Office of Chief Counsel
Internal Revenue Service
memorandum
CC:LM:CTM:LA:2:TL-N-880-00KHAnkeny

date: March 21, 2001

to: Ted Takeuchi, Manager
Rhonda Hall, Case Coordinator
Marilyn Le, Revenue Agent

from: Katherine H. Ankeny
Attorney (LMSB)

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subject: **Validity of Forms 872 for the Consolidated Groups of [redacted] and [redacted]**

DISCLOSURE STATEMENT

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ISSUES

Is the Form 872 for the consolidated group of [redacted], which was signed by [redacted] as successor in interest to [redacted] as successor in interest to [redacted], a valid agreement? Similarly, is the Form 872 for the consolidated group of [redacted], which was by signed [redacted] as successor in interest to [redacted], a valid agreement?

CONCLUSION

The Forms 872 at issue are valid agreements under either of the following two theories:

(1) The parties to the Forms 872 intended to extend the period of limitations for the consolidated groups of [redacted] and [redacted], and a court would construe the ambiguous Forms 872 to conform to the parties' mutual intent.

(2) [redacted] and [redacted] ratified the Forms 872 by signing the correctly drafted, current Forms 872.

However, we would need additional evidence before we could conclude that [redacted] had actual authority to sign the Forms 872 or that [redacted] and [redacted] should be estopped from asserting that the Forms 872 are invalid.

(b)(5)(AWP), (b)(5)(AC) [redacted].

FACTS

Acquisitions of [redacted] and [redacted]

On [redacted], [redacted] acquired the [redacted] consolidated corporations (the "[redacted] acquisition"). In exchange, the shareholders of [redacted] received $[redacted] in cash and $[redacted] in debt. After a series of mergers among the [redacted] consolidated corporations, [redacted] became the parent of the consolidated group, and [redacted] became a wholly-owned subsidiary of [redacted]. Finally, [redacted] changed its name to [redacted] in a section 368(a)(1)(F) transaction. (We refer to [redacted], fka [redacted], as "[redacted]")

On [redacted] acquired the [redacted] consolidated corporations as wholly owned, direct subsidiaries of [redacted] (the "[redacted] acquisition"). The stockholders of [redacted] received [redacted]% of the [redacted] stock.

[redacted] and [redacted] both of which were incorporated in Delaware, are still active and in good standing.

The Prior Form 872 for [redacted]

On [redacted], [redacted], vice president and treasurer of [redacted], signed a Form 872 for [redacted] (the "prior Form 872"). The prior Form 872 extended the period of limitations for the [redacted] consolidated group's [redacted] and [redacted] tax years to [redacted]. The stated corporate signatory is "[redacted]."

The Forms 872 at Issue for [redacted] and [redacted]

In [redacted], Examination requested that Counsel review the Form 872 at issue for [redacted]. It extended the period of limitations for the [redacted] consolidated group's [redacted], [redacted], [redacted], and [redacted] tax years to [redacted]. The signatory's stated corporate name is:

> [redacted] as successor in interest to [redacted] as successor in interest to [redacted] (AKA: [redacted]).

On [redacted], District Counsel approved the Form 872, advising:

> This memorandum will serve to document our approval of the draft Form 872 you have submitted to us for review. This Form 872 extends the statute of limitations for the covered years to [redacted], which years have been previously extended by Form 872. The complication which you have addressed is the changes in the parent corporation due to various mergers. You have advised us that you have researched these mergers and verified the correct name and EIN of the various corporations referenced on the second page of the draft Form 872.

On [redacted], Examination sent the Form 872 to [redacted], as the Director of Corporate Tax at [redacted], stating:

> The attached is to extend the statute on [redacted]. for the [redacted], [redacted], [redacted], and [redacted] year end income tax returns.
>
> Due to the recent merger by [redacted] and [redacted], we recently requested an opinion from our District Counsel and we were advised to have an Officer of [redacted] (the new owner of [redacted] and [redacted]) execute the statute by signing and dating the attached 872 form.

Also, please state in writing that the person signing is a corporate officer of [redacted] and is authorized to extend the statute. The statement should be on [redacted]'s letterhead.

On [redacted], [redacted], as "EVP Finance," signed the Form 872. [redacted], senior vice president of [redacted], returned the Form 872 to Examination. In his transmittal letter, [redacted] stated that "[redacted] is Executive Vice President Finance for [redacted] and as such, is authorized to act on its behalf."

