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MEMORANDUM FOR NATIONAL DIRECTOR
COLLECTION FIELD OPERATIONS OP:CO:C

FROM: Joseph W. Clark
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Branch 2 (General Litigation)

SUBJECT: Statute of Limitations Issues Arising in Connection with the
Clean-up of Aged Non-Master File Accounts

This responds to your request, dated February 23, 1999, to provide you with legal guidance in connection with the above referenced project. Issues pertaining to refunds and credits were coordinated with the Assistant Chief Counsel (Income Tax & Accounting). This memorandum is not to be cited as a precedent.

ISSUES:

1. Is an otherwise valid assessment of tax rendered invalid by the Service's failure to retain or locate the administrative file supporting the assessment?
2. Is an otherwise valid extension of the collection period rendered invalid by the Service's failure to retain or locate the original Form 900, Tax Collection Waiver, executed by the taxpayer?
3. Is an extension of the collection statute obtained after the expiration of the original or previously agreed upon collection period valid?
4. Is a formal claim required to initiate the refund process with respect to overpayments for which the claim period is open?
5. Must the Service notify the taxpayer of a potential refund or credit?
6. Are there any exceptions to the section 6511(b) limitations period for refunds?
7. If the taxpayer who made the overpayment is now deceased, can the Service transfer the funds to excess collection account?

8. What is the impact of Restructuring and Reform Act (RRA) section 3461 on waivers obtained in connection with installment agreements?
9. Prior to the Bankruptcy Reform Act of 1994, what was the impact of B.C. § 362 upon the Service's ability to assess a tax against a non-petitioning spouse?

CONCLUSIONS:

1. Absent contrary evidence, the Certificate of Assessments and Payments (Form 4340) is sufficient to establish that assessment was properly made.
2. The Service may rely on its computerized records and other circumstantial evidence to show that the statute of limitations on collection was extended or suspended due to litigation, bankruptcy, offer in compromise, or by agreement with the taxpayer.
3. An extension of the collection period executed after the expiration of the original or previously agreed upon statute of limitations is invalid.
4. Section 6402 does not require that the taxpayer file a claim for refund before the Service makes a credit or refund. Section 6511(b)(2)(C) governs refunds where no claim for refund is made by the taxpayer.
5. The Service need not notify the taxpayer of a potential refund or credit.
6. A refund is allowed only to the extent provided for in I.R.C. § 6511.
7. The Service may transfer any unclaimed overpayments to the excess collection account in accordance with established procedures.
8. Pursuant to RRA § 3461(c)(2), a waiver executed in connection with an installment agreement is effective until the date agreed to, plus an additional 90 days.
9. Section 362 of the Bankruptcy Code does not suspend the assessment period for assessment against a non-petitioning spouse.

BACKGROUND:

The Service has commenced a project to review and verify all Non-Master File (NMF) accounts. The NMF contains information with respect to tax liabilities not supported by the Master File (MF). These include, but are not limited to, accounts established for non-petitioning or innocent spouses, Trust Fund Recovery Penalty assessments, and other civil penalty assessments.

Because the NMF is largely a manual system of recordkeeping, NMF accounts are not

routinely updated. The Service made a decision to review and update all of these accounts. It is our understanding that this review will consist of researching the Master File and other computerized records to verify NMF assessments, payments and credits, and to determine the correct collection statute expiration date (CSED). This memorandum addresses several legal issues that may arise as a result of this review.

LAW & ANALYSIS:

Validity of Assessment

Section 6301 of the Internal Revenue Code authorizes the Secretary to collect taxes. Usually, the first step toward collection is the making of an assessment. I.R.C. §§ 6321 and 6322. Section 6201 authorizes and requires the Secretary to assess all taxes, including interest, additional amounts, additions to the tax, and assessable penalties. I.R.C. § 6201(a). The act of assessment, *i.e.* recording the taxpayer's liability, is accomplished when the assessment officer schedules the liability and signs the assessment document (Form 23C, *Certificate of Assessment*, or RACS 006, *Summary Record of Assessment*). I.R.C. § 6203; Treas. Reg. § 301.6203-1.

