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MEMORANDUM FOR TECHNICAL ADVISOR, AIR TRANSPORT
PREFILING & TECHNICAL GUIDANCE (LARGE & MIDSIZE
BUSINESS)

FROM: Chief, Branch 8
Associate Chief Counsel (Passthroughs and Special Industries)

SUBJECT: National Office Field Service Advice: Guidance Regarding the
Proper Method for Examiners to Use when Extending the
Periods of Limitation for Assessment of Collected Excise Taxes

DISCLOSURE STATEMENT

Field Service Advice is Chief Counsel Advice and is open to public inspection pursuant to the provisions of § 6110(i). The provisions of § 6110 require the Internal Revenue Service (IRS) to remove taxpayer identifying information and provide the taxpayer with notice of intention to disclose before it is made available for public inspection. See § 6110(c) and (i). Section 6110(i)(3)(B) also authorizes the IRS to delete information from Field Service Advice that is protected from disclosure under 5 U.S.C. § 552 (b) and (c) before the document is provided to the taxpayer with notice of intention to disclose. Only the National Office function issuing the Field Service Advice is authorized to make such deletions and to make the redacted document available for public inspection. **Accordingly, the Examination, Appeals, or Counsel recipient of this document may not provide a copy of this unredacted document to the taxpayer or their representative.** The recipient of this document may share this unredacted document only with those persons whose official tax administration duties with respect to the case and the issues discussed in the document require inspection or disclosure of the Field Service Advice.

This Field Service Advice responds to your memorandum dated July 25, 2000. Field Service Advice is not binding on Examination or Appeals and is not a final case determination. This document is not to be cited as precedent.

Questions concerning this advice may be directed to [REDACTED]

You have requested guidance on the appropriate forms to use and the information to include when requesting an extension of time to assess under § 6501(c)(4) of the Internal Revenue Code with respect to the excise taxes imposed by §§ 4251, 4261, and

4271. You have asked us to consider three hypothetical situations and three sample phrases¹ concerning the language to use to reflect the appropriate tax period on a consent to extend the period for assessment (consent).

As a preliminary matter, we concur with your conclusion, as evidenced by the three situations in your memorandum, that a consent to extend the period of limitation for assessment under § 4251, 4261, or 4271 does not extend the period of limitation for making a separate penalty assessment against the collector of tax under § 6672. Therefore, if the IRS proceeds against both the taxpayer and the collector the periods for assessment must be separately extended for each party. See § 49.4291-1 of the Facilities and Service Excise Tax Regulations concerning proceeding directly against the taxpayer.

ISSUES

1. What are the appropriate forms to use to extend the periods for assessment in the three hypothetical situations listed below?
2. What information must be included in the consents to be valid?

CONCLUSIONS

1. Form 872-B, Consent to Extend the Time to Assess Miscellaneous Excise Taxes, is the appropriate form to use to extend the period for assessment in the first situation, referenced below. Form 2750, Waiver Extending Statutory Period for Assessment of Trust Fund Recovery Penalty, is the appropriate form to use for the second and third situations, referenced below.
2. To be valid all consents should contain all of the information requested by the forms, including the taxpayer's name, address, and identification number, the type of tax, the tax period or periods, the taxpayer's authorized signature and date, and the expiration date of the consent, if applicable. Although no particular language is needed, the information must be sufficient to manifest the intent of the parties to extend the period for assessment.

FACTS

You did not provide facts relating to a specific case. However, you request guidance with respect to the following three hypothetical situations.

Situation 1. The collecting agent did not collect the tax due but did timely file Form 720, Quarterly Federal Excise Tax Return, reporting tax for other transactions. The examiner wishes to extend the period for assessment of tax under § 4261 for the person that pays for the transportation (the taxpayer).

¹ An examiner should follow the rules set forth in the IRM discussed herein. However, please note that your third sample phrase should not be used.

Situation 2. The collecting agent collected the proper amount of tax but failed to report and pay over the tax to the government. However, it timely filed Form 720 reporting tax for other transactions. The examiner wishes to extend the period for assessment for the collecting agent.

Situation 3. The collecting agent failed to collect the tax but did timely file Form 720 reporting tax for other transactions. The examiner wishes to extend the period for assessing the penalty imposed under § 6672 against the collecting agent.

APPLICABLE LAW AND DISCUSSION

Section 4251 imposes a tax on amounts paid for communications services; § 4261 imposes a tax on amounts paid for transportation of persons by air; and § 4271 imposes a tax on the transportation of property by air. The tax is paid by the person that pays for the service or facility (the taxpayer) and generally the person receiving the payment for the service or facility (the collecting agent) is obligated to collect the tax from the taxpayer and pay it over to the government.² Sections 4251(a)(2), 4261(d), 4271(b), and 4291.

Under § 6672(a), any person required to collect, truthfully account for, and pay over any tax who willfully fails to collect the tax, or truthfully account for and pay over the tax, or willfully attempts in any manner to evade or defeat the tax or the payment thereof, shall, in addition to other penalties provided by law, be liable for a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over. The trust fund recovery penalty imposed by § 6672 (the TFRP) is distinct from the liability imposed under §§ 4251, 4261, and 4271.³ Thus, to the extent an examiner wishes to proceed against both the taxpayer and the collecting agent to ensure the IRS collects the appropriate amount of tax, separate consents must be secured.

Section 6501(a) provides generally that tax shall be assessed within three years after the return was filed.⁴ Pursuant to § 6501(c)(4), the IRS and a taxpayer can agree in writing to extend the period for assessment, as long as the agreement is entered into

² The taxes imposed by §§ 4251, 4261, and 4271 are the so-called “collected” excise taxes, which are those taxes imposed upon the person making the payment subject to tax and collected by the person receiving that payment.

