


January 20, 2010

MEMORANDUM FOR CHRISTOPHER WAGNER, COMMISSIONER  
SMALL BUSINESS/SELF-EMPLOYED DIVISION

FROM:

  
Nina E. Olson  
National Taxpayer Advocate

SUBJECT:

Taxpayer Advocate Directive 2010-3 (*Permanently Resolve or Restrict Excessively Long Statutory Periods for Collection Extended Pre-1998 to Reflect Current Policy Limits (plus any applicable statutory suspensions) and Correct Miscalculated CSEDs*)

### **TAXPAYER ADVOCATE DIRECTIVE**

I am issuing this Taxpayer Advocate Directive (TAD) to direct the Commissioner, Small Business/Self-Employed Division to:

1) within ten days of this TAD, provide the National Taxpayer Advocate with the names of SB/SE employees to be included in a joint SB/SE-TAS workgroup for review, and resolution, adjustment or correction of all accounts with collection statute expiration dates (CSEDs) extended beyond 15 years after assessment (plus any statutory suspensions);

2) within 180 days of this TAD, identify and review all accounts with CSEDs extended beyond 15 years after assessment through the joint SB/SE-TAS workgroup, and

(A) abate the tax and additions to tax for accounts with CSEDs extended beyond 15 years after assessment (plus any statutorily required suspensions) that would have already expired if limited to 15 years, unless exceptional circumstances exist, and notify the taxpayers involved; and

(B) adjust the CSEDs to reflect the statutory period for collection of 15 years (plus any statutorily required suspensions) for accounts with

CSEDs that will not expire after their extensions are limited to 15 years from assessment, notify the taxpayers involved, and if necessary, correct these CSEDs for statutory suspensions incorrectly calculated; and

3) within ten days of this TAD, issue Interim Guidance limiting any CSED extended by a Form 900, *Tax Collection Waiver*, in connection with an installment agreement post-1998 to 15 years (plus any statutory suspensions).

I will provide TAS and TAS Research employees to serve on the joint SB/SE-TAS workgroup and assist your employees in this directive.

## **I. Authority**

This TAD is being issued pursuant to Delegation Order No. 13-3, granting the National Taxpayer Advocate the authority to issue a TAD to mandate administrative or procedural changes to improve the operation of a functional process or to grant relief to groups of taxpayers (or all taxpayers) when implementation will protect the rights of taxpayers, prevent undue burden, ensure equitable treatment, or provide an essential service to taxpayers.<sup>1</sup> I have raised concerns, in writing (via three Annual Reports to Congress<sup>2</sup>), regarding incorrect CSEDs and excessively long CSED extensions. In addition, I have raised concerns, in writing (via the 2009 Annual Report to Congress), regarding the IRS's failure to write-off accounts with pre-1998 CSED extensions that if entered into today would violate current IRS policy. Attached is the Most Serious Problem, *IRS Policies and Procedures for Collection Statute Expiration Dates Adversely Affect Taxpayers*, from the 2009 Annual Report to Congress, which serves as a proposed TAD issued to the responsible operating area within the meaning of IRM 13.2.1.6.1.2 (July 16, 2009), and which includes the IRS formal written response, declining to make those changes in a majority of cases. In addition, since 2004, TAS has raised these concerns in IRS-TAS taskforces and working groups. Therefore, all procedural requirements for issuing this TAD have been satisfied.<sup>3</sup>

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<sup>1</sup> Internal Revenue Manual (IRM) 1.2.50.4, Delegation Order 13-3 (formerly DO-250, Rev. 1), *Authority to Issue Taxpayer Advocate Directives* (Jan. 17, 2001). See also IRM 13.2.1.6, *Taxpayer Advocate Directives* (July 16, 2009).

<sup>2</sup> National Taxpayer Advocate 2004 Annual Report to Congress 180-92; National Taxpayer Advocate 2006 Annual Report to Congress 520-26; National Taxpayer Advocate 2009 Annual Report to Congress 217-27.

<sup>3</sup> In advance of issuing a TAD, the National Taxpayer Advocate is required to work with and communicate with the owners of the process in order to correct the problem. IRM 13.2.1.6.1 (July 16, 2009).

