INTERNAL REVENUE SERVICE
NATIONAL OFFICE TECHNICAL ADVICE MEMORANDUM

October 05, 2005

Third Party Communication: None
Date of Communication: Not Applicable

Number: **200614005**
Release Date: 4/7/2006

Index (UIL) No.: 263A.04-00, 263A.04-06
CASE-MIS No.: TAM-165086-04/CC:ITA:B7

Taxpayer's Name:
Taxpayer's Address:

Taxpayer's Identification No
Year(s) Involved:
Dates of Conferences:

LEGEND:

Taxpayer =
P =
Year 1 =
Year 2 =
Date 1 =
Date 2 =
Date 3 =
Date 4 =
X =

ISSUES

Issue (1): Were Taxpayer's assembling, repackaging, and transportation costs "section 471 costs" for purposes of § 263A of the Internal Revenue Code at the time Taxpayer requested permission to change its method of accounting for them?

Issue (2): Did the Commissioner have authority to grant Taxpayer consent to change the classification of its assembling, repackaging and transportation costs capitalized prior to the enactment of § 263A from § 471 costs to additional § 263A costs?

Issue (3): Did Taxpayer receive the Commissioner's consent to reclassify the subject costs as additional § 263A costs?

Issue (4): Did Taxpayer implement the subject consent agreement properly when it removed the subject costs from its book ending inventory (previously capitalized using a burden rate) using a "high-level" adjustment when it calculated its § 471 costs?

Issue (5): Is Taxpayer entitled to relief under § 7805(b)?

CONCLUSIONS

Issue (1): The assembling, repackaging, and transportation costs capitalized by Taxpayer prior to the enactment of § 263A were "section 471 costs" for purposes of § 263A at the time Taxpayer requested permission to change its method of accounting for them.

Issue (2): The Commissioner did have authority to grant Taxpayer consent to change the classification of its assembling, repackaging and transportation costs capitalized prior to the enactment of § 263A from § 471 costs to additional § 263A costs.

Issue (3): Taxpayer received Commissioner's consent to reclassify the subject costs and treat them as additional § 263A costs.

Issue (4): Taxpayer did not implement the subject consent agreement properly when it removed the subject costs from its book ending inventory (previously capitalized using a burden rate) by using a "high-level" adjustment when it calculated its § 471 costs.

Issue (5): Taxpayer is not entitled to relief under § 7805(b).

FACTS

Taxpayer is a reseller of X. Taxpayer is a member of an affiliated group that files consolidated federal income tax returns. Taxpayer uses an overall accrual method of accounting. Taxpayer accounts for inventories under the first-in, first-out (FIFO) method, valued at retail lower of cost or market. Prior to the enactment of § 263A, Taxpayer capitalized certain assembly, repackaging and transportation costs (hereinafter "handling costs") to ending inventory via the use of book burden rates. At all relevant times, Taxpayer used the simplified resale method with the historic absorption ratio election to allocate additional § 263A costs.

For all relevant periods (both before and after the enactment of § 263A), the Taxpayer used its book inventory method as a starting point to determine its § 471 costs and ending inventory for tax purposes. In Year 1, Taxpayer started using a new inventory cost system, P, to calculate its book inventory costs. Using the P system, the Taxpayer continued to capitalize most costs (including the costs at issue) to inventory at the item level using several burden rates.[1] Under this system Taxpayer's various handling costs were capitalized to different items at different rates. Taxpayer used the P system during all years relevant to this technical advice request.

