

**Office of Chief Counsel  
Internal Revenue Service  
Memorandum**

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date: June 29, 2012

to: Karen Edie, Revenue Agent  
(Large Business & International)

from: Elizabeth R. Edberg  
Attorney (Detroit)  
(Large Business & International)

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subject: Authority to Sign Form 870-LT

This memorandum responds to your request for assistance. This advice may not be used or cited as precedent.

LEGEND

\$X =

ABC Partnership =

Article M =

Article N =

Article O =

Article P =

Company A =

Company B =

Company C =

Date 1 =

Date 2 =

Date 3 =

Individual D =

Section A =

Section B =

Section C =

Section D =

Section E =

Section F =

Section G =

X% =

Year 1 =

Years at Issue =

## ISSUES

1. Does a provision in an Operating Agreement that restricts a Managing Member (Company B) from settling claims against Company A over a certain amount without the consent of certain additional members prevent the Managing Member from executing a Form 870-LT on behalf of Company A with respect to partnership adjustments to ABC Partnership?
2. Does a restriction in an Operating Agreement on the ability of the Company B to bind other members to tax settlement agreements without their written consent prevent Company B from executing a Form 870-LT on behalf of Company A with respect to partnership adjustments to ABC Partnership?
3. Does a restriction in an Operating Agreement on the ability of Company C to bind other members to tax settlement agreements without their written consent prevent Company C from executing a Form 870-LT in its capacity as Managing Member of Company B, as Managing Member of Company A, with respect to partnership adjustments to ABC Partnership?
4. What title should be used for the signature on the Form 870-LT?
5. Will Company A's execution of the Form 870-LT bind its indirect partners to the partnership items provided in the 870-LT?

## CONCLUSIONS

1. No. To the extent this restriction is applicable, it is met as Company B owns 100% of Company A; thus, there are no additional members to consent.
2. No. The restriction relates to Company B's ability to act as the TMP of Company A, not Company B's management authority. Company B is not acting as the TMP of Company A. Rather, Company B is acting in its capacity as the Managing Member of Company A. Therefore, the restriction does not apply.
3. No. The restriction relates to Company C's ability to act as the TMP of Company A, not Company B's management authority. Company B is not acting as the TMP of Company A. Rather, Company B is acting in its capacity as the Managing Member of Company A. Therefore, the restriction does not apply.
4. The signature line for the Form 870-LT should read: Company A, by Company B, Managing Member, by Company C, Managing Member, by Individual D, Managing Member.
5. Company A's execution of the Form 870-LT will bind its indirect partners provided that such partners have not been identified as provided in section 6223(c)(3).

## FACTS

During the Years at Issue, ABC Partnership was a limited liability company taxed as a partnership for federal tax purposes. During the Years at Issue, Company A was a member of ABC Partnership.

Company A was a limited liability company taxed as a partnership. Its tax matters partner ("TMP") was Company B, also a limited liability company taxed as a partnership. Company B's TMP was Company C, also a limited liability company taxed as a partnership. The TMP for Company C was Individual D. Companies A, B, and C were all formed in Delaware.

In Year 1, Company A became a single member limited liability company, and, thus, a disregarded entity for federal tax purposes. Company B is the sole member of Company A.

Company A's Operating Agreement dated Date 1<sup>1</sup> designates Company B as its Managing Member. Article M of the Operating Agreement discusses the management of Company A. Section A under Article M provides that management and control is vested in the Managing Member, except as provided in Section B, and that actions of the Managing Member in accordance with this will bind Company A. No other member has the authority to participate in the management and control of, or to bind, Company A except as provided in Section B.

Specifically, Section A provides:

Except as provided in Section [B], the Managing Member shall have the overall responsibility for the management, operation, and administration of the Company, including all actions to be taken by the Company as a member of [ABC Partnership]. The actions of the Managing Member taken in accordance with such rights and powers shall bind the Company. Except as provided in Section [B] or authorized by the Managing Member, no Member shall participate in the management and control of the business of the Company, nor shall any member have the right or authority to act on behalf of the Company in connection with any matter.

Section B lists certain acts that cannot be undertaken on behalf of Company A without the consent of certain additional members. Generally, such provisions relate to actions involving changes to the organizational documents of, or capitalization or organization of, ABC Partnership or Company A. One provision relates to the settlement of claims against Company A over \$X, as follows:

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<sup>1</sup> There have been no changes to the operating agreement since this date.