## II. Background

The CSED is the date that the IRS must cease taking collection actions on a taxpayer's account. The CSED may be suspended if a proceeding in court has begun, if the IRS and the taxpayer agree to extend the collection statute upon entering into an installment agreement (IA), or if the taxpayer and the IRS agree to extend the collection statute as part of a levy release.<sup>4</sup> Other case actions also may suspend or extend a CSED, such as a bankruptcy,<sup>5</sup> a Collection Due Process (CDP) appeal,<sup>6</sup> an offer in compromise (OIC),<sup>7</sup> or a request for relief from joint and several liability on a joint return,<sup>8</sup> to name a few. The IRS uses Form 900, *Tax Collection Waiver*, to extend CSEDs on accounts beyond the ten-year period for collections.<sup>9</sup> Before November 1995, the IRS secured these waivers on any account and for any duration provided the CSED was open.<sup>10</sup> The IRS subsequently revised its policy and procedures to limit CSED extensions entered with an IA to five years.<sup>11</sup>

In April 1998, the IRS Assistant Chief Counsel (General Litigation), in a memorandum to the Chief Counsel, concluded that IAs that partially paid the liability within the CSED were not permitted under the law.<sup>12</sup> Six years later, Congress amended IRC § 6159 as part of the American Jobs Creation Act of 2004 to permit the IRS and taxpayers to enter into partial payment installment agreements (PPIAs).<sup>13</sup> Now, the IRS will only secure CSED waivers in connection with PPIAs for a maximum of five years.<sup>14</sup>

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<sup>4</sup> IRC §§ 6502(a)(2) and 6331(k).

<sup>5</sup> IRC § 6503(h).

<sup>6</sup> IRC § 6330(e).

<sup>7</sup> IRC § 6331(k).

<sup>8</sup> IRC § 6015(e)(2).

<sup>9</sup> Form 900, *Tax Collection Waiver* (Rev. Apr. 2003).

<sup>10</sup> See IRM 53(11)1(1) (Oct. 28, 1993) (stating, "The ten year collection period may, at any time prior to its expiration, be extended for any period of time agreed upon in writing by the taxpayer and the District Director," but not providing any guidance on how employees should use CSED waivers).

<sup>11</sup> IRM 5331.1(12)(b)2 (April 4, 1994).

<sup>12</sup> IRS Chief Counsel, *Partial-Payment Installment Payment Agreements* (Apr. 20, 1998), as referenced by H.R. Rep. No. 108-755, at 649 (2004).

<sup>13</sup> Pub. L. No. 108-357, § 843, 118 Stat. 1418, 1600 (2004).

<sup>14</sup> IRM 5.14.2.1.3 (Sept. 26, 2008). When taxpayers have some ability to pay, but cannot pay their tax liabilities in full before the CSED expires, the IRS may allow them to enter into PPIAs. IRM 5.14.2.1 (Sept. 26, 2008).

Until 1998, the IRS routinely secured CSED extensions from taxpayers on all accounts, including those deemed currently not collectible (CNC).<sup>15</sup> Congress eliminated these extensions as part of the IRS Restructuring and Reform Act of 1998 (RRA 98).<sup>16</sup> Congress believed the IRS was forcing taxpayers into lengthy extensions, and that ten years was long enough to collect tax liabilities.<sup>17</sup> The Senate version of RRA 98 proposed to eliminate all CSED extensions, but in a compromise, Congress amended IRC § 6502 to provide that the CSED may be extended in connection with an IA or prior to a levy release after the ten-year period.<sup>18</sup> RRA 98 further provided that most CSED extensions, except for those entered in connection with an IA, would expire on or before December 31, 2002.<sup>19</sup>

### III. Reasons for Issuing this TAD

The IRS continues to neglect a group of taxpayers with CSEDs that were unreasonably extended in the past. These taxpayers are subject to collection action or potential collection action under a collection policy abandoned by the IRS for all other taxpayers over ten years ago. Before the IRS changed its policy regarding CSED extensions, it was common for IRS Collection personnel to extend collection statutes for periods as long as ten, 20, 30, 40, or even 50 years in conjunction with an IA.<sup>20</sup> Without specific guidelines on CSED extensions, some IRS collection personnel erred towards seeking lengthy CSED extensions. Taxpayers did not always understand the implications of signing the Form 900, *Tax Collection Waiver*.<sup>21</sup>

Many taxpayers with lengthy CSEDs owe more on their accounts than when they entered into their IAs. Yet in other cases, taxpayers have stopped making payments altogether.<sup>22</sup> Consider the following case:

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<sup>15</sup> National Taxpayer Advocate 2004 Annual Report to Congress 182.

<sup>16</sup> Pub. L. No. 105-206, § 3461, 112 Stat. 685, 764 (1998) (codified under IRC § 6502(a)).

<sup>17</sup> H.R. Rep. No. 105-364, at 69-70 (1998); Joint Tax Committee on Taxation, *General Explanation of Tax Legislation Enacted in 1998* 106 (Nov. 24, 1998). 144 Cong. Rec. S4147-01, S4184 (May 4, 1998) (statement of Sen. Roth).