On Date 2, in an Application for Change in Accounting Method (Form 3115), Taxpayer requested "a change in accounting method for inventoriable costs under Internal Revenue Code ("IRC") §§ 263A and 471." Taxpayer sought to reclassify the handling costs (which were treated as § 471 costs) as additional § 263A costs. In its request, Taxpayer stated that the "taxpayer currently treats certain costs, which are specified as handling costs for purposes of IRC § 263A, (such as processing, assembling, repackaging, transporting, and other similar activities), with respect to property acquired for resale, as IRC § 471 costs." Taxpayer proposed to treat "all handling costs as additional § 263A costs under Treas. Reg. § 1.263A-3(c)(4)." Prior to Year 2, the costs that were the subject of the Year 2 change in method of accounting were capitalized to book inventory at the item level, but were not removed as part of the conversion from book ending inventory to § 471 costs in ending inventory.

On Date 3, the Internal Revenue Service ("Service") requested additional information from Taxpayer. Specifically, the Service asked Taxpayer to "provide a complete list of the costs the taxpayer presently treats as § 471 costs that it proposes to treat as additional § 263A costs." The Service also asked Taxpayer to provide a "detailed justification for the taxpayer's proposed change, including the authority supporting the change."

Taxpayer responded by providing a definition of assembling costs, repackaging costs, and transportation costs based on § 1.263A-3(c)(4)(iii), (iv), & (v) of the Income Tax Regulations. As justification for its change, Taxpayer quoted the definitions for assembling costs, repackaging costs, and transportation costs found in § 1.263A-3(c)(4).

On Date 4, the Service issued a Consent Agreement. The Consent Agreement stated, in relevant part, that "the taxpayer will no longer treat certain costs as § 471 costs that the taxpayer indicates are additional § 263A costs. These are assembling costs, repackaging costs, and transportation costs. Instead, the taxpayer will treat these costs as additional § 263A costs." Taxpayer was required to revise its historic absorption ratio ("HAR") to reflect its reclassified costs. The Consent Agreement states

[1] Taxpayer asserts, to the contrary, that some of its costs were not capitalized at the item level. Assuming, *arguendo,* that Taxpayer's description of this fact is correct neither the conclusion of this technical advice memorandum nor the analysis used in reaching the conclusion would change for the reasons discussed below.

that "the taxpayer's § 471 costs under the simplified resale method will include the cost of merchandise determined in accordance with § 1.471-3. The taxpayer's additional § 263A costs under the simplified resale method will include all indirect costs, other than interest, that the taxpayer must capitalize under § 263A that are not treated as § 471 costs."

The Consent Agreement states that the director "must apply the ruling in determining the taxpayer's liability unless the director recommends that the ruling should be modified or revoked." It further indicates that the director will ascertain whether (1) the representations on which this ruling was based reflect an accurate statement of the material facts, (2) the amount of the § 481(a) adjustment properly determined, (3) the change in method of accounting was implemented as proposed in accordance with the terms and conditions of the Consent Agreement and Rev. Proc. 97-27, 1997-1 C.B. 680, (4) there has been any change in material facts on which the ruling was based during the period the method of accounting was used, and (5) there has been any change in the applicable law during the period the method of accounting was used.

Taxpayer implemented the method change by performing several computations. To start, Taxpayer recomputed its HAR by making three "high-level adjustments" to the HAR for the years that made up the test period. First, Taxpayer made "high-level" adjustments (i.e., adjustments that do not remove costs at the item level) to book cost of goods sold in order to recompute the § 471 costs to be included in the denominator of the HAR. Second, the denominator of the HAR was reduced by the handling costs that were the subject of its method change. The last "high-level" adjustment involved adding the aforementioned handling costs to the numerator of the HAR.

Next Taxpayer computed its § 471 costs in ending inventory. One of the adjustments to convert Taxpayer's book ending inventory to its § 471 costs in ending inventory involved removing the handling costs that were the subject of its accounting method change from its book ending inventory. In performing conversions of this type, Taxpayer regularly removed certain costs (that had been capitalized at the item level) from its book ending inventory using a high-level adjustment. The "high-level" adjustments are generally made by multiplying Taxpayer's book ending inventory by a fraction. The fraction is based, in-part, on the relationship between all § 471 costs in ending inventory and the total § 471 costs incurred during the year. The product is then subtracted from book ending inventory. Taxpayer neither described this method of removing § 471 costs nor sought permission to use this method when it requested permission to change its method of accounting for the costs at issue in this request for technical advice.[2] However, Taxpayer used this method to remove the handling costs that were the subject of its accounting method change from its book ending inventory.

