

Department
of the
Treasury

Internal
Revenue
Service

Office of
Chief Counsel

Notice

CC-2006-017

August 11, 2006

Subject: Closing Agreements and Assessments **Cancel Date:** Upon incorporation into CCDM

I. Purpose:

This notice clarifies the procedures for assisting the Internal Revenue Service in obtaining waivers of restrictions on assessment in connection with closing agreements in light of the opinion in Manko v. Commissioner, 126 T.C. No. 9 (Apr. 20, 2006).

II. Forms of Closing Agreements:

The Service uses different forms for closing agreements depending on the type of agreement. In cases not involving TEFRA partnerships, the Service uses three forms of closing agreements: 1) an agreement that finally determines tax liability, 2) an agreement that finally determines specific matters, and 3) a combined agreement, which finally determines both tax liability and specific matters. An agreement that finally determines tax liability is typically executed on Form 866. See generally IRM 8.13.1.2.1. This agreement reflects the total corrected tax liability for each period and type of tax covered in the agreement. An agreement that finally determines specific matters is typically executed on Form 906. See generally IRM 8.13.1.2.2. A combined agreement is prepared on plain paper rather than on a designated form and is used when a determination of corrected tax liability for one or more periods encompasses a determination of specific matters affecting other periods. See Rev. Proc. 68-16, 1968-1 C.B. 770, 778; IRM 8.13.1.2.3. The Closing Agreement Manual at Exhibit 8.13.1-4 provides an example of a combined agreement. This form of closing agreement is less commonly used than the other forms of closing agreements. In cases involving TEFRA partnerships, Form 866, Form 906, and combined agreements are sometimes used, though specialized TEFRA closing agreement forms, such as Form 870-LT and Form 870-PT, are more common.

III. Effect of Closing Agreement on Deficiencies:

Closing agreements are final determinations, which often result in deficiencies. The Service has very broad authority to assess taxes under section 6201, but its authority to assess deficiencies in income taxes, estate taxes, gift taxes, and certain excise taxes is subject to special rules and restrictions under section 6213. As a result, before assessing any deficiency flowing from the resolution of the issues in a closing agreement, the Service must ensure either that the taxpayer has properly waived any restrictions on assessment or that the restrictions on assessment

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under section 6213 do not otherwise apply. A taxpayer can waive the restrictions on assessment in several ways. The two most commonly relied upon in connection with closing agreements are: 1) on a separate waiver form, such as Form 870, "Waiver of Restrictions on Assessment and Collection of Deficiency in Tax and Acceptance of Overassessment," or, 2) by a waiver provision integrated into the closing agreement. If a waiver is integrated into the closing agreement, the best practice is to make it explicit (e.g., "By signing this agreement, taxpayer consents to the assessment and collection of the liabilities for tax, interest, additions to tax, and penalties determined by or resulting from the determinations of this agreement, waiving all defenses against and restrictions on the assessment and collection of those liabilities.")

Sometimes, a specific matter closing agreement will not result in an increase to the taxpayer's liability. For example, a specific matter closing agreement might determine that a disputed deduction was, in fact, proper. In these cases, it would not be necessary to request the taxpayer to waive the restrictions on assessment to participate in a closing agreement.

IV. Manko v. Commissioner:

An assessment based upon a closing agreement may be invalidated if the taxpayer did not waive restrictions on assessment. In Manko, taxpayers executed a Form 906, "Closing Agreement on Final Determination Covering Specific Matters," agreeing with the Service on the treatment of non-TEFRA partnership items for 1988 and 1989. Taxpayers did not waive the restrictions on making an assessment, either in the closing agreement itself or in a separate form. Without resorting to the deficiency procedures, the Service assessed deficiencies for taxpayer's 1988 and 1989 tax liabilities, based on the determinations in the closing agreement. After the period of limitations for 1988 and 1989 had lapsed, taxpayers brought a collection due process action under section 6330(d), challenging the Service's proposed levy of their assessed tax liabilities.

In court, taxpayers argued that collection could not proceed because the Service had not issued a statutory notice before making an assessment. Although the Service argued that taxpayers had implicitly waived the restrictions on assessment, the court did not agree. The Tax Court concluded that a closing agreement covering specific matters, while binding the parties to the matters agreed upon, does not render a deficiency notice unnecessary. The court contrasted the Form 906 used by the parties with the Form 866, "Agreement as to Final Determination of Tax Liability," which determines a taxpayer's liabilities for a specific tax year. The latter type of closing agreement, said the court, requires no deficiency notice before assessment, as the closing agreement itself provides the necessary authority for making an assessment. See Marathon Oil Co. v. United States, 42 Fed. Cl. 267, 280 (1998), aff'd per curiam, 215 F.3d 1343 (Fed. Cir. 1999); Manko, 126 T.C. No. 9 at 12-13. Observing that the parties never agreed to the amount of taxpayers' liabilities for the years at issue, the court held that the Service could not proceed with collection.

V. Waivers and Interest:

Waivers of restriction on assessments can result in the suspension of interest on the underlying deficiency. If notice and demand for payment of the deficiency is not made within thirty days after the waiver becomes effective, interest cannot be imposed on the deficiency for the period beginning immediately after the thirtieth day and ending with the date of the notice and demand; moreover, interest cannot be imposed during this period on any interest with respect to the deficiency for any prior period. Section 6601(c). In the case of a settlement under section 6224(c) that results in the conversion of partnership items to non-partnership items, interest

must be suspended on the computational adjustment resulting from the settlement if the Service does not make notice and demand for payment of the adjustment within thirty days after the settlement. Id.

Waivers that are not integrated into a closing agreement can be conditioned on the execution of the closing agreement by the Commissioner. If a waiver will become effective when a closing agreement determining tax liability is executed on behalf of the Commissioner, the waiver has no effect on interest; once the Commissioner executes the closing agreement, the restrictions on assessment that section 6213(a) imposes no longer apply. See Rev. Rul. 57-305, 1957-2 C.B. 856. If a waiver will become effective when a closing agreement determining specific matters is executed on behalf of the Commissioner, interest must be suspended under section 6601(c) if the Service does not make notice and demand within thirty days after the closing agreement is executed.

The provisions of the Closing Agreement Manual, IRM 8.13.1, will be modified consistent with this Chief Counsel Notice. Questions regarding this Notice should be directed to Stuart Spielman, Branch 3, Administrative Provisions and Judicial Practice Division, at (202) 622-7950.

/s/

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