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

OFFICE OF
CHIEF COUNSEL

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INTERNAL REVENUE SERVICE NATIONAL OFFICE FIELD SERVICE ADVICE

MEMORANDUM FOR
ASSOCIATE DISTRICT COUNSEL

FROM: DEBORAH A. BUTLER
ASSISTANT CHIEF COUNSEL (FIELD SERVICE)
CC:DOM:FS

SUBJECT: CONSENTS (FORMS 872)

This Field Service Advice responds to your memorandum dated October 28, 1999. Field Service Advice is not binding on Examination or Appeals and is not a final case determination. This document is not to be cited as precedent.

LEGEND

CorpA	=
CorpAGroup	=
CorpB	=
CorpBGroup	=
CorpC	=
CorpD	=
CorpE	=
CorpF	=
IndM	=
Year1	=
Year2	=
Year3	=
Year4	=
Year5	=
Year6	=
Year7	=

Year8 =
Date1 ` =
Date2 =
Date3 =
Date4 =
Date5 =
Date6 =
Date7 =
Date8 =
Date9 =
Date10 =
Date11 =
Date12 =
Date13 =
Date14 =
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Date18 =
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Date23 =
Date24 =
Date25 =
Date26 =
Date27 =
Date28 =
Date29 =
Date30 =
Date31 =
Date32 =
Date33 =
StateA =
AgencyB =
#B =
#C(CorpB) =
#D(CorpC) =
TextB =

TextC = _____
_____
_____

TextD =

ISSUES
What are the proper forms for consents (Forms 872) to extend the periods of assessment for the continuing “CorpAGroup” for Year3, Year4, and Year5, and the terminated “CorpBGroup” for Year2 and Year3.

CONCLUSIONS
We recommend that the following language be used for the consents of the “CorpAGroup” and the “CorpBGroup” for the years stated above.

“CorpAGroup”
Consent A:

Title Line: CorpC*

*with regard to the consolidated tax liability of CorpA and Affiliates consolidated group for tax years Year3, Year4, and Year5.

Signature Line: CorpC
(Signature by authorized officer of the company)

Consent B:

Title Line: The CorpF, as successor to CorpA and as agent for CorpA and Affiliates.

Signature Line: CorpF

(Signature by authorized officer of the company)

_____

“CorpBGroup”

Consent C:

Title Line: CorpC, parent of CorpF, successor by merger to CorpB and Affiliates.

Signature Line: CorpC
(Signed by authorized officer of the company)

Consent D:

Title Line: CorpF, as successor by merger to CorpB and as agent for CorpB and Affiliates

Signature Line: CorpF
(Signature by authorized officer)

All four of the above consents are needed. We understand that "Consent C" was obtained Date27 (which is listed in our table below as consent number 10).

FACTS
CorpA and Affiliates (the "CorpAGroup") filed consolidated Federal income tax returns for at least calendar years Year1 through Year5, reporting consolidated tax liabilities, all of which are being contested by the Service. CorpB, a StateA corporation, ("CorpB") and Affiliates (the " CorpBGroup") filed consolidated returns for at least Year2 and Year3, reporting consolidated tax liabilities, all of which are being contested by the Service. The audit of the CorpBGroup commenced Date1, and the thirty day letter for Year2 and Year3 was issued on Date8. The case is currently pending before Appeals.

The Plan and Business Combination (Year6).
On Date5, the AgencyB approved and authorized CorpA's acquisition of control of CorpB and the business combination by which CorpA and CorpB became subsidiaries of CorpC, a StateA corporation incorporated Date3, the resulting common control of CorpD and CorpE by CorpC, the consolidation of CorpD and CorpE operations, and the merger of CorpD and CorpE by CorpC.
CorpA and CorpB became wholly owned subsidiaries of CorpC on Date7, (as a result of downstream mergers of transitory merger subsidiaries of CorpC merging with and into each of them). The former shareholders of CorpA acquired control (more than 50 percent) of the outstanding common stock of CorpC as a result of the business combination, which we assume constituted a reverse acquisition. (The