[2] While Taxpayer asserts that the Service has not changed this methodology when examining Taxpayer's returns for prior years and has even occasionally used the methodology in proposing adjustments for prior years there is nothing to indicate that the Service has ever granted a change in accounting method requested by Taxpayer using this methodology.

Taxpayer's method of removing the handling costs at issue from its § 471 costs affected the amount of other costs included in § 471 costs. In particular, Taxpayer's method of removing § 471 costs in the aggregate results in the removal of an amount of § 471 costs different from the amount of § 471 costs that would be removed if Taxpayer had readjusted its burden rates to stop treating such costs as § 471 costs. This difference results because the costs at issue were capitalized to different items at different rates by Taxpayer under its book method of accounting while the costs were removed from ending inventory based on the overall percentage of costs remaining in ending inventory. [3]

LAW AND ANALYSIS:

The request for technical advice in this case centers around Taxpayer's change in its method of accounting for certain assembling, repackaging and transportation costs that Taxpayer capitalized under its book method of accounting prior to the enactment of § 263A. The first several issues focus on whether the Taxpayer may change its method of accounting for these types of costs. For the reasons discussed below, Taxpayer was permitted to change its method of accounting for the costs at issue. This raises the issue of whether Taxpayer changed its method of accounting in a permissible manner. The final issue in this request for technical advice is raised by the conclusion, described below, that Taxpayer did not change its method of accounting in a permissible manner. This last issue is whether Taxpayer is entitled to relief under § 7805(b). As discussed below, Taxpayer is not entitled to relief under § 7805(b).

1) Were Taxpayer's assembling, repackaging, and transportation costs "section 471 costs" for purposes of § 263A at the time Taxpayer requested permission to change its method of accounting for them?

The initial issue for consideration in the request for technical advice is whether Taxpayer's handling costs were § 471 costs for purposes of § 263A when Taxpayer requested permission to change its method of accounting for them. Section 1.263A-1(d)(2)(i) provides that for purposes of the regulations under § 263A, a taxpayer's § 471 costs are the costs, other than interest, capitalized under its method of accounting immediately prior to the effective date of § 263A. In this case, Taxpayer capitalized the handling costs at issue prior to the effective date of § 263A. Those handling costs so capitalized were § 471 costs for purposes of § 263A at the time Taxpayer filed its request for a change in method of accounting. See § 1.263A-1(d)(2)(i).

[3] This difference could theoretically result in either the removal of more costs from § 471 costs than were included under Taxpayer's original method of accounting or the removal of less than all the handling costs that were the subject of the method change. In the present case, the net result of Taxpayer's calculations was to lower the value of its ending inventory by an amount exceeding the amount originally included as § 471 costs in ending inventory under Taxpayer's method of accounting for financial reporting purposes. In effect, Taxpayer's methodology resulted in the removal of costs other than the handling costs at issue from its § 471 costs.

2) Did the Commissioner have authority to grant Taxpayer consent to change the classification of its assembling, repackaging and transportation costs capitalized prior to the enactment of § 263A from § 471 costs to additional § 263A costs?

The next issue to be considered is whether the Commissioner had authority to grant Taxpayer permission to change its method of accounting for the handling costs at issue in this case by permitting Taxpayer to reclassify those costs as additional § 263A costs. The field asserts that the Commissioner does not have the authority to grant Taxpayer permission to reclassify § 471 costs as additional § 263A costs. Specifically, the field reasons that the Commissioner's authority is limited under § 1.263A-1(d)(2)(iii) to situations in which taxpayers also change their method of accounting for financial reporting purposes for costs described in § 1.471-11(c)(2)(iii). The field also reasons that changes under § 1.263A-1(d)(2)(iii) are limited to producers because of the reference to "category 3" costs in that section. Taxpayer, on the other hand, takes the position that the Commissioner had authority to grant Taxpayer permission to reclassify the handling costs at issue.

