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MAY 2001 *BULLETIN NO. 488*

COLLECTION, BANKRUPTCY AND SUMMONSES BULLETIN

Department of the Treasury Office of Chief Counsel Internal Revenue Service

Priorities Under Tax Lien Act Do Not Extend To Action to Enforce Levy

The Tax Lien Act, I.R.C. § 6323, does not control the determination of claim priority when the Government has a judgment under I.R.C. § 6332(d) against a person who failed or refused to honor a levy, the Ninth Circuit held in **Law Offices of Jonathan A. Stein v. Cadle Company, 2001 U.S. App. LEXIS 8723 (9th Cir. May 10, 2001)**. In this case, the taxpayer owed a large amount of delinquent taxes. He was the president and CEO of a company which became insolvent. The Service issued a levy against his compensation, but the company ignored the levy and continued to pay the taxpayer. The Service then sued the company to enforce the levy, and obtained judgment under section 6332(d) in January, 1996.

A third party also obtained a judgment against the company, docketing it in March, 1996. The company then got a damages award, to which both the Service and the third party claimed priority. In the ensuing interpleader proceeding, the Government claimed priority under the Insolvency Act, 31 U.S.C. § 3713(a). The third party claimed priority by virtue of his judgment lien under I.R.C. § 6323. The district court held for the Government under section 3713, and the appellate court affirmed. The Ninth Circuit agreed that, under United States v. Estate of Romani, 523 U.S. 517 (1998), the judgment lien would have priority if the United States was relying on a tax lien created under I.R.C. § 6321 as the basis for the liability. However, in this case, the Government was not relying on a lien against the taxpayer for its priority claim. Instead, the Government claimed priority based on a judgment against the taxpayer's employer, under section 6332(d)(1).

The company thus was liable, not for a tax, but for the value of the compensation it failed to pay over in response to the Service's levy. Since it was not the taxpayer who was liable, section 6323 is inapplicable, and so the Government prevails under section 3713.

LEVY: Failure to Surrender Property
PRIORITY: Insolvency

CASES

1. BANKRUPTCY CODE CASES: Compromise & Settlement

In re Matunas, 2001 Bankr. LEXIS 344 (Bankr. D.N.J. Apr. 16, 2001) - Service entered into stipulation with debtors for 1993-95 tax years, specifying secured and priority claims. The Service later determined it failed to include all of the 1993 taxes in the stipulation. The court, however, found the Service bound by judicial estoppel because (1) the stipulation had the effect of a final judgment on the merits under B.C. § 505(a); (2) the debtor and the Service were the same parties that signed the stipulation and (3) the Service's claim arises from the same transaction and occurrence (the same tax period) that was the subject of the stipulation.

2. BANKRUPTCY CODE CASES: Appeals

In re Brown, 2001 U.S. App. LEXIS 6014 (6th Cir. Apr. 9, 2001) - Trustee appealed district court's remand for "proceedings consistent with the court's ruling" that the Service's proof of claim was not automatically barred under B.C. § 502(a) where the Service did not have notice of the bankruptcy. The Sixth Circuit dismissed for lack of subject matter jurisdiction, holding that it would not deem final a district court's decision if the district court had not certified the decision pursuant to Fed. R. Civ. P. 54(b).

3. BANKRUPTCY CODE CASES: Chapter 13: Filing and Allowance of Post-Petition Claims

In re Wilkoff, 2001 Bankr. LEXIS 124 (Bankr. E.D. Pa. Jan 24, 2001) - Debtors filed Chapter 13 bankruptcy in November, 1998, owing 1998 income and self-employment taxes (which are estimated and paid quarterly). The debtors provided for payment of all priority taxes in their Chapter 13 plan, to which the Service did not object. Nor did the Service file a Proof of claim, but instead moved to lift the automatic stay prior to initiating collection action. The debtors argued that at least 3/4 of the 1998 tax liability was pre-petition, but the court disagreed. Relying on In re Ripley, 926 F.2d 440 (5th Cir. 1990), the court held that federal income tax liability is determined and incurred on an annual basis regardless of whether estimated payments are due during the year. Consequently, the tax liability was a post-petition debt within the scope of B.C. § 1305(a)(1). Section 1305 allows the Service the option of filing a claim for the post-petition debt, but does not require it. Since no claim was filed, and so no claim was allowed under B.C. § 502, the tax claim could not be "provided for" in the Chapter 13 plan and could not be discharged under B.C. § 1328(a).

4. BANKRUPTCY CODE CASES: Determination of Secured Status: Amount Secured by Lien

Jeffrey v. United States, 2001 Bankr. LEXIS 337 (Bankr. W.D. Pa. Apr. 12, 2001) - Service claimed secured status on proof of claim based on debtor's personal property, pension plan and medical malpractice claim. Although the debtor claimed

the personal property was exempt from levy under I.R.C. § 6334(a), the court found that exemption from levy did not preclude the attachment of a tax lien, and so the claim was secured. The court also found that the medical malpractice claim was a property interest under state law, and that although the debtor could not receive a distribution from her pension plan at this time, her right to future payments was subject to the Service's tax lien.

5. BANKRUPTCY CODE CASES: Jurisdiction of the Bankruptcy Court

In re Chris-Marine, Inc., 2001 U.S. Dist. LEXIS 5565 (M.D. Fla. Mar. 16, 2001) - When debtor objected to its proof of claim, the United States moved for permissive withdrawal of reference, which was denied. The district court found the fact that the two parties engaged in prior document litigation to be insufficiently connected with the current tax controversy so as to warrant withdrawal of the reference.

6. BANKRUPTCY CODE CASES: Proofs of Claim: Amendment/Supplement

In re Goodman, 87 AFTR2d ¶ 2001-929 (Bankr. N.D. Tex. Apr. 6, 2001) - Debtor filed a return showing tax due, but made no payment. The Service filed a proof of claim for a lesser amount, which was not objected to. After the debtor's Chapter 13 plan was confirmed, the Service amended its claim to the correct amount shown on the debtor's return. The debtor objected, arguing that the confirmation of his plan precluded the Service from amending its claim. The court disagreed, finding the debtor was not prejudiced. The claim remained for the same tax year (and so was not a new claim), listed what the debtor himself reported as taxes owed, and the debtor's plan was to pay 100% of the claims.

7. BANKRUPTCY CODE CASES: Refunds

In re Stephenson, 2001 Bankr. LEXIS 477 (Bankr. W.D. Ok. Apr. 27, 2001) - Court refused to let debtor voluntarily dismiss Chapter 7 bankruptcy after trustee learned of tax refunds. The court held the debtor had no absolute right of dismissal under B.C. § 707(a), and that dismissal would harm creditors now that assets were available.

8. BANKRUPTCY CODE CASES: Refunds: Bankruptcy Court Determination

IRS v. Pransky, 2001 U.S. Dist. LEXIS 5872 (D.N.J. Mar. 30, 2001) - Debtor untimely filed for tax refunds prior to bankruptcy. The Service filed a proof of claim, and in response to the debtor's opposition, the Service argued that the debtor's failure to apply for a refund by timely filing his returns was a bar to jurisdiction under I.R.C. § 6511(a). In reversing the bankruptcy court, the district court held that the debtor could not in bankruptcy raise otherwise time-barred issues as a defense or counterclaim to the Government's proof of claim. The court also refused to find jurisdiction under the doctrine of equitable recoupment, holding that the statute of limitations on filing a refund claim was jurisdictional. Finally, the court found that the debtor's remittances, sent in before the Service had assessed tax liability without any designation as to what they were intended to pay, were deposits rather than

payments under Rev. Proc. 84-58. Therefore the debtor's refund suit was outside the statute of limitations in I.R.C. § 6511(a).

9. BANKRUPTCY CODE CASES: Setoff

In re Krause, 2001 Bankr. LEXIS 341 (B.A.P. 8th Cir. Mar. 27, 2001) - Government's setoff rights cannot be modified or denied due to "compelling circumstances." Except as otherwise noted in B.C. § 553, a creditor's setoff rights are unaffected by bankruptcy. Since the Government's setoff rights make its claim secured under B.C. § 506(a), the debtor's Chapter 12 plan is infeasible and so cannot be confirmed.

10. BANKRUPTCY CODE CASES: Setoff: Refunds: Penalties

In re Silver Eagle Company, 2001 Bankr. LEXIS 471 (Bankr. D. Or. Apr. 16, 2001) - The bankruptcy court determined that it would not exercise equitable discretion to deny the setoff of the Service's claim for pre-petition tax penalties against the debtor's income tax refund. The debtor, in Chapter 7 bankruptcy, was entitled to a sizeable tax refund, but also owed over $50,000 in pre-petition taxes, half of which was penalty. The trustee argued that since the Service's penalty claim was subordinated under B.C. § 724(a) and 726(a)(4), the Service should be denied setoff so that other creditors could be paid. The court found that since the Service had a valid right to setoff under I.R.C. § 6402 and met the requirements for mutuality under B.C. § 553, the Service was entitled to setoff its debt. The court refused to find that subordination was a basis to deny setoff.

11. BANKRUPTCY CODE CASES: Statute of Limitations: On Collection After Assessment

In re Fiels, 2001 Bankr. LEXIS 301 (Bankr. D. Md. Apr. 3, 2001) -Adopting the majority approach of "automatic" tolling, the court tolled the priority period under B.C. § 507(a)(8)(A) which in turn rendered the debtor's taxes non-dischargable under B.C. § 523(a)(1)(A), due to the debtor's prior bankruptcy filings.