(v) any settlement of litigation, regulatory investigations or disputes against the Company in excess of \$X.

Such claims may only be settled with the written consent of members holding at least X% of the voting power.

Article N of the Operating Agreement relates to miscellaneous matters. Section C under Article N relates to tax matters. The first paragraph of Section C designates the Managing Member as TMP for purposes of I.R.C. § 6231(a)(7). The second paragraph of Section C gives the Managing Member the authority to make all determinations for Federal and other tax purposes on behalf of Company A, except the Managing Member cannot bind other members to extensions of the statute of limitations or to settlement agreements without their written consent.

Specifically, Section C provides:

(a) Tax Matters Partner. The Managing Member shall be designated as the Tax Matters Partner of the Company for purposes of Section 6231(a)(7) of the Code. Each person (for purposes of this Section [E], called a "Pass-Thru Partner") that holds or controls an interest as a Member on behalf of, or for the benefit of, another person or persons, or which Pass-Thru Partner is beneficially owned (directly or indirectly) by another person or persons, shall, within 30 days following receipt from the Tax Matters Partner of any notice, demand, request for information or similar document, convey such notice or other document in writing to all holders of beneficial interests in the Company holding such interests through such Pass-Thru Partner. In the event the Company shall be the subject of an income tax audit by any Federal, state or local authority, to the extent the Company is treated as an entity for purposes of such audit, including administrative settlement and judicial review, the Tax Matters Partner shall be authorized to act for the Company. The relationship of the Tax Matters Partner to the Members is that of a fiduciary and the Tax Matters Partner has a fiduciary obligation to perform its duties as Tax Matters Partner in such manner as will serve the best interests of the Company. All expenses incurred in connection with any such audit, investigation, settlement or review shall be borne by the Company.

(b) Elections. The Managing Member shall be authorized to make all elections and other determinations for Federal, state, local and foreign tax purposes, on behalf of the Company. Notwithstanding the foregoing (and except in instances where it would have a material adverse effect on the Company), the Managing Member shall not bind any Member to an extension of the statute of limitations or to a closing agreement or settlement agreement for Federal, state, local or foreign tax purposes

without such Member's prior written consent, which shall not be unreasonably withheld.

Company B's Operating Agreement dated Date 2<sup>2</sup> designates Company C as its Managing Member. Article O of the Operating Agreement discusses the management of Company B. Section D of Article O provides that management and control is vested in the Managing Member. There are no exceptions to this. The actions of the Managing Member in accordance with this will bind Company B. No other member has the authority to participate in the management and control of, or to bind, Company B.

Specifically, Section D provides:

The Managing Member shall have the overall responsibility for the management, operation and administration of the Company. The actions of the Managing Member taken in accordance with such rights and powers shall bind the Company. Except as authorized by the Managing Member, no Member shall participate in the management and control of the business of the Company, nor shall any Member have the right or authority to act on behalf of the Company in connection with any matter.

Article P of the Operating Agreement relates to miscellaneous matters. Section E under Article P relates to tax matters and is virtually identical to the tax matters provision under Company A's operating agreement. The first paragraph of Section E designates the Managing Member as TMP for purposes of I.R.C. § 6231(a)(7), and the second paragraph of Section E gives the Managing Member the authority to make all determinations for Federal and other tax purposes on behalf of Company B, except the Managing Member cannot bind other members to extensions of the statute of limitations or to settlement agreements without their written consent.

Company C's Operating Agreement dated Date 3<sup>3</sup> designates Individual D as its Managing Member. Section F of the Operating Agreement discusses the management of Company C and provides that management and control is vested in the Managing Member. There are no exceptions to this. The actions of the Managing Member in accordance with this will bind company C. Section G of the Operating Agreement addresses tax matters and designates the Managing Member as TMP without any restrictions.

The adjustments to ABC Partnership for most of the Years at Issue exceed \$X.

## LAW AND ANALYSIS

Partnerships do not pay federal income taxes, but they are required to file annual information returns reporting the partners' distributive shares of tax items. I.R.C.

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<sup>2</sup> There have been no changes to the operating agreement since this date.