As noted above, § 1.263A-1(d)(2)(i) defines § 471 costs as the costs, other than interest, capitalized under a taxpayer's method of accounting immediately prior to the effective date of § 263A. The regulation further provides that if a taxpayer included a cost described in § 1.471-11(c)(2)(iii) [which applies to category 3 costs of manufacturers] in its inventoriable costs immediately prior to the effective date of § 263A, that cost is included in the taxpayer's § 471 costs. See § 1.263A-1(d)(2)(iii). Section 1.263A-1(d)(2)(iii) goes on to provide that a change in the financial reporting practices of a taxpayer for costs described in § 1.471-11(c)(2)(iii) subsequent to the effective date of § 263A does not affect the classification of those costs as § 471 costs. Finally, the last sentence of § 1.263A-1(d)(2)(iii) notes that a taxpayer may change its established methods of accounting used in determining § 471 costs only with the consent of the Commissioner.

The clear import of the last sentence of § 1.263A-1(d)(2)(iii) is that taxpayers may change their method of accounting for § 471 costs with the consent of the Commissioner. This interpretation of the regulation finds support in the preamble of the temporary regulations that preceded § 1.263A-1. In discussing the simplified production method of accounting, a method that the preamble notes is similar to the simplified resale method, the preamble indicates that "[a]ny change in the determination of section 471 costs which would constitute a change in method of accounting under law prior to the Act shall be deemed to constitute a change in method of accounting under section 263A, and is thus subject to all requirements of law regarding such change." See T.D. 8131, 1987-1 C.B. 98, 102.

In support of its position, the field first argues that the Commissioner's authority under § 1.263A-1(d)(2)(iii) is limited to situations in which a taxpayer also changes its method of accounting for financial reporting purposes for costs described in § 1.471-

11(c)(2)(iii). In addition, the field reasons that changes under § 1.263A-1(d)(2)(iii) are limited to producers because of the reference to "category 3" costs in that section.

The first two sentences of § 1.263A-1(d)(2)(iii) provide specific rules for taxpayers relating to costs described in § 1.471-11(c)(2)(iii). However, they do not limit the ability of the Commissioner to grant changes in methods of accounting for § 471 costs generally. Nor do the first two sentences of § 1.263A-1(d)(2)(iii) limit the ability of the Commissioner to reclassify § 471 costs as additional § 263A costs. Indeed, the definition of additional § 263A costs refers to amounts not capitalized prior to the enactment of § 263A "adjusted as appropriate for any changes in methods of accounting for section 471 costs." See § 1.263A-1(d)(3). In short, nothing in § 1.263A-1(d) limits the Commissioner's authority to grant a change allowing a taxpayer to reclassify costs (including costs described in § 1.471-3(b)) from § 471 costs to additional § 263A costs. Accordingly, the Commissioner had authority to grant Taxpayer consent to change the classification of its assembling, repackaging and transportation costs capitalized prior to the enactment of § 263A from § 471 costs to additional § 263A costs.

3) Did Taxpayer receive the Commissioner's consent to reclassify assembling, repackaging and transportation costs from § 471 costs to additional § 263A costs?

Having determined that the costs at issue were § 471 costs and that the Commissioner had authority to allow Taxpayer to change its methods of accounting for § 471 costs, the next issue is whether Taxpayer received the Commissioner's consent to reclassify assembling, repackaging and transportation costs from § 471 costs to additional § 263A costs. This issue centers on whether Taxpayer informed the Service that the costs for which it sought permission to change its method of accounting were § 471 costs. For the reasons explained below, Taxpayer received the Commissioner's consent to reclassify assembling, repackaging and transportation costs from § 471 costs to additional § 263A costs.

