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DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224
January 20, 1999

CC:EL:GL:Br2
GL-120400-98

UILC: 9999.98-00

Number: **199914033**
Release Date: 4/9/1999

MEMORANDUM FOR DISTRICT COUNSEL, ILLINOIS DISTRICT

FROM: Joseph W. Clark
Senior Technical Reviewer, Branch 2 (General Litigation)

SUBJECT: Waiver of I.R.C. § 6532(b) Limitations Period

By way of an electronic mail message on November 4, 1998, you asked our views regarding a taxpayer's ability to waive the I.R.C. § 6532(b) two/five year limitation period on suits brought by the Service to recover erroneous refunds. This document is not to be cited as precedent.

Your concern that taxpayer agreements to extend the § 6532(b) period may not be enforceable appears to stem from the absence of any express authorization for such extensions in § 6532(b). This lack of any express authorization stands in sharp contrast to the express language allowing extensions found in § 6532(a)(2), which provides for the extension by the government of the two year limitation period on taxpayers' right to file refund suits. Indeed, the Service has taken the position that the § 6532 limitation periods on a taxpayers' right to bring suits against the government are jurisdictional. See *Hull v. United States*, 146 F.3d 235, 237-238 (4th Cir. 1998).

However, the basis for claiming that the § 6532(a) and (c) periods are jurisdictional is that the defendant in these suits is the government, and the doctrine of sovereign immunity is implicated. See *Hull*, 146 F.3d at 238; *RHI Holdings, Inc.*, 142 F.3d 1459, 1462 (Fed. Cir. 1998); *Ohio National Life ins. Co. v. United States*, 922 F.2d 320, 324 (6th Cir. 1990). Courts have held that the instances in which the government has allowed itself to be sued should be narrowly construed. *Id.* In contrast, no such doctrine is implicated under § 6532(b), where the suit is brought by the government against the taxpayer. Indeed, when applying a statute of limitations against the government, as with § 6532(b), it has been held that the statute should be strictly construed in favor of the government. *O'Gilvie v. United States*, 66 F.3d 1550, 1554 (10th Cir. 1995) (construing when a refund is made

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pursuant to § 6532(b)), following *United States v. Wurts*, 303 U.S. 414, 416 (1938) (when interpreting predecessor to § 6532(b), court stated that “the Government’s right to recover funds, from a person who received them by mistake and without right, is not barred unless Congress has clearly manifested its intention to raise a statutory barrier”). See also *United States v. Morgan*, 1995 U.S. App. LEXIS 25009 (9th Cir.) (holding that taxpayer waived the affirmative defense that the government’s suit was barred by the § 6532(b) statute of limitations by failing to raise the issue in the pleadings before the district court).

There is also case law supporting the view that statutory authorization for waivers by taxpayers are unnecessary. *Aiken v. Burnet*, 282 U.S. 277, 280 (1931) (holding that even prior to the enactment of the provision in the tax code expressly allowing waivers by the taxpayer of the limitation period on assessment, “the limitation periods on assessment could be waived by the taxpayer in the same fashion as other statutes of limitations are waived”). See also *McDonnell v. United States*, 288 U.S. 420, 424 (1933) (further explaining that the purpose of the provision expressly allowing a taxpayer to waive the limitations period on assessment was not to grant authority for waivers or to limit their effect, but to remove any doubt as to their validity by expressly recognizing them), citing H. Rep. No. 179, 68th Cong., 1st Sess., p. 26; S. Rep. No. 398, 68th Cong., 1st Sess., p.32. But see § 3461 of the Restructuring and Reform Act of 1998, limiting the Service’s ability to enter into consensual waivers with taxpayer of the § 6502 collection limitations period.

We have found only one decision addressing the precise § 6532(b) issue at hand, *United States v. National Steel Corp.*, 75 F.3d 1146 (7th Cir. 1996). In *National Steel*, the taxpayer argued that its agreement to extend the § 6532(b) period was ineffective because no statute authorizes the government to extend the statute of limitations, whereas there is statutory authorization for the government to do so for refund suits brought against it. The court nevertheless held that a taxpayer can waive the § 6532(b) period, explaining:

The reason for the asymmetry is obvious, and is of no help to National Steel. A statute of limitations is a defense, and, unless jurisdictional, can be waived by the defendant. Section 6532(a)(2) . . . makes clear that the United States has this normal right of defendants, the right to waive the statute of limitations. When the United States is the plaintiff, as in this case, it has no occasion to waive the statute of limitations, because the statute of limitations confers no right on it, so there is nothing for it to waive. Only the defendant (here the prospective defendant in a suit for the recovery of an erroneous refund) can waive the statute of limitations, and did so. No statute precludes such a waiver.

75 F.3d at 1149.

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In our view, the holding in *National Steel* is correct, and it is controlling in your jurisdiction. We have also coordinated with the Department of Justice on this issue, and they are in concurrence. If you have any further questions, please call the attorney assigned to this matter in Branch 2 at (202) 622-3620.