



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

OFFICE OF
CHIEF COUNSEL

November 13, 2002

Number: **200307077**
Release Date: 2/14/2003
CC:CORP:B05
POSTF-157876-01
UILC: 1502.77-01, 6501.08-00, 6501.08-08, 6501.08-09

MEMORANDUM FOR Area Counsel,

FROM: Associate Chief Counsel (CORP) CC:CORP:B05

SUBJECT: Execution of Form 872 by Trustee of Liquidating Trust

Field Service Advice is not binding on Examination or Appeals and is not a final case determination. This Chief Counsel Advice should not be cited as precedent

LEGEND

Company =

Trustee =

Trust 1 =

Trust 2 =

Agreement 1 =

Agreement 2 =

Plan =

District X =

Government Official =

Date 1 =

POSTF-157876-01

Date 2	=
Date 3	=
Date 4	=
Date 5	=
<u>a</u>	=
<u>b</u>	=
<u>c</u>	=
<u>d</u>	=
<u>e</u>	=
<u>f</u>	=
<u>g</u>	=

ISSUES

1. Which entity is the proper entity to execute a Form 872 for Company and its subsidiaries for the taxable years ending on Date 1 and Date 2, where Company, the common parent of a consolidated group, has filed for bankruptcy.
2. Who is authorized to sign the Form 872 for Company and its subsidiaries for the taxable years ending on Date 1 and Date 2, where Company, the common parent of a consolidated group, has filed for bankruptcy.

CONCLUSIONS

1. Company remains the sole agent for the consolidated group that it was the common parent of for the taxable years ending on Date 1 and Date 2.
2. Under § 6062 and Rev. Rul. 83-41, 1983-1 C.B. 349, clarified and amplified, by Rev. Rul. 84-165, 1984-2 C.B. 305, Company's president, vice-president, treasurer, assistant treasurer, chief accounting officer, or any other officer duly authorized to act on behalf of Company may sign a Form 872 with respect to the consolidated income tax liability of Company and its subsidiaries. However, it is unclear whether Trustee may sign a Form 872 on

POSTF-157876-01

behalf of Company with respect to the consolidated income tax liability of Company and its subsidiaries for the taxable years ending on Date 1 and Date 2.

FACTS

Company is the common parent of an affiliated group of corporations (“the Consolidated Group”). It filed consolidated U.S. Corporate Income Tax Returns (Form 1120) with its affiliates for the taxable years ending Date 1 and Date 2.

On Date 3, Company, together with several of its direct and indirect subsidiaries, filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for District X. On Date 4, the Bankruptcy Court entered an Order Confirming the Plan.

In accordance with the Plan, Company established a liquidating trust, known as Trust 1, to liquidate its assets. Trustee was appointed as the trustee of Trust 1. Company also established Trust 2 to wind up Company’s affairs and to ultimately dissolve Company.

According to a report filed by Trustee with the Bankruptcy Court on Date 5, Trust 1 is currently in the process of liquidating Company’s assets pursuant to the Plan and will file the final corporate tax return on behalf of Company. Company has not filed a Certificate of Dissolution with the Government Official. However, the officers of Company are no longer available to sign a consent on behalf of Company. In addition, neither Company, nor the members of the Consolidated Group, have notified the Service regarding the designation of another member to act as the agent for the Consolidated Group, pursuant to § 1.1502-77(d).

LAW AND ANALYSIS

Issue 1.

Generally, § 1.1502-77(a) provides that a common parent of a consolidated group is the sole agent for each subsidiary member in the group, duly authorized to act in its own name in all matters relating to the tax liability for the consolidated return year. Thus, a common parent of a consolidated group is authorized to sign a Form 872 on behalf of its subsidiaries. In addition, § 1.1502-77(c) provides that, unless otherwise agreed, a common parent’s waiver of the statute of limitations on assessment shall bind each corporation that was a member of the consolidated group for the consolidated return year.

In J & S Carburetor Co. v. CIR, 93 T.C. 166 (1989), the United States Tax Court held that when a common parent of a consolidated group filed for bankruptcy, members of the consolidated group were not permitted to file a petition with the Tax

POSTF-157876-01

Court. The Tax Court explained that § 1.1502-77(a) did not make an exception for the bankruptcy of the common parent. Thus, even when the common parent has filed for bankruptcy, the common parent remains the sole agent for its consolidated group.