It is generally accepted that the Government need not produce the original documentation used to make the assessment to establish that the tax has been properly assessed. See Gentry v. United States, 962 F.2d 555, 558 (6th Cir. 1992) (original documents used to make assessment need not be produced); United States v. Zolla, 724 F.2d 808, 810 (9th Cir. 1984), *cert. denied* 469 U.S. 830 (1984) (where copies of notices of deficiency and demands for payment were destroyed, Service could establish they were properly sent by certification). Also United States v. Dixon, 672 F. Supp. 503, 505 (M.D. Ala. 1987), *aff'd per curiam* 849 F.2d 1478 (11th Cir. 1988). Instead, a certified copy of a Form 4340, *Certificate of Assessments and Payments*, constitutes prima facie proof that a timely and proper assessment was made against the taxpayer.¹ Koff v. United States, 3 F.3d 1297 (9th Cir. 1993) (*per curiam*); United States v. McCallum, 970 F.2d 66 (5th Cir. 1992); United States v. Chila, 871 F.2d 1015, 1018 (11th Cir. 1989); United States v. Miller, 318 F.2d 637, 639 (7th Cir. 1963). See also United States v. Janis, 428 U.S. 433, 440-41 (1976). Once a timely and proper

¹ Form 4340 can also be used to establish the proper and timely mailing of the notice and demand for payment under I.R.C. § 6303. James v. United States, 970 F.2d 750 (10th Cir. 1992).

assessment is established, it is presumed correct and the burden of proving the assessment incorrect rests with the taxpayer. United States v. Stonehill, 702 F.2d 1288, 1294 (9th Cir. 1983); United States v. Lease, 346 F.2d (2d Cir. 1965).² “A general denial of liability is insufficient to meet the taxpayer’s burden.” Avco Delta Corp. v. United States, 540 F.2d 258, 262 (7th Cir. 1976), citing United States v. Prince, 348 F.2d 746 (2d Cir. 1965). Rather, the taxpayer must allege specific facts or proffer affirmative evidence showing that the Government’s calculation is incorrect or that the assessment is arbitrary. See, e.g., Pittman v. Commissioner, 100 F.2d 1308, 1318 (7th Cir. 1996). If the taxpayer produces no credible evidence, the assessment will be presumed correct and the Service will be allowed to proceed with collection. See Chila, 871 F.2d at 1018; Dixon 672 F. Supp. at 506.³

Excessive Assessment

If at any time the Service determines that an assessment is either (1) excessive in amount; (2) assessed after the expiration of the period of limitations on assessment properly applicable thereto, or (3) erroneously or illegally assessed, the assessment should be immediately abated pursuant to I.R.C. § 6404(a). Amounts exceeding the properly assessed tax liability are overpayments which should be refunded to the taxpayer in accordance with I.R.C. § 6511.

² While not relevant to the inquiry at hand, we note that an amendment to the Internal Revenue Code changes this presumption for some cases involving audits conducted after July 22, 1998. See I.R.C. § 7491.

³ The new I.R.C. § 7122(c)(3) does not impact this conclusion. The general purpose of section 7122 as amended by the RRA is to expand taxpayer opportunities to enter into offer-in-compromise agreements. See Conf. Rep. H.R. 105-599, 105th Cong. 2d Sess. at 289. Section 7122(c)(3)(B)(i) and the implementing draft regulatory provision only address the criteria for acceptance of an offer-in-compromise, and do not impact the validity of the tax assessment which is the subject of the proposed offer. This provision merely provides that the fact that the assessed tax cannot be verified because the Service is unable to locate the taxpayer’s return or administrative file cannot be the sole reason for rejecting an offer-in-compromise based on doubt as to liability. This provision does not provide that the taxpayer can successfully challenge the assessment of the tax merely because the Service has destroyed the taxpayer’s records.

Missing Form 900 Waiver

The presumption of correctness attaching to tax assessments does not attach to extensions of the statute of limitations on collection. The burden of proving the existence and validity of a collection waiver lies with the Government. United States v. McGaughey, 977 F.2d 1067, 1071 (7th Cir. 1992); United States v. Grabscheid, 82 U.S.T.C. ¶ 9382 (N.D. Ill. 1982). When the taxpayer raises the statute of limitations as a defense to collection and the original collection period has expired, the statute is presumed expired and the burden of showing that it was extended, either by law or by agreement, shifts to the Government. Schenk v. Commissioner, 35 T.C. Memo 1652, 1654 (1976).

