
Internal Revenue Service
memorandum

date: AUG 16 1996

to: Compliance Coordinator for Tax Systems Modernization (TSM)
CP:CO:SC

from: Associate Chief Counsel (Domestic) CC:DOM

subject: Assessments Under Customer Service

This responds to your March 12, 1996, memorandum to the Special Counsel (Modernization and Strategic Planning).

In earlier advice, we discussed the rules governing waiver of restrictions on assessment applicable to individuals' income tax deficiencies, as asserted in the Underreporter Program. See the June 9, 1995, memorandum from the Deputy Chief Counsel and ~~the September 26, 1995, memorandum from the Assistant Chief Counsel (Field Service)~~. You now seek a more general explanation of the assessment rules for businesses and individuals.

ISSUES

(1) What taxes are subject to the restrictions on assessment under section 6213(a) of the Internal Revenue Code?

(2) Where required by section 6213(d), may a "signed notice in writing" waiving the restrictions on assessment be in other than pen-to-paper form, e.g., on-line?

(3) What are the potential liabilities of Service personnel for improper disclosure of tax information when discussing assessments?

(4) What are the potential liabilities of Service personnel seeking to enforce collection of assessments?

CONCLUSIONS

(1) "Deficiency taxes" are subject to the restrictions on assessment under section 6213(a) of the Code. "Nondeficiency taxes" are not.

(2) A "signed notice in writing" waiving the restrictions on assessment under section 6213(d) may be in any written form prescribed by the Secretary, including "on-line." However, this writing cannot, by definition, be solely oral.

(3) An unauthorized disclosure of tax information could result in criminal liability against a Service employee pursuant to section 7213 and/or civil liability against the United States pursuant to section 7431. Service personnel may disclose assessment (or other tax) information to the taxpayer, the taxpayer's attorney in fact under section 6103(e)(6), or the taxpayer's designee under section 6103(c). Regardless of the form of communication, Service personnel must ensure that the person receiving the tax information is an authorized recipient under section 6103.

(4) Section 7433 gives taxpayers a civil cause of action for damages against the United States, if an IRS officer or employee recklessly or intentionally disregards any provision of the Code in collecting Federal tax. The courts are divided on whether the action would lie for collection of improperly assessed taxes.

DISCUSSION

Issue 1: Restrictions on Tax Assessment

The Internal Revenue Code's assessment scheme distinguishes between taxes subject to the deficiency procedures ("deficiency taxes") and taxes not subject to the deficiency procedures ("nondeficiency taxes").

Sections 6201-6207 govern assessment of nondeficiency taxes. Pursuant to sections 6202 and 6203, the Secretary has promulgated regulations providing general assessment procedures for "nondeficiency" taxes. The Service may and does assess these taxes without notice or taxpayer agreement.

Sections 6211-6216 govern the assessment of deficiency taxes. As discussed in our previous memoranda, section 6213 imposes time and notice restrictions on the Secretary's authority to assess tax deficiencies. Under section 6213(a) of the Code, the Service may not assess a deficiency in tax unless a notice of deficiency has been mailed to the taxpayer and the period for filing a Tax Court petition has expired. If a taxpayer timely files a petition disputing a deficiency in Tax Court, the Service may not assess until the decision of the Tax Court becomes final. Section 6213(d) permits a taxpayer to waive the restrictions on assessment by filing a "signed notice in writing" with the Secretary.

The restrictions on assessments under section 6213 are based on the type of tax (deficiency v. nondeficiency) being imposed and not the type of taxpayer (individual, business, etc.) owing the tax. The section 6213(a) restrictions apply only to deficiency taxes imposed by subtitle A or B and chapters 41, 42, 43, and 44 of the Code.

The following is a list of deficiency taxes subject to the section 6213(a) restrictions on assessment:

SUBTITLE A--INCOME TAXES

CHAPTER 1-- Normal Taxes and Surtaxes
(Income tax imposed on individuals, corporations, estates and trusts, etc.)

CHAPTER 2--Tax on Self-Employment Income

CHAPTER 3--Withholding of Tax on Nonresident Aliens and Foreign Corporations

CHAPTER 5--Tax on Transfers to Avoid Income Tax

CHAPTER 6--Consolidated Returns

SUBTITLE B--ESTATE AND GIFT TAXES

CHAPTER 11--Estate tax

CHAPTER 12--Gift tax

CHAPTER 13--Tax on Certain Generation-Skipping Transfers

CHAPTERS 41-44 ONLY OF SUBTITLE D--MISCELLANEOUS EXCISE TAXES

CHAPTER 41--Public Charities

CHAPTER 42--Private Foundations and Certain Other Tax-Exempt Organizations

CHAPTER 43--Qualified Pension, Etc., Plans

CHAPTER 44--Qualified Investment Entities

All other taxes imposed by the Internal Revenue Code are nondeficiency taxes, not subject to the section 6213(a) restrictions on assessments.

You asked whether all taxes on business enterprises are nondeficiency taxes exempt from the section 6213(a) restrictions on assessment. As stated above, the type of tax, not the type of taxpayer, controls. Business enterprises may be subject to both deficiency and nondeficiency taxes. For example, an individual who operates an unincorporated business may be liable for Chapter 1 income tax (deficiency tax) and several nondeficiency taxes; e.g., Chapter 21 (FICA), Chapter 23 (FUTA), and Chapter 24 (Collection of Income Tax at Source on Wages).

