

Office of Chief Counsel
Internal Revenue Service
Memorandum

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date: May 31, 2006

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(Small Business/Self-Employed)

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subject: Response to potential assessment statute extension

This memorandum responds to your request for assistance. This advice may not be used or cited as precedent.

LEGEND

Corporation X =

Officer Y =

Date 1 =

Date 2 =

Date 3 =

Date 4 =

Date 5 =

Date 6 =

Date 7 =

Date 8 =

Date 9 =

ISSUES

Whether a Form 2750, Waiver Extending Statutory Period for Assessment of the Trust Fund Penalty, executed during the 90 day extension of the assessment period provided by section 6672(b)(3)(A), is valid and enforceable.

CONCLUSIONS

A Form 2750 waiver executed during the 90 day extension of the assessment period provided by section 6672(b)(3)(A) is a valid and enforceable agreement to extend the period of assessment.

FACTS

Corporation X had an assessed unpaid balance for employment tax for the 3rd quarter of 1991. This assessment was based on a return filed by the taxpayer on Date 1. The tax reported thereon was assessed on Date 2. The limitations period on assessment began on Date 3, and was due to expire on Date 4. Pursuant to section 6672, a Trust Fund Recovery Penalty investigation was initiated and several officers of Corporation X were recommended for assertion of the penalty.

The assertion recommendation was made on Date 4 which was the last day of limitations period on assessment. On the same day, Letter 1153, Notice of Proposed Assessment, was issued and mailed by certified mail to all of the officers listed on the Form 4183, Recommendation of Assertion of Trust Fund Penalty, as responsible for the penalty. As a result of the issuance of Letter 1153, the assessment statute was automatically extended for 90 days due to the Taxpayers Bill of Rights 2. This extension is to provide additional time for the officers of Corporation X to appeal the proposed assessment. In order to meet the requirements of a timely appeal, the officers of Corporation X had to appeal within 60 days of the issuance of Letter 1153.

One of the proposed officers of Corporation X, Officer Y, responded with a protest letter which was received on Date 5. The protest letter was found to be incomplete due to the fact that the protest letter was issued by an unenrolled return preparer not authorized to represent Corporation X on collection matters. Officer Y was notified of his right to cure a defective appeal within 45 days; however, the proper appeal was not received until Date 6. That date was beyond the 45-day deadline to cure a defective appeal and beyond the 60-day deadline for a timely appeal. Accordingly, the limitations period for assessment for Officer Y was due to expire on Date 7.

At this time, the revenue officer secured Form 2750, Waiver Extending Statutory Period for Assessment of the Trust Recovery Penalty. Taxpayer executed Form 2750 on Date 8, and returned the form to the revenue officer who executed the Form on Date 9.

LAW AND ANALYSIS

Section 6672, Failure To Collect or Pay Over Tax, Or Attempt To Evade or Defeat Tax, also commonly referred to as the trust fund recovery "penalty", imposes a one-hundred percent penalty on "responsible persons" if the responsible person willfully fails to pay over to the government the amount of taxes otherwise due. Wood v. United States, 808 F.2d 411 (5th Cir. 1987). Courts have held that the section 6672 penalty is a return based penalty, because it is not separate and distinct from the underlying employment tax liability. Rather, the penalty is a mechanism for collecting the underlying employment tax liability. Therefore, the assessment of the section 6672 penalty is subject to the period of limitations on assessment provided in section 6501. See, e.g. Lauckner v. United States, 68 F.3d 69 (3rd Cir. 1995), aff'g 1994 U.S. Dist. LEXIS 17187 (D.N.J. 1994), acq., A.O.D. 1996-006, 1996-2 C.B. 1.

The Taxpayer Bill of Rights 2, enacted on July 30, 1996, included a special statute of limitations provision in I.R.C. § 6672(b) along with a requirement to send a 60-day notice of proposed assessment, Letter 1153, before making notice and demand for payment of the trust fund recovery penalty. When the 60-day notice is issued before the expiration of the assessment statute, the statute will not expire before the date 90 days after the 60-day notice was mailed. See I.R.C. § 6672(b)(3).

Section 6501(a) provides generally that tax shall be assessed within three years after the return was filed. Pursuant to section 6501(c)(4), the IRS and a taxpayer can agree in writing to extend the period for assessment, as long as the agreement is entered into before the expiration of the assessment period. Section 6501(c)(4)(B) requires the IRS to notify a taxpayer of its right to (1) refuse to extend the period of limitation for assessment; (2) limit the extension to particular issues; and (3) limit the extension to a particular period of time. To provide for the receipt of uniform, complete information, the IRS has developed specific forms to document the written agreement to extend the period for assessment between the IRS and taxpayers. Form 2750, Waiver Extending Statutory Period for Assessment of the Trust Fund Recovery Penalty, is used to extend the period of limitations for assessment of the Trust Fund Recovery Penalty. See IRM 4.23.14.6.