12. BANKRUPTCY CODE CASES: Statute of Limitations: On Collection After Assessment

In re Evoli, 258 B.R. 839 (Bankr. M.D. Fla. 2001) - Following In re Morgan, 182 F.3d 775 (11th Cir. 1999), the court found that where the debtor was discharged from Chapter 7 bankruptcy and filed for Chapter 13 relief four months later, the equities favored the Government so as to toll the three-year priority period under B.C. § 507(a)(8)(A). However, the court refused to extend the priority period for an additional six months, as provided by I.R.C. § 6503(h)(2). The court held that the equitable power under B.C. § 105(a) permits the court to carry out the provisions of the Bankruptcy Code, including the ability to provide the Service a full three years to collect priority taxes. Such equitable powers do not extend to additional periods during which the Service was not prohibited from collecting, such as the six month period in section 6503.

13. PENALTIES: Failure to Collect, Withhold or Pay Over: Responsible Person
United States v. Chapman, 2001 U.S. App. LEXIS 7709 (9th Cir. April 17, 2000) ***(unpublished)*** - The Ninth Circuit held that the trial court failed to apply the proper standards in determining whether the taxpayer was a responsible officer subject to the Trust Fund Recovery Penalty, I.R.C. § 6672. The appellate court reiterated that (1) responsibility is a matter of status, duty and authority, not knowledge; (2) an individual may be held responsible if he had the authority required to exercise significant control over the corporation's financial affairs, regardless of whether he exercised such control in fact; (3) section 6672 applies to all responsible persons, not just the most responsible and (4) there was no basis for the district court to conclude that a person could not be held responsible for nonpayment of taxes once the Service takes action by lien to recover the funds.

14. SUITS: By the United States: Foreclosure of Tax Lien; Fraudulent Conveyances
Tapp v. United States, 2001 U.S. Dist. LEXIS 6435 (W.D. Tex. Apr. 30, 2001) - The Government brought suit to foreclose on a federal tax lien, arguing that the property had been fraudulently conveyed. The taxpayer requested a jury trial, claiming that a right to jury trial exists when the Government seeks monetary recovery based on a fraudulent transfer. The court found, however, that the Government was not seeking monetary relief, nor was the amount of the tax assessment in question. Since the Government's action is for equitable relief, the court found no right to jury trial exists.

15. SUMMONSES: Issuance: Service of Summons
Scott v. United States, 87 AFTR2d ¶ 2001-851 (W.D. Ky. Apr. 3, 2001) - Service issued summons to taxpayer's accountants. Although the principal taxpayers received notice, their corporate counterparts did not, and so the taxpayers moved to quash. The Service argued that such a technical defect did not serve to invalidate the summons, but the court disagreed. The court held that the Service failed to comply with United States v. Powell, 379 U.S. 48 (1964) because it did not follow all of the necessary administrative steps required by the Code, and so the summons was invalid.

The following material was released previously under I.R.C. § 6110.
Portions may be redacted from the original advice.

CHIEF COUNSEL ADVICE

INNOCENT SPOUSE; COLLECTION; REMINDER NOTICE

CC:PA:CBS:Br2
GL-131927-00
March 6, 2001 UIL # 42.00.00-00

MEMORANDUM FOR ASSISTANT COMMISSIONER (EXAMINATION)
Attention: Jack G. Holstein, Innocent Spouse Project Manager

FROM: Joseph W. Clark
Senior Technical Reviewer, Branch 2
(Collection, Bankruptcy & Summonses)

SUBJECT: CP-71 Annual Reminder Notice
When Innocent Spouse Relief Requested

This constitutes our response to your December 8, 2000, request for advice on several issues pertaining to the Service's sending of certain annual reminder notices to taxpayers who have requested innocent spouse relief pursuant to I.R.C. § 6015. [1] As is discussed below, our opinion is that sending the annual reminder notices does not violate the prohibition with respect to levies and court proceedings imposed by I.R.C. § 6015(e)(1)(B)(i). Moreover, although the Service generally is required by statute to send a reminder notice to any taxpayer with a tax delinquent account, the Service's participation in resolving a taxpayer's request for innocent spouse relief constitutes a legally valid substitute for sending the notice to that taxpayer.

ISSUES: 1) If the Service continues to send CP-71 annual reminder notices to a taxpayer who has filed a request for innocent spouse relief, is the Service violating the prohibition on certain collection activity which is imposed, once such a request is filed, by I.R.C. § 6015(e)(1)(B)(i)?

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[1] Your request for advice was directed to the Chief, Branch 2 (Administrative Provisions and Judicial Practice), who subsequently forwarded the request to Branch 2 (Collection, Bankruptcy & Summonses) for disposition.

2) Given that the annual reminder notices are required to be sent pursuant to I.R.C. § 7524, can the Service legally decide not to send them to a taxpayer who has filed a request for innocent spouse relief?

CONCLUSIONS: 1) Sending CP-71 annual reminder notices does not violate the prohibition imposed by I.R.C. § 6015(e)(1)(B)(i) since this activity is not among those prohibited.

2) Although the Service is required to send the annual reminder notices to any taxpayer who has a delinquency, the Service's participation in proceedings involving a taxpayer's request for innocent spouse relief constitutes a legally valid substitute for sending the notice while the taxpayer's request is pending.

STATUTORY AND FACTUAL BACKGROUND: The Internal Revenue Service Restructuring and Reform Act of 1998 eased the requirements for obtaining relief from joint and several liability on a tax return jointly filed by a husband and wife. The new provisions are set forth in the current version of I.R.C. § 6015.

Section 6015(b) provides that, with respect to a jointly-filed return, an individual may be partially or fully relieved of liability for an understatement of tax, if: 1) the understatement is attributable to erroneous items of the individual's spouse; 2) the spouse seeking relief establishes that in signing the return he or she did not know, and had no reason to know, that the understatement existed; 3) taking into account all the facts and circumstances, it would be inequitable to hold the spouse seeking relief liable for the deficiency in tax attributable to such understatement; and 4) relief is sought within two years of the date the Service has commenced collection activities with respect to the spouse seeking the relief. Alternative avenues of relief available to spouses filing jointly are afforded by Section 6015(c) and Section 6015(f). These provisions, respectively, limit liability for taxpayers no longer married, legally separated, or no longer living together (Section 6015(c)) and allow for potential relief on an equitable basis where subsections (b) and (c) do not afford relief (Section 6015(f)).

Section 6015(e)(1)(A) provides for Tax Court review of the Service's determination on a request for innocent spouse relief made pursuant to Section 6015(b) or (c). Section 6015(e)(1)(B), entitled "Restrictions Applicable to Collection of Assessment," states, in pertinent part:

> (i) IN GENERAL. – ... [N]o levy or proceeding in court shall be made, begun, or prosecuted against the individual making an election under subsection (b) or (c) for collection of any assessment to which such election relates until the expiration of the 90-day period described in subparagraph (A), or, if a

> petition has been filed with the Tax Court, until the decision of the Tax Court has become final.

I.R.C. § 6015(e)(1)(B)(i). Section 6015(e)(2) provides for suspension of the statute of limitations on collection during the period the prohibition imposed by Section 6015(e)(1)(B)(i) is in effect. [2]

The remaining statutory provision which is relevant here is I.R.C. § 7524. This provision was added to the Internal Revenue Code, through the second Taxpayer Bill of Rights, in 1996, and it states:

> Not less often than annually, the Secretary shall send a written notice to each taxpayer who has a tax delinquent account of the amount of the tax delinquency as of the date of the notice.

Section 7524 applies to tax years after 1996. H.R. Rep. No.104-506, at 46-47 (1996), reprinted in 1996 U.S.C.C.A.N. 1143, 1169-1170.

In your request for advice, you specifically address the use of Form CP-71. This form is a notice which has been used for Collection for many years and is the notice which is currently sent pursuant to Section 7524. [3]

ANALYSIS: Your questions pertain to the juxtaposition of two Internal Revenue Code provisions, Section 6015(e)(1)(B)(i) and Section 7524. Specifically, you are concerned with the potential conflict between Section 6015(e)(1)(B)(i), which could be construed as prohibiting the Service from sending annual reminder notices such as those embodied by Form CP-71, and Section 7524, which appears to require, without qualification, that the Service issue such notices.

We have previously addressed the scope of the prohibition imposed by Section 6015(e)(1)(B)(i). In advice given to the Assistant Commissioner (Examination) and the Assistant Commissioner (Collection) approximately two years ago, we took the position that

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[2] As a matter of policy, the Service refrains from engaging in the activities prohibited by Section 6015(e)(1)(B)(i) even where innocent spouse relief has been sought pursuant to Section 6015(f). See IRM Handbook 104.5.1.7. However, because the Service is not prohibited by statute from undertaking these activities where relief has been sought under Section 6015(f), the statute of limitations on collection continues to run during the applicable period.

[3] The current version of the Internal Revenue Manual does not appear to set forth the purpose of Form CP-71. A prior version of the Manual, however, stated that this form was used as a “reminder of tax due” to Individual Master File taxpayers, on “deferred” and “currently not collectible” accounts. See IRM 6(762.1) (1993), 6(11)00-51 (1992).

because the express terms of the statute refer only to innocent spouse activities relating to levies and proceedings in court for collection, activities such as issuing notices demanding payment, which are not encompassed within either of these categories, are not prohibited by Section 6015(e)(1)(B)(i). Thus, the type of notices at issue here, annual notices informing taxpayers of continuing tax delinquencies, also would not be prohibited by Section 6015(e)(1)(B)(i). As we noted in our former advice, the Service could, as a matter of policy, decide to refrain from engaging in activities in addition to those prohibited by statute while a request for innocent spouse relief is pending; however, in response to your specific question, there is no legal prohibition on issuing CP-71 annual reminder notices during the pendency of such a request.