business combination had the same economic effect on the stockholders of CorpB and CorpA as would a direct merger of CorpA and CorpB. 1995 CorpC10K, Part I,p.1) In other words, on that date all of the CorpA and CorpB shares were converted into shares of CorpC (at different conversion ratios). The taxpayers treated the CorpAGroup as if it continued to exist and the CorpBGroup as having terminated, Date7. Treas Reg. § 1.1502-75 (d) (3). This Plan and Business Combination was set forth in an Agreement and Plan of Merger dated as of Date2, as amended (the "Agreement"). Pursuant to Amendment No. #B, of the Agreement (dated as of Date6), CorpC became a party, contractually assumed all of the

obligations of CorpA, in its capacity as "TextB". Significantly, it represented and warranted that it "TextC" (Underscoring added). CorpC in an apparent exercise of its corporate powers under the Agreement to carry on the businesses of CorpA and CorpB , executed consents to extend the period of assessment (under section 6501 (a)).

The First And Second Mergers (Year7).
On Date11, CorpA merged with and into CorpB, in a reorganization under section 368 (a) (1) (D) (as they were commonly controlled by CorpC). The next day, CorpB's wholly owned railroad subsidiary, CorpE, merged with and into CorpD, and the surviving railroad changed its name to CorpF, a StateA corporation.

The Third Merger (Year8).
CorpB subsequently merged downstream with and into (its wholly owned subsidiary) **CorpF** on Date17, which transferred by operation of law, all of the disappearing corporation's assets and liabilities to the survivor, including the entire consolidated Federal income tax liability for each year which it was a member (and \ or the common parent) of the CorpBGroup. Likewise, it had the legal effect of transferring CorpA's liability for the consolidated income tax of the CorpAGroup for those years which CorpA was a member and \ or the common parent. Treas. Reg. § 1.1502-6 (a). In addition, the merger under StateA General Corporate Law *vested* ...TextD. (Underscoring added)

Consents (Forms 872) were executed as set forth in the table below. **Consents numbered 1, 3, 5, 7, 9 and 10 in bold type relate to the terminated CorpBGroup.** Each of them contained the EIN of **CorpB** (**#C**). The other consents relate to the continuing CorpAGroup. Each of them contained the EIN of CorpC (#D).

Consents' Title	Date Signed By IRS	Years Extended	Exp'n Date	Executed For
1.CorpC as successor in interest to CorpB & Affiliates	**Date9**	**Year3**	**Date14**	Same as Title
2.CorpC & Affiliates (Formerly: CorpA & Affiliates)	Date10	Year3	Date16	Same as Title
3.Same as 1.	**Date12**	**Year3**	**Date16**	Same as Title
4.CorpB Successor by merger to CorpA & Affiliates	Date13	Year3 & Year4	Date19	CorpB & CorpC
5.Same as 1.	**Date15**[1]	**Year2 & Year3**	**Date22**	Same as Title
6.CorpB Successor by merger to CorpA & Affiliates	Date18	Year3, Year4 & Year5	Date24	CorpB & CorpC
7.Same as 1.	**Date20**	**Year2 & Year3**	**Date26**	Same as Title
8.CorpB Successor by merger to CorpA & Affiliates	Date21	Year3, Year4 &Year5	Date31	CorpB & CorpC
9.Same as 1.	**Date25**	**Year2 & Year3**	**Date31**	Same as Title
10.CorpC, parent of CorpF, Successor by merger to SFP & Affiliates	**Date27**	**Year2 & Year3**	**Date32**	Same as Title

[1]The last consent dated before the downstream merger of CorpB with and into CorpF, which occurred Date17.

ADDITIONAL CONSENTS

We understand (based upon a facsimile dated Date30) that new consents were executed by the Service on Date29 as follows for the CorpAGroup.

CorpC, parent of the CorpF Company, Successor by merger to CorpB, Successor by merger to CorpA, & Affiliates.

This consent was signed in the corporate names of CorpC and CorpF Company (on Date28), and extended the periods of assessment through Date33.

CASE DEVELOPMENT, HAZARDS AND OTHER CONSIDERATIONS

Based upon the foregoing information (and the assumption that Year2 and Year3 were open to assessment when consent number 5 was executed), in the absence of valid post-merger consents, the period of assessment against CorpF as the survivor to the merger for Year2 and Year3, would have expired after Date23.