Since the Service's document disposition guidelines call for the retention of Forms 900, *Tax Collection Waiver*, for the duration of the collection statute, the Service will generally be able to introduce the original or a certified copy of the original Form 900 as evidence that the statute was extended by the taxpayer. See Fed. R. Evid. 1004 (original required unless lost, destroyed, not obtainable, in possession of opponent, or collateral). If the original document is lost or destroyed, however, the Service may use circumstantial evidence to prove the existence of a waiver. See United States v. Conry, 621 F.2d 599 (9th Cir. 1980).

In United States v. Morgan, 1991 U.S. Dist. LEXIS 17367 (E.D. Mich. 1991), for example, the Service relied on a copy of an IMF NCC computer transcript and a supporting affidavit to establish that the assessment period for the 1977 tax year was extended by the taxpayer until September 3, 1982. The supporting affidavit explained that the entry on the IMF transcript - "ASED 090382" - corresponded to the transaction code TC 564, which is used to show that an extension of the assessment statute was obtained. The court found that the Government met its burden of persuasion on the issue. The taxpayer did not rebut the Government's assertion, and the Court entered summary judgment in favor of the Government. Similarly, in United States v. Georgi, 98-1 U.S.T.C. (CCH) ¶ 50,406, the Service relied on a certified copy of a Form 4340 and a sample copy of Form 656 to prove that the collection periods for the taxes at issue were tolled by two consecutive Offers in Compromise submitted by the taxpayer and rejected by the Service.

In summary, an otherwise valid waiver or an extension of the statute of limitations is not rendered invalid by the Service's failure to retain or find the original records evidencing the extension. The Service may rely on its computerized records to evidence that the statute of limitations was extended or suspended either by law or agreement. However, where the Service's computerized records do not contain any data evidencing an extension of the statute beyond the original collection period, and the Service does not have other documentation showing an extension, the Service will not be able to meet its burden of proof when a taxpayer raises the statute of limitations as a defense.

In those instances the Service should take immediate steps to cease all collection activities. The taxpayer may also be entitled to a refund of amounts paid after the expiration of the collection period in accordance with I.R.C. § 6511.

Waiver after the Statute of Limitations

In order to be valid, an agreement by the taxpayer to extend the statute of limitations on collection period must be (1) in writing; (2) entered into before the expiration of the original collection period or a previously agreed upon extension; and (3) executed by the taxpayer and an authorized delegate of the Commissioner. I.R.C. § 6502(a); Treas. Reg. § 301.6502-1(a)(2)(i). Accordingly, a waiver of the statute of limitations on collection obtained after the expiration of the original or previously extended collection period is invalid.

Payments after Collection Period

Payments after expiration of the statute of limitations on collection are overpayments and, subject to the statute of limitations on claims for refund, must be refunded to the taxpayer. Section 6401(a) provides that the term overpayment includes that part of the amount of the payment of any internal revenue tax which is assessed or collected after the expiration of the statute of limitations properly applicable thereto. Section 6402(a) provides that within the applicable statute of limitations the Commissioner may credit the amount of any overpayment against any outstanding liability for a tax and, subject to certain offsets, must refund the balance to the taxpayer.

An overpayment, therefore, includes (1) a payment of unassessed tax made after the statute of limitations on assessment has expired, or (2) a payment of assessed tax made after the statute of limitations on collection has expired. See Rev. Rul. 85-67, 1985-1 C.B. 364, and Rev. Rul. 74-580, 1974-2 C.B. 400. In either case, the overpayment must be refunded regardless of whether the payment is voluntary or involuntary. See Rev. Rul. 74-580, 1974-2 C.B. 400; I.R.C. § 6511.