<sup>3</sup> There have been no changes to the operating agreement since this date.

§§ 701, 6031. The individual partners then report their distributive shares of the tax items on their federal income tax returns. I.R.C. §§ 701-704.

To eliminate the administrative burden caused by duplicative audits and litigation and to provide consistent treatment of partnership items among the partners in the same partnership, Congress enacted the unified audit and litigation procedures of the Tax Equity and Fiscal Responsibility Act of 1982 (“TEFRA”). Pub. L. 97-248, § 401, 96 Stat. 648; see I.R.C. §§ 6221-34; *Meruelo v. Commissioner*, 132 T.C. 355, 362 (2009); H. Conf. Rept. 97-760, at 599-600 (1982), 1982-2 C.B. 600, 662-63. Pursuant to TEFRA, partnership items are determined in a single partnership-level proceeding. I.R.C. §§ 6221, 6225.

Generally, the TMP is the partner designated to act as a liaison between the partnership and the IRS in administrative proceedings, and as a representative of the partnership in judicial proceedings. See I.R.C. § 6231(a)(7); *Bush v. United States*, 101 Fed. Cl. 791, 793 (2011); *Conway v. United States*, 50 Fed. Cl. 273, 276 (2001). In connection with this, the TEFRA provisions confer on the TMP certain rights and responsibilities, including the ability to execute statute extensions and bind certain non-notice partners. See I.R.C. §§ 6224(c)(3), 6229(b)(1)(B); *Conway*, 50 Fed. Cl. at 276.

I.R.C. § 6231(a)(2) defines the term “partner” as “(A) a partner in the partnership, and (B) any other person whose income tax liability under subtitle A is determined in whole or in part by taking into account directly or indirectly partnership items of the partnership.”

I.R.C. § 6231(a)(9) defines the term “pass-thru partner” as “a partnership, estate, trust, S corporation, nominee, or other similar person through whom other persons hold an interest in the partnership with respect to which proceedings under this subchapter are conducted.”

I.R.C. § 6231(a)(10) defines the term “indirect partner” as a person holding an interest in a partnership through 1 or more pass-thru partners.

I.R.C. § 6224(c) provides that the Secretary may enter into a binding settlement agreement as to a partnership item with any partner, and that the settlement agreement binds with finality those partners who execute the agreement. In some circumstances, the TMP and a pass-thru partner can also bind other partners.

If a pass-thru partner enters into a settlement agreement with the IRS with respect to partnership items, he binds all indirect partners having an interest in the partnership through the pass-thru partner, unless the IRS has been notified of the indirect partner's name, address and beneficial interest in the partnership in accordance with I.R.C. § 6223(c)(3) and Treas. Reg. § 301.6223(c)-1,<sup>4</sup> at least 30 days before the settlement

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<sup>4</sup> Specifically, I.R.C. § 6223(c)(3) provides two methods for identifying an indirect partner – (1) the information must be furnished on the tax return of the partnership being audited, or (2) in a statement to

agreement is entered into with the pass-thru partner. I.R.C. § 6224(c)(1); Treas. Reg. § 301.6224(c)-2(a)(1). I.R.C. § 6224(c)(1) expressly states “[a]n indirect partner is bound by any such agreement entered into by the pass-thru partner unless the indirect partner has been identified as provided in section 6223(c)(3).”

Treas. Reg. § 301.6224(c)-2(b)(1) addresses the person in the pass-thru partner who is authorized to enter into a settlement agreement that binds indirect partners. In the case of a pass-thru partner that is a TEFRA partnership, the regulation provides that the TMP of that partnership has authority. However, when the regulation was written, there were no limited liability companies and the TMP of a partnership would always be a general partner authorized to bind the entity under State law.

If the pass-thru partner “is a limited liability company, then a manager of the LLC, under State law, must sign, regardless of whether the LLC is subject to the TEFRA partnership procedures.” IRS CCN CC-2009-027, Q&A (F)3.

The instructions for the Form 870-LT provide: “If the partner is an LLC, the agreement should be signed by the manager of the LLC or other authority as authorized by State law. The signature line should show: [Name of LLC], by [Name of Manager], Followed by the title [Manager].”

