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INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

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MEMORANDUM FOR DISTRICT COUNSEL, ROCKY MOUNTAIN DISTRICT

FROM: Kathryn A. Zuba
Chief, Branch 2 (Collection, Bankruptcy & Summonses)

SUBJECT: Collection Statute of Limitations - Offer in Compromise Pending
as of December 31, 1999.

This memorandum responds to your request for advice dated June 22, 2000. This document may not be cited as precedent by taxpayers.

ISSUE:

How is the statute of limitations for collection under section 6502(a) of the Internal Revenue Code determined for liabilities named on offers in compromise accepted for processing on or before December 31, 1999, and still pending with the Service after that date?

CONCLUSION:

If an offer in compromise was accepted for processing on or before December 31, 1999, but remained pending after that date, the statute of limitations for collection is determined by giving effect to both the waiver provision contained in the Form 656 and the suspension of the collection statute provided by section 6331(k)(3) and Treas. Reg. § 301.7122-1T.

BACKGROUND:

It has long been the policy of the Internal Revenue Service to suspend enforced collection efforts when a taxpayer submits an offer in compromise, unless collection of the tax would be jeopardized or the offer was made merely as a delay tactic. See Policy Statement P-5-97 (Approved July 10, 1959); Treas. Reg. § 301.7122-1(d)(2) (1960). To insure that the Government's eventual ability to collect was not harmed by withholding collection efforts, consideration of an offer was conditioned upon the execution by the taxpayer of a waiver of the statute of limitations for collection for the

period the offer was being considered, while any term of an accepted offer was not completed, and for one additional year. See Treas. Reg. § 301.7122-1(f) (1960); Form 656, Offer in Compromise, Item 8(e) & (n) (Rev. 1-97).

The IRS Restructuring and Reform Act of 1998 (RRA) required several changes to this scheme. First, RRA section 3462 codified the practice of withholding collection while an offer to compromise is being considered by adding section 6331(k) to the Code. See P.L. 105-206, 112 Stat. 685, 764 (1998). Effective January 1, 2000, that section prohibits levy while an offer is pending, for thirty days after an offer is rejected, and while a timely filed appeal of that rejection is pending with the IRS Office of Appeals. See I.R.C. § 6331(k)(1); Temp. Treas. Reg. § 301.7122-1T(f)(2). The section further provides that “rules similar to” those contained in paragraphs (3), (4), and (5) of section 6331(i), which prohibits levy during court proceedings for refund of a divisible tax, will apply. See I.R.C. § 6331(k)(3). Paragraph (5) of section 6331(i) provides that the statutory period for collection is suspended while levy is prohibited. Temporary Treasury Regulations section 301.7122-1T(h)(2) applies this rule to the period that levy is prohibited due to the pendency of an offer in compromise.

Second, RRA section 3461 amended section 6502 of the Code, also effective as of January 1, 2000, to limit the Service’s ability to secure from taxpayers agreements to extend the statutory period for collection. See P.L. 105-206, 112 Stat. 685, 763-64 (1998). The Service and taxpayers can now only agree to an extension of the statute of limitations for collection under 6502(a) in two circumstances: 1) the extension is agreed to at the same time as an installment agreement between the taxpayer and the Service, or 2) the extension is agreed to prior to a release of levy under section 6343 which occurs after the expiration of the statutory ten year period for collection. See I.R.C. § 6502(a)(2). Thus, effective January 1, 2000, the Service can no longer secure a waiver of the collection statute as a condition for consideration of the offer, but can rely on the suspension of the statute provided by regulations section 301.7122-1T(h)(2) to keep the collection statute from expiring while the offer is being considered. Further, the Service can no longer extend the collection statute to allow a taxpayer more time to pay any compromise reached. Compromise agreements must now be structured so that all payments are received prior to the expiration of the collection period. See I.R.C. § 6401(a) (amounts collected after expiration of applicable period for collection to be treated as overpayments).

Finally, RRA contained a non-Code “sunset” provision which governs the continued effect of waivers of the collection statute executed prior to January 1, 2000. If a waiver was secured in conjunction with the granting of an installment agreement, the period for collection will expire ninety days after the date specified in the waiver. If the waiver was not obtained at the same time as an installment agreement, the period for collection will expire not later than December 31, 2002, or the end of the original collection statute if it would have occurred after that date. See RRA § 3461(c)(2).