If the Service were to decide that policy considerations relevant to Section 6015 warranted refraining from issuing the type of annual notices contemplated by Section 7524, the question which would then arise is whether the Service could do so given the apparent mandatory nature of the language contained in the latter provision. We have previously taken the position that sending these notices is, as a general matter, required. However, the House Report in the legislative history of Section 7524 reflects that the purpose of the statutorily-required notice is to serve as a reminder to the taxpayer that, regardless of whether the Service is actively pursuing a given delinquency at a given time, the taxpayer still owes the amount at issue. See H.R. Rep. No. 95-595, supra. For this reason, we have taken the position that certain actions on the part of the Service and/or taxpayers with delinquencies may be tantamount to the Service's constructive compliance with the Section 7524 requirement that reminder notices be sent annually. These actions may include, but are not limited to, the parties' participation in ongoing litigation pertaining to the delinquency. In the litigation scenario, it is generally unnecessary to send out notices since the affected parties presumably are aware of the existence and the amount of the asserted liability as a result of the pleadings or other relevant documents filed in the litigation. Thus, where the amount of the liability alleged by the Service to be delinquent is set forth in some sort of litigation-related document, this documentation serves as a legally adequate substitute for sending the Section 7524 required annual notice of delinquency.

We believe that proceedings pertaining to a request for innocent spouse relief constitute, for this purpose, a litigation scenario. Moreover, in this context the taxpayer, by virtue of initiating a request for innocent spouse relief with respect to a given delinquency, presumably is aware of the continuing existence of the delinquency. Accordingly, where a request for innocent spouse relief either is under consideration by the Service or has been disposed of by the Service and is on appeal to the Tax Court, the Service's participation in the proceedings constitute constructive compliance with the annual notice requirement of Section 7524. As a result, the Service can legally refrain from sending out the annual reminder notice embodied by Form CP-71. [4]

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[4] If the nonpetitioning spouse were not a party to the disposition of the request for innocent spouse relief, however, the Service presumably would still be required to provide him or her with the annual notice required by I.R.C. § 7524, since he or she

SEIZURE; SALE OF HANDGUNS

February 12, 2001

CC:PA:CBS:B01:KSBrown
GL-124700-00
UIL: 50.00.00-00

MEMORANDUM FOR ASSOCIATE AREA COUNSEL - GREENSBORO
CC:SB:2:GBO
ATTN: A. KENNEDY DAWSON

FROM: Alan C. Levine
Chief, Branch 1 (Collection, Bankruptcy & Summonses)
CC:PA:CBS:B01

SUBJECT: Disposition of Seized Handguns

This advice is in response to your memorandum dated November 14, 2000, concerning the above subject. This document is advisory only and is not to be relied upon or otherwise cited as precedent.

ISSUE:

How should the Internal Revenue Service ("Service") dispose of nine handguns and two collectible guns that were seized from Criminal Investigation ("CI") by Compliance?

CONCLUSION:

The Service should sell the collectible guns and Compliance should release the nine remaining handguns back to CI for disposition.

FACTS:

The Service has nine handguns and two collectible guns under seizure. CI seized the guns, along with other items (i.e., silver bars and bullions, gold bullions, and approximately 15,000 to 20,000 coins), pursuant to a search warrant to gather evidence of tax evasion. In 1994 the Collection Division, now Compliance, subsequently served a Notice of Seizure on CI with respect to the firearms and other items. The taxpayers were convicted of tax evasion, served time and have since been released from prison. The taxpayers still have outstanding tax liabilities. The firearms are not contraband or subject to forfeiture under

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would continue to be jointly and severally liable for the same liability. See I.R.C. § 6013(d)(3).

the Gun Control Act of 1968. The appraised values of each of the nine handguns range from a low of $80.00 to a high of $375.00. CI currently has custody of the firearms.

LAW AND ANALYSIS:

In your memorandum dated November 14, 2000, you requested advice as to the proper disposition of the seized firearms. Sections 5.10.2.7 and 9.7.10.11 of the Internal Revenue Manual ("IRM") provide the procedures for the disposition of seized and forfeited firearms. The collectible guns may be sold pursuant to section 5.10.2.7(6). [1] However, the facts presented in this case are such that the methods of disposal provided in these sections cannot be used to dispose of the remaining nine handguns.

Section 5.10.2.7(2) of the IRM provides, in relevant part, that if personal guns "are found as part of a seizure, they should be released to the taxpayer after concurrence of Bureau of Alcohol, Tobacco and Firearms (ATF)." The Gun Control Act of 1968, however, prevents the Service from returning the nine handguns to the taxpayers because the taxpayers are convicted felons. 18 U.S.C. § 922(d)(1). [2] Section 5.10.2.7(5) states that "a suit to foreclose the Federal tax lien should be recommended rather than holding a public sale of any weapons remaining in inventory." In this case the total value of the nine handguns is not sufficient to recommend a suit to enforce the federal tax lien. [3] Even if the value were sufficient, it is our understanding that the United States Marshall may not be willing to sell the handguns as he would other property after a successful suit to foreclose. Finally, section 9.7.10.11 which provides for the disposal of forfeited firearms is not applicable in this case because the nine handguns are not forfeited property.

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[1] Section 5.10.2.7(6) provides as follows: "Firearms that are primarily collector's items, as described in IRC 5845, may be sold at public auction or sealed bid sale, with the concurrence of ATF."

[2] Section 18 U.S.C. § 922(d)(1) provides as follows:

> (d) It shall be unlawful for any person to sell or otherwise dispose of any firearm or ammunition to any person knowing or having reasonable cause to believe that such person –
>
> > (1) is under indictment for, or has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

[3]

Irrespective of this difficulty, we have been informed that CI will be able to dispose of the firearms at issue. [4] Accordingly, we recommend that Compliance release the nine handguns back to CI for disposition. [5] No credit for the nine handguns is to be given to the taxpayers' accounts since the handguns will not be sold pursuant to I.R.C. § 6335.

ERRONEOUS REFUND; BANKRUPTCY; AUTOMATIC STAY; POST-PETITION

CC:EL:GL:Br3
GL-606800-98
November 25, 1998 UILC: 09.13.05-00

MEMORANDUM TO KENTUCKY-TENNESSEE DISTRICT COUNSEL

FROM: Lawrence H. Schattner
Chief, Branch 3 (General Litigation)

SUBJECT: Erroneous Refund and Request for Repayment

This Service Center Advice is in response to your memorandum dated August 14, 1998, received by the Office of Chief Counsel (General Litigation) on August 27, 1998. This document is not to be relied upon or otherwise cited as precedent.

ISSUE:

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5 The Service's position is that other than as provided in I.R.C. § 6343, the Commissioner, in his or her discretion, may return levied upon property that is in the possession of the government pending sale under I.R.C. § 6335.

If a debtor in a Chapter 13 bankruptcy has received an erroneous refund for a post-bankruptcy petition tax year, can the Memphis Service Center request repayment of the erroneous refund without violating the automatic stay imposed by the bankruptcy?

CONCLUSION:

The Internal Revenue Service can request repayment of an erroneous refund attributable to post-chapter 13 petition tax liabilities without violating the automatic stay because such erroneous refund is not necessary for or committed to the funding of the taxpayer-debtor's chapter 13 plan.

FACTS:

The debtor filed a chapter 13 bankruptcy petition in 1995, in federal court. At the time the debtor filed his bankruptcy petition, he had an outstanding income tax liability for the 1994 tax year. Upon learning of the debtor's bankruptcy, the Internal Revenue Service (Service) placed a bankruptcy freeze, code 520, on the debtor's account and filed a pre-petition proof of claim for the 1994 tax year. For the 1995 and 1996 post-petition tax years, the debtor received refunds from the Service. For the 1997 post-petition year, the debtor was issued a manual refund. A few days later, the debtor was also issued a computer-generated refund for the same amount, resulting in an erroneous refund.

There are a significant number of these erroneous refund/bankruptcy cases within the Memphis Service Center. In addition, because the Memphis Service Center serves more than one state, these other cases are not limited to one bankruptcy district, but rather involve bankruptcy districts across several states.

The Memphis Service Center requests advice as to whether it can contact the debtor, by letter or other means, and request repayment of the erroneous refund without violating the automatic stay.

LAW AND ANALYSIS:

The filing of a bankruptcy petition creates an estate which includes generally "any legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a)(1). The filing of a bankruptcy petition also automatically stays or enjoins creditors from taking action or continuing action to collect their prepetition claims or enforce their liens. 11 U.S.C. § 362. It also stays a wide range of actions that would affect or interfere with property of the estate, property of the debtor, or property in the custody of the estate. The courts have uniformly held that the stay of section 362 is extremely broad in scope and, aside from the limited statutory exceptions in 11 U.S.C. § 362(b), applies to almost any type of formal or informal action taken against the debtor or the property of the estate. Midlantic National Bank v. New Jersey Department of Environmental Protection, 474 U.S. 494 , 503 (1986); Association of St. Croix Condominium Owners v. St. Croix Hotel Corp., 682 F.2d 446 (1st Cir. 1982); Wedgewood Investment Fund, Ltd. v. Wedgewood

Realty Group, Ltd., 878 F.2d 693 (3d Cir. 1989); Ingersoll-Rand Financial Corp. v. Miller Mining Co., 817 F.2d 1424 (9th Cir. 1987). This is consistent with the legislative history:

> The automatic stay is one of the fundamental debtor protections provided by the bankruptcy laws. It gives the debtor a breathing spell from his creditors. It stops all collection efforts, all harassment, and all foreclosure actions. It permits the debtor to attempt a repayment or reorganization plan, or simply to be relieved of the financial pressures that drove him into bankruptcy.