Refund or Credit Where No Claim Is Filed

Section 6402 does not require that the taxpayer file a claim for refund before the Service makes a credit or refund. See Rev. Rul. 68-65, 1968-1 C.B. 555. In fact, section 6511(b)(2)(C) contemplates such a situation by providing a limit on the amount that can be refunded if no claim for refund is filed. This section provides that if no claim is filed, the refund is limited to that amount that would have been allowable if a claim was filed on the date the refund is allowed. The date the refund is "allowed" for purposes of section 6511(b)(2)(C) is the date a certifying official signs a Form 2188, Voucher and Schedule of Overpayments and Overassessments. See General Instrument Corp. v. United States, 33 Fed. Cl. 4 (1995); Treas. Reg. § 301.6407-1.

Notice to Taxpayer

The Service is not required to notify the taxpayer of a potential refund or credit or to provide the taxpayer with additional opportunities to file a claim for refund beyond those already afforded to all taxpayers under the Code and the existing procedures. The Service may wish, however, to furnish such notice to the taxpayers. In addition, there are other methods the Service may use to ensure that the taxpayer is aware of a potential claim with respect to such overpayments due to voluntary payments and refund offsets for which the claim period is open.

First, in cases where the Service has determined that a refund is due the taxpayer, the Service could simply make the refund without waiting for the taxpayer to file a claim.⁴ See I.R.C. § 6511(b)(2)(C). Second, the Service could evaluate whether the taxpayer has filed an informal claim for refund.

In contrast to a formal claim for refund, the judicially created “informal claim doctrine” is far more flexible. Generally, an informal claim is:

a notice fairly advising the Commissioner of the nature of the taxpayer’s claim . . . where formal defects and lack of specificity have been remedied by amendment filed after the lapse of the statutory period . . . This is especially the case where such a claim has not misled the Commissioner and he has accepted and treated it as such.

United States v. Kales, 314 U.S. 186, 194 (1941). See also United States v. Memphis Cotton Oil Co., 288 U.S. 62, 73 (1933); United States v. Felt & Tarrant Mfg. Co., 283 U.S. 269 (1931).⁵

A valid informal claim must have a written component, but the form of the written component may vary. As the Court of Claims explained:

⁴ A claim for refund may be either formal or informal. A formal claim is made on the authorized form and states the specific year and type of tax. Treas. Reg. §§ 301.6402-2(c), 301.6402-2(d), 301.6402-3, 301.6402-4. In addition, a formal claim (1) sets forth in detail each ground upon which a credit or refund is claimed, (2) sets forth facts sufficient to apprise the Commissioner of the exact basis of each ground, and (3) is signed under penalties of perjury. Treas. Reg. § 301.6402-2(b).

⁵ Some courts refer to an informal claim as a waiver of the technical requirements of a formal claim contained in the regulations. See Kales, 314 U.S. at 197; Bonwit Teller & Company v. United States, 283 U.S. 258 (1931); BCS Financial Corporation v. United States, 118 F.3d 522, 525 (7th Cir. 1997). However, no affirmative waiver of the regulations by the Service is required for an informal claim. See Mills v. United States, 890 F.2d 1133 (11th Cir. 1989), on remand, 1990 U.S. Dist. LEXIS 12970 (Sept. 21, 1990).

[T]he writing should not be given a crabbed or literal reading, ignoring all the surrounding circumstances which give it body and content . . . In addition to the writing and some form of request for a refund, the only essential is that there be made available sufficient information as to the tax and the year to enable the Internal Revenue Service to commence, if it wishes, an examination into the claim.

American Radiator & Standard Sanitary Corp. v. United States, 318 F.2d 915, 920 (Ct. Cl 1963). Thus, an informal claim exists if, based on the facts and circumstances of each case, the Service is on notice that a refund is sought for certain years. In sum, the general body of case law demonstrates a liberal interpretation of the informal claim doctrine in favor of finding an informal claim.

Finally, in the case where the taxpayer has made a claim that does not meet either the requirements of a formal claim or the more liberal standards of the informal claim doctrine, the Service could ask the taxpayer to perfect the claim. Conceivably, this could take the form of a notice of potential claim.

Statute of Limitations for Refunds

A refund is allowable only to the extent provided in the Internal Revenue Code. The Supreme Court has stated that, even if amounts are collected without legal authority and pursuant to an illegal assessment, they may not be refunded if the claim is not made within the statutory period of limitations. Kavanagh v. Noble, 332 U.S. 535, 539 (1947), reh'g denied 333 U.S. 850 (1948). Also Rosenman v. United States, 323 U.S. 658 (1945) (claims for tax refunds must conform strictly to the requirements of Congress).