The field argues that the Consent Agreement is best construed as not applying to § 471 costs because Taxpayer did not indicate in its submission (1) that Taxpayer capitalized the costs at issue prior to the enactment of § 263A and (2) that at least some of the costs were required to be capitalized under § 1.471-3(b) prior to the enactment. Under this line of reasoning, the Commissioner could not have granted consent to Taxpayer's change in accounting method because Taxpayer neither described the change to the Commissioner nor specifically requested permission to make the change.

Taxpayer's Year 2 Form 3115 stated that "the taxpayer proposes to treat handling costs that are currently **characterized as** section 471 costs as additional 263A costs under Treas. Reg. § 1.263A-3(c)(4)." (emphasis added). While the Taxpayer's Form 3115 did not specifically state that the subject costs were capitalized prior to the enactment of § 263A, the above-quoted statement indicated that the treatment of § 471 costs were at issue in Taxpayer's request. By definition § 471 costs are those costs

that a taxpayer capitalized under its method of accounting immediately prior to the effective date of § 263A. See § 1.263A-1(d)(2). In short, the Commissioner was aware that Taxpayer was requesting permission to change its method of accounting for § 471 costs. Taxpayer's Year 2 Form 3115 did not mislead the Commissioner on this point.

Issue (4): Whether Taxpayer implemented the subject consent agreement properly when it removed the subject costs from its book ending inventory (previously capitalized using a burden rate) using a "high-level" adjustment when it calculated its § 471 costs.

As noted above, the Consent Agreement gives Taxpayer permission to cease treating the relevant costs as § 471 costs and to begin treating them as additional § 263A costs. Under the Consent Agreement, the field must apply the ruling in determining the taxpayer's liability unless it recommends that the ruling be modified or revoked. Further, the field is to ascertain, *inter alia*, whether the change in method of accounting was implemented as proposed in accordance with the terms and conditions of the Consent Agreement and Rev. Proc. 97-27. For the reasons described below, Taxpayer did not implement the Consent Agreement as proposed.

An understanding of Taxpayer's method of accounting for the costs at issue is necessary to understanding why the Consent Agreement was not properly implemented. Taxpayer uses its book inventory method as a starting point to determine its § 471 costs in ending inventory. The Taxpayer's book inventory method capitalizes most costs (including the costs at issue) to inventory at the item level using several burden rates. Under this method of accounting the amount of § 471 costs that remain in ending inventory depends on the mixture of the various items in ending inventory.

The Consent Agreement granted Taxpayer permission to reclassify, as additional § 263A costs, certain assembling costs, repackaging costs, and transportation costs that Taxpayer treated as § 471 costs. To implement the new method granted by the Consent Agreement, Taxpayer needed to remove the assembling costs, repackaging costs, and transportation costs from its book ending inventory when converting book ending inventory to § 471 ending inventory on a year to year basis, and also recalculate the § 471 costs and the additional § 263A costs in its HAR.

Taxpayer's method of removing the assembling costs, repackaging costs, and transportation costs from its § 471 costs under the Consent Agreement differs significantly from the method it used to include those costs for financial accounting purposes. Taxpayer first capitalized the handling costs to inventory using several burden rates with the result that various handling costs were capitalized to different items at different rates. Taxpayer then removed the costs using a "high-level" adjustment (i.e., an adjustment that does not remove costs at the item level) rather than by adjusting its burden rates. The adjustment is generally made by multiplying Taxpayer's book ending inventory by a fraction. The fraction is based, in-part, on the relationship between all § 471 costs in ending inventory and the total § 471 costs incurred during the year. The product is subtracted from book ending inventory.