H.R. Rep. No. 595, 95th Cong., 1st Sess. 340 (1977); S. Rep. No. 989, 95th Cong., 2d Sess. 54-55 (1978).

11 U.S.C. § 362(c) provides that the automatic stay continues until the subject property is no longer the property of the estate, or until the case is either dismissed, closed, or a discharge is granted. In a chapter 13 case, the discharge is not granted and the case is not closed until completion of payments under the plan. 11 U.S.C. §§ 350(a), 1328(a). Thus, an analysis of what constitutes property of the estate is essential to determining whether the Service can request the taxpayer-debtor to remit the amount of the erroneous refund stemming from a post-petition tax year.

The law is clear that property acquired before the petition becomes the property of the estate for distribution to creditors and subject to the automatic stay. Thus, prepetition tax refunds are property of the bankruptcy estate and subject to the automatic stay. In re Barowsky, 946 F.2d 1516 (10th Cir. 1991); Turshen v. Chapman, 823 F.2d 836 (4th Cir. 1987); In re Larish, 149 B.R. 117 (Bankr. M.D. Tenn. 1993); In re Lancaster, 161 B.R. 308 (Bankr. S.D. Fla. 1993); Taborski v. United States, 141 B.R. 959 (Bankr. N.D. Ill. 1992). However, generally property acquired after the bankruptcy petition, including postpetition tax refunds, remains the property of the debtor and not subject to the automatic stay.

The law is not as clear concerning a Chapter 13 post-petition tax debt, including a claim against the debtor for an erroneous refund, because the courts have spit over whether the subject property is property of the Chapter 13 bankruptcy estate. A particular feature of Chapter 13 cases is that property of the estate, as defined by 11 U.S.C. § 541, is supplemented by 11 U.S.C. § 1306. Section 1306(a) provides that property of the Chapter 13 estate also includes (1) all property listed in section 541 that the debtor acquires after the commencement of the case, but before the case is closed, dismissed, or converted, and (2) earnings from services performed by the debtor after the commencement of the case, but before the case is closed, dismissed, or converted. Section 1306(b) provides that, except as provided in a confirmed plan, the debtor shall remain in possession of all property of the estate. Viewed in isolation, this provision arguably renders all property owned or acquired by the debtor during the pendency of the case as property of the estate, thus precluding any post-confirmation action against the debtor. This provision, however, must be read in conjunction with 11 U.S.C. § 1327(b), which provides: "Except as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor." Whether the Service can pursue post-

confirmation actions depends in part on the scope of section 1306(a) and the extent to which section 1327(b) modifies or supercedes section 1306(a).

Although the lower court cases addressing this issue are conflicting, many courts have agreed that after confirmation of the chapter 13 plan, all property revests in the debtor, except property that is specifically retained as property of the estate in the plan or in the order confirming the plan. Shell Oil Co. v. Capital Financial Services, 170 B.R. 903 (S.D. Tex. 1994); Laughlin v. United States, 98 B.R. 494 (D. Neb. 1989), aff'd on other grounds, 912 F.2d 197 (8th Cir. 1990), cert. denied, 498 U.S. 1120 (1991); In re Lambright, 125 B.R. 733 (Bankr. N.D. Tex. 1991); In re Petruccelli, 113 B.R. 5 (Bankr. S.D. Cal. 1990); In re Walker, 84 B.R. 888 (Bankr. D. D.C. 1988); In re Mason, 45 B.R. 498 (Bankr. D. Ore. 1984), aff'd, 51 B.R. 548 (D. Ore. 1985); In re Johnson, 36 B.R. 958 (Bankr. D. Utah 1983); In re Lewis, 33 B.R. 98 (Bankr. W.D.N.Y. 1983). Under these authorities the automatic stay is inapplicable to post-petition assets that are not specifically designated as property of the estate in the plan.

A minority of courts take the position that based on the language of section 1306(a), all property of the debtor remains property of the estate during the pendency of the chapter 13 case, and creditors cannot take any collection action against the debtor without obtaining relief from the stay pursuant to section 362(d). Matter of Schewe, 94 B.R. 938 (Bankr. W.D. Mi. 1989); In re Aneiro, 72 B.R. 424 (Bankr. S.D. Calif. 1987). Under this line of authority, the protection of the automatic stay is extended to all post-petition property for the entire life of the plan.

Some courts, however, have taken a compromise approach by permitting collection action only against property which is not committed to the funding of the plan. These courts conclude that property which funds the plan (such as the portion of the debtor's wages to be paid to the trustee each month) constitutes property of the estate pursuant to section 1306(a), which brings post-petition property into the estate, and section 1322(a)(1), which states that the plan shall provide for submission of future income of the debtor to the control of the trustee as is necessary for execution of the plan. See, e.g., In re Leavell, 190 B.R. 536 (Bankr. E.D. Va. 1995); In re Markowicz, 150 B.R. 461 (Bankr. D. Nev. 1993); In re Thompson, 142 B.R. 961 (Bankr. D. Colo. 1992); In re McKnight, 136 B.R. 891 (Bankr. S.D. Ga. 1992); In re Ziegler, 136 B.R. 497 (Bankr. N.D. Ill. 1992); In re Clark, 71 B.R. 747 (Bankr. E.D. Pa. 1987). These courts would, accordingly, permit the Service to take collection action against post-petition property of the debtor so long as the property is not necessary for funding the plan and is not committed to the plan.

The only appellate decision to address the issue was decided by the Eighth Circuit in Security Bank of Marshalltown, Iowa v. Neiman, 1 F.3d 687 (8th Cir. 1993). The issue in this case was whether debts incurred by the chapter 13 debtors post-confirmation but before conversion to chapter 7 should be considered administrative expenses afforded higher priority distribution status in the subsequent chapter 7 case. This issue turned on whether the chapter 13 estate continued to exist after confirmation of the chapter 13 plan.

The court held that the bankruptcy estate continued to exist. The court reasoned that there must be an estate post-confirmation so that the trustee has something to administer. Id. at 690-691. The court accordingly held that the debts were incurred to preserve the chapter 13 estate and should be given administrative expense status under 11 U.S.C. § 503(b)(1)(A). However, since the only issue presented to the court was whether an estate continues to exist post-confirmation, the court did not expressly address the issue of exactly what property is in the post-confirmation estate. In fact, the court favorably cited to both Root, which holds that the estate is limited to property necessary for funding the plan, and Aneiro, which holds that all property is in the estate. Id at 691. Thus, it is not clear exactly where the Eighth Circuit stands on the issue of what property is in the post-confirmation estate.

The Service's position is that there is an estate post-confirmation, but it is limited to funds necessary for or committed to the funding of the plan (e.g., the portion of the debtor's monthly wages to be paid over to the trustee). See, e.g., Leavell, supra, 190 B.R. at 540-41. Our position is that the after-acquired property provision of section 1306(a) should be read in conjunction with sections 1327(b) and 1322(a)(1). Pursuant to section 1327(b), title to property is generally vested in the debtor upon confirmation, thus removing property of the debtor from the estate. However, section 1306(a) establishes a limited post-confirmation estate consisting of after-acquired property described in section 1322(a)(1), i.e., the portion of the debtor's future earnings or other income to be submitted to the trustee to execute the plan. This interpretation serves to protect those assets necessary for the effectuation of the chapter 13 plan, while also vesting all other property in the debtor so as not to impair the debtor's ability to obtain post-confirmation credit and resume normal financial activities.

CASE DEVELOPMENT, HAZARDS AND OTHER CONSIDERATIONS:

Under the Service's position, the post-petition, post-confirmation Chapter 13 bankruptcy estate is limited to post-petition, post-confirmation funds necessary for or committed to the funding of the chapter 13 plan. An erroneous refund, by definition, does not fall within this category. An erroneous refund is a totally unexpected payment. It is a windfall to which the debtor is not legally entitled, and which a taxpayer would normally be required to return to the Service. By definition, none of the parties to the bankruptcy has any knowledge of the erroneous refund attributable to post-petition tax years at the time the bankruptcy petition was filed or at the time the chapter 13 plan was confirmed. Accordingly, the amount of the erroneous refund cannot be considered necessary for or committed to the funding of the chapter 13 plan. Therefore, given that the amount is not necessary for or committed to the funding of the chapter 13 plan, under the majority rule of the courts and under the Service's position, the erroneous refund based upon post-petition tax liabilities, is not property of the bankruptcy estate.

As the erroneous refund sum is property vested in the debtor and not committed to the funding of the chapter 13 plan under the majority view of the courts and under the Service's position, there is no violation of the automatic stay provision of 11 U.S.C. § 362

if the Service simply contacts the debtor, by letter or other means, and requests repayment of the erroneous refund. Sending a letter and asking for payment is not an act against the property of the estate; merely requesting payment has no effect at all on the debtor's compliance with the chapter 13 plan.

Even if the debtor responds to the Service's request for repayment by paying the amount of the erroneous refund in full, this action should still have no effect on the debtor's compliance with the chapter 13 plan assuming that the debtor is still in full possession of the amount of the erroneous refund. The debtor would merely be doing what he should have done as soon as he received the erroneous refund attributable to post-petition tax liabilities, i.e., return the funds to the Service. Because he would be using funds vested in himself and not committed to or necessary for the funding of the chapter 13 plan, there is no violation of the automatic stay. The Service's actions in receiving the payment and applying it to the taxpayer's account would not be actions directed against property of the estate but at most actions to collect a post-petition obligation.