Section 6511 of the Code provides both a limitation on the time period in which a claim for refund can be made and a limitation on the amount that is allowed as a refund. Under section 6511(a), a claim for refund of an overpayment of tax is required to be filed by the taxpayer within 3 years from the time the return was filed or 2 years from the tax was paid, whichever is later, or if no return is filed by the taxpayer, within 2 years from the time the tax was paid.

Section 6511(b) limits the amount of a refund. Section 6511(b)(2)(A) provides that, if the claim is filed within 3 years from the time the return is filed, the refund is limited to the tax paid in the immediately preceding 3 years plus the period of any extension of time for filing the return. Section 6511(b)(2)(B) provides that if the claim is not filed

within the 3-year period, the refund is limited to the tax paid during the immediately preceding 2 years. Section 6511(b)(2)(C) provides that if no claim is filed, the refund is limited to that amount that would have been allowable if a claim was filed on the date the refund is allowed.

In most of the cases that this memorandum is intended to address, the taxpayer will have filed a return more than 3 years before filing a formal or informal claim, or, if no claim, more than 3 years before the Service would allow a refund. Thus, we anticipate that refunds for affected taxpayers will generally be limited to the taxes paid in the 2 years immediately preceding either the date the claim is filed or the date the refund is allowed.⁶

Mitigating Circumstances

Generally, mitigating circumstances can not be invoked to extend the statute of limitation for credit or refund. A new statutory provision, however, acts to suspend the statute if certain requirements are met. Section 6511(h), as added by section 3202 of the Internal Revenue Service Restructuring and Reform Act of 1998 (RRA), Pub. L. No. 105-206, 112 Stat. 685 (July 22, 1998), suspends the statute of limitations period for filing a claim for credit or refund under section 6511(a) for any period of an individual taxpayer's life during which the taxpayer is unable to manage the taxpayer's financial affairs because of a medically determinable mental or physical impairment that can be expected to result in death, or has lasted (or can be expected to last) for a continuous period of not less than 12 months. (A taxpayer is not considered to be financially disabled during any period in which the taxpayer's spouse or any other person is authorized to act on behalf of the taxpayer in financial matters.) Section 6511(h)(2)(A) requires that proof of the taxpayer's financial disability be furnished to the Internal Revenue Service. Procedures for taxpayer's seeking suspension of the period of limitations due to financial disability appear in Rev. Proc. 99-21, 1999-17 I.R.B. 18.

Deceased Taxpayer

If the overpayment for which a claim period is open was made by a taxpayer who is now deceased and the Service is unable to determine the appropriate person or entity entitled to claim the refund, the overpayment can be moved to excess collection account (XSF). See IRM 3.17.220, *Excess Collection File*, and related Handbooks.

⁶ As previously noted, the date a refund is "allowed" for purposes of section 6511(b)(2)(C) is the date a certifying official signs a Form 2188, Voucher and Schedule of Overpayments and Overassessments.

However, if an appropriate party files a timely refund claim for the deceased taxpayer's overpayment, see Form 1310, *Statement of Person Claiming Refund Due a Deceased Taxpayer*, the overpayment must be refunded. IRM 3.17.220.2.10.

Collection Waivers and RRA § 3461

Prior to its amendment by the RRA, section 6502(a) of the Internal Revenue Code authorized the Secretary to accept waivers extending the statute of limitations on collection after assessment prior to the expiration of the collection period. The Code did not place any restrictions on the length of the extension, the number of times an extension could be granted, or the circumstances under which an extension could be obtained. No specific form or particular wording was required to effectuate a valid waiver. Rosenbloom v. United States, 699 F. Supp. 284 (S.D. Fla. 1988) (citing McGinty v. United States, 568 F. Supp. 818 (N.D. Tex. 1983)).