Rev. Rul. 2004-88 provides that state law determines a partner’s status, noting that “[a]lthough the regulations under sections 301.7701-1 through 301.7701-3 provide that a disregarded entity is disregarded for all federal tax purposes, these regulations do not alter state law.” Therefore, even if a limited liability company is disregarded for tax purposes, it remains a partner in the partnership.

Rev. Rul. 2004-88 determined that a disregarded entity is a pass-thru partner.

State law governs who has authority to act on behalf of a limited liability company. Cf. Rev. Rul. 2004-88.

DEL. CODE ANN. tit. 6, § 18-402 (West) provides that the management of a limited liability company shall be vested in its members unless the limited liability company agreement provides otherwise. The limited liability company agreement may provide for management, in whole or in part, by a manager or managers. Unless otherwise provided in a limited liability company agreement, each member and manager has the authority to bind the limited liability company. DEL. CODE ANN. tit. 6, § 18-402 (West).

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the IRS that fulfills the requirements of Treas. Reg. § 301.6223(c)-1. Treas. Reg. § 301.6223(c)-1(b)(2) requires the statement to (1) identify the partnership, each partner for whom information is supplied, and the person supplying the information by name, address, and taxpayer identification number; (2) explain that the statement is furnished to correct or supplement earlier information with respect to the partners in the partnership; (3) state the taxable year to which the information relates; (4) set out the corrected or additional information; and (5) be signed by the person supplying the information.

In *Medical & Business Facilities, Ltd. v. Commissioner*, 60 F.3d 207 (5th Cir. 1995), *rev'g* T.C. Memo. 1994-38, the Fifth Circuit relied upon language in the partnership agreement that vested management and control of the business in a managing general partner and management committee comprised of the firm's general partners to determine that a statute extension signed by one general partner without approval from the management committee was not signed by a person authorized in writing under I.R.C. § 6229(b)(1)(B).<sup>5</sup> The court determined that the managing general partner and management committee had to act collectively on all decisions with respect to the management and control of the business, including the execution of a statute extension. *Med. & Bus. Facilities, Ltd.*, 60 F.3d at 210-11. A provision under Louisiana law that gave general partners the authority to bind the partnership did not give the general partner the requisite authority to sign the statute extension as a statute was not sufficient written authorization for purposes of I.R.C. § 6229(b)(1)(B), which provides a consent may be executed by "any other person *authorized by the partnership in writing* to enter into such an agreement." *Id.* at 211.

### In General

As Company A is a partner of ABC Partnership, the IRS may enter into a settlement agreement with Company A with respect to the partnership items of ABC Partnership. See I.R.C. § 6224(c). The fact Company A became a disregarded entity in Year 1 does not change this, as disregarded entities are still partners. See Rev. Rul. 2004-88.

Because Company A is a limited liability company, its manager under State law must sign on its behalf, regardless of whether the LLC is subject to the TEFRA partnership procedures. See IRS CCN CC-2009-027, Q&A (F)3; *cf.* Rev. Rul. 2004-88. Therefore, Company B may sign the Form 870-LT on behalf of Company A provided Company B has authority under state law. In this case, Company A's Operating Agreement provides that Company B is the Managing Member of Company A and no other member has management authority. Therefore, Company B is the manager of Company A under State law. See DEL. CODE ANN. tit. 6, § 18-402.

However, there are several provisions in Company A's Operating Agreement that must be analyzed to make sure Company B has the necessary authority.

### Issue 1

The adjustments to ABC Partnership for most of the Years at Issue exceed \$X. Article M, Section B of Company A's Operating Agreement provides that the Managing

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<sup>5</sup> I.R.C. § 6229(b)(1) provides that provides the statute of limitations may be extended "with respect to all partners, by an agreement entered into by the Secretary and the tax matters partner (or any other person authorized by the partnership in writing to enter into such an agreement), before the expiration of such period." In the *Medical & Business Facilities, Ltd.* case, the general partner who signed the statute extension was not the TMP and the government attempted to rely on the "or any other person authorized by the partnership in writing" provision to validate the statute extension.



Member cannot settle claims against Company A over \$X without the written consent of members holding at least X% of the voting power. While we view the partnership adjustments as claims (to the extent the assertion of adjustments, rather than actual amounts due, constitutes a claim) against the partners of ABC Partnership rather than claims against Company A, this provision, if applicable, is met as Company B owns 100% of Company A. Thus, there are no additional members to consent.