The analysis is somewhat more problematic in cases where the debtor has spent the amount of the erroneous refund. In these cases, it is more than likely that the source of any repayment would be from the debtor's income or wages, i.e., funds necessary for or committed to the funding of the chapter 13 plan. However, this possibility should not prevent the Service from simply sending a letter requesting repayment. The letter itself is innocuous. It merely notifies the taxpayer-debtor of the erroneous refund and requests repayment of funds to which the debtor has no legal right and which he should have returned immediately upon receipt (or upon discovering the error). As noted above, it is at most an act to collect a post-petition obligation against the debtor and is not barred by the provisions of 11 U.S.C. § 362.

There are three possible responses by the debtor who has spent the amount of the erroneous refund: (1) the debtor could reply that the erroneous refund sum is no longer extant and that he does not have the ability to repay the same out of his income; (2) the debtor could simply ignore the Service's request; or (3) the debtor could repay the amount of the erroneous refund out of other funds at his disposal. Neither the first or second possible responses would have any effect on the funding of the Chapter 13 plan. If the debtor ignores the letter or pleads inability to repay the erroneous refund, the Service would then have to decide whether it could pursue recovery, either by filing an erroneous refund suit or, if permitted, by assessing the amount erroneously refunded and collecting the amount administratively, without violating the automatic stay. If the Service decided to bring an action for recovery of erroneous refund under I.R.C. § 7405, or if the Service was able to assess the amount of the erroneous refund, such actions would be directed to the debtor in his personal capacity to collect a post-petition debt. Neither procedure would be directed to the bankruptcy estate. If the debtor believed repayment of the erroneous refund jeopardized his ability to make payments under the Chapter 13 plan, he could raise this as a defense to administrative recovery efforts or to any judicial action. Moreover, the bankruptcy trustee also could intervene and argue that repaying the erroneous refund would jeopardize the funding of the plan. The Service would have to

respect any credible showing that such repayment would jeopardize the funding of the Chapter 13 plan. However, merely sending a letter requesting repayment does not violate the automatic stay even if the letter is viewed as the first step to additional recovery efforts because these additional recovery efforts, directed against the debtor in his personal capacity and not against the bankruptcy estate, do not violate the automatic stay.

The third possible response could jeopardize the funding of the chapter 13 plan if the debtor uses wage income or other amounts committed to the funding of the chapter 13 plan to repay the Service instead. However, the letter asking for repayment of the erroneous refund would not be asking for property of the estate; it would not be threatening any action to collect property of the estate. If the debtor did send a check for the amount of the refund, the Service would have no way of knowing whether the funds were property of the estate or dedicated to the funding of the estate. Cashing the check could be a violation of the automatic stay if the funds upon which the check were drawn were in fact estate property or property dedicated to the funding of the Chapter 13 plan. However, the chance of a violation could be minimized. A warning could be included in the letter that no funds allocated to or dedicated to Chapter 13 plan payments are to be used to repay the Service the amount of the erroneous refund. With this warning included, the mere sending of a letter requesting repayment of the erroneous refund should not jeopardize the funding of the chapter 13 plan, and therefore should not be considered to violate the automatic stay of 11 U.S.C. § 362(a). If the debtor ignores the warning and sends a check drawn upon estate funds or funds dedicated to the funding of the estate, the Service would simply have to refund such funds upon the petition of the trustee. This slight possibility that the debtor will remit estate funds and ignore warnings to the contrary cannot prevent the Service from sending a simple letter asking for repayment of a legitimate post-petition debt.

In sum, the mere sending of a letter asking for payment of the amount of the erroneous refund is not an act against the property of the estate, but rather an act against the debtor personally to collect a post-petition debt. As such, the mere sending of the letter requesting repayment of an erroneous refund does not violate the automatic stay provision. However, depending upon the source of the funds, it is possible that the Service's receipt of funds sent by the debtor to repay the erroneous refund could violate the automatic stay. If the Service receives a check, and has no reason to believe that the check is drawn upon estate funds, the Service should cash the check. However, the Service must be prepared to refund the funds upon a credible showing by the bankruptcy trustee that the funds were estate property or property dedicated to the funding of the chapter 13 plan.

Although we conclude that under the circumstances presented, sending a letter notifying the debtor of the erroneous refund and requesting repayment of the erroneous refund does not violate the automatic stay provision, we express no opinion as to whether the Service could take additional steps to secure repayment of the erroneous refund.

OFFERS IN COMPROMISE; JOINT AND SEVERAL LIABILITY; STATE LAW

July 25, 2000 CC:PA:CBS:Br2

GL-802136-00
UILC: 17.23.00-00

MEMORANDUM FOR DISTRICT COUNSEL, ROCKY MOUNTAIN DISTRICT

FROM: Kathryn A. Zuba
Chief, Branch 2 (Collection, Bankruptcy & Summonses)

SUBJECT: Choice of Law in Offers in Compromise

This memorandum responds to your request for advice dated April 24, 2000. This document may not be cited as precedent.

ISSUE:

When the Service compromises with one party to a joint and several tax liability, which state's law governs for purposes of determining the effect of such compromise on the liability of the other joint obligor.

CONCLUSION:

The effect of a compromise on the obligations of other parties who are jointly and severally liable for the taxes compromised is governed by the law of the state of residence of the compromising taxpayer.

BACKGROUND:

The Internal Revenue Code permits married individuals to elect to file a joint return for income taxes. See I.R.C. § 6013(a). If a married couple elects to do so, liability for the tax liabilities of the year covered by the return is joint and several. See I.R.C. § 6013(d)(3). As a joint as several debt, the Service may collect the entire debt from either spouse, or may choose to reach a compromise with one spouse or the other. You have asked what law governs for purposes of determining how compromise with one spouse will affect the liability of the non-compromising spouse.

The Internal Revenue Manual instructs offer specialists to take the steps necessary, where appropriate, to preserve the Government's right to collect from other individuals liable for the tax liability that is the subject of the compromise agreement. See IRM 5.8.6.2(1). To determine what effect compromise with one spouse will have on the liability of the other spouse, the manual relies on the law of the state in which the offer proponent resides. See IRM 5.8.6.2(2). Based upon the rule followed in the particular jurisdiction, the manual provides collateral agreements which are to be secured as additional consideration for the compromise. In states which follow the common law rule which releases co-obligors from liability upon compromise with one liable party, Pattern Letter P-229 is to be secured. See IRM Exhibit 5.8.6-1. In states where the express reservation of the right to proceed against

the taxpayer who is not a party to the compromise will protect the Government, Pattern Letter P-230 is to be secured. See IRM Exhibit 5.8.6-2. In states where neither collateral agreement will effectively preserve the Government's ability to collect from the non-compromising party, the collection potential of both spouses must be considered in determining the adequacy of a particular offer. See IRM 5.8.6.2(2).

Your memorandum of April 24th raises the possibility that some law other than that of the offer proponent's state of residence may govern for purposes of determining the effect of a compromise on the liability of a taxpayer who is jointly and severally liable for the same taxes. For instance, you cite the rule that the place of contract formation, regardless of the residency of the parties, may govern for this purpose. Under this rule, the contract is formed where the last act is done which is necessary to form the contract and bind the parties. Alternatively, you cite the rule that the law of the place of performance governs. In a contract for the payment of money, this rule would hold that the place of payment is considered the place of performance.

LAW & ANALYSIS:

Agreements to compromise federal tax liabilities have generally been interpreted by the courts by applying contract principles. See United States v. Feinberg, 372 F.2d 352 (3d Cir. 1967); United States v. Lane, 303 F.2d 1 (5th Cir. 1962). When it becomes necessary for courts to settle a dispute between the Service and a taxpayer regarding the interpretation or effect of a compromise, those courts have often relied upon state law contract principles for the rule of decision. See, e.g., United States v. Ross, 176 F. Supp. 932 (D. Neb. 1959). Generally, courts have applied the law of the state where the taxpayer resides. Id. It does not appear that this assumption as to which law applies has been subject to any serious challenge when it has been necessary for such disputes to be submitted to the courts.

Your memorandum questions this assumption, particularly in light of the fact that the compromise process will now frequently involve acts in several different states. As your memorandum points out, an offer may now be submitted in one state, accepted in another, and provide that payments must be sent to a third. Both of the rules you have cited–place of formation and place of performance–would likely have yielded the same result when the Service's functions were more localized. Now, however, application of either of those rules may yield a different result than the "place of residence" rule which the Internal Revenue Manual assumes will govern.

Both of the rules you have cited have ample support in both commentaries and case law. See 16 Am.Jur.2d Conflicts of Laws §§ 94 & 104 and cases cited therein. However, the uncertainties you have pointed out when contracts involve formation or performance across state lines have led most courts to favor the "significant relationship" rule. See Restatement (Second) Conflict of Laws § 188; 16 Am.Jur.2d Conflicts of Laws § 86. Under this rule, the law of the forum which has the most significant contacts with the subject matter of the contract is held to govern. Id. Facts such as where the contract was formed

or where performance is required are but two of the relevant considerations, and may be resorted to if the significant relationship rule does not yield a definitive answer. See NL Industries, Inc. v. Commercial Union Ins. Co., 65 F.3d 314 (3d Cir. 1995) (law of place of making controls unless another state had dominant relationship with parties and issues); 16 Am.Jur.2d Conflicts of Laws § 104 (contract to repay money lent governed by place of payment unless another state has more significant relationship to contract).

