

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

Number: **201206014**

Release Date: 2/10/2012

CC:PA:02:SLahabi

POSTF-124243-11

UILC: 6501.04-03, 6501.04-11, 6501.08-05

date: October 17, 2011

to: Associate Area Counsel

()

Attn:

from: Blaise G. Dusenberry

Senior Technician Reviewer, Branch 1

(Procedure & Administration)

subject: Application of section 6501(c)(8) to an S corporation and its shareholders.

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

LEGEND

S corporation =

Date 1 =

Date 2 =

Date 3 =

Date 4 =

Date 5 =

Date 6 =

Date 7 =

Date 8 =

Date 9 =

Date 10 =

Date 11 =

Date 12 =

Date 13 =

Date 14 =

X percent =

Y percent =

Z percent =

Year 1 =

Year 2 =

Year 3 =

Year 4 =

Year 5 =

Year 6 =

X =

ISSUES

(1) If an S corporation fails to report information required by section 6038, does section 6501(c)(8) apply to extend the period of limitations for assessment with respect to the returns of the shareholders of the S corporation?

(2) If a taxpayer fails to report information required by section 6038, how does section 6501(c)(8), as amended in 2010, apply to extend the period of limitations?

(3) Does section 6501(c)(8) apply to amended returns filed on or after Date 3 for original returns filed between Date 1 and Date 2?

(4) If reasonable cause is established for the late filing of the Form 5471, are other items on the Form 1120S or Form 1040 available for adjustment under section 6501(c)(8)(B)?

CONCLUSIONS

(1) It depends. If an S corporation fails to report the information required by section 6038, section 6501(c)(8) extends the period of limitations for assessment with respect to the S corporation. Under the facts below, section 6501(c)(8) also extends the period of limitations for assessment with respect to the tax returns of the two majority shareholders of the S corporation as they own X percent of the S corporation. Section 6501(c)(8), however, probably does not extend the period of limitations for assessment with respect to the tax returns of the remaining thirteen shareholders who, together, own less than Y percent of the S corporation.

(2) For returns of S corporation and the two majority shareholders that were filed after March 18, 2010, or the returns filed on or before that date if the section 6501 period (determined without regard to the 2010 amendments) for assessment of taxes had not expired as of that date, section 6501(c)(8), as amended in 2010, applies to extend the period of limitations for assessment with respect to the entire tax return, not just adjustments related to the failure to report under section 6038.

(3) No, the applicability of section 6501(c)(8) is determined based on the date on which the original returns were filed, not the date of the amended returns.

(4) No, if the failure to file Form 5471 with respect to S corporation's year 5 and year 6 tax years and the two majority shareholders' year 4–year 6 tax years was due to reasonable cause, the extended limitations period only applies to the item or items related to the failure and not the other items on the returns.

FACTS

Taxpayer herein, S corporation (referred to as “S corporation”), is an S corporation with X shareholders. Two of the shareholders (referred to as “two majority shareholders”), own X percent of S corporation. S corporation was formed as an S corporation on Date 4. Its predecessor entity was an S corporation as well. S corporation has 5 wholly-owned controlled foreign corporations (CFCs), which it treated as disregarded entities for tax years year 1–year 6. In Date 3, S corporation filed amended returns for year 1–year 6 recharacterizing the 5 CFCs as regarded entities. S corporation did not file Forms 5471 with these amended returns, and the amended returns did not report the information that should have been furnished on the Forms 5471. Two minority interest shareholders (collectively holding Z percent) also filed amended returns for year 5 and year 6 prior to the expiration of the statute of limitations for their year 5 taxable year but they too did not file Forms 5471 with their amended returns. The two majority shareholders did not file amended returns or Forms 5471.

Absent application of section 6501(c)(8), the normal three-year period of limitations for S corporation's year 1–year 4 taxable years expired on or before Date 5. The normal three-year period of limitations for S corporation's year 5 taxable year expired on Date 6. The normal three-year period of limitations for S corporation's year 6 taxable year will expire on Date 7.

Similarly, the normal three-year period of limitations for S corporation's shareholders for the year 1–year 3 taxable years expired on or before Date 8. The normal three-year period of limitations for S corporation's shareholders for the year 4 taxable year expired between Date 9 and Date 10. The normal three-year period of limitations for S corporation's shareholders for the year 5 taxable year expired between Date 11 and Date 12. The normal three-year period of limitations for S corporation's shareholders for the year 6 taxable year has not yet expired, but will expire in the normal course between Date 13 and Date 14.

LAW AND ANALYSIS

Section 6038(a)(1) imposes information reporting requirements on any United States person who controls a foreign corporation. Pursuant to section 6038(a)(4), the information reporting requirements prescribed in section 6038(a)(1) also are imposed on any United States person who is treated as a United States shareholder of any foreign corporation that is treated as a controlled foreign corporation. Section 6038(e)(2) defines a person “in control” of a corporation as a person who owns stock possessing more than 50 percent of the total combined voting power of all classes of stock entitled to vote, or more than 50 percent of the total value of shares of all classes of stock of a

corporation. Section 6038(e)(2) further states that “[i]f a person is on control of a corporation which in turn owns more than 50 percent of the total combined voting power of all classes of stock entitled to vote for another corporation, or owns more than 50 percent of the total value of the shares of all classes of stock of another corporation, then such person shall be treated as in control of such other corporation.” In this case, the two majority shareholders own X percent of S corporation and are in control of S corporation and the 5 CFCs. These two majority shareholders, therefore, are required to file Form 5471 with respect to the CFCs. S corporation itself also has a reporting obligation with respect to the CFCs under section 6038. From the facts provided to us, it does not appear that the other shareholders own enough stock in the S corporation to have an obligation to furnish information under section 6038(a)(4).