Issue 2: Written Waivers of Assessment Restrictions

Where required, waivers of restriction under section 6213(d) must be a "signed notice in writing." The taxpayer's consent as evidenced by a signed writing is a critical legal requirement. In previous advice, we explained why an oral statement cannot be used to satisfy the writing requirement.

Section 6061 of the Code provides that any return, statement, or other document required to be made under the internal revenue laws shall be signed in accordance with forms or regulations prescribed by the Secretary. See section 301.6061-1T of the regulations. In our September 26, 1995, opinion concerning what individuals are authorized to sign, we explained that reliable and verifiable signed writings in electronic form may serve as waivers of restrictions on assessment under section 6213(d). See sections 6062 and 6063 for additional rules concerning what individuals are authorized to sign the returns of corporations or partnerships.

Issue 3: Potential Disclosure Problems

New forms of written waivers of restriction may present problems of identifying the "writer" of the waiver. For example, how would the IRS identify the party writing about an assessment "on line"? From a disclosure standpoint, the Service's responsibility in communicating with taxpayers or authorized third parties is conceptually no different whether the communication is oral, on paper, or "on line." Likewise, it makes no difference whether the Service uses a live assistor or an interactive telephone system. Disclosure issues are raised and resolved based upon the authority of the Service to make the information known, and not the medium of communication.

The disclosure of a taxpayer's own information to the taxpayer is authorized by section 6103 of the Code. Further, a taxpayer may, in writing, specify that a third party receive the taxpayer's information either as an attorney in fact (section 6103(e)(6)) or as the taxpayer's designee (section 6103(c)). From the standpoint of disclosure and privacy laws, the real question is whether the Service can demonstrate that in its direct dealings with the taxpayer or the taxpayer's authorized representative, the Service has taken reasonable steps to ensure that, in fact, it is dealing solely with the taxpayer or taxpayer's authorized representative rather than an unauthorized third party.

An unauthorized disclosure of tax information could result in criminal liability against an IRS employee who wilfully discloses the information in an unauthorized fashion (section 7213). In addition, the United States could be civilly liable if

an employee knowingly or negligently makes an unauthorized disclosure (section 7431).

Issue 4: Potential Liabilities for Improper Collection

Section 7433 of the Code provides that if, in connection with any collection of Federal tax with respect to a taxpayer, any officer or employee of the Internal Revenue Service recklessly or intentionally disregards any provision of the Code, or any regulation promulgated thereunder, then the taxpayer may bring a civil action for damages against the United States in a United States district court. Except as provided in section 7432 (civil damages for failure to release lien), this civil action shall be the exclusive remedy for recovering damages resulting from such actions.

The majority of appellate courts that have considered the issue take the position that section 7433 can only be asserted to challenge unlawful collection practices, and not the validity and merits of an assessment. Shaw v. United States, 20 F.3d 182 (5th Cir. 1995), ~~cert denied, ___ U.S. ___, 115 S. Ct. 635 (1994)~~ (statute's plain language and legislative history indicate taxpayer cannot seek damages under section 7433 for an improper assessment of taxes); Gonsalves v. I.R.S., 975 F.2d 13 (1st Cir. 1992) (incorrect determination of tax not a basis for claim under section 7433). See also, Miller v. United States, 763 F. Supp. 1534, aff'd, 66 F.3d 220 (9th Cir. 1995) (noting distinction between an assessment activity and a collection activity). Therefore, an invalid assessment is not actionable under section 7433.

However, some courts have reached the opposite result. In Crowd Management Services, Inc. v. United States, 792 F. Supp. 87 (D. Or. 1992), aff'd, 26 F.3d 130 (9th Cir. 1994) (unpublished), the taxpayer challenged a section 6672 assessment and sought damages under section 7433. The district court found that a section 6672 assessment is in essence a collection action since the purpose of the penalty assessment is to ensure that taxes are collected. The Ninth Circuit agreed with the position as well as ~~the lower court's ultimate finding that the taxpayer failed to present sufficient evidence to support the section 7433 claim.~~

In Miklautsch v. Gibbs, 90-USTC ¶ 50,587 (D. Alas. 1990), the Service assessed liability for gains from certain investments made by the taxpayers despite a contrary ruling by the Tax Court. The district court construed section 7433 as not limited solely to acts in disregard of proper collection procedures. Rather, in the court's view, the statute governs any act in disregard of any provision in the Internal Revenue Code which is connected with the eventual collection of tax. The district court found that "under a proper interpretation of section 7433, where a tax has

been wrongfully assessed, and the Service goes ahead and enforces collection of the tax, an action shall lie."

We think that, even though the trend of the law favors the position that section 7433 can only be asserted to challenge unlawful collection practices, there remains the hazard, though slight, that a court could find that section 7433 applies to any improper assessment which the Service attempts to collect by enforcement. See also, V-1 Oil Co. v. United States, 813 F. Supp. 730 (D. Idaho 1992) (agreeing with Miklautsch that section 7433 is inapplicable where the taxpayer makes a voluntary payment and the Service does not engage in enforcement actions).

If you would like to discuss these issues further, please let us know.

/s/ Daniel J. Wiles

for JUDITH C. DUNN

cc: Deputy Chief Counsel
Associate Chief Counsel (Enforcement Litigation)
Special Counsel (Modernization & Strategic Planning)

Attachments: Previous memoranda (6/9/95, 9/26/95)