In the case of compromise of federal tax liabilities, the Service's assumption that the law of the taxpayer-proponent's state of residence will govern is reasonable in light of this rule. The Service generally will accept an offer to compromise when the amount offered reasonably reflects what could be collected by other means. See Policy Statement P-5-100. To determine what could be collected through other means, the Service must first rely on state law to determine the nature of a taxpayer's interest in property. See Aquilino v. United States, 363 U.S. 509, 513 (1960). Having done so, the Service can then determine whether that interest is subject to the federal tax lien, and, thus, subject to levy by the Service. See I.R.C. §§ 6321, 6331.

State law plays a particularly important role in many of the states of your district, as a determination of what could be collected and applied to the tax debt will often require consideration of state community property laws. We believe that these factors, together with the fact of the taxpayer's domicile, weigh heavily in favor of the rule the Service has assumed will govern in the event it is necessary to later determine how compromise has effected the status of other parties liable for the taxes at issue.

CONCLUSION:

We conclude that, for purposes of determining the effect of compromise on the liabilities of other parties who are jointly and severally liable for the taxes at issue, the law of the state with the most significant relationship to the contract will govern. We agree with the offer in compromise handbook's conclusion that this will generally be the state of residence of the proponent of the offer.

OFFERS IN COMPROMISE; JOINT AND SEVERAL LIABILITY; STATE LAW

March 16, 2001

CC:PA:CBS:Br2
GL-119545-01
UILC: 17.23.00-00

MEMORANDUM FOR ASSOCIATE AREA COUNSEL (SB/SE), AREA 5 (DENVER)

FROM: Kathryn A. Zuba
Chief, Branch 2 (Collection, Bankruptcy & Summonses)

SUBJECT: Choice of Law in Offers in Compromise - Reconsideration

This memorandum responds to your request for advice dated April 24, 2000, and supplements our memorandum of July 25, 2000. This document may not be cited as precedent.

ISSUE:

When the Service compromises with one party to a joint and several tax liability, what law governs for purposes of determining the effect of that compromise on the liability of the other joint obligor.

CONCLUSION:

The effect of a compromise under section 7122 of the Internal Revenue Code on the obligations of other parties who are jointly and severally liable for the taxes compromised is governed by that section and Treasury Regulations issued pursuant to that section. However, to foreclose disputes on the question of whether such a compromise has the effect of releasing other parties from liability for the taxes at issue, we continue to recommend that the Service take the steps necessary, under the law of the state of residence of the compromising taxpayer, to preserve the ability to collect from other parties.

BACKGROUND:

The Internal Revenue Code permits married individuals to elect to file a joint return for income taxes. See I.R.C. § 6013(a). If a married couple elects to do so, liability for the taxes of the year covered by the return is joint and several. See I.R.C. § 6013(d)(3). As a joint and several debt, the Service may collect the entire debt from either spouse, or may choose to reach a compromise with one spouse or the other.

The Internal Revenue Manual instructs offer specialists to take the steps necessary, where appropriate, to preserve the Government's right to collect from other individuals liable for the tax that is the subject of a compromise agreement. See IRM 5.8.6.2(1). To determine what effect compromise with one spouse will have on the liability of the other spouse, the manual relies on the law of the state in which the offer proponent resides. See IRM 5.8.6.2(2). Based upon the rule followed in the particular jurisdiction, the manual provides collateral agreements which are to be secured as additional consideration for the compromise.

Your memorandum questioned the Service's assumption that the law of the offer proponent's state of residence will govern for purposes of determining the effect of a compromise on the liability of a taxpayer who is jointly and severally liable for the same taxes. Our response concluded that the Service's procedures are consistent with the rule that a contract is governed by the law of the forum which has the most significant contacts with the subject matter of the contract. However, our memorandum incorrectly stated this

view as a conclusion that the law of the taxpayer's state of residence will always govern for purposes of interpreting the compromise agreement. We wish to clarify our position on this matter.

LAW & ANALYSIS:

Agreements to compromise federal tax liabilities have generally been interpreted by the courts by applying contract principles. See United States v. Feinberg, 372 F.2d 352 (3d Cir. 1967); United States v. Lane, 303 F.2d 1 (5th Cir. 1962). However, compromise agreements are also governed by statutes and Treasury regulations. Regulations limit the scope of a compromise agreement as follows: "Acceptance of an offer to compromise will conclusively settle the liability of the taxpayer specified in the offer." Temp. Treas. Reg. § 301.7122-1T(d)(5) (emphasis added). Thus, the regulations limit the effect of a compromise to the release of only the party named on the offer. Where the Internal Revenue Code establishes that taxpayers are jointly and severally liable for the tax, the Government's ability to collect from one taxpayer is not prejudiced by compromise with a different taxpayer.

However, some courts have relied upon state law contract principles for the rule of decision when faced with a dispute between the Service and a taxpayer regarding the interpretation or effect of a compromise. See, e.g., United States v. Ross, 176 F. Supp. 932 (D. Neb. 1959). For this reason, we have advised the Service to take the steps necessary to protect the Service's ability to collect from a non-compromising spouse whenever a compromise with one spouse is recommended for acceptance. The Service's procedures for the compromise of joint and several liabilities incorporate our prior advice. We continue to believe it prudent to take these preventive measures. For these purposes, the Service should continue to refer to the law of the state with the most significant relationship to the contract. We agree with the offer in compromise handbook's conclusion that this will generally be the state of residence of the proponent of the offer.

ESTATE TAX LIEN; RELEASE; RECAPTURE PERIOD

CC:PA:CBS:Br1
GL-103422-01

March 16, 2001

UIL 51.06.00-00

MEMORANDUM FOR SBSE ASSOCIATE AREA COUNSEL, NEWARK

FROM: Alan C. Levine
Chief, Branch 1 (Collection, Bankruptcy & Summonses)

SUBJECT: Release of Lien, IRC § 2032A

This memorandum responds to your request for advice dated January 19, 2001. This document may not be used or cited as precedent. I.R.C. § 6110(k)(3).

ISSUE:

Whether the I.R.C. § 6324B special estate tax lien must be released after the 10-year recapture period of I.R.C. § 2032A(c)(1) has elapsed.

CONCLUSION:

The section 6324B lien must be released if the 10-year recapture period has elapsed without a triggering event for the recapture tax, such that there is no longer any potential liability for recapture. However, if a triggering event did occur within the 10-year period such that the recapture liability arises, the lien should not be released until that liability has been fully satisfied or has become unenforceable, which may be at some point after the 10-year period.

BACKGROUND:

Your office has received a request for advice on the above-cited issue. The facts you present are as follows: Special tax liens (Forms 668H) are filed by the Special Procedures Branch ("SPB"), when requested to do so by the Estate and Gift Tax Group ("EGT"). Under I.R.C. § 2032A, Special Use Valuation, the EGT forwards a Form 611 containing the information necessary to prepare the Form 668H to SPB and the Form 668H is filed in the appropriate location.

The Insolvencies, Decedent's Estates, and Estate Taxes Collecting Handbook, IRM 5.5.8.3(2), provides in pertinent part, "Approval of the Estate and Gift Tax Manager should be secured before releasing the lien imposed by IRC § 6324B."

SPB has requested approval from EGT to file releases of federal tax liens in those cases where more than ten years have passed since the election was filed under section 2032A. EGT has responded that it is unable to concur, based on the lack of manpower. In addition, EGT argues that the taxpayers have not requested the releases.

SPB has asked whether it is necessary for the heir to request a formal release of lien or whether the Service should file a release of lien once it has become aware of the expiration of the 10-year period.

DISCUSSION:

I.R.C. § 6324B creates a special lien for the pending additional estate tax attributable to the estate's election to use a "special use value" for certain "qualified" property for estate tax calculation purposes. The lien is created by an election under I.R.C.

§ 2032A (valuation of farm real property and certain real property used in family businesses).

The amount of the lien is an amount equal to the “adjusted tax difference” attributable to the property interest. I.R.C. § 6324B(a). Generally, this is the difference between the estate tax calculated using the fair market value of the property and the estate tax calculated using the special use value of the property. The property covered by this lien is the interest in qualified real property. I.R.C. § 6324B(c)(2).

Section 6324B(b) provides that the duration of the section 6324B lien is as follows:

> (B) Period of Lien.–The lien imposed by this section shall arise at the time an election is filed under section 2032A and shall continue with respect to any interest in the qualified real property--
>
> > (1) until the liability for tax under subsection (c) of section 2032A with respect to such interest has been satisfied or has become unenforceable by reason of lapse of time, or
> >
> > (2) until it is established to the satisfaction of the Secretary that no further tax liability may arise under section 2032A(c) with respect to such interest.

(Emphasis added.)

Section 2032A(c)(1) provides as follows:

> (1) Imposition of Additional Estate Tax.–If, within 10 years after the decedent’s death and before the death of the qualified heir--
>
> > (A) the qualified heir disposes of any interest in qualified real property (other than by a disposition to a member of his family), or
> >
> > (B) the qualified heir ceases to use for the qualified use the qualified real property which was acquired (or passed) from the decedent, then there is hereby imposed an additional estate tax.

Thus, liability for a recapture tax arises if the qualified heir disposes of any interest in the property or fails to use the property for a qualified purpose within 10 years [6] from the decedent’s date of death. This recapture period also ceases if the qualified heir dies and, thus, can be less than 10 years.

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[6] With respect to the estates of decedents dying before December 31, 1981, the reapture period was 15 years rather than 10 years.

Section 2032A(c)(4) provides that the recapture tax described in section 2032A(c)(1) shall become due and payable on the date which is 6 months after the disposition or cessation described. Section 2032A(f) further provides that the statute of limitations for assessment of the recapture tax is generally 3 years from the date the Secretary was notified of the disposition/cessation (but may be later). Accordingly, while the event that triggers the liability for the recapture tax must occur within 10 years of the decedent's death, collection of that liability may clearly continue beyond that 10-year period.