Validity of Consents For CorpB and Affiliates.

All of the consents relating to CorpB were executed in the name of CorpC, except for the last consent noted above (signed Date29). The first five used as successor in interest to CorpB and Affiliates. The sixth used CorpC, parent of CorpF, successor by merger to CorpB and Affiliates. We believe these consents are more likely than not valid based upon the doctrines of corporate agency, implied, actual and apparent authority, mutual assent, and\ or ratification. In addition, we believe the consents are subject to reformation. These doctrines are mentioned below. Those consents executed after the Third Merger would benefit from the application of [redacted] which deems the merged corporation to continue post-merger for the purpose of prosecuting its pending actions or proceedings. United States v. Maryland & Virginia Milk Producers, Inc., 145 F. Supp. 374, 375 (D.D.C. 1956) ("Statutes of this type are remedial and should be broadly and liberally construed.")

Each of the consents executed in Year8 (consents numbered 6, 7 and 8, in the table above), were executed by Mr. IndM after the Third Merger, when CorpB had ceased to exist. Consequently, he as an officer of CorpB, may arguably have lacked authority to sign agreements extending the statute of limitations for CorpB unless Amendment No. #B of the Agreement, and\or [redacted] conferred that

authority, or unless the parties understood that as the Vice President and General Tax Counsel of all three companies, he represented each of them as their agent or attorney in fact. See Lone Star Life Insurance Company v. Commissioner, T.C. Memo 1997-465, 74 T.C.M. (CCH) 904, 909 (1997) (officer's dual role and the prominent role that he played in executing consents and appointing attorneys in fact to act for the consolidated group, provided ample support for the conclusion that he ratified the consents executed by the ineligible group member; consents held valid based upon theories of mutual assent or ratification.)

Section [redacted] authorizes a merged corporation to continue in order to prosecute a pending proceeding as if the merger had not occurred. In addition, [redacted] provides in part that any action or proceeding, pending by or against any corporation which is a party to a merger shall be prosecuted as if such merger had not taken place. The Tax Court has indicated that a 30-day letter sent before a merger is the equivalent of an action or proceeding pending. Brannon's of Shawnee, Inc. v. Commissioner, 71 T.C. 108, 117 (1978) (dictum).

Based upon the foregoing, we believe that the consents executed by Mr. IndM were valid. He was Vice President and General Tax Counsel of CorpC, CorpB and CorpF. As an officer of each corporation, he had actual authority to sign the consents under the Agreement as well as under applicable [redacted]. In addition, he arguably had implied and apparent authority to act on behalf of CorpB which he exercised over many years to keep the periods of assessment open. Clearly, the Service and each taxpayer considered him to represent each corporation as its attorney in fact for this purpose. Hence the consents should also be found valid based upon mutual assent or ratification.

Reformation

Reformation is an equitable remedy used to reframe written contracts to reflect the real agreement between the parties when, because of mutual mistake, the writing does not embody the contract as actually made. Woods v. Commissioner, 92 T.C. 776, 782 (1989). Here, there arguably was an agreement between the parties based upon the execution of multiple consents, although one of them (CorpB) actually ceased to exist prior to execution of the Year8 consents. The parties intended that CorpB's years remain open to assessment, yet CorpC's name was stated in the title of the consents by mistake. Section [redacted] applied to enable the merged corporation (CorpB) to continue to exist in order to agree to continue its tax proceeding by executing consents. Consequently, a court

should be able to reform the consents in question with the correct corporate name to reflect the parties' understanding to extend the statute.

Corporate Agency

Moreover, all the facts and circumstances taken together clearly manifest the intent of the parties to extend the statute for CorpBGroup, by authorizing CorpC to act on behalf of both CorpBGroup and CorpAGroup to effectively combine their ownership and operation. Facts and circumstances that support finding that the corporate name used to execute the consents in question was used as the agent of CorpF, the agent of the CorpBGroup, (the so-called agent of the agent) are outlined below.

