied, Subsidiary stepped into the shoes of Partner 1 and assumed all its rights and obligations. On Date 5, Partner 2 merged with Subsidiary 2, a State 3 limited liability company. Thus, Subsidiary 2 stepped into the shoes of Partner 2 and assumed all its rights and obligations.

It is arguable whether the status of the two merged entities as partners of Partnership survived the mergers. Under State 3 law, however, a surviving entity is subject to the debts and duties of its constituent entities.
. Presumably, this statute contemplates empowering the surviving corporation to engage in all transactions needed to wind up the affairs of the merged entity. Further, Subsidiary and Subsidiary 2, as successors-in-interest to Partner 1 and Partner 2, respectively, are the only entities remaining with an interest in adjustments related to Partnership. As such, it is logical that they would be permitted to execute consents on behalf of Partnership .

In Georgetown Petroleum-Edith Forrest v. Commissioner, T.C. Memo. 1994-13, the issue was the validity of a consent to extend the statute of limitations. The consents were signed in 1987 by an officer of Georgetown Petroleum, Inc. (GPI), the sole general partner and the TMP of the partnership. In January 1986, however, before the consents were executed, GPI merged into another corporation, Petroleum Logic, Inc. (PLI). Noting the prior course of dealing with the corporate officer, the fact that the corporate officer was also the President of PLI and the fact that there was no evidence that the Service knew or had reason to know that GPI has been merged into PLI, the court held that the corporate officer had authority to act on behalf of and bind the partnership, and concluded that the consents were effective.

In this case, the Form 872-P was executed by Corporate Officer on behalf of Partner 1, as TMP of Partnership. Corporate Officer is a vice president of Subsidiary, authorized to execute tax-related documents on behalf of Subsidiary and its subsidiaries. Subsidiary 2 is a subsidiary of Subsidiary.

Thus, Corporate Officer was authorized to execute consents on behalf of both of the successors-in-interest by merger of the two original partners of Partnership. We conclude there are sufficient grounds to support the argument that Corporate Officer had the authority to execute the Tax year 1 consent.[1]

In addition, you have indicated that the taxpayer is amenable to curing any defects that may exist in the consents as signed. Ratification is permissible in a TEFRA proceeding to adopt the actions of an agent. See generally, Mishawaka Properties v. Commissioner, 100 T.C. 353, 365 (1993). In this case, it would be advisable to seek ratification of the Form 872-P for Tax year 1, as a protective measure.

Issue 2:

As discussed above, Partner 1's status as TMP was terminated upon its merger into another entity. The only other general partner also merged into another entity, terminating its status as TMP. Partnership did not designate a successor TMP. Accordingly, the Service is authorized to select a partner to be the TMP. Treas. Reg. § 301.6231(a)(7)-1(p)(2). Alternatively, the successors-in-interest may designate a TMP. As a best practice, we recommend the parties attempt to reach a mutual agreement as to which entity should be selected as TMP.

Assuming the Service selects Subsidiary as the TMP, Subsidiary is a member of a consolidated group of which Parent Corporation is the parent. Accordingly, a corporate officer of Parent Corporation may sign as agent for Subsidiary, as follows.

> Parent Corporation (EIN), by INSERT NAME, INSERT OFFICE HELD, as agent of Subsidiary, as successor-in-interest by merger to Partner 1 (EIN), TMP and general partner of Partnership.

CASE DEVELOPMENT, HAZARDS AND OTHER CONSIDERATIONS

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[1] The failure to properly identify Corporate Officer's representative capacity should not invalidate the consent. See Pleasanton Gravel Co. v. Commissioner, 85 T.C. 839 (1985); Georgetown Petroleum-Edith Forrest v. Commissioner, T.C. Memo. 1994-13.

[redacted]

Subsidiary adopted a corporate resolution, prior to the execution of the Form 872-P, which authorized Corporate Officer, as vice president of Subsidiary, to execute tax-related documents on behalf of Subsidiary and subsidiaries. Subsidiary, however, was (and is) a member of the consolidated group for which Parent Corporation is the parent corporation. Parent Corporation filed consolidated tax returns for the group, including Subsidiary 2. Under Treas. Reg. § 1.1502-77(a), the common parent is 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. No subsidiary has authority to act for or to represent itself in any such matter. Accordingly, an officer of Parent Corporation would have been in a better position to bind Subsidiary and Subsidiary 2. Where members of a consolidated group are partners in a TEFRA partnership, we generally recommend signatures from the parent of the consolidated group as agent for the members and from the TMP of the partnership, individually.

Notwithstanding the general rule, the Service may, upon notifying the common parent, deal directly with any member of the group in respect of its liability, in which event the member shall have full authority to act for itself. Treas. Reg. § 1.1502-77(a). [redacted]

In addition, under Treas. Reg. § 301.6231(a)(7)-1(b), a partnership may only designate a person as the TMP for a taxable year if that person was a general partner at some time during the taxable year for which the designation is made or is a general partner in the partnership as of the time the designation is made. [redacted]

Treas. Reg. § 301.6231(a)(7)-1(p) and (q) set forth the guidelines for the Commissioner's selection of the TMP. These regulations clearly contemplate the selection of a general partner for this duty, or, at a minimum, the selection of a partner. [redacted] In the alternative, we believe Parent Corporation has authority to sign as agent for the two successors-in-interest by merger of the original partners for the reasons set forth above.

[redacted]

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.

Please call if you have any further questions.

/s/ Susan T. Mosley

By: _____

SUSAN T. MOSLEY
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