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INTERNAL REVENUE SERVICE
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INTERNAL REVENUE SERVICE NATIONAL OFFICE FIELD SERVICE ADVICE

MEMORANDUM FOR ASSOCIATE AREA COUNSEL-
CC:LM:RFP:

Attention:

FROM: Jasper L. Cummings, Jr.
Associate Chief Counsel CC:CORP

SUBJECT: Consents to Extend the Statute With Respect to a
Consolidated Group

This Field Service Advice responds to your memorandum dated December 7, 2000. Field Service Advice is not binding on Examination or Appeals and is not a final case determination. This document is not to be used or cited as precedent.

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LEGEND

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Parent	=
Sub 1	=
Sub 2	=
Sub 3	=
Sub 4	=
Year 1	=
Year 2	=
Year 3	=
Year 4	=
Year 5	=
Year 6	=
Year 7	=
Year 8	=
Year 9	=
Year 10	=
Day 1	=
Day 2	=
Day 3	=
Day 4	=
Day 5	=
Day 6	=
Day 7	=
Day 8	=
Day 9	=
Day 10	=
Day 11	=

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Day 12	=
Day 13	=
Day 14	=
Month 1	=
Executive #1	=
Executive #2	=
Appeals Officer #1	=
Appeals Officer #2	=

ISSUES

1. Whether the common parent of a consolidated group filed an income tax return for the Year 4 consolidated year sufficient to start the running of the period of limitations on assessment for the consolidated group where the common parent erroneously filed a short-year consolidated return and a short-year separate return (A consolidated return for the entire year was required under the consolidated return regulations).
2. Whether the issuance of a notice of deficiency to the bankrupt parent of a consolidated group, which suspends the running of the period of limitations on assessment of the common parent while in bankruptcy, also suspends the period of limitations for the nonbankrupt members of the consolidated group.
3. Whether the bankruptcy of the common parent of a consolidated group affects the validity of the consents or the power of attorney to sign those consents.

CONCLUSIONS

1. The erroneously filed short-year consolidated return and short-year separate return do not constitute a valid income tax return for the Year 4 consolidated group sufficient to start the running of the period of limitations for that year.
2. Based on the plain language of IRC § 6503(a)(2), the issuance of a notice of deficiency to the bankrupt parent of a consolidated group, which suspends the running of the period of limitations on assessment of the common parent while in bankruptcy, also suspends the period of limitations for assessing the nonbankrupt subsidiaries with which the parent made a consolidated return.

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3. The bankruptcy of the common parent of a consolidated group does not affect the consents or the power of attorney to sign those consents. There is no requirement that the bankruptcy trustee sign a power of attorney prepared after the trustee is appointed or that the trustee reaffirm a power of attorney executed before the trustee's appointment.

FACTS

Parent was the common parent of Sub 1 (for tax years Year 1-Year 4), Sub 2 (for tax years Year 1-Year 4), Sub 3 (for tax years Year 2 & Year 4), and Sub 4 (for tax years Year 1 & Year 2). Parent sold Sub 1 and Sub 2 on Day 11, Year 4. Parent sold Sub 3 on Day 12, Year 4. Parent filed consolidated returns for tax years Year 1, Year 2, and Year 3. For the Year 4 tax year, Parent filed a consolidated return for the period from Day 1, Year 4 to Day 10, Year 4 and a separate return for the period Day 11, Year 4 to Day 14, Year 4. The other former subsidiary members of the group filed separate returns for the short periods in Month 1, Year 4. On Day 1, Year 5, Parent was acquired by another corporation. Parent filed a Chapter 7 bankruptcy petition on Day 3, Year 8, and the case was converted to Chapter 11 on Day 5, Year 8. It is our understanding of the facts that two of the subsidiaries of Parent (Sub 1 and Sub 2) did not file for bankruptcy.

The copies of the Forms 1120 (U.S. Corporation Income Tax Return) we received disclose the following information:

<u>Return period</u>	<u>Taxpayer name</u>	<u>Received</u>	<u>Signed by</u>
Year 1	Parent & subsidiaries	Day 8, Year 2	Executive #1
Year 2	Parent & subsidiaries	Day 4, Year 3	Executive #2
Year 3	Parent & subsidiaries	Day 7, Year 4	Executive #2
Day 1, Year 4- Day 10, Year 4*	Parent & subsidiaries	Day 9, Year 5	Executive #2
Day 11, Year 4- Day 14, Year 4**	Parent	Day 9, Year 5	Executive #2

* Hereinafter referred to as "Short-Year Consolidated Return"

** Hereinafter referred to as "Short-Year Separate Return"

We have informally notified your office in Month 1, Year 10 that Parent's filing of the Short-Year Consolidated and Short-Year Separate Returns did not comply with the consolidated return regulations. Parent should have filed one return for the entire year

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including all of Parent's items of income, deduction, and credit and such items for the subsidiaries for the periods ending when the subsidiaries were sold. See Treas. Reg. § 1.1502-76(b)(1)(i) and Example 2 of Treas. Reg. § 1.1502-76(b)(3) of the regulations then in effect. The revenue agent discovered this error upon examining the tax returns. Parent did not provide any statement with those returns which would normally have disclosed why Parent filed a short year separate return from Day 11, Year 4 through Day 14, Year 4.

