

**Office of Chief Counsel
Internal Revenue Service
memorandum**

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to: Holly L. McCann
Chief, Excise Tax Program
Small Business/Self-Employed

from: Susan T. Mosley
Chief, Branch 3
Procedure & Administration

subject: Extension of Section 6206 Assessment Period

This is in response to your coordination request on the above-referenced matter.

ISSUE

Whether the Service and a taxpayer may enter into an agreement to extend the special three-year statute of limitations set forth in section 6206.

CONCLUSION

The Service should continue to make section 6206 assessments within the period provided for in section 6206.

BACKGROUND

The American Jobs Creation Act of 2004 and subsequent legislation provided incentive credits for the production, sale, and use of certain fuels. Taxpayers may make claims for these credits under various code sections. Section 6206 provides that the IRS may recover excessive payments of these credits by assessing the excessive portions as tax. Section 6206 also provides a special limitations period for assessing these amounts.

In July 2010, the Excise Tax Program issued interim guidance advising examiners to not enter into consent agreements to extend the assessment limitations period under section 6206. [REDACTED]

[REDACTED]

LAW AND ANALYSIS

Section 6206 provides that any excessive payments made to a taxpayer under certain excise tax provisions (relating to credits or refunds of excise tax on gas used for farms, gas used for non-highway purposes, and special fuels) are recovered by the IRS by an assessment of the excessive payment in the same manner that tax is assessed under section 4041 or 4081. Section 6206 contains its own limitations period by providing that assessment of these excessive payments must be made within three years from the last day prescribed for the taxpayer to file a claim for a refund under the applicable excise tax provision. Section 6501(c)(4) provides that the period prescribed in section 6501 for assessment of tax may be extended by mutual consent by both the Secretary and the taxpayer. No provision, including section 6501(c)(4), however, explicitly provides for extension of the section 6206 three-year period. The issue is whether the assessment period may nonetheless be extended by consent of the government and the taxpayer.

No court has ruled on whether the relevant period may be extended, and the legislative history does not assist in determining whether Congress intended to authorize consents in the situation or simply overlooked the issue entirely when enacting section 6206.¹ We did find one case in which the Tax Court applied section 6501(c)(4) to permit extension by agreement of a special limitations period outside of the section 6501(a) period. In Crawford v. Commissioner, 97 T.C. 302 (1991), the Tax Court held that the limitations period in section 183(e)(4) may be extended by a consent under section 6501(c)(4) even though no provision in section 183 provides for such an extension. The background surrounding the passage of the special limitations period, the legislative history, and the statutory language of section 183(e)(4) itself convinced the Tax Court that section 6501(c)(4) applied to extend the period. Id. at 307. Significantly, the court was persuaded by section 183(e)(4)'s incorporation by reference of the "statutory period for the assessment" – the section 6501(a) period – that would otherwise apply, and references in legislative history to the "normal 3-year limitations period" being extended by section 183(e)(4). Further, the special period of limitations in section 183(e)(4), applicable to deductions attributable to section 183 activity, was enacted to ameliorate the harshness of requiring taxpayers to waive the normal three year assessment period for non-section 183 activity. Id. at 306.

In contrast, nothing in the language of section 6206 itself or the legislative history unequivocally indicates that Congress intended section 6501(c)(4) to apply to assessments under section 6206. This ambiguity raises concerns regarding the validity of an assessment after expiration of the three-year period. As the terms of section 6206 itself do not expressly allow a consent to an extension of the section 6206 limitations period, other provisions in the Code must be examined to determine if there is a clear indication that section 6501(c)(4) should apply to section 6206.

As referenced above, section 6501(c)(4) provides that the period prescribed in section 6501 for assessment of tax may be extended by mutual consent by both the Secretary and the taxpayer. Section 6501(a) provides the general rule that "any tax imposed by this title shall be assessed within 3 years after the return was filed." The specific provision in section 6206 supplants the

¹ Internal Revenue Code of 1954, Amendment, Pub. L. No. 84-466, § 4(b)(1), 70 Stat. 87; H.R. Rep. No. 84-1957 (Conf. Rep.) (1956) (no conference amendments impacting I.R.C. § 6206); S. Rep. No. 84-1609, at 9 (1956); H.R. Rep. No. 84-1684, at 8 (1956).

general provision in section 6501(a) and, therefore also removes the section 6206 assessment from the ambit of section 6501(c)(4). Moreover, the section 6206 period is triggered by the due date of the taxpayer's claim (for a refund or payment under the relevant excise tax section) rather than the filing of a tax return contemplated by section 6501(a).

