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From:

Sent: Thursday, September 27, 2012 7:29:35 AM

To:

Cc:

Subject: RE: CDP Question

After discussing the matter with the Revenue Officer, we learned the following:

The \$ liability was reported and assessed several years ago and the ASED has long since expired. \$ was paid and \$ abated. The RSED has also expired on the \$ payment. The service then reassessed the \$, but the authority to reassess was called into question during the CDP hearing at issue. The estate and the Service now agree that the second assessment was invalid. Accordingly, this second assessment needs to be abated. However, the Notice of Determination (NOD) erroneously indicates that the initial \$ assessment will be abated, as opposed to the subsequent \$ assessment. More than 30 days have passed since the issuance of the NOD and the taxpayer never petitioned the Tax Court. You have asked whether the Service may now issue a corrected NOD or, alternatively, whether the Service may ignore the erroneous statement in the NOD.

Appeals may amend or revise a NOD within the 30-day period in which a taxpayer may petition the Tax Court if the NOD is clearly in error, the taxpayer has not petitioned Tax Court and the correction can be made within the 30-day period in which the taxpayer may petition the Tax Court. IRM Part 8.22.9.15(1). Moreover, the NOD may not be rescinded. *Id.* In this case, an amended or revised NOD is not an option, because the 30-day period in which the taxpayer could have petitioned the Tax Court based on the original NOD has expired. Moreover, despite the issuance of an erroneous NOD, Appeals may not abate the initial \$ assessment, because it was not properly at issue in the CDP hearing. Indeed, abating the \$ would not marginally benefit the taxpayer (above and beyond abating the \$ that is still on the books), because it would not result in the issuance of a \$ credit or refund to the taxpayer. Section 6511(b)(2) prohibits the Service from crediting or refunding to the taxpayer any payments made before the two-year period immediately preceding the date on which the refund is allowed if no refund claim is filed. In this case, the NOD would be considered the date on which the refund was allowed. It is our understanding that the taxpayer has made no payments during the two-year period preceding the NOD. Moreover, while Appeals is authorized to abate the subsequent \$ assessment, because it was made after the expiration of the assessment statute of limitations (see section 6404(a)(2)), Appeals is not authorized to abate the original \$ assessment. The original assessment was neither excessive in amount nor erroneously or illegally assessed. See IRC section 6404(a)(1) and (3). Appeals may only implement a determination to the extent authorized to do so. Accordingly, Appeals should send a letter to the taxpayer describing the error and explaining that Appeals will in fact abate the \$ assessment (as agreed to in the CDP hearing), but, despite the statement in the NOD, Appeals is prohibited from abating the original \$ assessment. This does not change the determination in the NOD, which is that collection will not proceed. Because we have concluded that in this case Appeals may clarify and correct the NOD with a letter, we do not need to further consider whether Appeals may unilaterally ignore an erroneous misstatement in a NOD.

Feel free to call me if you have any questions or further want to discuss.

Regards,