The Form 872 at issue for [redacted] extended the period of limitations for the [redacted] consolidated group's [redacted] tax year to [redacted]. The signatory's stated corporate name is:

[redacted] ([redacted]) as successor in interest to [redacted] ([redacted]).

On [redacted], [redacted], as "EVP Finance," signed the Form 872 at issue for [redacted]. Counsel did not review the Form 872. Examination retained no copies of any transmittal letters concerning the execution of the Form 872.

At the time [redacted] signed the Forms 872 at issue, [redacted] and [redacted] were located in [redacted], California and [redacted] was located in [redacted], Oregon.

<u>The Current Forms 872 for [redacted] and [redacted]</u>

On [redacted], Examination asked for Counsel's advice about additional consents to extend the period of limitations for the [redacted] consolidated group's [redacted] and [redacted] tax years and for the [redacted] consolidated group's [redacted], [redacted], [redacted], and [redacted] tax years (the "current Forms 872").

On April 5, 2000, Counsel advised Examination that the current Forms 872 should state the signatories' corporate names as [redacted] and [redacted]. Counsel explained that [redacted] was the common parent of the consolidated group during the [redacted] and [redacted] tax years and [redacted] was the common parent of the consolidated group for the [redacted], [redacted], [redacted], and [redacted] tax years. [redacted] still exists, although it changed its name from [redacted] to [redacted]. [redacted] still exists. Counsel concluded that [redacted] and [redacted] should sign the current Forms 872 as alternative agents, under section 1.1502-77T(a)(4)(i).

In the April 5, 2000 advice to Examination, Counsel also explained that neither [redacted] nor [redacted] had a successor that could sign the current Forms 872 as an alternative agent under section 1.1502-77T(a)(4)(ii). In the [redacted] acquisition, the stockholders of [redacted] received cash and debt, not stock. The [redacted] acquisition appears to have been a reverse triangular merger under section 368(a)(2)(E). Therefore, neither acquisition was a reorganization described in subparagraph (A), (C), (D), (F), or (G) of section 368(a)(1).

[redacted] and [redacted] signed the current Forms 872, which were drafted according to Counsel's April 5, 2000 advice.

<u>Counsel's Initial Concern about the Validity of the Forms 872 at Issue for [redacted] and [redacted]</u>

(b)(5)(AC) [redacted]. However, while preparing the April 5, 2000 advice to Examination, Counsel became concerned about their validity. The signatory's corporate name stated in the [redacted] Form 872 is [redacted] as successor to [redacted] as successor to [redacted]. Similarly, the signatory's corporate name stated in the [redacted] Form 872 is [redacted] as successor to [redacted]. But, [redacted] was not the successor to [redacted], which was not the successor to [redacted]. As explained in Counsel's April 5, 2000 advice to Examination, [redacted] and [redacted] had no successor that could sign as an alternative agent.

If the Forms 872 are invalid, then the three-year periods of limitations would have expired on the [redacted] through [redacted] tax years:

Tax Year	Date Return Filed	Date 3-Year Period of Limitations Expired
[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]

* The prior Form 872 extended the period of limitations on the [redacted] consolidated group's [redacted] and [redacted] tax years until [redacted].

We then requested that Examination gather the information necessary to determine whether there is a reasonable argument that the Forms 872 are valid.

Examination obtained documents showing that [redacted] was authorized to sign the Forms 872 at issue on behalf of [redacted] and [redacted]. [redacted] signed the [redacted] Form 872 on [redacted]. According to the resolution of the [redacted] board of directors, dated as of [redacted], [redacted] was a senior vice president of [redacted] and was authorized to sign all agreements in the name of [redacted] as he may deem necessary. [redacted] had no resolutions for the period after [redacted] and before [redacted]. [redacted] signed the [redacted] Form 872 on [redacted]. According to the resolution of the [redacted] board of directors, effective as of [redacted], [redacted] was an executive vice president of [redacted] and was authorized to sign all agreements in the name of [redacted] as he may deem necessary.

Examination is still collecting information about any audits of [redacted] during [redacted] and [redacted], when the Forms 872 at issue were signed. We do know that [redacted] did not have a [redacted] tax year, which is the last tax year included in the Form 872 at issue for [redacted].

DISCUSSION

(1) The Parties to the Forms 872 at Issue Intended to Extend the Period of Limitations for the Consolidated Groups of [redacted] and [redacted], and a Court Would Construe the Ambiguous Forms 872 to Conform to the Parties' Mutual Intent.

In the Forms 872 at issue, there is a discrepancy between the taxpayers' names and the corporate signatories' names. This discrepancy creates an ambiguity. However, a court would construe the Forms 872 to conform to the parties' mutual intent to extend the period of limitations for the consolidated groups of [redacted] and [redacted].