Before a Trust Fund Recovery Penalty is assessed, taxpayers are sent or given Letter 1153, Notice of Proposed Assessment. Letter 1153 advises the taxpayer of the proposed penalty and of their appeal rights. The taxpayer may agree to the penalty by returning signed Form 2751, Proposed Assessment of the Trust Fund Recovery Penalty. If the taxpayer disagrees with the proposed penalty, the taxpayer may file a written protest. The taxpayer has 60 days in which to file a timely protest. A protest is considered timely if it is mailed on or before the 60th day, i.e. timely mailed is timely filed. See IRM 8.11.1.8.5(2). The 60 day period is measured from the mailing date of the Letter 1153, or from the delivery date if Letter 1153 is delivered in person. A timely mailed protest is still timely for purposes of I.R.C. § 6672(b)(3)(B) even if the protest is inadequate. See IRM 5.7.6.1.6(1). Taxpayers who establish that they did not receive

the Letter 1153, and therefore could not exercise their appeal rights, will be given an opportunity for administrative appeal although the penalty has been assessed. See IRM 8.11.1.8.5(2).

In Crawford v. Commissioner, 97 T.C. 302 (1991), the taxpayer was engaged in a hobby. The taxpayer filed the proper forms to elect to postpone the determination regarding whether the activity was engaged in for profit for a five year test period. Pursuant to section 183(e)(4), after the taxpayer's election, the period for assessing tax with respect to the taxpayer's activity would "not expire before the expiration of two years after a return is due...for the last year in the test period." Id. at 304. During the first year after the test period, the taxpayer and the Service executed a Form 872, Consent to Extend the Time to Assess Tax. Before the extended period expired the Service mailed the taxpayer a notice of deficiency. The taxpayer petitioned the Tax Court, and alleged that the Form 872 was ineffective because it had been executed during the extended period provided by section 183(e)(4), rather than the three year period mandated by section 6501(c)(4). This argument was rejected by the Tax Court. While the Tax Court acknowledged that section 183(e)(4) does not expressly reference section 6501(a), the Tax Court nevertheless concluded that there was a legislative intent to modify section 6501(a) where a section 183(e) election had been made. Accordingly, the Tax Court concluded that the agreement to extend the period of limitations for assessment was effective notwithstanding the fact that it was executed during the extended period provided by section 183(e)(4).

Section 6501(c)(4)(A) permits the Service and the taxpayer to agree to extend the period for the assessment of any tax if the parties consent to such agreement in writing before the expiration of the time prescribed for assessment. In this case, the period of assessment was extended 90 days due to the issuance of the 60 day notice under section 6672(b)(3)(A). Unlike in the Crawford case, section 6672(b)(3)(A) explicitly references section 6501(a) by stating that the period provided by such section for the assessment of such penalty shall not expire before the date 90 days after the issuance of the 60 day notice.

We believe the effect of section 6672(b)(3)(A) is similar to the effect of section 183(e)(4). Section 183(e)(4) was enacted to allow the period of limitations under section 6501(a) to be extended by operation of law where the Service required additional time to examine an activity's profit motive. Similarly, the function of section 6672(b)(3)(A) is to suspend the period of limitations on assessment to provide the taxpayer an opportunity to appeal the proposed assessment.

We have found no legal authority which would prohibit the execution of a written agreement to extend the period of assessment during the 90 day extension provided under section 6672. The Service has structured its administrative practices to attempt to secure an extension of the period of limitations during the three year period provided by section 6501(a). We believe the administrative practice of usually securing an extension within the original three year period of limitations is an appropriate practice.

Nevertheless, we believe the Internal Revenue Code allows the Service to secure an extension agreement at any time provided that the period of limitations with respect to a particular tax year is open. Accordingly, the Form 2750, Waiver Extending Statutory Period for Assessment of the Trust Fund Recovery Penalty, is valid and enforceable, notwithstanding the fact that the waiver was executed outside of the assessment period provided by section 6501(a).

This writing may contain privileged information. Any unauthorized disclosure of this writing may undermine our ability to protect the privileged information. If disclosure is determined to be necessary, please contact this office for our views.

Please call _____ if you have any further questions.