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February 28, 2005

GLS-103040-05
GLS-HQ-0095-05
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MEMORANDUM FOR ALICE L. RONK
ACTING ASSISTANT DEPUTY COMMISSIONER,
OPERATIONS SUPPORT

FROM: Mark S. Kaizen /s/ MSK
Associate Chief Counsel (General Legal Services)

SUBJECT: Use of funds retained under I.R.C. § 6306(c)(2).

This responds to your request for advice regarding the retention of a portion of the collections by persons who have entered into qualified collection contracts with the Service under the authority of I.R.C. § 6306, added by § 881 of The American Jobs Creation Act of 2004, Pub. L. 108-357, 118 Stat. 418 (Oct. 22, 2004). Specifically, the IRS may retain "an amount not in excess of 25 percent of such amount collected for collection enforcement activities of the Internal Revenue Service." I.R.C. § 6306(c)(2). The Service is considering using a portion of these retained amounts to fund the Filing and Payment Compliance (FPC) project, a computer system used to enhance collection efforts. For the reasons discussed below, we are of the opinion that there is a legal basis for the funds to be used for either collection activities funded by the Tax Law Enforcement (TLE) appropriation, or for the FPC which is funded by the Business Systems Modernization (BSM) appropriation. If the funds are to be used to fund the FPC, the Service will have to comply with the review and approval requirements of the BSM appropriation. You have also asked whether the funds retained under I.R.C. § 6306(c)(2) are available for obligation indefinitely or only during the fiscal year in which the funds were collected. As discussed below, we are of the opinion that I.R.C. § 6306(c)(2) retention authority constitutes a permanent, indefinite appropriation and the funds may be used without fiscal year limitation.

The retained amounts are appropriated funds as they are "amounts available for obligation or expenditure." 31 U.S.C. §§ 701(2), 1101(2). As appropriated funds, the

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retained amounts are subject to general fiscal law principles. See GAO, *Principles of Federal Appropriations Law* at 15-98 (March 2001). One guiding principle is that the funds may be used only for authorized purposes. 31 U.S.C. § 1301(a). Further, an appropriation for a specific object is available for that object to the exclusion of a more general appropriation which might otherwise be considered available for the same object. See e.g. Comp. Gen. B-289209 (May 31, 2002); GAO, *Principles of Federal Appropriations Law* (3d ed., Jan. 2004) at 2-21 – 2-23 and additional cases cited therein. Finally, the authority to retain funds does not generally provide authority to override limitations and procedures established in other appropriations statutes. See Comp. Gen. B-230304 (March 18, 1988) (Federal Prison Industries revolving fund may not be used to construct prisons where it is beyond the scope of the purpose of the revolving fund, and prison construction is funded by Justice Department appropriations subject to certain approval requirements).

The legislative history does not elaborate on the intended meaning of “collection enforcement activities.” See H.R. Conf. Rep. 108-755, 108th Cong., 2d Sess. 739-742 (2004). The Service’s collection activities are generally paid out of the Service’s Tax Law Enforcement (TLE) appropriation which provides for the necessary expenses of collecting unpaid accounts. See Pub. L. 108-447 (Dec. 8, 2004). Because collection enforcement activities are specifically funded by the TLE appropriation, we believe that the retained amounts are available to fund collection activities that are typically funded by the TLE appropriation.

Our analysis, however, does not end there. The plain language of I.R.C. § 6306(c)(2) does not specifically direct that the retained funds be used to augment a specific appropriation account and we also believe that the retained funds may also be available for the FPC, a modernization project funded by the BSM appropriation. The “collection enforcement activities” language used in I.R.C. § 6306(c)(2) is not the same as “collecting unpaid accounts” language as used in the TLE appropriation. Thus, in the absence of informative legislative history clarifying Congressional intent regarding the use of the retained funds, we cannot definitively conclude that the retained funds must be used exclusively for collection activities funded solely by the TLE appropriation.

The FPC is a system designed to support the Service’s internal collection activities, as it is intended to reduce collection cycle time, making the use of the Service’s internal collection resources more efficient. See <http://bsm.web.irs.gov/F&PC/Objective.htm>. Thus, the FPC can be considered a collection enforcement activity within the plain meaning of I.R.C. § 6306(c)(2). Of course, prior to obligating any of the retained funds for the FPC, the Service must comply with the review and approval procedures contained in the BSM appropriation. See Pub. L. 108-447 (Dec. 8, 2004).

You have also asked whether the retained funds are available for obligation only during the fiscal year in which collected or indefinitely. Generally, “an appropriation in a regular, annual appropriation law may be construed to be permanent or available

continuously only if the appropriation expressly provides that it is available after the fiscal year covered by the law in which it appears." 31 U.S.C. § 1301(c)(2). However, the authority to retain funds provided in I.R.C. § 6306(c)(2) is not an annual appropriation act, and the general presumption of fiscal year limitations would not apply. Rather, a statute which authorizes the deposit of receipts into a specific fund, and which makes the fund available for a specific purpose without the need for further appropriation by Congress constitutes a permanent appropriation. 73 Comp. Gen. 321 (1994); *see also Principles* at 2-18. Even in the absence of statutory language establishing a specific fund for retained funds, the retained funds will be considered a permanent appropriation where it is clear that the funds are available for expenditure for a particular purpose without additional Congressional action. 59 Comp. Gen. 215 (1980) (authority for HUD to retain inspection fees and to use the retained fees to pay inspection expenses constituted a permanent appropriation); *see also Principles* at 2-20. Because I.R.C. § 6306(c)(2) is a statute which authorizes the Service to retain funds and use them for collection enforcement activities without an additional appropriation from Congress, the retained funds may be construed as a permanent appropriation, and the funds may be expended without fiscal year limitation.

If you have any questions regarding this matter, or if we can provide additional assistance, please contact Kirsten Witter of this office at (202) 283-7900.

cc: Carol A. Campbell, Division Counsel (Wage and Investment)
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