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DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
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INTERNAL REVENUE SERVICE NATIONAL OFFICE TECHNICAL ASSISTANCE

MEMORANDUM FOR [REDACTED]

FROM: W. Edward Williams
Senior Technical Reviewer CC:INTL:Br1

SUBJECT: Information Request Under a United States Income Tax
Convention

This Technical Assistance responds to your memorandum dated October 6, 1998. Technical Assistance is not binding on Examination or Appeals and is not a final case determination. This document is not to be used or cited as precedent.

LEGEND:

Country A = [REDACTED]

Official B = [REDACTED]

Period X = [REDACTED]

Treaty = [REDACTED]

ISSUE(S):

Whether the U.S. competent authority is required to obtain information to respond to a request from the competent authority of Country A for years for which the U.S. statute of limitations on assessment is closed but the statute of limitations of Country A is open?

CONCLUSION:

The United States is obligated to request information to respond to a request from a treaty partner even though the U.S. statute of limitations is closed for the year under examination by the treaty partner.

FACTS:

The competent authority of Country A, pursuant to the exchange of information article of the Treaty, made a request through Official B that the U.S. competent authority obtain information from a U.S. entity for use in a tax examination of an [REDACTED] taxpayer for Period X. The U.S. statute of limitations with respect to the U.S. entity has expired for the years under examination in Country A.

LAW AND ANALYSIS

The exchange of information article of the Treaty requires that the competent authorities of the United States and Country A shall exchange information that is relevant for the administration of the Treaty or of the domestic taxes of the treaty partners that are covered by the Treaty. The obligation to exchange information does not require a treaty partner to take administrative measures contrary to the laws or administrative practice of either the requesting or the requested State; or to supply information that is not obtainable under the laws or administrative practice of either of the States.

The obligation to obtain information for the purpose of an exchange under the Treaty is unrelated to whether the United States has the taxpayer under examination or needs the information for domestic tax purposes. In this regard, the Commentary to the exchange of information article in the OECD Model Tax Convention On Income And Capital (1992) includes the following:

types of administrative measures authorised for the purpose of the requested State-s tax must be utilised, even though invoked solely to provide information to the other Contracting State. [Emphasis added.]

See also United States v. Stuart, 489 U.S. 353 (1989); United States v. A.L. Burbank & Co., Ltd., 525 F.2d 9 (2d Cir. 1975), cert. denied 426 U.S. 934 (1976) (IRS summonses are properly utilized where the purpose is solely to assist a tax investigation conducted by a treaty partner); and Barquero v. United States, 18 F.3d 1311 (5th Cir. 1994).

The taxpayer in Stuart argued that the criminal referral restriction on the issuance of an administrative summons barred the IRS from issuing a treaty summons when the treaty partner had made the equivalent of a criminal referral under its own law. This argument is similar to the issue in this case, that is, whether the U.S. statute of limitations bars the IRS from issuing a summons. The Supreme Court explicitly rejected the imposition of restrictions under U.S. law in this context, as follows:

The sole reference to these provisions [i.e., the exchange of information article] during the brief floor debate in the Senate contained no hint that the 1942 Convention was intended to incorporate domestic restrictions on the issuance of summonses by the IRS in connection with American tax investigations [footnote omitted]

Stuart, supra, at page 367. Similarly, there is no support for the view that the authority to issue a treaty summons depends on whether the U.S. statute of limitations is open for the year under examination by the treaty partner.

With respect to the methods that a State is required to employ to obtain information to respond to a treaty request, the Commentary to the OECD Model Convention includes the following:

Information is deemed to be obtainable in the normal course of administration if it is in the possession of the tax authorities or can be obtained by them in the normal procedure of tax determination, which may include special investigations or special examination of the business accounts kept by the taxpayer or other persons, provided that the tax authorities would make similar investigations or examinations for their own purposes. This means that the requested State has to collect the information the other State needs in the same way as if its own taxation was involved....

CASE DEVELOPMENT, HAZARDS AND OTHER CONSIDERATIONS:

The question that you asked us to address concerns the effect that the U.S. statute of limitations has on the authority of the IRS to ask for information to respond to a request for an exchange of information from a treaty partner. You did not ask for our views on a particular request or whether a particular request meets the other requirements for an exchange of information. For example, before the Service requests information for a treaty partner, the Service must have received from the treaty partner confirmation that the information is needed for a tax matter covered by the treaty and that the information is foreseeably relevant to this tax matter.

If you have any further questions, please call Ed Williams at (202) 622-3268.

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