<sup>18</sup> IRC § 6502(a)(2). Under this provision, the IRS could extend the CSED in cases where the IRS served a levy on a fixed and determinable right, e.g., pension payment, Social Security payments, or trust fund payments of the taxpayer, but had to release the levy due to hardship after the ten-year period had run. See National Taxpayer Advocate 2006 Annual Report to Congress 527-30.

<sup>19</sup> Pub. L. No. 105-206, § 3461(c)(2), 112 Stat. 685, 764 (1998).

<sup>20</sup> National Taxpayer Advocate 2006 Annual Report to Congress 520.

<sup>21</sup> National Taxpayer Advocate 2006 Annual Report to Congress 521.

<sup>22</sup> National Taxpayer Advocate 2006 Annual Report to Congress 524.

A retired couple with health problems lives in a small town south of Dallas. The original assessments were made in 1988 for the 1985 and 1987 tax years, and would have expired in 1998 under the normal ten-year statute. However, the couple established an IA in December 1989, and signed a Form 900 waiver extending the CSED to December 23, 2027. They made small payments (\$75 to \$150/month) until 1991, but then they were placed in CNC - hardship status. They filed an OIC in April 2008 to pay \$2,000 against the \$48,000 liability for 1985 and 1987. The offer was rejected in September 2008, and their representative appealed. In his appeal, the representative did not dispute the reasonable collection potential (RCP) calculation showing a "greater amount was collectible." He only challenged the Form 900 waiver that created this "unconscionable" CSED extension.<sup>23</sup> On April 10, 2009, Appeals sustained the OIC rejection. The case went back into active collection but the accounts were closed CNC as of December 16, 2009.<sup>24</sup>

In preparing the 2009 Annual Report to Congress, TAS Research found that almost 80 percent of the 4,671 taxpayers identified with excessively long CSEDs have not made a payment in over a year.<sup>25</sup> Further, six of 17 cases with excessively long CSEDs reviewed by TAS and submitted to IRS Collection for review had miscalculated CSEDs, including one which appears to violate RRA 98 as the extension was not entered in connection with an IA.<sup>26</sup>

Due to the taxpayer burden created by these lengthy CSEDs and the possibility of over or under payments due to miscalculated CSEDs, I identified the IRS's mishandling of CSEDs as a Most Serious Problem. In the IRS's formal response to the 2009 Most Serious Problem, *IRS Policies and Procedures for Collection Statute Expiration Dates Adversely Affect Taxpayers*, it stated:

The National Taxpayer Advocate highlights a number of cases in which she believes the collection statutes were

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<sup>23</sup> See AOIC history, offer # 1000687252 (Oct. 31, 2008).

<sup>24</sup> TAMIS case # 4527492

<sup>25</sup> TAS Research data from IRS Compliance Data Warehouse (CDW) extract (Sept. 24, 2009).

<sup>26</sup> See TAS Program Analyst, Patricia Barnes, E-mail, Subject: *MSP response on CSEDs* (Dec. 1, 2009).

unreasonably extended. The IRS reviewed a number of these cases and, in a majority of the cases, the decisions to extend the CSED was appropriate. Nevertheless, the IRS will review cases with questionable CSED extensions to determine whether circumstances exist under which the IRS should consider alternative resolution options.<sup>27</sup>

I believe that the relevant inquiry regarding excessive extensions does not involve whether they were appropriate or legally justified in the past, but rather is the IRS still supporting these practices now. While RRA 98 did not eliminate lengthy CSED extensions in connection with IAs, the IRS adopted a policy consistent with congressional intent and limited CSED extensions to five years. Further, RRA 98 left the Commissioner's plenary authority to abate assessments unchanged.

The Commissioner has plenary authority to abate the unpaid portion of any tax, or any liability in respect thereof, if it is excessive in amount (IRC § 6404(a)(1)), or if the IRS determines under uniform rules prescribed by the Commissioner that the administration and collection costs involved would not warrant collection of the amount due (IRC § 6404(c)).<sup>28</sup> The Commissioner's authority to abate assessments could be found in the internal revenue laws as early as 1864.<sup>29</sup> In debates over § 44 of the Internal Revenue Act of June 30, 1864 (the predecessor to IRC § 6404), Senator Howe opposed the bill as it would vest too much authority in one man, the Commissioner of Internal Revenue.<sup>30</sup> In recommending that the authority to abate tax liabilities be stricken from the bill, he stated, "this section in the very words which I have proposed to strike out still gives the Commissioner of Internal Revenue unlimited and unrestricted authority over this whole revenue . . ."<sup>31</sup> No Senator present for Senator Howe's assertions regarding the Commissioner's authority objected to or rejected them, but the bill passed unchanged. Thus, it appears that Congress intended for the Commissioner to have plenary authority to abate certain unpaid taxes.