The Court has applied contract principles when interpreting the terms of a Form 872. First, the Court determines the parties' intent. Woods v. Commissioner, 92 T.C. 776, 780 (1989). If an ambiguity exists in the Form 872, the Court will admit extrinsic evidence to clarify the ambiguity and to determine the parties' intent. Id. The Form 872 will then be interpreted in accordance with the parties' intent. Constitution Publishing Co. v. Commissioner, 22 B.T.A. 426, 428 (1931). Evidence of intent is shown by the Form 872 as well as any contemporaneous communications. See Hicks v. Commissioner, T.C. Memo. 1991-564 (the parties' failure to agree to an unrestricted Form 872 was shown by the restrictions included in the transmittal letter). Evidence of intent is also shown by any other Forms 872 covering the same tax years. See Pleasanton Gravel Co. v. Commissioner, 85 T.C. 839, 843, 854 (1985) (the failure to include the name of

the corporate signatory in one of the four Forms 872, all of which covered the same taxable years, was a mere clerical error and did not invalidate that Form 872).

In the context of reforming a Form 872, the Court recently construed the Form 872 to confirm to parties' intent. San Francisco Wesco Polymers, Inc. v. Commissioner, T.C. Memo. 1999-146. The Form 872 erroneously stated the name and EIN of the taxpayer's successor instead of the taxpayer. The Court concluded that the taxpayer's president was authorized under state law to sign the Form 872, as an act necessary to wind up the taxpayer's affairs. The Court stressed that the Service's transmittal letter with the Form 872 referred to the taxpayer. It stressed that the Form 872 correctly stated the taxpayer's tax year as the period to be extended. The Court inferred that the individual signatory, as president of both corporations, must have understood that the Form 872 referred to the taxpayer, not to the taxpayer's successor.

Similar to the president in San Francisco Wesco Polymers, [redacted] had the actual authority under state law to sign both Forms 872 at issue. The duties of the officers of [redacted] and [redacted], which are Delaware corporations, must be stated in the bylaws or in the resolutions of the boards of directors. Del. Code Ann. tit. 8, § 142 (2000). According to the [redacted] and [redacted] resolutions of the board of directors of [redacted] and [redacted] [redacted] was authorized to sign all agreements as he may deem necessary.

[redacted], as a vice president of both [redacted] and [redacted], should have understood that the Form 872 at issue for [redacted] was intended to extend the period of limitations for the [redacted] consolidated group, not the [redacted] consolidated group. In the Form 872 at issue for [redacted], the taxpayer is identified as "[redacted]" The taxpayer's EIN is identified as [redacted], which is the EIN of [redacted]. The stated address is "[redacted], [redacted], [redacted]," which was the address of [redacted]. The stated periods are the [redacted], [redacted], [redacted], and [redacted] tax years. These are the tax years for the [redacted] consolidated group that were under audit on [redacted], when [redacted] signed the Form 872. [redacted] did not have a [redacted] tax year, which is the last tax year included in the Form 872 at issue for [redacted]. Although the Form 872 included an erroneous recitation that [redacted] and [redacted] were successors of [redacted], [redacted] and [redacted] were identified as acting on behalf of [redacted].

The transmittal letters also show that [redacted] and Examination intended to extend the period of limitations for the [redacted] consolidated group. Examination addressed its [redacted], [redacted] letter to "[redacted], the Director, Corporate Tax of [redacted]." As characterized by Examination in that letter, the Form 872 was "to extend the

statute on [redacted]" In his [redacted] letter in response, [redacted] did not voice any disagreement with Examination's characterization of the Form 872.

Similarly, [redacted], as a vice president of both [redacted] and [redacted], should have understood that the Form 872 at issue for [redacted] was intended to extend the period of limitations for the [redacted] consolidated group, not the [redacted] consolidated group. In the Form 872, the taxpayer is identified as "[redacted]" The taxpayer's EIN is identified as [redacted], which is the EIN for [redacted]. The stated address is "[redacted], [redacted]," which was the address of [redacted]. The stated period is the [redacted] tax year. This is the tax year for the [redacted] consolidated group that was under audit on [redacted], when [redacted] signed the Form 872. Although the Form 872 included an erroneous recitation that [redacted] was the successor of [redacted], [redacted] was identified as acting on behalf of [redacted].

