

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

CC:PA:05:SKBrophy
POSTS-140455-08

date: November 26, 2008

to: Clinton H. Russell
Supervisory Revenue Officer, Collection, Collection Policy, Case Resolution Alternatives
(Small Business/Self Employed)

from: Gene W. Beard
Senior Technician Reviewer, Branch 5
(Procedure & Administration)

subject: Installment Agreement Requests Without Specific Amounts

Your office requested our views concerning cases in which the Service receives correspondence or a Collection Information Statement from a taxpayer that does not specify an installment payment amount and establishes an installment agreement without further contact with the taxpayer. As explained below, we believe this practice fails to satisfy the requirement that installment agreements be in writing, may cause the improper collection of the installment agreement user fee, and creates uncertainty as to when levy is prohibited based on an installment agreement request.

DISCUSSION

Typically, the Service does not process a request for an installment agreement unless the request identifies the taxpayer, identifies the tax liability, proposes a monthly payment amount, and the taxpayer meets certain tax compliance requirements. IRM 5.14.1.3(4) and IRM 5.19.1.5.4.8(2). IRM 5.19.1.5.4.8(2), however, contains an exception for correspondence requests that don't propose an installment payment amount, and references IRM 5.19.1.5.4.14. As modified on October 10, 2008, IRM 5.19.1.5.4.14 directs that if the Service receives a correspondence or a Collection Information Statement (Form 433-A, Form 433-B, or Form 433-F) that is processable but for the lack of the installment agreement amount, the Service should determine the installment payment amount, input an installment agreement code into the Service's computer system, and send the taxpayer Letter 2273C confirming the agreement and explaining the agreement's terms. No other communication is made with the taxpayer and the correspondence is not treated as a pending installment agreement request for purposes of calculating the collection statute expiration date. Installment agreement request forms (Forms 9465 and 433-D) that do not contain installment payment amounts are processed the same way. (Form 433-D is used to authorize agreements that will be paid via direct debits from the taxpayer's bank account, but no direct debit agreements are established when the form does not contain an installment

payment amount.) [REDACTED]

We believe that when an installment agreement request or other correspondence contains no proposed installment payment amount, an installment agreement is not established until the taxpayer makes a payment in the amount indicated by the Service, or otherwise evinces agreement to the terms proposed by the Service. I.R.C. § 6159(a) gives the Service the authority to enter into a written installment "agreement" with a taxpayer if it will facilitate the full or partial collection of such liability. While an installment agreement is not a contract between the Service and the taxpayer because there is no consideration given on the part of the taxpayer, the use of the term "agreement" contemplates a mutual understanding of the material terms, including the amount of the required installment payments. There has been no mutual understanding of the installment payment amount until the taxpayer agrees to the Service's proposed amount. When a taxpayer makes a payment in the required amount, the taxpayer exhibits agreement with the terms offered by the Service and an installment agreement is reached.

The practice prescribed in IRM 5.19.1.5.4.14 does not meet the requirement in the Internal Revenue Code that installment agreements be in writing [REDACTED]. I.R.C. § 6159(a) authorizes the Service to enter into written installment agreements. The regulations under section 6159 provide that the writing may either take the form of a document signed by the taxpayer and the Service, or a written confirmation of an agreement entered into by the taxpayer and the Service that is sent to the taxpayer. Treas. Reg. § 301.6159-1(b)(2). See also Prop. Treas. Reg. § 301.6159-1(c)(2), 72 Fed. Reg. 9712, 9715 (March 5, 2007). In the situation your office described, there is no document signed by the Service and the taxpayer that shows the installment agreement payment amount. Also, the letter sent by the Service reflecting its determination of the acceptable payment amount is not a written confirmation of an (oral) agreement entered into by the taxpayer and Service because there was no agreement at the time the letter was sent. The Service has not, therefore, met the requirement that the installment agreement be in writing. (The Service is bound, however, by the "agreement" identified in the Letter 2273C and cannot alter, modify, or terminate the agreement other than for the reasons listed in I.R.C. § 6159(b).)

Another problem with the practice your office described is that the Service may be improperly collecting the installment agreement user fee. Under 26 C.F.R. § 300.0, the user fee is imposed on the entering into of an installment agreement and 26 C.F.R. § 300.1 specifies that the fee applies to installment agreements entered into under I.R.C. § 6159. While we would disagree, taxpayers could argue that the user fee does not apply to the agreements at issue because the agreements were not in writing and were therefore outside the scope of section 6159. Further, the user fee would clearly not apply in situations where the taxpayer did not consent to the terms proposed by the Service. The Service typically collects the user fee by subtracting it from the initial

payment(s) made under the agreement. If, under the practice your office described, the taxpayer makes a tax payment, but does not pay the amount that was proposed by the Service, there would be no agreement and the Service should not collect the user fee from the payment.

The writing requirement and user fee problems may not apply when the Service establishes an installment agreement based on a Form 9465 Installment Agreement Request with a blank payment amount. Form 9465 contains the instruction, "If a payment amount is not listed on line 11, one will be determined for you by dividing the balance due by 60 months." [REDACTED]

[REDACTED] this instruction shows that the taxpayer agreed to the amount to be determined by the Service, and the Service can therefore agree to the term by so calculating the payment amount and notifying the taxpayer that the installment agreement request was granted.

[REDACTED] Collection Information Statement Forms 433-A and 433-B do not mention installment payments. Form 433-F contains a brief section entitled "Additional Information" that provides:

1. **We cannot consider an installment agreement unless all returns have been filed. Attach a signed copy of ALL unfiled return(s).**
2. Proposed Monthly Installment Agreement Payment Amount: _____
3. Please explain any expected changes to future income or expenses:

(emphasis in original). Form 433-F does not otherwise mention installment agreements. It is unclear, therefore, whether the taxpayer has requested an installment agreement when a Collection Information Statement is submitted. Further, such an agreement does not specify the tax that would be subject to the liability and therefore would not be "pending" under the Service's procedures. The establishment of an installment agreement based on such a Form 433-F, as well as Forms 433-A and 433-B, may therefore result in the same writing and user fee problems identified above even if an installment agreement amount is specified; there may be no agreement until the taxpayer consents to the terms offered by the Service.

[REDACTED] Levy is prohibited while an installment agreement is "pending" (plus 30 days and any time a proposed rejection is appealed) and the collection statute is likewise tolled for that time. I.R.C. §§ 6331(k) and (i). "Pending" is not defined in the statute or in the regulations and is therefore a matter of the Service's procedures. See Prop. Treas. Reg. § 301.6159-1(c)(2), 72 Fed.

Reg. 9712, 9714 (March 5, 2007) ("A proposed installment agreement becomes pending when it is accepted for processing"). IRM 5.14.1.3(4) sets a clear line as to when an installment agreement request becomes pending; an installment agreement request is only pending, and levy is only prohibited, if there is a request that identifies the taxpayer, identifies the tax liability, proposes a monthly payment amount, and the taxpayer meets certain tax compliance requirements. The practice in IRM 5.19.1.5.4.14, however, blurs the point at which an installment agreement becomes pending because the Service processes correspondence where the installment payment amount is not specified, the amount of the liability is not identified, and it's not even clear that the taxpayer requested an installment agreement. [REDACTED]

[REDACTED]

If you have any questions, please call Shannon Brophy at 202-622-3620.