Taxpayer's method of removing § 471 costs in the aggregate results in the removal of an amount of § 471 costs different from the amount of handling costs originally included in Taxpayer's § 471 costs under Taxpayer's original method of accounting. This difference results because the costs at issue were capitalized to different items at different rates by Taxpayer under its book method of accounting while the costs were removed from ending inventory based on the overall aggregate percentage of costs remaining in ending inventory. This manner of implementing the Consent Agreement means that the amount removed from § 471 costs differs from the amount originally included in inventory under Taxpayer's method of accounting for financial accounting purposes. By removing costs in excess of the costs that were originally capitalized using Taxpayer's book method, Taxpayer effectively reclassified costs that were not the subject of Taxpayer's Form 3115.

The Consent Agreement granted Taxpayer permission to reclassify, as additional § 263A costs, only certain assembling costs, repackaging costs, and transportation costs that Taxpayer treated as § 471 costs. It did not grant Taxpayer permission to remove additional amounts. Nor did it grant Taxpayer permission to remove less than the full amount of the assembling costs, repackaging costs, and transportation costs that Taxpayer treated as § 471 costs. Nevertheless, this resulted from the manner in which Taxpayer implemented its change in method of accounting. As a result, Taxpayer did not properly implement the change in accounting method described in the Consent Agreement.[4]

Taxpayer advances several arguments in support of its position that its change in method of accounting was proper. These arguments are not persuasive for the reasons described below.

First, Taxpayer argues that § 1.263A-7 allows the use of reasonable estimates when a taxpayer changes its method of accounting for costs under § 263A. Section 1.263A-7(c)(2) provides that estimates may be used in some circumstances for revaluing inventory as a result of a change in accounting method. While the subject change is a change in method of calculating costs under § 263A, Taxpayer's reliance on § 1.263A-7(c) is misplaced because the issues presented by this request for technical advice involve the use of estimates on an on-going basis. Calculation of a § 481(a) adjustment is only consequentially affected by the initial determination, at issue here, of whether Taxpayer properly implemented its new method of accounting on an on-going basis.[5]

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[4] This memorandum does not address whether use a high-level adjustment to remove § 471 costs from § 471 costs in ending inventory might be appropriate in other situations.

[5] This technical advice memorandum does not determine whether Taxpayer properly could rely on § 1.263A-7 if the amount of the § 481(a) adjustment, and not the appropriateness of how Taxpayer implemented its new method, were at issue Nevertheless, it is worth noting that Taxpayer would have to show that the amount of the costs at issue requiring estimates was not significant. See § 1.263A-7(c)(2)(iii)(A)(2).

Second, Taxpayer argues that because it uses the simplified method to compute its additional § 263A costs, it should be permitted to use a simplified method to recompute its § 471 costs. However, while § 1.263A-3(d) provides for a simplified method for resellers to determine the amount of additional § 263A costs allocable to ending inventory, neither that method, nor any other method provides a simplified method to capitalize § 471 costs or remove such costs from inventory.

Finally, Taxpayer argues that it should be permitted to use a high-level adjustment to remove the subject costs because it had always removed other similar costs from book ending inventory using a high-level adjustment. As noted in the facts, Taxpayer neither described this method of removing § 471 costs nor sought permission to use this method when it requested permission to change its method of accounting for the costs at issue in this request for technical advice. Even if Taxpayer did have such a pre-existing method, this does not address the fact that Taxpayer asked for permission to remove very specific costs and its method removes costs other than those costs specified in its Form 3115 and additional information letters.[6]

Issue (5): Is Taxpayer entitled to § 7805(b) relief?

Taxpayer argues that if the Service is adverse to its position, it should be granted relief from retroactive application pursuant to § 7805(b). Taxpayer reasons that it is entitled to § 7805(b) relief because (1) Taxpayer went through the formal process of requesting consent by filing a Form 3115, and the Service granted a Consent Agreement; (2) the Service created a valid and reasonable basis for Taxpayer to rely on such Consent Agreement and to change its accounting method and procedures; and (3) Taxpayer would suffer detrimentally as a result of its reasonable reliance on the Consent Agreement. The Taxpayer also argues that none of the conditions exist that would justify retroactive revocation of the Consent Agreement. For the reasons described below, Taxpayer is not entitled to relief under § 7805(b).