Section 6501(a) provides that the amount of any tax imposed by Title 26 shall be assessed within three years after the return was filed. The final sentence of this subsection defines “return” to mean “the return required to be filed by the taxpayer (and does not include a return of any person from whom the taxpayer has received an item of income, gain, loss, deduction, or credit).” This was a codification of the Supreme Court’s holding in Bufferd v. Commissioner, 506 U.S. 523 (1993). In Bufferd, the Supreme Court clarified that section 6501 applies to the return filed by the ultimate taxpayer and not the return filed by the taxpayer’s S corporation. The amendment of section 6501 was understood to apply the logic of Bufferd to other flow-through entity situations. Robinson v. Commissioner, 117 T.C. 308, 318 (2001).

Prior to March 18, 2010, section 6501(c)(8) provided, in relevant part, that in the case of any information which is required to be reported to the Secretary under section 6038, the time for assessment of any tax imposed with respect to any event or period to which such information relates shall not expire before the date which is three years after the date on which the Secretary is furnished the information required to be reported.

Section 6501(c)(8) was amended in 2010 by the Hiring Incentives to Restore Employment Act (“HIRE”), Pub. L. No. 111-147 (124 Stat. 106), § 513, to provide, in relevant part, that in the case of any information which is required to be reported to the Secretary under section 6038, the time for assessment of any tax imposed with respect to any tax return, event or period to which such information relates shall not expire before the date which is three years after the date on which the Secretary is furnished the information required to be reported. The amendment applies to returns filed after March 18, 2010, or returns filed on or before that date if the section 6501 period (determined without regard to such amendments) for assessment of such taxes had not expired as of that date.

The HIRE Act amendment to section 6501(c)(8), therefore, clarifies that a failure to file a Form 5471 for a particular tax year extends the time for the assessment of tax with respect to any tax return to which the information relates. The inclusion of “tax return” in section 6501(c)(8) means the extended period applies to all the information reported on a tax return and is not limited to adjustments to income related to the information that

should have been reported under section 6038. See Technical Explanation of the Revenue Provisions Contained in Senate Amendment 3310, The “Hiring Incentive to Restore Employment Act,” Under Consideration in the Senate, JCX-4-10 (February 23, 2010). In this case, S corporation’s tax returns for the year 5 and year 6 taxable years were filed before March 18, 2010, and the period of limitations was open as of March 18, 2010. Similarly, the tax returns of the two majority shareholders for the year 4, year 5 and year 6 taxable years were filed before March 18, 2010, and the period of limitations was open as of March 18, 2010. Thus, the HIRE Act amendment applies to those years and section 6501(c)(8), as amended, operates to extend the time for assessment of tax with respect to S corporation’s entire year 5 and year 6 taxable years, and with respect to the two majority shareholders entire year 4, year 5 and year 6 taxable years.

The HIRE Act amendment, however, does not apply to S corporation’s year 1–year 4 taxable years, or the two majority shareholders’ year 1–year 3 taxable years because the period of limitations with respect to those years expired before the effective date of the HIRE Act amendments. Thus, whether the section 6501 period is open for assessment of any additional tax due to S corporation’s failure to file Form 5471 in years year 1–year 4 or due to the two majority shareholders’ failure to file 5471 in years year 1–year 3 would depend on whether the particular tax is related to the information required to be reported under section 6038. Based on the facts presented to us, it is not clear whether the two majority shareholders would owe additional tax as a result of the change of status of the CFCs.

S corporation’s filing of amended returns in Date 3 for the year 1–year 6 taxable years presents a question regarding whether filing amended returns after the effective date of the HIRE Act amendments changes the application of section 6501(c)(8). As noted above, the amended returns did not furnish the information required by a Form 5471, and Forms 5471 were not attached to the amended returns. The two majority shareholders did not file Forms 5471 either. Therefore, S corporation and the two majority shareholders continue to be in noncompliance with the section 6038 requirements and the section 6501(c)(8) period could continue to apply to the relevant taxable years. We caution, however, that for S corporation’s year 1–year 4 taxable years, and the two majority shareholders’ year 1–year 3 taxable years, the HIRE Act amendments do not apply, so section 6501(c)(8) only extends the assessment period for tax imposed with respect to any event or period to which the information required to be furnished relates, rather than the entire tax return. In contrast, S corporation’s tax returns for the year 5 and year 6 tax years and the two majority shareholders’ tax returns for the year 4, year 5 and year 6 tax years were filed before March 18, 2010, and the period of limitations for assessment has not expired. Therefore, section 6501(c)(8) extends the assessment period with respect to the information on the entire tax returns for those tax years.

Section 6501(c)(8) was further amended on August 10, 2010, to provide that if the failure to furnish the required information is due to reasonable cause and not willful

neglect, the extended limitations period only applies to the item or items related to the failure and not the entire tax return. Pub. L. No. 111-226 (124 Stat. 2403), § 218. This provision is effective as if included in section 513 of the HIRE Act. If S corporation's failure to file Forms 5471 for the year 5 and year 6 tax years, and the two majority shareholders' failure to file Forms 5471 for the year 4–year 6 tax years, was due to reasonable cause, the extended limitations period would only apply to the item or items related to the failure and not the entire tax returns. The determination of whether reasonable cause exists depends on all the facts and circumstances. We have not been provided with sufficient information to make that determination but we are available to assist you with the reasonable cause analysis should the need arise.

[REDACTED]

[REDACTED]

[REDACTED]

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 (202) 622-4940 if you have any further questions.