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<sup>27</sup> National Taxpayer Advocate 2009 Annual Report to Congress 224.

<sup>28</sup> The Secretary of Treasury delegates this authority to the Commissioner of Internal Revenue. "Secretary" under IRC § 6404 means "the Secretary of the Treasury or his delegate." IRC § 7701(a)(11)(B). IRC § 7701(a)(12)(A) defines "or his delegate" as "any officer, employee, or agency of the Treasury Department duly authorized by the Secretary of the Treasury directly, or indirectly by one or more redelegations of authority, to perform the function mentioned or described in the context."

<sup>29</sup> See § 44 of the Internal Revenue Act of June 30, 1864.

<sup>30</sup> Cong. Globe, 38th Cong., 1st Sess. 2702 (June 3, 1864).

<sup>31</sup> *Id.*

Congress again addressed the Commissioner's abatement authority in 1954 when it added IRC § 6404(c). It is clear that Congress recognized that the Commissioner had the administrative authority to abate unpaid taxes by the Senate Finance Committee's report:

A change from existing law is contained in subsection (c) of this section. It provides that the Secretary may (but is not required to) abate the unpaid portion of the assessment of any tax or any tax liability in respect thereof, if it is determined that the administration and collection cost involved would not warrant collection of the amount due. *This section recognizes the practice of a number of years adopted under the general administrative authority of the Department (emphasis added).*<sup>32</sup>

Thus, IRC §§ 6404(a) and (c) give the Commissioner plenary authority on deciding whether to abate unpaid taxes which are either excessive in amount or which involve excessive administration and collection cost.

The Office of Chief Counsel asserted in *H & H Trim & Upholstery Co. v. Commissioner* that "excessive in amount" under IRC § 6404(a)(1) only refers to liabilities assessed erroneously or illegally.<sup>33</sup> However, the Tax Court rejected this narrow interpretation of "excessive" by noting that Counsel's interpretation would render § 6404(a)(1) superfluous as § 6404(a)(3) already permits abatement of "erroneously or illegally assessed" taxes. Further, the court relied on *Webster's Dictionary* to define "excessive" as "whatever notably exceeds the reasonable, usual, proper, necessary, just, or endurable," to define "just" as "equitable," and "equitable" as "fair."<sup>34</sup> While the Tax Court was careful to limit this interpretation to interest abatement cases, it suggests that the Commissioner's authority to abate "excessive" unpaid taxes applies to abatement of unpaid taxes if enforcing them would be unreasonable, unjust, or inequitable.

Whether the collection and administrative cost would not warrant collection of the account or the account is excessive in amount due to the inequity of enforcing lengthy CSED extensions against taxpayers, the Commissioner may abate unpaid taxes and accruals on these accounts. However, I believe that the IRS should carefully consider abatements in cases of fraud, tax evasion, frivolous filings, or lengthy periods of

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<sup>32</sup> S. Rep. No. 1622, 83d Cong., 2d Sess., 581 (1954).

<sup>33</sup> *H & H Trim & Upholstery Co. v. Commissioner*, T.C. Memo. 2003-9.

<sup>34</sup> *Id.*

noncompliance. Some factors, such as several years of current compliance, economic hardship, allegations of an IRS employee's coercion in connection with a Form 900 waiver, and accruals outpacing payments under an IA, should weigh in favor of abating liabilities or adjusting CSEDs for taxpayers with these circumstances. I would be happy to assist you in further developing criteria to determine which taxpayers should receive the relief contemplated by this TAD.

The IRS needs to resolve taxpayer inequity and avoid excess collection and administrative cost by abating most accounts that have CSEDs extended beyond 15 years from assessment if more than 15 years (plus applicable statutory suspensions) has passed since assessment. Alternatively, in cases where the CSEDs would still be open, the IRS should adjust the CSEDs on these accounts to 15 years from assessment (plus applicable statutory suspensions). Further, the IRS should correct any CSED errors identified in reviewing these accounts with lengthy CSEDs, and the IRS should refund overpayments resulting from these errors as appropriate. In summary, I believe that the IRS should not make these taxpayers into debtors for life.

If you have any questions, please contact Glenn Thomas on my staff at (202) 622-1412.

Attachment

cc: Steven T. Miller, Deputy Commissioner, Services and Enforcement