The Service's policies and procedures for the consideration and disposition of offers in compromise have been revised to reflect these changes in the law. However, some confusion exists with respect to the effect these changes in the law will have on offers that were accepted for processing prior to December 31, 1999, but remained pending after that date. Because the Service was authorized to secure waivers of the statute of limitations at the time the Forms 656 in such cases were submitted, and the statute of limitations for collection was suspended as a matter of law beginning on January 1, 2000, it would appear that the Service receives the benefit of both a waiver of the collection statute by agreement and an automatic suspension of the collection statute under the Code. You have been asked by your district how the collection statute is determined in such cases.

DISCUSSION:

As is discussed above, prior to the enactment of RRA, the Service could extend the statute of limitations under section 6502 of the Code by agreement with the taxpayer at any time prior to the expiration of the ten-year statutory period. The statutory period, once extended, could be further extended by agreement at any time prior to the expiration date specified in the previous agreement. These agreements took the form of a waiver of the collection statute by the taxpayer, most often accomplished through a Form 900, Tax Collection Waiver. Although the statute refers to an extension by agreement, the courts have uniformly held that, since the statute of limitations is a defense available to the taxpayer in the event the Service attempts to collect beyond the statutory time period, extension of the time to collect is accomplished via a unilateral waiver of that defense by the taxpayer, and that a tax collection waiver is not a contract. See Strange v. United States, 282 U.S. 270, 276 (1931); Florsheim Bros. Drygoods Co. v. United States, 280 U.S. 453, 468 (1930).

The Code also contains various provisions that operate to toll the period for collection upon the occurrence of certain events. For example, section 6503 suspends the running of the statute of limitations for collection when the assets of the taxpayer are in the control or custody of a court, when the taxpayer is outside of the United States for more than six months, or when the Service is prohibited from collection because the taxpayer has filed bankruptcy. See I.R.C. § 6503(b) (control or custody of court); I.R.C. § 6503(c) (taxpayer outside of United States); I.R.C. § 6503(h) (bankruptcy). Such suspensions act to toll the collection statute even where it has been previously extended by agreement to a date certain. See, e.g., Klingshirn v. United States, 147 F.3d 526, 528 (6th Cir. 1998) (applying I.R.C. § 6503(h)). Cf. Meridian Wood Products Co., Inc. v. United States, 725 F.2d 1183, 1188 (9th Cir. 1984) (applying 6503 to suspend previously extended statute of limitations for assessment). In such cases, the statute of limitations is established by the tax collection waiver and the suspension of the statute acts to further extend the period for collection from that date forward. See Kaggen v. IRS, 57 F.3d 163, 165 (2d Cir. 1995). If the collection period with respect to a particular liability has been waived or suspended on multiple occasions, the collection period is determined by giving effect to each suspension or waiver in the order in which

they occurred, counting periods during which suspensions overlapped only once. See, e.g., United States v. First Midwest Bank, 1997 U.S. Dist. LEXIS 16913 (N.D. Ill. October 28, 1997).

The suspension of the collection statute provided by regulations section 301.7122-1T(h)(2) operates in the same manner as the suspension provisions of section 6503. The statute of limitations for collection is first determined by giving effect to any prior waivers that extended the collection period, and that period is then regarded as suspended for any time an offer in compromise was pending after December 31, 1999.

EXAMPLE 1: The taxpayer executed, and the Service accepted, a waiver of the collection statute prior to December 31, 1999. The waiver extended the collection statute until March 31, 2001. On June 1, 2000, the taxpayer submits an offer to compromise, which the Service recognizes as processable that same day. The offer is rejected on July 30, 2000, sixty days later. The collection statute will have been suspended for the sixty days the offer was pending with the Service and for thirty days thereafter, for a total of ninety days. Assuming that the taxpayer does not appeal the rejection, the period for collection will now expire on June 29, 2001.