The following Forms 872 (Consent to Extend the Time to Assess Tax) to extend the period of limitation were executed by Parent:

<u>For year end</u>	<u>Expiration</u>	<u>Taxpayer Name</u>
Day 14, Year 1	Day 2, Year 6	Parent & Affiliated Companies
Day 14, Year 1 & Day 14, Year 2	Day 14, Year 6	"
Day 14, Year 1 & Day 14, Year 2	Day 2, Year 7	"
Day 14, Year 1, Day 14, Year 2, & Day 14, Year 3	Day 2, Year 8	"
Day 14, Year 1, Day 14, Year 2, Day 14, Year 3, & Day 14, Year 4	Day 14, Year 8	"
Day 14, Year 1, Day 14, Year 2, Day 14, Year 3, & Day 14, Year 4	Day 14, Year 9	Parent & Subs
Day 14, Year 1, Day 14, Year 2, & Day 14, Year 3	Day 14, Year 10*	Parent & Subsidiaries
Day 14, Year 4	Day 14, Year 10**	Parent

* Hereinafter referred to as "Year 10 Multi-Year Consent"

** Hereinafter referred to as "Year 10 Consent for Year 4"

Prior to the execution of the last set of consents, the Service's practice was to include all years at issue on the same consent form. For reasons that are not clear,

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Appeals Officer #1 abandoned this practice with respect to the final set of consents (the Year 10 Multi-Year Consent and the Year 10 Consent for Year 4). Thus, Appeals Officer #1 decided that one Form 872 (Consent to Extend the Time to Assess Tax) would cover Year 1, Year 2, and Year 3 and another Form 872 would cover Year 4.

The Year 10 Consent for Year 4 sent to Parent's representative for signature showed the name of the taxpayer as "Parent" but showed the corporate name as "Parent & Subs." Despite this discrepancy, the taxpayer's representative signed the Form 872 for Year 4. However, the representative crossed out the taxpayer's address as typed on the form and substituted a new handwritten address. In a cover letter dated Day 6, Year 9, addressed to the representative, Appeals Officer #1 enclosed a new consent form reflecting the correct address. The cover letter indicates that Appeals Officer #1 would not accept the previously signed form because of the handwritten address. He therefore asked the representative to sign a new Year 10 Consent for Year 4 showing the correct address (we assume that he also asked the representative to sign a new Year 10 Multi-Year Consent because it also showed an incorrect address). As a result, the error in the address was corrected, but another error remained in the Year 10 Consent for Year 4 as finally signed by the taxpayer's representative: the consent shows both the taxpayer name and the corporate name as "Parent" and makes no mention of other members of the consolidated group. By contrast, the final Form 872 for Year 1, Year 2, and Year 3 (the Year 10 Multi-Year Consent) correctly shows both the taxpayer name and the corporate name as "Parent & Subsidiaries."

Appeals Officer #1 has since retired and Appeals Officer #2 informs us that his predecessor did not know why the name change occurred on the Year 10 Consent for Year 4. However, Appeals Officer #2 speculates that the name on this consent was automatically generated by a computerized system that draws data from tax returns. As previously mentioned, Parent erroneously completed a short year separate return for the Day 11, Year 4 through Day 14, Year 4 period. A separate return would not disclose the name of the subsidiaries on the return. This would explain why the name shown on the Year 10 Consent for Year 4 was the same as the name on the erroneously filed Short-Year Separate Return for Year 4.

A notice of deficiency was issued to "Parent & Subs." on Day 13, Year 10, for tax years ending Day 14, Year 1; Day 14, Year 2; Day 14, Year 3; and Day 14, Year 4.

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LAW AND ANALYSIS

Issue 1

In general, Internal Revenue Code (IRC) § 6501(a) provides that tax must be assessed within three years after the return was filed. IRC § 6501(c)(3) provides that in the case of failure to file a return, the tax may be assessed at any time.

In the present case, the taxpayers had been filing as a consolidated group. Under the consolidated return regulations, once an affiliated group files a consolidated return, it must continue filing consolidated returns unless the group deconsolidates or it obtains the Service's permission to stop filing consolidated returns.

As previously mentioned, Parent should have filed one consolidated return for the entire Year 4 year including all of Parent's items of income, deduction, and credit and such items for the subsidiaries for the periods ending when the subsidiaries were sold. See Treas. Reg. § 1.1502-76(b)(1)(i) and Example 2 of Treas. Reg. § 1.1502-76(b)(3) of the regulations then in effect.

Treas. Reg. § 1.1502-75(g)(2) (as promulgated in Treasury Decision 6894, 1966-2 C.B. 362, 415) provides that if a consolidated return is required to be filed, the filing of separate returns by the members of the group for such year shall not be considered as the making of a return for the purpose of computing any period of limitation with respect to such consolidated return unless a statement is attached to the return. According to the regulation, such statement must set forth: "(i) The most recent taxable year of the member for which its income was included in a consolidated return, and (ii) The reasons for the group's belief that a consolidated return is not required for the taxable year."

