

Office of Chief Counsel
Internal Revenue Service
Memorandum

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date: July 8, 2013

to: Team Manager Bert W. Bennett (LB&I), Milwaukee

from: Associate Area Counsel (LB&I), Chicago

subject: **Validity of Closing Agreement**

UIL 7121.01-00

Years 20 and 20

This memorandum is in response to your request for advice regarding the validity of a closing agreement that was executed, after a fast-track negotiation, by the Team Manager and the Appeals Team Case Leader, without having been submitted for review by the Joint Committee on Taxation. In our opinion, the closing agreement should have been submitted to the Committee but it is, nonetheless, a valid and enforceable agreement.

This memorandum was coordinated with Deirdre Donnelly of Chief Counsel, Procedure and Administration, Branch 5.

Facts

The taxpayer is a insurance company which

. The taxpayer included as reserves for federal income tax purposes .
In the course of a examination of the returns for 20 and 20 , the Service challenged the taxpayer's deductions for increases in these reserves.

The dispute was referred for settlement under the fast-track mediation procedures. The parties agreed to a decrease in the reserves in the amount of

. There were no carryback adjustments in connection with this

settlement. Because the settlement had a direct impact on multiple future years, a closing agreement was executed. On behalf of the taxpayer, the closing agreement was signed by the Vice-President for tax; on behalf of the Service by the Team Manager and the

Appeals Team Case Leader. The document was signed near the end of November, 20 .

The examination for 20 and 20 remains open due to a failure to reach an agreement on a completely unrelated issue. The Compliance Division is currently in the process of closing the examination and issuing a notice of deficiency on that issue and related penalties.

The taxpayer filed its income tax return for 20 on September 15, 20 . It filed a Form 1139 (Corporation Application for Tentative Refund) six days later, on September 21, 20 . That Form claimed a carryback of net capital loss from 20 to 20 in the amount of , generating a refund of , and the carryback to 20 of an unused general business credit in the amount of , generating a refund of that same amount. The taxpayer filed its income tax return for 20 on September 15, 20 . It filed a Form 1139 fifteen days later, on September 30, 20 . That Form claimed a carryback of net capital loss from 20 to 20 in the amount of , generating a refund of .

Currently, both the taxpayer and the Service are satisfied with the closing agreement on the issue and neither wishes to alter or overturn it.

The Joint Committee on Taxation is a standing committee of Congress consisting of five members of the House of Representatives and five members of the Senate.

Issues and Answers

(1) Was the fast-track settlement at issue subject to Joint Committee review? (Yes)

(2) Does a closing agreement remain valid although the Team Manager and the fast-track Appeals Team Case Leader failed to submit the closing agreement to the Joint Committee prior to execution? (Yes)

(3) Should the settlement be submitted for Joint Committee review prior to closing the examination for these years? (Yes)

Law and Regulations

I.R.C. Sec. 7121 ("Closing Agreements") gives the Secretary of the Treasury the authority "to enter into an agreement in writing with any person relating to the liability of such person . . . in respect of any internal revenue tax for any taxable period."

Treas. Reg. Sec. 301.7121-1(a) delegates the authority to enter into closing agreements to the Commissioner of Internal Revenue.

I.R.C. Sec. 6405(a) states:

No refund or credit of any income . . . tax . . . in excess of \$2 million shall be made until after the expiration of 30 days from the date upon which a report giving the name of the person to whom the refund or credit is to be made, the amount of such refund or credit, and a summary of the facts and the decision of the Secretary, is submitted to the Joint Committee on Taxation.

I.R.C. Sec. 6405(b) states:

Any credit or refund allowed or made under section 6411 ["Tentative carryback and refund adjustments"] shall be made without regard to the provisions of subsection (a) of this section. In any such case, if the credit or refund, reduced by an deficiency in such tax thereafter assessed and by deficiencies in any other tax resulting from adjustments reflected in the determination of the credit or refund, is in excess of \$2 million, there shall be submitted to such committee a report containing the matter specified in subsection (a) at such time after the making of the credit or refund as the Secretary shall determine the correct amount of the tax.

Analysis

Issue (1): Joint Committee Jurisdiction

The first question to consider is whether the fast-track Appeals settlement at issue was subject to Joint Committee (JC or JCT) review. Under I.R.C. Sec. 6405(a), the JC must be given the opportunity to review any proposed refund of more than \$2 million. In such situations, a report is sent to the JC and, if the JC does not object to the refund within thirty days, the refund can be paid or credited. If the JC objects, then the Service will not issue the refund until the JC and the Service reach an agreement with respect to the disputed issues. (There are procedures, not relevant here, for resolving disputes between the Service and the JC. See IRM 4.36.4.)

I.R.C. Sec. 6405(b) applies to a particular kind of proposed refund. In the case of a proposed refund exceeding \$2 million arising under section 6411 ("Tentative carryback and refund adjustments"), the refund shall be paid without JC review, but a report describing the refund shall be provided to the JC once the examination is completed. Such a report is then subject to the review authority given in Sec. 6405(a). If the JC objects to the refund, the Service must then attempt to recover it.

The taxpayer has suggested that the Code makes a distinction between "review" and "report." According to the taxpayer, a proposed refund under Sec. 6405(a) must be "reviewed" by the JC-- and the JC may reject the proposed refund-- while a refund arising under Sec. 6411 need only be "reported" to the JC for informational purposes-- and the JC cannot reject that refund. The taxpayer is incorrect. The JC's authority over all jurisdictional refunds is the right to review the refund prior to issuance by the Service. The only distinction between a section 6405(a) refund and a section 6405(b) refund is that the latter type of refund is paid first and reviewed later, while the former type of refund is submitted to the JC for review prior to issuance.¹

¹ As a matter of policy, until the Service and the JC are in agreement with respect to all aspects of the refund, the Service will refrain from issuing the refund.