Generally, cross references have no legal effect, although they may shed light on what Congress intended. I.R.C. § 7806(a). Section 6207(6) (housed in Subtitle F, Chapter 63-Assessment) provides a general cross reference to Chapter 66 for periods of limitation on assessment. Chapter 66 contains section 6501. This cross reference is a mere general cross reference informing one reading Chapter 63-Assessment of the location of the rules regarding limitations on assessment (logically, Chapter 66-Limitations). The general cross reference in section 6207(6) does not necessarily mean that Congress intended to incorporate section 6501(c)(4) into section 6206 for the purpose of extending the section 6206 assessment limitations period.

Section 6504(8) cross references section 6206 for the applicable limitations period in the case of an assessment on an excess amount paid (as described in section 6206). [REDACTED]

[REDACTED] But an inference can be drawn that the cross reference indicates that section 6206 contains the exclusive rules for the limitations period on assessment under section 6206. The wording of section 6501(c)(4) supports the latter inference because it specifically refers to "the time prescribed *in this section* [i.e., section 6501] for the assessment of any tax imposed by this title...." and does not refer to section 6206 or its special limitations period.² (emphasis added).

Section 6206 is a unique Code section in that it permits the government to administratively recover an amount that is tantamount to an erroneous refund. To accomplish this, section 6206 provides that the excessive payment or refund is assessed in the same manner as if it were a tax imposed by section 4081 (with respect to refunds under section 6416(a)(4) and payments under sections 6420 and 6421), or 4041 or 4081 (with respect to payments under section 6427) and as if the person who made the claim were liable for such tax. While this means that the general assessment and collection rules that apply to sections 4041 or 4081 also apply to an assessment of an amount under section 6206, the specific limitations period in section 6206 itself clearly trumps any other period. Any reading of the Code that concludes the excessive payment or refund is assessed within the same limitations period as a tax under section 4041 or 4081 would arguably read the special limitations provision of section 6206 out of the statute.

One construction of sections 6206 and 6207(6) in conjunction with sections 6501(c)(4) and 6504(8) is that Congress was entirely silent on this consent issue. On the other hand, a broad reading of these sections may lead to the conclusion that Congress intended to incorporate section 6501(c)(4) into section 6206. Under this view, Congress intended all the rules, including section 6501(c)(4), that apply to the assessment and collection of taxes imposed by sections



² Section 6501(c)(4) was enacted in 1954 prior to the enactment of section 6206 in 1956. See H.R. Rep. No. 83-1337, at 502 (1954) ("Paragraph (4) of subsection (c) contains the existing provision of the income-tax law permitting an extension of time for assessment by written agreement between the taxpayer and the Internal Revenue Service, and extends this rule to all taxes.") As a matter of statutory construction, Congress is presumed to be aware and to have knowledge of the effect that its own action may have on existing statutes.

4041 or 4081 to apply equally to the assessment and collection of the excessive amounts described in section 6206. While both interpretations may be reasonable, it is relatively apparent that Congress has not unequivocally provided for the ability to enter into an agreement to assess beyond the three-year period provided for in section 6206.

Because the applicability of section 6501(c)(4) to section 6206 is not clear, assessments under section 6206 should be made within the time period prescribed in section 6206.

CASE DEVELOPMENT, HAZARDS AND OTHER CONSIDERATIONS

There is some Supreme Court case law from the 1930s suggesting that consent would be valid despite the absence of express statutory authority.³ These cases involved, however, litigants attempting to benefit by disavowing an agreement that the party entered into an arm's length manner.



Please contact Keith Brau at 622-3620 if you have any questions.

³ See McDonnell v. United States, 288 U.S. 420, 424 (1933) (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); 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 period on assessment could be waived by the taxpayer in the same fashion as other statutes of limitations are waived."); See also Walsonavich v. United States, 335 F.2d 96, 100-101 (3d Cir. 1964) (recognizing that estoppel is rarely invoked against the government, but holding that it was estopped from arguing it lacked authority to enter into an extension agreement); but see Chaney v. United States, 45 Fed. Cl. 309, 317-18 (1999) (holding that a party involving estoppel against the government bears a heavy burden to prove the elements of estoppel, which include, inter alia, a misrepresentation by an agent of the United States acting within the apparent scope of duty and a factual context in which the absence of equitable relief would be unconscionable.); United States v. Brockamp, 519 U.S. 347 (1997) (equitable tolling principles do not extend the statute of limitations for bringing refund claims).