The RRA, however, significantly amended section 6502. See RRA § 3461. After December 31, 1999, the Service will no longer be able to obtain waivers of the collection period except in two narrowly defined circumstances. RRA § 3461(a). In addition, all extensions of the collection period executed prior to January 1, 2000, shall expire no later than December 31, 2002, except that “in a case of an extension in connection with an installment agreement, the 90th day after the end of the period of such an extension.” RRA § 3461(c)(2) (emphasis added).

The phrase “in connection with” is not defined in the statute. We believe, however, that the meaning of this phrase can be derived from subsection (a)(2)(B) of section 3461, which provides in relevant part as follows:

if there is an installment agreement between the taxpayer and the Secretary, prior to the date which is 90 days after the expiration of any period for collection agreed upon in writing by the Secretary and the taxpayer at the time the installment agreement was entered into.

RRA § 3461(a)(2)(B); I.R.C. § 6502(a)(2)(A) (emphasis added).

The statutory language is ambiguous. When looking at subsections (a)(2)(B) and (c)(2) of RRA § 3561 together, however, it is evident that the two subsections actually parallel or complement each other. Both subsections contain the same “exception” for waivers obtained in connection with an installment agreement. Subsection (a)(2) contains an installment agreement waiver exception to the general prohibition against collection waivers in the future (after December 31, 1999). Subsection (c)(2) provides the same exception for collection waivers obtained in the past (prior to January 1, 2000).

Both subsections reference the 90-day period which is to be tacked on to the end of the agreed upon extension. Thus, in order to understand the meaning or intent of one provision, one must read and understand the other.

Accordingly, we believe that the phrase “in connection with” in section 3461(c)(2) is synonymous with the phrase “at the time the installment agreement was entered into” in subsection (a)(2)(B). For a waiver to be effective until the agreed upon date plus 90 days, therefore, that waiver must have been signed at the same time the installment agreement was entered into and as a condition of entering into the installment agreement. See Treas. Reg. § 301.6159-1(b)(1)(i)(A).⁷ Whether a waiver was obtained in conjunction with - *i.e.* for the purpose of -- an installment agreement must be made on a case-by-case basis. The mere existence of an installment agreement indicator on the taxpayer’s account is not sufficient to support reliance on any waiver due to expire after December 31, 2002.

Assessment Against Non-petitioning Spouse

Section 6501(a) generally affords the Service three years from the time a return is filed for a given period to assess a tax for that period. Section 6503(h)(1) states that the statute of limitations for assessment is suspended throughout “the period during which the Secretary is prohibited by reason of [a bankruptcy case] from making the assessment” I.R.C. § 6503(h)(1). Prior to 1994, the automatic stay which is generally triggered by the filing of a bankruptcy petition barred the Service from assessing any pre-petition taxes against the debtor. B.C. § 362(a)(6); In re Coleman American Cos., Inc., 26 B.R. 825 (Bankr. D. Kan. 1983); In re Twomey, 24 B.R. 779 (Bankr. W.D.N.Y. 1982). The prohibition did not extend to nondebtors, such as non-petitioning spouses. Accordingly, the period for assessment against a non-petitioning spouse is not suspended by the debtor’s bankruptcy.

⁷ An agreement to extend the statute of limitations on collection is not a contract. Florsheim Bros. Drygoods Co. v. United States, 280 U.S. 453, 468 (1930). Rather, it is a voluntary, unilateral waiver of a defense by the taxpayer. Strange v. United States, 282 U.S. 270, 276 (1931). The Service may, as a condition of entering into an installment agreement, require the taxpayer to sign a waiver extending the collection period. Treas. Reg. § 301.6159-1(b)(1)(i)(A). This agreement to extend the collection period, however, is separate and independent from the installment agreement. As such, the fact that the installment agreement is later terminated does not affect the validity of a waiver obtained in connection with the installment agreement.

HAZARDS AND OTHER CONSIDERATIONS:

You have also raised a couple of issues regarding payments received after the expiration of the statute of limitations on collection either from a bankruptcy or a receivership proceeding. These, and other fact-dependent issues, will have to be addressed on a case-by-case basis. The cases should be referred through the proper channels to the local district counsel for a legal opinion.

If we can be of further assistance in this matter, please do not hesitate to contact us at

cc: Assistant Commissioner, Forms and Processing
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Assistant Regional Counsels (Tax Litigation) (via e-mail)