The same analysis would apply in the case of an offer submitted on or before December 31, 1999, but which remains pending after that date. Section 301.7122-1T(h)(2) suspended the statute of limitations, as previously extended by the parties, effective January 1, 2000. The first step in the analysis would be to interpret and give effect to the waiver in the Form 656. Courts have held that a tax collection waiver should be interpreted in a manner consistent with the intent of the taxpayer and the Government. See United States v. Havner, 101 F.2d 161, 163-64 (8th Cir. 1939) and cases cited therein. The language of the waiver provision indicates an intent to extend the statute for the length of time necessary to evaluate the offer, for performance to be completed, and for one additional year.

In this situation, the intent of the parties is given effect by construing the waiver as being measured only with reference to periods during which the collection period is not otherwise suspended by the pendency of the offer, i.e., by ignoring periods named in the waiver to which section 301.7122-1T(h)(2) applies. This is accomplished by starting with the collection period as it existed at the time the offer was submitted and adding to that period any time that the offer remained pending prior to January 1, 2000, plus one year.

EXAMPLE 2: An offer in compromise was submitted on September 1, 1999, and deemed processable by the Service that same day. The ten-year collection period for the liability named on the offer was set to expire on February 1, 2000. If the offer remains pending until December 31, 1999, the waiver provision will extend the collection statute for a period equal to the four months the offer was pending in 1999,

plus one year. The new collection statute expiration date, as extended by the waiver, is June 1, 2001.¹

The next step in the analysis is to give effect to the suspension provided as a matter of law by section 301.7122-1T(h)(2). The collection statute, having been extended to a date certain by the waiver, is then suspended, beginning on January 1, 2000, for the time the offer is pending, and, if the offer is rejected, for an additional thirty days or until an appeal of that rejection has been resolved.

EXAMPLE 3: The offer in EXAMPLE 2, above, was rejected on June 1, 2000. Section 301.7122-1T(h)(2) acted to suspend the statute from January 1 to June 1, 2000, plus an additional thirty days. Assuming that the taxpayer does not appeal the rejection, the collection period resumed running on July 2, 2000, and will expire on December 1, 2001.

Arguably, the period for collection in these cases should be further extended, pursuant to the waiver executed prior to January 1, 2000, by the period of time after acceptance of the offer but before completion of its terms or default by the taxpayer. See United States v. Feinberg, 372 F.2d 352, 356 (3d Cir. 1967). However, interpreting the waiver as including periods after December 31, 1999, would be inconsistent with the intent of Congress in limiting the Service's authority to solicit and accept waivers of the collection statute. Under the revised statutory scheme, the interests of the Government are protected by suspending the statute of limitations for collection for the period that an offer is pending, plus thirty days after a rejection and during an appeal of that rejection. Congress implicitly determined that this was sufficient protection to warrant withholding collection while an offer was being considered. Further, if the waiver is interpreted as including the period after acceptance of the offer, the waiver itself would continue to grow in length even after the Service no longer had the authority to extend the collection statute in this manner.

Finally, interpreting the waiver as referring only to periods prior to January 1, 2000, provides a rule of construction which can be applied in all cases and will allow both the Service and the taxpayer to know, with certainty, how much time remains on the collection statute at any given point in time. Because the waiver provision can be interpreted as of January 1, 2000, the amount of time remaining on the collection statute for all pending offers in compromise can be determined without the uncertainty that would surround post-acceptance actions by the taxpayer or the Service.

¹ If this first step leads to the conclusion that the statute of limitations for collection was extended beyond December 31, 2002, the waiver acted to extend the statute until that date only. If the waiver would extend the statute beyond December 31, 2002, but the original collection statute expiration date was, itself, beyond that date, the waiver essentially had no effect. See RRA § 3461(c)(2).

EXAMPLE 4: The offer in EXAMPLE 2, above, was accepted on June 1, 2000. Section 301.7122-1T(h)(2) acted to suspend the statute from January 1 to June 1, 2000. The collection period resumed running on June 2, 2000, and will expire on November 1, 2001.

If an offer in compromise was submitted prior to December 31, 1999, and remains pending after that date, the statute of limitation for collection under section 6502 is determined by giving effect to both the waiver of the statute of limitations for collection contained on the Form 656 and the suspension of the collection statute under section 301.7122-1T(h)(2) of the Treasury Regulations.

If you have any questions, please contact the attorney assigned to this matter at (202) 622-3620.

cc. Assistant Regional Counsel (GL), Western Region