The lien in section 6324B will expire upon occurrence of one of three events, as previously discussed: (1) the recapture tax liability has been satisfied; (2) the recapture tax liability is unenforceable by reason of lapse of time; or (3) no further recapture tax liability is possible. The issue raised by your office is whether the recapture liability becomes "unenforceable by reason of lapse of time" such that the Service should file a certificate of release for the section 6324B lien after the elapse of the 10-year period, even though the Service can continue to collect the recapture liability beyond the 10-year period.

There is little case law addressing the duration of the section 6324B lien. However, we do not read the phrase "liability ... has become unenforceable by reason of lapse of time" to equate the elapse of the 10-year period, such that all section 6324B liens must be automatically released after 10 years following the decedent's death. Rather, the 10-year period provides a measure of time during which the recapture tax triggering event must occur. The "liability" for the tax may continue beyond that period, as provided by sections 2032A(c)(4) and (f). Accordingly, if a recapture event has occurred during the 10-year period and the recapture tax liability has not been fully satisfied within that 10-year period, the section 6324B lien should not be released, as the recapture tax liability is still enforceable.

Support for this position is found in the legislative history. The General Explanation of the Tax Reform Act of 1976 (H.R. 10612, 94th Congress, Public Law 94-455) [Prepared by the Staff of the Joint Committee on Taxation (December 29, 1976)] provides, at page 543, "[t]he Act provides a special lien on all qualified farm or closely held business real property with respect to which an election to use the special use valuation provision has been made. This lien is to continue until the tax benefit is recaptured or until the potential liability for recapture ceases (i.e., the qualified heir dies or a period of 15 years from the decedent's death lapses)." Thus, the legislative history equates the 15-year (now 10-year) period with the time period after which the potential liability for recapture ceases, rather than a time period after which the recapture tax liability becomes unenforceable.

If Congress had intended for the section 6324B lien to have a finite duration of 10 years, it could have used clearer language to provide for this result. If the "unenforceable by lapse of time" language simply meant that the 10-year period had elapsed, this would render the additional language in the statute providing that the lien will expire when no further recapture liability is possible (which also indicates the lapse of the 10-year period) superfluous.

While the section 6324B lien should not be automatically released at the end of the 10-year recapture period, the District does need to make a release determination at that time. If there was recapture liability that has been fully satisfied before the elapse of the 10-year period or if there was no recapture liability triggered during that 10-year period, such that there is no possible future recapture tax liability, the Service is required to release the section 6324B lien, pursuant to I.R.C. § 6325. Section 6325(a)(1) provides that "[s]ubject to such regulations as the Secretary may prescribe, the Secretary shall issue a certificate of release of any lien imposed with respect to any internal revenue tax not later than 30 days after the day on which ... [t]he Secretary finds that the liability for the amount assessed, together with all interest in respect thereof, has been fully satisfied or has become legally unenforceable ... ."

If the 10-year period has passed without triggering any recapture liability, or any recapture liability has been fully satisfied, and the Service fails to release the lien, as required by section 6325(a)(1), there is potential for damage claims under I.R.C. §§ 7432 and 7433. The criteria for potential damage claims under sections 7432 and/or 7433 are further discussed in your memorandum (i.e., the taxpayer must first exhaust all administrative remedies).

Accordingly, we conclude that the duration of the section 6324B lien may be beyond the 10-year recapture period, such that the liens should not automatically be released upon the date 10 years after the decedent's death. If the 10-year period has elapsed without the recapture tax being triggered such that there is no further potential for liability or if any recapture liability has been fully satisfied, however, the liens should be released. The District should make a determination as to whether or not to release the section 6324B liens after the elapse of the 10-year period and should release the liens, where appropriate, as soon as possible in order to avoid potential damage claims.

COLLECTION STATUTE OF LIMITATIONS; FORM 900 WAIVER; INSTALLMENT AGREEMENT

CC:PA:CBS:B02
GL-807246-00
March 19, 2001
UILC 85.02.00-00

MEMORANDUM FOR SBSE ASSOCIATE AREA COUNSEL
(San Francisco)

FROM: Alan C. Levine
Chief, Branch 1 (Collection, Bankruptcy & Summonses)

SUBJECT: Collection Statute Waiver Issues

This memorandum responds to your December 18, 2000 request that we post-review a memorandum issued on November 22, 2000 by your office, and a supplemental memorandum dated December 15, 2000. Both of these memoranda discuss the validity of waivers of the collection statute of limitations where the waivers, executed in connection with installment agreements, contain certain errors. This document may not be used or cited as precedent. I.R.C. § 6110(k)(3).

FACTS:

The facts, as provided in the November 22, 2000 memorandum from your office, essentially are that the Technical Support Branch, SB/SE Area 13 (formerly the Special Procedures Function) has found that certain Form 900 Tax Collection Waivers, signed by the taxpayer in conjunction with the extension of the collection statute of limitations expiration date (CSED), contain errors. Technical Support is concerned that these errors may invalidate the CSED waivers. The errors described include Forms 900 which:

- were signed by a Service employee other than the Branch Chief;
- extend the CSED for multiple years to a single date, rather than the dates which conform to I.R.C. § 6502(a)(2)(A); or
- contain an incorrect assessment date or the wrong amount due.

In a separate case, a revenue officer received a waiver in connection with an installment agreement that will pay the liability in full within the period of the original CSED. The revenue officer does not want to process this waiver. Finally, there is a question about whether the Service is required to obtain Form 900, as set forth in the IRM, where the CSED is extended by statute under I.R.C. § 6331(k).

Based on these facts, you present the following issues:

(1) Is a Form 900 that is signed by an Internal Revenue Service employee other than a Branch Chief, valid?

(2) Is a Form 900 that contains an extension date that does not conform to the constraints of I.R.C. § 6502(a), as applicable to requests made on or after January 1, 2000, valid?

(3) Is a Form 900 that contains an incorrect assessment date or balance due but correctly states the type of tax and tax period, valid?

(4) May the Service decline to accept a Form 900 proffered with an installment agreement (IA) when the Service determines that the waiver is unnecessary because the IA will result in full payment of the tax, penalties and interest within the I.R.C. § 6502(a) ten-year statute of limitations?

(5) What is the effect of an invalid Form 900 on an IA?

In addition, your supplemental memorandum of December 15, 2000, addressed the following additional issue:

(6) Do I.R.C. § 6331(i) and (k) act to extend the CSED even without a Form 900?

ANALYSIS:

Issue 1: Who Must Sign the Waiver?

In order to be valid, an agreement by the taxpayer to extend the statute of limitations on the 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). Although, at one time, the Ninth Circuit took the position that the lack of the Commissioner's signature did not invalidate the waiver, [7] this changed with Rohde v. United States, 415 F.2d 695 (9th Cir. 1969). Since Rohde, the Ninth Circuit's position has been that, based on the Treasury Regulation, the Commissioner's (or delegate's) signature is necessary for an effective collection waiver. Rohde, 415 F.2d at 698.

Delegation Order No. 42 (IRM 1.2.2.24) provides that the authority to sign all consents fixing the period of limitations on assessment or collection is delegated to certain individuals, including District Directors. [8] See also Treas. Reg. § 301.6502-1(a)(2)(i); United States v. Cook, 494 F.2d 573 (5th Cir. 1974); Howard v. United States, 868 F. Supp. 1197, 1201-1202 (N.D. Cal. 1994). In turn, District Directors may redelegate such authority to Collection-Revenue Officers of grade GS-7 or higher. IRM 1.2.2.24(2)(d). However, the IRM requires that any IAs that extend beyond the original CSED must be approved by a Branch Chief. IRM 5.14.1.7(7); 5.14.6.2(1)(e).

We could find no court that has ruled on the issue of whether a Form 900 signed in violation of the IRM is still valid. [9] The closest parallel is the case of United States v. Lee, 333 F. Supp. 398 (E.D. Pa. 1971), where the taxpayer signed a collection waiver under I.R.C. § 6502(a), but argued that the waiver was invalid since it was signed by a revenue officer rather than a District Director. The taxpayer argued that since Rohde held a waiver to be invalid without the District Director's signature, the waiver (in the Lee case) was

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[7] See, e.g., Commissioner v. Hind, 52 F.2d 1075 (9th Cir. 1931); Holbrook v. United States, 284 F.2d 747 (9th Cir. 1960).

[8] "Director" has now replaced the words "District Director." Rev. Proc. 2001-1, § 1 at page 8 and § 12.03 at page 46.

[9] In United States v. Simons, 129 F.3d 1386 (10th Cir. 1997), the Tenth Circuit, although resolving the case on other grounds, indicated that it would have found a Form 900 waiver signed by a revenue officer, valid.

invalid. The court disagreed, holding that the issue in Rohde was the absence of a signature. In Lee, the question was whether the District Director could appropriately delegate his authority, and the court found that he did. The court also found that, had the Government tried to argue that the waiver was invalid because the revenue officer exceeded his authority, the court would not hesitate to use estoppel against the Government in upholding the waiver.