In your examination, the taxpayer filed claims for refunds arising from tentative carrybacks of net capital losses under Sec. 6411 within fifteen days of filing its returns for the years 20 and 20 . These refund claims were far in excess of \$2 million. These refund claims were thus subject to post-payment JC review under Sec. 6405. In addition, all adjustments proposed by the Compliance Division for those same years (20 and 20) were also subject to JC review. This is because any proposed adjustment could increase or decrease the Sec. 6405 carryback refund, possibly making it more or less than \$2 million. It follows that the loss adjustment expense (LAE) issue was subject to JC review, even though it was unrelated to the claimed carrybacks, and even though it was settled on terms which did not result in a refund arising from that issue.

Issue (2): Authority to Execute a Closing Agreement

As mentioned above, during the course of the examination for 20 and 20 , a proposed adjustment to the taxpayer's reserve for was subjected to fast track mediation. A compromise was reached on that issue and a closing agreement was signed by the Appeals Team Case Leader and the examination Team Manager. As explained above, this closing agreement embodied an adjustment which should have been, but was not, submitted for JC review.

Closing agreements are authorized by I.R.C. Sec. 7121. This section gives the Secretary of the Treasury the authority to execute a closing agreement on behalf of the government. This authority has been delegated to many lesser officials.

In a fast track settlement, Appeals Officers have the authority to execute a closing agreement under Delegation Order 8-3 (formerly Delegation Order 97). IRM 4.51.4.5.3.9(2) states that "an Appeals Official, such as an Appeals Team Case Leader (ATCL) . . . uses delegated settlement authority to approve and enter into any FTS that involves hazards of litigation by using a Specific Matters Closing Agreement (Form 906) or a waiver Form 870-AD."

The Fast Track Settlement (FTS) procedures are governed by Rev. Proc. 2003-40, 2003-2 D.B. 1044. These procedures allow an issue to be considered and resolved by the Appeals Office during the course of an examination before that examination has been completed. Under Sec. 2.03,

Any recommended settlement by the FTS Appeals Official of an issue in FTS shall be subject to the procedures that would be applicable if the issue were being considered by Appeals, including procedures in the Internal Revenue Manual and existing published guidance. FTS therefore creates no special authority for settlement by the FTS Appeals Official.

Closing agreements are described in IRM 8.13.1 ("Processing Closing Agreements in Appeals"). IRM 8.13.1.1.4.1(4) states that "there are two general limitations on the closing agreement authority of Operating Division officials and other field officials. The first is that the agreements must be with respect to cases under their jurisdiction." IRM 8.13.1.4(1) states that "as explained in Delegation Order 97 . . . Appeals Team managers and Appeals Team Case Leaders . . . have authority to execute closing agreements in cases under their jurisdiction."

IRM 8.13.1.4.6.1(1) states:

In cases subject to Joint Committee jurisdiction that involve a closing agreement, the agreement will be signed by or for the taxpayer, but not by the approving Service official, and will be submitted as part of the original Joint Committee report. However, the report or transmittal should contain a statement indicating tentative approval of the closing agreement by the Compliance Operating Division official. If the Joint Committee on Taxation (JCT) takes no exception to the report and the proposed closing agreement, the Compliance Operating Division official may sign the closing agreement.

In our opinion, the closing agreement was within the Appeals Officer's settlement jurisdiction and his signature is therefore valid to bind the Service to that agreement. In accordance with the above citations, an Appeals Team Case Leader has authority delegated to him to sign closing agreements in settlements reached in a fast-track mediation. Although the settlement at issue here was statutorily required to be submitted to the JC for its review prior to signing the closing agreement, the failure of the ATCL to submit the agreement for review by the JC does not strip the ATCL of signing authority. As explained above, the case is under the

ATCL's "jurisdiction" for settlement purposes; it is simultaneously under the JC's "jurisdiction" for purposes of their review. The JC never has settlement authority-- it cannot negotiate with a taxpayer or sign a closing agreement-- but only the power to review a settlement reached by others. The failure to refer the settlement to the Joint Committee is a violation of Sec. 6405(a), but such failure does not affect the ATCL's settlement authority. We conclude that the closing agreement was validly executed by the ATCL's signature.

Issue (3): Submission of the Case to the Joint Committee

Given that the settlement agreement should have been submitted to the JC for its approval, but was not, and given that the Service is nonetheless bound by the ATCL's signature on the closing agreement, should the matter now be reported to the JC?

IRM 8.7.9.5.2(1) states:

If it is discovered that an overpayment under IRC 6405 in excess of \$2 million has been refunded without a report to the JCT, prepare a report as soon as possible. This must be done even though the statutory period of limitations has expired for one or more years. Explain the failure to submit a timely report in the JC letter.

Although the above section is not directly applicable to your facts, it is clear from this section that, if the Service neglected to refer to the JC a matter subject to JC review, the Service's procedures require the Service to report that issue to the JC even if the refund has been irrevocably paid. We conclude that a report on the issue should be written and referred to the JC as soon as possible, using the usual procedures, even though the JC no longer has the legal right to reject the settlement embodied in the closing agreement. The referral should include a copy of this memorandum.

If you have any questions, please contact the undersigned at
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