The parties' intent is also shown by their execution of the current Forms 872. Both the current Form 872 and the Form 872 at issue for [redacted] included the [redacted] consolidated group's [redacted] and [redacted] tax years. If [redacted] and Examination had not intended to extend those tax years when the Form 872 at issue was signed in [redacted], they would not have signed the current Form 872 in [redacted]. Both the current Form 872 and the Form 872 at issue for [redacted] included the [redacted] consolidated group's [redacted] tax year. If [redacted] and Examination had not intended to extend that tax year when the [redacted] Form 872 at issue was signed in [redacted], they would not have signed the current Form 872 in [redacted].

<u>(2) [redacted] and [redacted] Ratified the Forms 872 at Issue by Signing the Current Forms 872.</u>

Assuming arguendo that [redacted] lacked the authority to sign the Forms 872 at issue, they would still be valid. This is because [redacted] and [redacted], by executing the current Forms 872, ratified [redacted]'s authority to sign the Forms 872 at issue.

As explained by the Court, a purported principal's subsequent conduct may show under California law that he impliedly ratified the action of the purported agent:

> Under established case law in the State of California, "Ratification is the voluntary election by a person to adopt in some manner as his own an act which was purportedly done on his behalf by another person, the effect of which, as to some or all persons, is to treat the act as if originally authorized by him." . . . Further, "A purported agent's act may be

> adopted expressly or it may be adopted by implication based on conduct of the purported principal from which an intention to consent to or adopt the act may be fairly inferred, including conduct which is 'inconsistent with any reasonable intention on his part, other than that he intended approving and adopting it.'"

Mishawaka Properties Co. v. Commissioner, 100 T.C. 353, 364-64 (1993) (citations omitted). In Oregon, where [redacted] is located and where [redacted] may have signed the Forms 872, the state courts have also adopted the principle of ratification. Michel v. ICN Pharmaceuticals, Inc., 549 P.2d 519, 525 n2 (Or. 1976).

For example, in Kraasch v. Commissioner, 70 T.C. 623, 629 (1978), the Court concluded that the taxpayers ratified their accountant's authority to sign a petition on their behalf. The Court stated that "even if this were a situation where . . . [the accountant] acted upon . . . [the taxpayers'] behalf without authority, . . . [the taxpayers] are still bound . . . because they subsequently ratified [the accountant's] actions." Id. at 628. Ratification was implied, based on the taxpayers' conduct subsequent to the filing of the petition. The Court stressed that the taxpayers "had or should have had sufficient knowledge of the status of their case and that they gave their consent and approval to their agent's acts." Id. at 629.

Based on Mishawaka Properties and Kraasch, the Court held that two tax matters partners ratified Forms 872-O for their partnerships' 1982 tax year. Transpac Drilling Venture 1982-16 v. Commissioner, T.C. Memo. 994-26 (1994), rev'd and rem'd on other grounds sub nom., Transpac Drilling Venture 1982-12 v. Commissioner, 147 F.3d 221 (2d Cir. 1998). The tax matters partners contended that because they incorrectly signed the powers of attorney, the Forms 872 were invalid. The Court reasoned that the tax matters partners' "subsequent action (execution of the Forms 872-O for 1983 and 1984) and inactions (failure to disavow the powers of attorney or the Forms 872-O for 1982) . . . further indicate a ratification of the powers of attorney."

The case for ratification of [redacted]'s authority to sign the Forms 872 at issue is even stronger than it was in Transpac Drilling. [redacted] and [redacted] have not merely continued to participate in their audits and failed to disavow the validity of the Forms 872. They have signed current Forms 872 covering three of the same tax years. The current Form 872 for [redacted] includes the [redacted] and [redacted] tax years, which are included in the Form 872 at issue for [redacted]. The current Form 872 for [redacted] includes the [redacted] tax year, which is the only year included in the Form 872 at issue for [redacted].

(3) We Would Need Additional Evidence Before We Could Conclude that [redacted] Had Actual Authority to Sign the Forms 872 at Issue or that [redacted] and [redacted] Should Be Estopped from Asserting that Forms 872 Are Invalid.

[redacted] (b)(5)(AWP) [redacted], we would recommend obtaining other evidence that might support two additional theories: [redacted]'s actual authority, and estoppel.

With respect to [redacted]'s actual authority, we would need to obtain all of the [redacted] acquisition documents, including any pledge and indemnity agreement or tax sharing agreement. There may be an agreement authorizing [redacted] to resolve any tax controversies on behalf of the [redacted] and the [redacted] consolidated groups.

