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CHIEF COUNSEL

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MEMORANDUM FOR DISTRICT COUNSEL, ROCKY MOUNTAIN DISTRICT

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

SUBJECT: Waiver of I.R.C. § 6672(b) Notice

By way of a General Litigation Transmittal Memorandum dated October 20, 1998, you asked our views regarding a taxpayer's ability to waive the notice requirement under I.R.C. § 6672(b). This document is not to be cited as precedent.

You state in your memorandum that the principals of a corporate Chapter 11 debtor approached the IRS regarding employment tax deficiencies of the corporation. They explained that a creditor of the corporation was seeking personal judgments against them. The creditor does not currently have a lien of any kind against the principals, and the principals would prefer the IRS to have the first lien against their property for trust fund taxes. They have agreed to accept responsibility for the trust fund taxes and would like the IRS to immediately assess the trust fund taxes and file notices of federal tax liens.

You state that subsection (b) of IRC § 6672 requires the IRS to give the taxpayer notice of the proposed assessment and then allow the taxpayer 60 days to contest the determination before the IRS makes an assessment of the penalty. You state that Form 2751, Proposed Assessment of Trust Fund Recovery Penalty, presently contains language waiving this 60 day period. However, you were concerned that recent legislation might have affected the manner in which the IRS should obtain such a waiver. In particular, you were concerned that § 3468 of the IRS Restructuring and Reform Act of 1998 (hereafter "RRA") may have an impact on the ability of the IRS to ask a taxpayer to waive the § 6672(b) 60 day notice period.

As you explained, RRA § 3468 provides that "No officer or employee of the United States may request a taxpayer to waive the taxpayer's right to bring a civil action against the United States . . . for any action taken in connection with the internal

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revenue laws” except where the taxpayer waives the right “knowingly and voluntarily” or with the advice of a tax practitioner. You were concerned that the Form 2751 waiver of the § 6672(b) notice period could in effect operate as a waiver of certain rights to bring civil actions against the United States. You concluded that the IRS should therefore take steps to insure that the waiver is made knowingly and voluntarily when the taxpayer is without counsel.

You mentioned two types of civil actions which could be considered to have been effectively waived by a waiver of the § 6672(b) notice period and agreement to the proposed assessment. First, you intimated that by such a waiver, the taxpayer is in effect waiving the right to bring an action under I.R.C. § 7433, as amended by the RRA, for failure of a collection employee to obtain approval before filing a notice of lien, as required by RRA § 3421. To the contrary, we do not believe that a waiver of the § 6672(b) 60 day notice period, or the agreement to the assessment of the proposed trust fund recovery penalties, would operate as a waiver of any § 3421 action against the IRS for violations of collection procedures which have not yet occurred.

Second, you were concerned that by waiving the right to 60 days notice under § 6672(b), the taxpayer has demonstrated agreement to the proposed assessment and commencement of collection action, and therefore potentially waives the right to contest that action. Thus, you reasoned that the waiver would in essence be a waiver of the right to bring an action for refund, a potential form of civil action.

We do not believe that the Form 2751 waiver of notice and agreement to immediate assessment precludes a taxpayer from bringing an action for refund. While we have found no case expressly dealing with the preclusive effect, if any, of a Form 2751 waiver, we have found several analogous cases dealing with the preclusive effect of Form 870-AD waivers. See *Aronsohn v. United States*, 988 F.2d 454, 456-7 (3rd Cir. 1993); *Kretchmar v. United States*, 9 Cl. Ct. 191 (1985); *Elbo Coals, Inc. v. United States*, 763 F.2d 818, 820 (6th Cir. 1985); *Stair v. United States*, 516 F.2d 560, 564-5 (2nd Cir. 1975); *General Split Corp. v. United States*, 500 F.2d 998, 1003-04 (7th Cir. 1974); *Cain v. United States*, 255 F.2d 193, 199 (8th Cir. 1958); *Daugette v. Patterson*, 250 F.2d 753, 756 (5th Cir. 1957), cert. denied, 356 U.S. 902 (1958); *Guggenheim v. United States*, 77 F.Supp. 196, 196 11 Ct. Cl. 163 (1948), cert. denied 335 U.S. 908 (1949). These cases acknowledge that the Form 870-AD waiver does not meet the formal requirements for settlement embodied in the IRC. However, the courts in these cases nevertheless held that a taxpayer can be equitably estopped from bringing a refund suit in situations where the government has made concessions in a settlement agreement embodied in a Form 870-AD waiver, and has detrimentally relied upon the agreement by allowing the statute of limitations to expire on the conceded issues. For contra view, see *Uinta Livestock Corp. v. United States*, 355 F.2d 761 (10th Cir. 1966) (arguing that equitable estoppel may not be an available remedy to enforce a Form 870-AD

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settlement agreement and preclude a refund suit because the agreement was not formally approved pursuant to the procedures prescribed for settlement with the IRS in the tax code). See also *Whitney v. United States*, 826 F.2d 896 (9th Cir. 1987).

The Form 870-AD waiver situation is quite distinguishable from that of the Form 2751 waiver. The Form 870-AD waivers in the above cited cases contained express language that the taxpayer was waiving the right to claim a refund and file a suit for refund. Form 2751 contains no such language. Further, as mentioned above, before the courts would apply equitable estoppel to prevent a taxpayer from filing a refund suit they require the government to show that it made actual concessions and relied upon the settlement to its detriment by not assessing the conceded tax claims before the statute of limitations has run. In the situation you describe, or in the routine situation where a Form 2751 is sent to the taxpayer along with the notice of the proposed penalty (see IRM §§ 5639.11 - 5639.13), the government is not conceding any claim, and is not detrimentally relying on the waiver by allowing the statute of limitations to pass.

Accordingly, we conclude that the Form 2751 waiver of the § 6672(b) notice period is not a waiver of a right to a "civil action against the United States" in the present case, and RRA § 3468 is not invoked. Rather, by signing a Form 2751 the taxpayers only waive the right to administrative appeal and to file a claim for abatement after assessment, which we do not believe are "civil actions" as contemplated by the intent or language of RRA § 3468, but rather are merely administrative remedies. Further, as previously stated, we do not believe that the waiver operates as a waiver of the right to bring an action under § 7433 for violation of collection procedures. If you have any further questions, please call the attorney assigned to this matter in Branch 2 at (202) 622-3620.