³ The TFRP, applicable to withheld income and employment taxes and excise taxes imposed by §§ 4251, 4261, and 4271, is used to facilitate the collection of tax and to enhance voluntary compliance. See Policy Statement P-5-60. Although denominated a penalty, it is not penal in nature, since it brings to the government only the same amount to which it was entitled by way of the tax. It is simply a means of ensuring that the tax is paid. See Olsen v. United States, 952 F.2d 236 (8th Cir. 1991)(citations omitted).

⁴ For purposes of the penalty imposed by § 6672, the operative return is the Form 720 filed by the collecting agent. See § 40.6011(a)-1(a)(3) of the Excise Tax Procedural Regulations. Therefore, the penalty must be assessed, or an extension of time to assess must be obtained, within three years of the later of the due date or the actual filing date of the Form 720 for the period in which the payment was received.

before the expiration of the assessment period. Section 6501(c)(4)(B) requires the IRS to notify a taxpayer of its right to (1) refuse to extend the period of limitation for assessment; (2) limit the extension to particular issues; and (3) limit the extension to a particular period of time. The notification requirement applies to requests to extend the periods of limitation for assessment made after December 31, 1999. Section 301.6501(c)-1(d) of the Procedure and Administration Regulations specifically requires a consent be executed by both parties to be valid.

Section 7501 provides that whenever an person is required to collect or withhold any internal revenue tax from any other person and to pay over the tax to the United States, the amount of tax collected or withheld shall be held to be a special fund in trust for the United States. The amount of the fund shall be assessed, collected, and paid in the same manner and subject to the same provisions and limitations (including penalties) as are applicable with respect to the taxes from which the funds arose.

Appropriate Form

An otherwise valid waiver agreement need not be executed upon a particular form or even embodied in one writing. See Stearns Co. v. United States, 291 U.S. 54 (1934). No particular formula of words is necessary. Section 6501(c)(4) only requires that the parties reach written agreement regarding the extension; it leaves the parties free to decide for themselves the terms governing the extension. Pursell v. Commissioner, 38 T.C. 263, 278 (1962), aff'd. per curiam 315 F.2d 629 (3d Cir. 1963). The failure to use the appropriate form will not render a consent ineffective as long as the writing manifests a clear intent of the parties to extend the period for assessment.

However, to provide for the receipt of uniform, complete information the IRS has developed specific forms to document the written agreement to extend the period for assessment between the IRS and taxpayers. IRM 121.2.22.4.1 provides that Form 872-B is used to extend the time to assess miscellaneous excise taxes and IRM 121.2.22.6.11 provides procedures for those consents. Per IRM 121.22.4.1, Form 2750 is used to extend the period for assessment with respect to the TFRP. See IRM 121.22.6.10.3.(3), which provides that all examiners are responsible for protecting the period to assess the TFRP. See also IRM 4.3.3.2.8(1), which specifically provides that consent Form 872-B is used to extend the statutory period of limitation for assessment of the excise taxes reported on Forms 720, 2290, 730, and 11-C. IRM 4.3.3.8.4(2) states, in part, that if a collecting agency has collected tax from its customers but failed to pay the tax to the government the tax should be assessed under § 7501(a) for the collecting agency. However, no part of the IRM provides for the use of a specific form to document a consent to extend the period for assessment under § 7501. As stated above, no particular form is necessary as long as the parties clearly manifest an intent to extend the period for assessment, in writing, and the writing is signed by both the collecting agent and the IRS.

Although the Form 872-B and Form 2750 are the forms currently provided for use by the IRM, there is no legal impediment to changing the IRM and creating a new form, provided all the necessary information is included. We would be happy to review any

proposed forms for legal sufficiency.

Content of Consents

As noted above, legally, a consent must be in writing, must be signed on behalf of the Commissioner by an appropriate person, and must be obtained only after taxpayers are properly notified of their rights under § 6501(c)(4)(B) for the consent to be valid. However, chapter 22 of IRM 121.2 sets forth in great detail the rules to follow when obtaining consents to extend the period for assessment.

IRM 121.2.22.5 covers the rules regarding the preparation of consents and makes clear that every effort should be made to ensure that a consent contains the terms of the agreement, the identity of the taxpayer, the tax periods involved, and the authority to sign the consent. The IRM specifically provides that the taxpayer's name, kind of tax, address, tax period, expiration date, signature and date, and taxpayer identification number should be included in the consent. The IRM also discusses each element in detail.

IRM 4.3.3.2.8(8) provides that one Form 872 -B may be used to obtain consent for one or more taxable periods. When a single form is used for multiple periods, all periods covered should be shown on the Form 872 -B. The periods may be shown inclusive, beginning with the first day of the earliest period and ending with the last day of the most recent period, e.g. 1/1/92 through 6/30/93. Copies of the consent should be attached to each return covered by the consent. The same specificity should be used when completing a Form 2750.

The most important factor is that the written consent manifest the intent of the parties to extend the period for assessment. An agreement to extend the period of limitation for assessment between the Commissioner and a taxpayer is not a contract, but a unilateral waiver of a defense by the taxpayer. Piarulle v. Commissioner, 80 T.C. 1035 (1983). Contract principles are significant, however, because § 6501(c)(4) requires the consent to be a written agreement between the parties. *Id.* When ambiguity exists in the wording of a consent, courts have been willing to look to the intent of the parties at the time the agreement is executed and to reform the written document to conform to the intent of the parties. See Kelley v. Commissioner, 45 F.3d 348 (9th Cir. 1995) and State Police Association of Massachusetts v. Commissioner, 125 F.3d 1, 4, (1st Cir. 1997) aff'g T.C. Memo 1996-407 (1996), and Woods v. Commissioner, 92 T.C. 776 (1989). However, ambiguity can be avoided by following the procedures in the IRM.