In this case, although Company has filed for bankruptcy, because Company remains in existence, Company remains the sole agent of the Consolidated Group authorized to execute a Form 872 on behalf of the Consolidated Group for taxable years ending Date 1 and Date 2.

Accordingly, the caption on the Form 872 should read, "Company and Consolidated Subsidiaries." The EIN of Company should be inserted on the upper right hand corner of the Form 872. In addition, the following language should be included at the bottom of the first page of the Form 872:

This is with respect to the consolidated income tax liability of the Company and affiliated subsidiaries consolidated group for taxable years ending Date 1 and Date 2.

Issue 2.

Section 6062 provides that a corporation's income tax return must be signed by the president, vice-president, treasurer, assistant treasurer, chief accounting officer, or any other officer duly authorized to act. The fact that an individual's name is signed on the return is prima facie evidence that the individual is authorized to sign the return on behalf of the corporation. Accordingly, any such officer may sign a consent, whether or not that person was the same individual who signed the return.

Section 6062 further provides that in the case of a return made for a corporation by a fiduciary pursuant to the provisions of § 6012(b)(3), such fiduciary must sign the return. Section 6012(b)(3) and § 1.6012-3(b)(4) of the Regulations on Procedure and Administration ("Regulations") provide that in the case where a receiver, trustee in a case under Title 11 of the United States Code, or assignee, by order of a court of competent jurisdiction, by operation of law or otherwise, has possession of or holds title to all or substantially all the property or business of a corporation, whether or not such property or business is being operated, such receiver, trustee, or assignee must make the income tax return for such corporation in the same manner and form as corporations are required to make such returns.

In Holywell Corporation, et al. v. Fred Staton Smith, etc., et al.: United States v. Fred Staton Smith et al., 503 U.S. 47 (1992), the Supreme Court held that a trustee in bankruptcy was required to pay the tax due on income attributable to the corporate debtors' property because § 6012(b)(3) of the Code requires him to make a return as the assignee of the property of the corporation. *Id.* at 52. However,

POSTF-157876-01

Trustee has only the powers defined in Agreement 1, which are specifically set forth in Article a. Thus, consistent with the Court's decision, a trustee of a liquidating trust is considered an assignee for purposes of § 6012(b)(3), thereby requiring the trustee to make a return for the corporation as its assignee.

Neither § 6501(c)(4) nor the regulations thereunder specify who may sign consents. Rev. Rul. 83-41, 1983-1 C.B. 349, clarified and amplified, by Rev. Rul. 84-165, 1984-2 C.B. 305, provides that the Service will generally apply the rules applicable to the execution of original returns to consents to extend the period of limitation for assessment. However, Rev. Rul. 83-41 does not recite the second sentence of § 6062 which provides that a fiduciary who makes a return on behalf of a corporation under § 6012(b)(3) may sign that return.

According to the facts provided, Trustee was appointed subsequent to the close of the taxable years ending Date 1 and Date 2. As a result, the Service is seeking an extension of the limitations period for tax years that pre-date the Trustee's appointment, and for which returns were timely filed. This fact does not, however, prevent the Trustee from executing the necessary consent. For example, the United States Bankruptcy Court for the Southern District of Texas held in In re: James Jackson McRae and Rita Joyce McRae, 181 B.R. 866 (1994), that the trustee of a liquidating trust be permitted to prepare and file all returns for pre-confirmation tax years.