A letter granting consent to a change in accounting method is a letter ruling. A letter ruling found to be in error or not in accord with the current views of the Service may be revoked or modified. See § 601.204(c) of the Procedural and Administrative Regulations; see also § 11.04 of Rev. Proc. 2005-1, 2005-1 I.R.B. 1. When a letter ruling is revoked, the revocation applies to all years open under the statute of limitations unless the Service exercises its discretionary authority under § 7805(b) to limit the retroactive effect of the revocation. See id. However, § 601.201(l)(5) of the Procedural and Administrative Regulations provides, in part, that except in rare and unusual circumstances, the revocation or modification of a ruling will not be applied retroactively with respect to the taxpayer to whom the ruling originally was issued or to a taxpayer

[6] Because Taxpayer did not properly implement the Consent Agreement for the reasons discussed above, it is unnecessary to determine whether Taxpayer recharacterized as additional § 263A costs amounts for transportation that are part of the cost of merchandise under § 1.471-3. However, any such recharacterization seemingly would be inconsistent with the Consent Agreement.

whose tax liability directly was involved in such ruling if (i) there has been no misstatement or omission of material facts, (ii) the facts subsequently developed are not materially different from the facts on which the ruling was based, (iii) there has been no change in the applicable law, (iv) the ruling originally was issued with respect to a prospective or proposed transaction, and (v) the taxpayer directly involved in the ruling acted in good faith in reliance upon the ruling and the retroactive revocation would be to his detriment. See also § 11.06 of Rev. Proc. 2005-1. Failure to satisfy any one of the conditions contained in that section justifies the denial of relief.

Contrary to Taxpayer's assertion, this request for technical advice does not involve the revocation of a letter ruling by the Service. Rather, as noted above, Taxpayer did not properly implement the Consent Agreement. Accordingly, § 601.201(l)(5) of the Procedural and Administrative Regulations does not apply in this case.

In support for its request for relief under § 7805(b), Taxpayer argues that the Service is effectively precluding it from using its existing, long established method for reclassifying § 471 costs using an aggregate high-level adjustment. However, Taxpayer neither described this method of removing § 471 costs nor sought permission to use this method when it requested permission to change its method of accounting for the costs at issue in this request for technical advice. When a taxpayer files a Form 3115 requesting the Commissioner's consent to a change in method of accounting, the taxpayer has "a duty to reveal all material factors pertinent to its request for an accounting method change." Cochran Hatchery, Inc. v. Commissioner, T.C. Memo 1979-390. Taxpayers can not shift this burden to the National Office. See id. Taxpayer argues that the Service was aware of and acquiesced to Taxpayer's use of high-level adjustments to remove § 471 costs. Accepting, arguendo, that Taxpayer has such a method, Taxpayer's failure to inform the Service of this method when Taxpayer filed its Form 3115 mitigates against granting relief under § 7805(b). Further, the Service's silence concerning a particular issue (in the Consent Agreement) should not be construed as acquiescence and can not be relied upon as a basis for obtaining retroactive relief under the provisions of § 7805(b).

Finally, having implemented the Consent Agreement improperly, Taxpayer cannot be said to have relied on it. Specifically, in this case, Taxpayer asked for permission to reclassify specific handling costs that Taxpayer was treating as § 471 costs. However, as noted earlier, the change made by Taxpayer removes an amount of costs that differs from the amount of costs that it asked to reclassify.

For the foregoing reasons, Taxpayer is not entitled to relief under § 7805(b).

CAVEAT(S):

A copy of this technical advice memorandum is to be given to the taxpayer(s). Section 6110(k)(3) of the Code provides that it may not be used or cited as precedent.