Parent filed a separate tax return for the period from Day 11, Year 4 through Day 14, Year 4. In addition, Parent failed to provide the requisite statement with its erroneously filed Year 4 Form 1120 return. Therefore, for the purpose of computing the statute of limitations for assessment of the group's consolidated tax, no consolidated tax return was ever filed for the group's Year 4 tax year.

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Since Parent failed to file a return, the statute of limitations for assessment with respect to the consolidated group never started. Therefore, the assessment period with respect to the consolidated group's Year 4 tax year remains open without reliance on the consents executed with respect to that year.¹

Issue 2

The filing of a bankruptcy petition does not by itself result in a suspension of the period for making an assessment. Section 6503(h) suspends this period if the Service is prohibited from making an assessment as a result of a case under Title 11. However, the automatic stay which goes into effect as of the filing of the bankruptcy petition does not prohibit the making of a tax assessment. B.C. § 362(b)(9)(D). We note that the Bankruptcy Code was amended by the Bankruptcy Reform Act of 1994 to permit tax assessments. This amendment, which is applicable to the present case, is effective for bankruptcy cases filed on or after the date of enactment, October 22, 1994. Prior to the 1994 amendments, tax assessments were prohibited by the automatic stay and, therefore, the IRC § 6501 period was suspended by IRC § 6503(h). Thus, IRC § 6503(h) does not suspend the IRC § 6501 period in the present case.

If a timely notice of deficiency is issued while the automatic stay is in effect, the IRC § 6501 period may be indirectly suspended as a result of bankruptcy. This is because the automatic stay bars the commencement or continuation of Tax Court proceedings concerning the debtor. B.C. § 362(a)(8). With the automatic stay preventing the taxpayer from petitioning the Tax Court, the taxpayer's period for filing a Tax Court petition is suspended pursuant to IRC § 6213(f)(1), and the Service is precluded from making an assessment pursuant to IRC § 6213(a) prior to the expiration of the period for filing a Tax Court petition. This has the effect of suspending the IRC § 6501 period pursuant to IRC § 6503(a)(1).

In summary, the assessment period for the tax liabilities of the debtor is suspended pursuant to IRC § 6503(a)(1) if a timely notice of deficiency was issued during the bankruptcy case. The suspension of the assessment period will last as long as the period for filing the Tax Court petition is suspended plus 60 days. The Tax Court petition period will remain suspended until the automatic stay is no longer in effect, which in a Chapter 11 case will ordinarily occur when the bankruptcy case is dismissed or a discharge is granted as a result of the confirmation of the Chapter 11 plan. B.C. §§ 362(c)(2), 1141(d).

¹Even without the benefit of Treas. Reg. § 1.1502-75(g)(2), the statute of limitations for the consolidated group's Year 4 tax year remains open because the Year 10 Consent for Year 4 is defensible under both Treas. Reg. § 1.1502-77(c) (which recognizes that a consent entered into just by the common parent is applicable to each member of the group) and the equitable remedy of reformation (to reflect the real intent of the parties) despite the failure to reference to the subsidiaries of the consolidated group.

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Applying the above analysis to the specific facts of this case with respect to the debtor Parent, the bankruptcy case by itself did not extend or suspend the period of limitations for assessment. Thus, the notice of deficiency issued in Month 1 of Year 10 was timely only if it was timely under nonbankruptcy law. However, for the reasons stated above, the notice of deficiency was timely under nonbankruptcy law. Thus, the assessment period for Year 1, Year 2, Year 3, and Year 4, will be generally suspended for the duration of the bankruptcy case.

With respect to the nondebtor subsidiaries, IRC § 6503(a)(2) provides that if a notice of deficiency is mailed to a corporation, the suspension of the period of limitations provided in IRC § 6503(a)(1) shall apply to corporations with which such corporation made a consolidated income tax return for the taxable year. The plain language of this provision thus indicates that the period of limitations for assessment against the subsidiaries with which Parent made a consolidated return is suspended if the period of limitation against Parent is suspended under IRC § 6503(a)(1). See Union Oil Co. of California v. Commissioner, 101 T.C. 130, 139 n.6 (1993). This is consistent with the principle that the nondebtor subsidiaries cannot petition the Tax Court. We thus conclude that because a timely notice of deficiency was issued, the period of assessment for the nondebtor subsidiaries and for the debtor will be suspended to the same extent under IRC § 6503(a)(2).

Issue 3

Our understanding is that a bankruptcy trustee has not been appointed in the Chapter 11 case and the estate is being operated by Parent as a debtor-in-possession. In any case, there is no requirement we are aware of that the bankruptcy trustee sign the power of attorney. The power of attorney is valid so long as an officer having authority to bind the corporation signs the form. See Instructions for Form 2848 (rev. January 2000). We are not aware of any requirement that the Chapter 11 trustee must specifically agree to the power of attorney or reaffirm a power of attorney executed prior to the trustee's appointment. A Chapter 11 trustee could, however, choose to revoke a prior power of attorney and appoint a new representative.

Please call if you have any further questions.

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