- The overall plan as filed with and approved by the AgencyB contemplated the business combination of both groups, the amalgamation of railroad operations, and the merger of both railroads under one corporate umbrella, viz.: CorpC. Hence CorpC should be viewed as jointly authorized to perform whatever actions were necessary or appropriate to carry out the combination.
- Significantly, Amendment No. #B to the Agreement defined CorpC as the TextB and contained the representation and warranty of CorpC that it was empowered and authorized to carry on the businesses of CorpA and CorpB.
- The business combination commenced with the Year5 formation under joint control of CorpC, which became a holding company for the parents of both groups on Date7. The name (derived from the nomenclature of each group) demonstrates *per se* the authority of both groups acting jointly.
- Both parents commenced a joint cash tender offer for stock of CorpB, again demonstrating concerted authority and joint action of both groups to effectively combine.
- The Third Merger was set forth in the plan approved by the AgencyB and filed on behalf of both groups.
- A corporate officer of all three corporations, the holding company and each party to the Third Merger signed the consents in question as well as at least six others over several years before and after the merger.
- The audit was ongoing for over three years and seven months prior to the merger.
- A thirty day letter for the years at issue was issued prior to the Third Merger to the CorpBGroup.

Based upon the foregoing, particularly CorpC's being named the surviving corporation under the Agreement; its representation of authority to carry on the business of CorpB; as well as the use of CorpC's name in the title of the consents (for CorpBGroup) as successor in interest all demonstrate that CorpC acted as agent of the CorpBGroup over many years.

CorpF became liable for the consolidated tax liability of the CorpBGroup (by the merger of the former common parent of said group with and into it). [redacted] Thus, CorpF is empowered to consent to the extension of the applicable statute of limitations in respect of such liability.
We note that the surviving corporation in a merger may validly execute a waiver to extend the statute of limitations on behalf of the predecessor corporation. Rev. Rul. 59-399, 1959-2 C.B. 488; GCM 34970, Primary Liability and Transferee Liability of Successor Corporations I-4092 (July 31, 1972). The courts agree that a successor corporation may execute a waiver on behalf of its predecessor. Pleasanton Gravel Co. v. Commissioner, 85 T.C. 839 (1985).

Conclusions Regarding Form of Consents. We recommend the execution of separate consents for each of the consolidated groups viz,: the continuing CorpAGroup and the terminated CorpBGroup in order to achieve greater clarity. The language of these consents are stated above under CONCLUSIONS. Please note that we have assumed the validity of prior consents to extend the statute of limitations in the past for the reasons discussed herein and assume that an earlier consent regarding Year2 for the CorpBGroup exists.

We note that as the common parent of the CorpAGroup, which continues in existence, (pursuant to the reverse acquisition which occurred Date7) CorpC is authorized and empowered as alternative agent to execute such consents with respect to the prior years Year3, Year4 and Year5. Temp. Reg. § 1.1502-77T (a) (4) (iv). Consequently, we use "as agent" in the proposed Form 872 in Consent B above under CONCLUSIONS.

The same use of "as agent" is appropriate for the Consent D above under CONCLUSIONS because CorpF, as successor by merger, is liable for the terminated CorpBGroups' entire consolidated tax liability. Consequently, it should execute Form 872, for such terminated group's calendar years Year2 and Year3, both as successor and as agent. See, Temp. Reg. § 1.1502-77T (a) (4) (ii).

We also note that CorpB, as the common parent of its consolidated group titled "CorpBGroup", was the proper party authorized to execute Form 872 in Year5, and until the day before its disappearance by merger with and into CorpF (which occurred Date17) for such group for calendar years Year2 and Year3. Temp. Reg. § 1.1502-77T (a) (4) (i).

REQUIRED ADDITIONAL INFORMATION

[redacted]

IMPACT OF TENDER OFFER ON REORGANIZATION AND REVERSE ACQUISITION

In the joint tender offer CorpB purchased [redacted] million shares and CorpA purchased [redacted] million shares of CorpB common stock for $[redacted]. per share, the payment of which was made on Date4 (the "Tender Offer").

[redacted]

[redacted]

[redacted]

If you have any further questions or comments, please call (202) 622-7930.

DEBORAH A. BUTLER
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By: _____
ARTURO ESTRADA
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