## Issue 2

Article N, Section C of Company A's Operating Agreement places restrictions on Company B's ability to bind other members to settlement agreements without their written consent. Neither Article N nor Section C relates to the management of Company A or who has authority to bind Company A. Rather, Article N address miscellaneous matters and Section C specifically addresses the Managing Member's authority to act as the TMP.

TEFRA created a single partnership-level proceeding for audits of partnership items. See Pub. L. 97-248, § 401, 96 Stat. 648; I.R.C. §§ 6221-34; *Meruelo*, 132 T.C. at 362; H. Conf. Rept. 97-760, at 599-600 (1982), 1982-2 C.B. 600, 662-63. The TMP is the liaison between the partnership and the IRS in such administrative proceeding. See I.R.C. § 6231(a)(7); *Bush*, 101 Fed. Cl. at 793; *Conway*, 50 Fed. Cl. at 276.

Thus, Company B, as the TMP of Company A, will act as the liaison between Company A and the IRS if there is an audit of Company A for a year when it was a TEFRA partnership.<sup>6</sup> This case involves a TEFRA audit of ABC Partnership, not Company A. Therefore, Company B is not acting as the TMP of Company A. Rather, Company B is acting in its capacity as the Managing Member of Company A. See IRS CCN CC-2009-027, Q&A (F)3 (“a manager of the LLC, under State law, must sign, regardless of whether the LLC is subject to the TEFRA partnership procedures”); *cf.* Rev. Rul. 2004-88 (indicating that State law governs who has authority to act on behalf of a limited liability company).

As discussed above, Company B is the manager of Company A under State law. Article M of Company A's Operating Agreement addresses the management of Company A. Article M, Section A places management and control in Company B and gives Company B the authority to bind Company A. The only exceptions to this management authority are listed in Article M, Section B. The exceptions in Section B are inapplicable and/or are met as discussed under Issue 1. The tax matters provision at issue is not contained within Article M, Section B and, thus, does not constitute a limitation on Company B's management authority.

Moreover, Section A expressly provides that Company B, as Managing Member, has “the overall responsibility for the management, operation, and administration of the

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<sup>6</sup> As Company A is now a disregarded entity, it is no longer a TEFRA partnership.

Company, *including all actions to be taken by the Company as a member of [ABC Partnership].*” As the execution of the Forms 870-LT is an action to be taken by Company A as a member of ABC Partnership, such action falls within the scope of Company B’s express management authority.

The facts of this case are distinguishable from *Medical & Business Facilities, Ltd.*, as the restrictions at issue in that case pertained to the management of the company, whereas the restrictions at issue here pertain to Company B’s ability to act as TMP for the members of Company A.

Therefore, Company B may sign the Form 870-LT on behalf of Company A as Company B has the necessary management authority under State law to do so. See DEL. CODE ANN. tit. 6, § 18-402.

The correctness of this conclusion is illustrated by the application of the restriction were it to apply. Application of the restriction would require the consent of individuals and/or entities that (1) have no management authority and (2) are no longer members. This would be contrary to DEL. CODE ANN. tit. 6, § 18-402 regarding who has authority to act on behalf of a limited liability company, and would override I.R.C. § 6224(c)(1),<sup>7</sup> which provides that a settlement agreement that is entered into by a pass-thru partner binds all indirect partners.

### Issue 3

A similar issue exists with respect to who may sign on behalf of Company B. Because Company B is a limited liability company, its manager under State law must sign on its behalf, regardless of whether the LLC is subject to the TEFRA partnership procedures. See IRS CCN CC-2009-027, Q&A (F)3; *cf.* Rev. Rul. 2004-88. Therefore, Company C may sign the Form 870-LT on behalf of Company B provided Company C has authority under state law. In this case, Company B’s Operating Agreement provides that Company C is the Managing Member of Company B and no other member has management authority. Therefore, Company C is the manager of Company B under State law. See DEL. CODE ANN. tit. 6, § 18-402.