For example, in Alumax Inc. v. Commissioner, 109 T.C. 133, 200 (1997), aff'd, 165 F.3d 822 (11th Cir. 1999), the Court held that the new parent corporation and its successor had actual authority to sign Forms 872 on behalf of the taxpayer's consolidated group. The Court based its holding on a pledge and indemnification agreement, which gave these corporations control over any challenge by the Service to the consolidation. Id. at 199-200. Similarly, in McKesson Corp. v. Commissioner, Nos. 19202-97, 13498-98, which case was settled, the Service argued that the new parent corporation had actual authority based on a tax sharing agreement. The tax sharing agreement provided that the new parent corporation assumed the responsibility to resolve the tax controversies of the taxpayer's consolidated group.

With respect to estoppel, we would need to obtain additional evidence concerning the parties' communications. At this time, we have insufficient evidence to conclude that [redacted] and [redacted] should be estopped from asserting that the Forms 872 at issue are invalid.

To rely on the doctrine of estoppel, the Service must establish each of the following four elements:

(1) There must be a false representation or wrongful misleading silence;

(2) the error must be in a statement of fact and not in an opinion or a statement of law;

(3) the person claiming the benefits of estoppel must be ignorant of the true facts; and

> (4) he must be adversely affected by the acts or statements of the person against whom an estoppel is claimed.

Kronish v. Commissioner, 90 T.C. 684, 695 (1988).

In Badger Materials, Inc. v. Commissioner, 40 T.C. 725, 733-34 (1963), the Court held that the transferees were not estopped to deny the validity of Forms 872. The taxpayer had liquidated. J.A. Gallagher, as treasurer of the taxpayer, executed the Forms 872. The Court held that he had no authority because the taxpayer had ceased to exist under Wisconsin law. Id. at 733. As analyzed by the Court, both parties misinterpreted Wisconsin law:

> All of the relevant facts here were known to respondent and he was charged with knowledge of the law. In view of these factors, it was a question of law whether the consents in question were valid. Is the taxpayer any more responsible for a correct interpretation of the law than the Commissioner? We are convinced by the evidence of record that Gallagher acted in good faith in signing the consents and that his actions were not for the purpose of inducing respondent to withhold action leading to the issuance of the notices of deficiency and transferee liability. But, in so acting, he assumed a power not authorized by Wisconsin law. Respondent, relying either on his own interpretation of the law or that of petitioners, chose to take no further immediate action. In our opinion both parties misinterpreted the Wisconsin statute. A mutual mistake of law does not create an estoppel.

Id. at 734.

As in Badger Materials, the Service misinterpreted the law. Based on Counsel's advice, Examination erroneously stated in its [redacted] letter that an officer of [redacted] must execute the Form 872. Examination built on that error by requesting a written statement that "the person signing is a corporate officer of [redacted] and is authorized to extend the statute. The statement should be on [redacted]'s letterhead." [redacted]'s only response was that "[redacted] is Executive Vice President Finance for [redacted] and as such, is authorized to act on its behalf."

At this time, we cannot establish elements (1), (2), and (3), which would be necessary to show that [redacted] should be estopped. [redacted]'s response did not contain a false representation. He accurately stated that [redacted] was authorized to act on behalf of [redacted]. [redacted] did fail to correct Examination's erroneous statement that an officer of [redacted] must sign the Form 872. But, we have no evidence he

intended to mislead Examination by his silence, within the meaning of element (1). On the contrary, the execution by [redacted] of its current Form 872 suggests that no one at [redacted] or [redacted] realized that [redacted]'s officers were not authorized to sign the Form 872 at issue. In addition, [redacted] was silent about an opinion or a statement of law, not a statement of fact, within the meaning of element (2). Finally, we have no evidence that Examination was ignorant of the true facts, within the meaning of element (3). Examination knew about the acquisitions and the continued existence of [redacted].

Similarly, with respect to the Form 872 at issue for [redacted], we cannot at this time establish elements (1), (2), or (3). Without copies of the transmittal letters accompanying the execution of the Form 872, we have no evidence that there was a false representation or a misleading silence. In addition, we have no evidence that Examination was ignorant about the acquisition and the continued existence of [redacted].

(4) Because the Forms 872 at Issue Are Valid Agreements under the Theories of Ambiguity and Ratification, (b)(5)(AWP), (b)(5)(AC) [redacted].

We do have sufficient evidence to show that the Forms 872 at issue are valid agreements under the theories of ambiguity and ratification. Therefore, [redacted].

Please call me at 213-894-3027, ext. 155, if you have any questions.

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cc: H. Nicholas Photakis, Case Manager for prior cycle