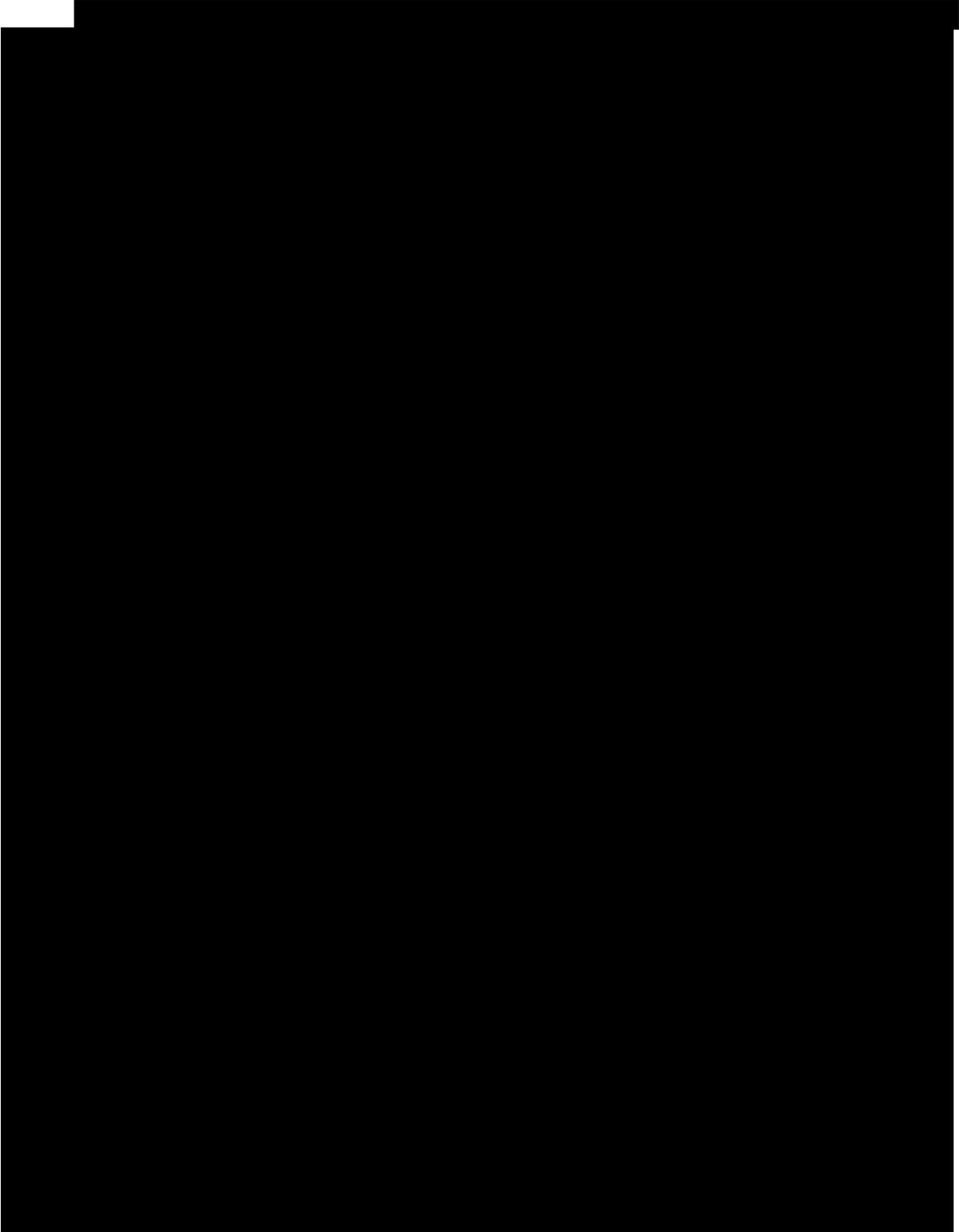
As mentioned above, Article a of Agreement 1 provides the Trustee with the powers to administer Trust 1. More specifically, Article b provides the Trustee with the power to effect any action which will protect the Trust 1 assets, including any method prescribed by law or equity. As such, the execution of a consent for a year which predates the Trustee's appointment may certainly fall within the purview of protecting the Trust 1 assets by any method deemed appropriate.

Similarly, Article c permits the Trustee to determine and satisfy any and all liabilities assumed by Trust 1. The execution of a consent for years for which returns have been filed, and which predate the assumption of the Trustee's responsibilities, constitutes the assumption of "any and all liabilities... assumed by Trust 1." Therefore, when read in conjunction with Article b, Article c provides the Trustee with the requisite authority to execute a consent for prior tax years.

Article d further provides the Trustee with authority to execute the necessary consent. To the extent that the Service determines that there is tax due for the tax years ending Date 1 and Date 2, Article d vests with the Trustee the power to pay any taxes determined to be due. Finally, Article e provides the Trustee with the authority to "pay taxes properly payable by Trust 1." To the extent that the Service determines a tax liability for the years in question, such liability would be "properly payable" by Trustee.

POSTF-157876-01

CASE DEVELOPMENT, HAZARDS AND OTHER CONSIDERATIONS



POSTF-157876-01



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 _____ at _____ for further assistance.