However, there is a provision in Article P, Section E of Company B’s operating Agreement that restricts the ability of Company C to bind other members to settlement agreements without their written consent. This provision is virtually identical to the tax matters provision in Company A’s Operating Agreement discussed in Issue 2 above. Neither Article P nor Section E relates to the management of Company B or who has authority to bind Company B. Rather, Article P address miscellaneous matters and Section E specifically addresses the Managing Member’s authority to act as the TMP. As discussed above, Company C is the manager of Company B under State law.

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<sup>7</sup> In effect, a broad interpretation of the provision at issue would require the IRS to obtain settlement agreements from all indirect partners even though such partners were not identified in accordance with I.R.C. § 6223(c)(3) and Treas. Reg. § 301.6223(c)-1.

Article O of Company B's Operating Agreement addresses the management of Company B. Article O, Section D gives Company C sole management authority with no exceptions. Therefore, for the same reasons discussed in Issue 2, this provision does not prevent Company C from signing the Form 870-LT on behalf of Company B, on behalf of Company A.

#### Issue 4

As discussed above, Company B is the manager of Company A and has authority to sign on its behalf, and Company C is the manager of Company B and has authority to sign on its behalf. Company C is also a limited liability company. Its Operating Agreement designates Individual D as its Managing Member and there are no restrictions on Individual D's management authority. Thus, Individual D is the manager of Company C and has authority to sign on its behalf. See IRS CCN CC-2009-027, Q&A (F)3; DEL. CODE ANN. tit. 6, § 18-402; cf. Rev. Rul. 2004-88.

Therefore, the signature line for the Form 870-LT should read:

Company A, by Company B, Managing Member, by Company C, Managing Member, by Individual D, Managing Member

This language is consistent with the instructions for the Form 870-LT.

#### Issue 5

The IRS may enter into a settlement agreement with Company A, as a partner of ABC Partnership, with respect to partnership items. See I.R.C. § 6224(c). As a limited liability company that is a disregarded entity for federal tax purposes, Company A is a pass-thru partner. See I.R.C. § 6213(a)(9); Rev. Rul. 2004-88. Because Company A is a pass-thru partner, if it enters into a settlement agreement with the IRS with respect to partnership items, it binds all indirect partners having an interest in the partnership through Company A, unless the IRS has been notified of the indirect partner's name, address and beneficial interest in the partnership in accordance with I.R.C. § 6223(c)(3) and Treas. Reg. § 301.6223(c)-1, at least 30 days before the settlement agreement is entered into with Company A. See I.R.C. § 6224(c)(1); Treas. Reg. § 301.6224(c)-2(a)(1).

To our knowledge, no indirect partners have been identified in accordance with I.R.C. § 6223(c)(3) and Treas. Reg. § 301.6223(c)-1. Any indirect partners that are identified in accordance with these provisions should be sent a separate Form 870-LT.

### CASE DEVELOPMENT, HAZARDS AND OTHER CONSIDERATIONS

#### Affected Items

We note that Form 870-LT is being used, which form permits the partner to agree to both partnership adjustments and affected items or only partnership adjustments.

I.R.C. § 6231(b)(1)(C) provides that the settlement of partnership items converts the partnership items to nonpartnership items.

Deficiency procedures do not apply to settled partnership items. See I.R.C. § 6230(a)(2)(A)(ii). Instead, the Service computes the change in tax liability and directly assesses this amount. This is known as a “computational adjustment.” See I.R.C. § 6231(a)(6). Section 6231(a)(6) provides that “[a]ll adjustments required to apply the results of a proceeding with respect to a partnership under this subchapter to an indirect partner shall be treated as computational adjustments.”

However, I.R.C. § 6230(a)(2)(A)(i) provides that deficiency proceedings apply to affected items which require partner level determinations.

Therefore, while a pass-thru partner may bind indirect partners to a settlement agreement as to a partnership item, see I.R.C. § 6224(c)(1), the pass-thru partner may not bind indirect partners to a settlement agreement as to affected items. To the extent affected items are involved, the indirect partners themselves would have to agree to such items or deficiency procedures must be initiated. Thus, Company A cannot sign Part II of Form 870-LT.

#### Case Development

[REDACTED]

[REDACTED]

[REDACTED]

Other Considerations

This writing may contain privileged information. Any unauthorized disclosure of this writing may undermine our ability to protect the privileged information. If disclosure is determined to be necessary, please contact this office for our views.

Please call (313) 628-3100 if you have any further questions.

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