Based on the court's analysis in Rohde, we believe the Ninth Circuit would find a valid delegation of authority under Treas. Reg. § 301.6502-1(a)(2)(i) and Delegation Order No. 42 which would allow a revenue officer to validly countersign a Form 900. Although the Internal Revenue Manual requires the signature of a Branch Chief, courts have held that the policies and procedures in the IRM do not have the force of law. United States v. Caceres, 440 U.S. 741, 754 (1979); First Federal Savings & Loan Ass'n of Pittsburgh v. Goldman, 644 F. Supp. 101, 103 (W.D. Pa. 1986) (citing Chrysler Corp. v. Brown, 441 U.S. 281 (1979)). We therefore believe that a court would uphold a waiver signed by a revenue officer rather than a Branch Chief, presuming the appropriate redelegation order was signed, as indicated on page 8 of your November 22 memorandum.

Issue 2: Extension Date Does Not Conform to I.R.C. § 6502(a)

The Restructuring and Reform Act of 1998 ("RRA 98") amended section 6502 of the Code, effective as of January 1, 2000, to limit the Service's ability to secure from taxpayers agreements to extend the statutory period for collection. See Pub. L. No. 105-206, 112 Stat. 685, 763-64 (1998). The Service and taxpayers can now agree to an extension of the statute of limitations for collection under 6502(a) in only two circumstances: 1) the extension is agreed to at the same time as an installment agreement between the taxpayer and the Service, or 2) the extension is agreed to prior to a release of levy under section 6343 which occurs after the expiration of the statutory ten-year period for collection. See I.R.C. § 6502(a)(2). If a waiver was secured "in connection with" the granting of an installment agreement, the period for collection will expire ninety days after the date specified in the waiver. See Treas. Reg. § 301.6159-1(b)(1)(i)(A). If the waiver was not obtained at the same time as an installment agreement, the period for collection will expire not later than December 31, 2002, or the end of the original collection statute if it would have occurred after that date. See RRA 98 § 3461(c)(2). [10]

The factual scenario posited by your office describes a taxpayer seeking to waive the statute of limitations on collection for more than one tax period. Form 900 waiver contains a blanket extension of the CSED to the same date, even though several tax periods are affected, and therefore extends the CSED for some taxes beyond the period authorized

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[10] Waivers granted prior to the effective date of the statute will expire no later than December 31, 2002, except that a waiver signed in connection with an installment agreement will expire on the 90th day after the end of the period of such extension. RRA 98 § 3461(c)(2); I.R.C. § 6502(a)(2)(A).

by Service policy. [11] We believe that such a waiver is valid, even though the Form 900 does not show which tax periods correspond to which CSEDs, as required by IRM 5.14.1.7(2)(f). Treasury Regulation section 301.6159-1(b)(1)(i)(A) states that the Service may require the taxpayer to agree to a "reasonable" extension of the collection statute as a condition of entering into an installment agreement. Initially, the proposed regulation did not contain the term "reasonable." This term was added, however, when concerns were raised that the provision stating that the Service could require that the taxpayer agree to an extension of the collection statute could lead to unnecessarily long extensions lasting beyond the terms of the installment agreement. Hence, we interpret the term "reasonable" to mean any extension necessary to permit payment of the tax liability under the installment agreement. Consequently, assuming that proper procedures were followed, a waiver executed in conjunction with an installment agreement is valid.

Although your memorandum addresses a waiver containing an extension date not in conformance with I.R.C. § 6502(a), no example of such nonconforming waiver is provided. The example you provide is a Form 900 used by the taxpayer to extend the CSED for several tax periods, where the Form 900 uses only a single CSED for each of those periods. Such a Form 900 does not violate I.R.C. § 6502(a), which mandates only that the waiver be entered into at the time of the installment agreement and does not limit the length of time for which the taxpayer may waive the CSED. [12] The waiver may not be in accord with Service policy, which provides that any extension of the CSED should be limited to five years. IRM 5.14.1.7(2)(f). The Service has recognized, however, that as a practical matter, some waivers will not be able to conform with this five-year extension policy. Accordingly, the Service has provided that a Form 900 waiver which contains multiple tax periods may provide for a single CSED extension date, which should correspond with the latest date necessary to full pay the installment agreement. See IRM 21.9.1.3.3.5(4).

In addition to this policy decision by the Service, there is a legal prohibition which prevents the Service from rescinding a waiver extending the statute of limitations on collection. As will be discussed in Issue # 3, below, a waiver is not a contract. Yet, rescission is a contract principle. See generally 17A Am.Jur. 2d Contracts § 512 (1990). In order to rescind a contract, the parties to the contract must mutually agree to cancel the contract. The same 'meeting of minds' is needed that was necessary to make the contract in the first place. Sturm v. Boker, 150 U.S. 312 (1893). Moreover, in order to be valid, an agreement to cancel or rescind a contract requires some consideration. Cuneo Press, Inc. v. Claybourn Corp., 90 F.2d 233 (7th Cir. 1937). The unilateral nature of a waiver, however, forecloses the option of a "meeting of minds" needed to rescind a contract. Furthermore,

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[11] It is the policy of the Service that extensions of the statutory period for collection be limited to five years beyond the original statutory period for collection for each tax assessment. See IRM 5.14.1.7.

[12] A separate rule applies to extensions signed prior to January 1, 2000. See RRA 98 § 3461(c)(2).

since the benefit or detriment (of a waiver or an agreement to "rescind" a waiver) is unilateral, the necessary consideration is also lacking. 17A Am.Jur. 2d Contracts § 515 (1990). As such, the taxpayer and the Service may not agree to 'rescind' a waiver extending the statute of limitations on collection.

Likewise, execution of a subsequent (shorter) waiver will not alter or invalidate the first (longer) waiver. See generally United States v. Fischer, 93 F.2d 488 (2d Cir. 1937). In Simmons v. Westover, 76 F. Supp. 442 (S.D. Cal. 1948), for example, the court rejected the taxpayer's argument that a subsequent waiver to a date certain limited an earlier, unlimited waiver of the collection statute. The court stated: "The extension already in effect [was] not reduced by additional unilateral waivers, since the government relinquished no rights by accepting them." Id. at 448. See also United States v. Heyl, 232 F. Supp. 489 (S.D.N.Y. 1964). Consequently, a waiver extending the statute of limitations on collection cannot be modified, canceled, or superseded by another waiver.

We concur that a waiver not authorized by I.R.C. § 6502(a) is invalid; however, from the facts presented, it is our view that a Form 900 which contains multiple tax periods but a single extended CSED date is not in violation of the statute. Because the IRM authorizes such a waiver, and because the Service cannot rescind or invalidate such a waiver once it is signed, we believe the Service can enforce the waiver to the extended CSED date.

Issue 3: Waiver With Incorrect Information

A tax collection waiver executed pursuant to I.R.C. § 6502(a)(2) 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). Though courts have, in limited contexts, applied contractual analysis to solve problems related to waivers, no court has held that a waiver is a contract. Aiken v. Burnet, 282 U.S. 277 (1930); Piarulle v. Commissioner, 80 T.C. 1035, 1042 (1983); Robertson v. Commissioner, T.C. Memo 1973-205. Therefore a taxpayer must demonstrate some noncontractual basis, such as prejudice or lack of due process, to invalidate a waiver on the grounds that the Form 900 contains an incorrect assessment date or balance due.

By contrast, 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, 82-1 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 1976-363 (1976). The few cases which have dealt with this tension between the need of the taxpayer to show that the error on the waiver form had a material effect, and the need of the Government to prove the CSED has not expired, are detailed in your

November 22 memorandum, from pages 12 through 16. [13] You conclude that, as there is no precedent on this issue in the Ninth Circuit, each waiver must be evaluated on a case-by-case basis.

Although not without exception, we note that the general rule applied by the courts in the case of tax notices which contain technical errors is that they will be deemed valid when the taxpayer has not been misled by the errors and was not prejudiced because he had the opportunity to contest the assessment on the merits. See, e.g., Sanderling, Inc. v. Commissioner, 571 F.2d 174 (3d Cir. 1978) (assessment valid despite clerical errors where taxpayer not misled as to proper year in question or amount in controversy); Sage v. United States, 908 F.2d 18, 22 (5th Cir. 1990) (rejecting challenge to I.R.C. § 6700 assessment because of failure to specify tax period); Planned Investments, Inc. v. United States, 881 F.2d 340, 344 (6th Cir. 1989) (same); Wood Harmon Corp. v. United States, 206 F. Supp. 773 (S.D.N.Y. 1962), aff'd 311 F.2d 918 (2d Cir. 1963) (assessment valid even where notice of assessment identified incorrect tax period); Allan v. United States, 386 F. Supp. 499 (N.D. Texas 1975), aff'd mem. 514 F.2d 1070 (5th Cir. 1975) (section 6672 assessment valid although notice states incorrect employer, where taxpayer knew of clerical error). See also United States v. Schroeder, 900 F.2d 1144 (7th Cir. 1990) (excessive assessment is not void so long as correct amount of tax can be ascertained from supporting records); Burns v. United States, 974 F.2d 1064 (9th Cir. 1992) (same). Cf. Brafman v. United States, 384 F.2d 863 (5th Cir. 1967) (assessment invalid where certificate of assessment not signed); United States v. Lehigh, 201 F. Supp. 224 (W.D. Ark. 1961) appeal dismissed 305 F. 2d 377 (8th Cir. 1962) (incorrect tax year on tax deficiency notice invalidated assessment despite taxpayer's knowledge of error).

While we acknowledge that litigation hazards may exist, we believe that a Form 900 which contains clerical errors, but which correctly states the type of tax and the applicable tax period, would be upheld by the courts. The prevailing view is indicated by the court in Mulford, Sr., v. Commissioner, 25 B.T.A. 238, 242 (1932), aff'd 66 F.2d 296 (3d Cir. 1933), which states:

> Where the taxpayer, by the execution of the waiver, has obtained delay in the collection of additional taxes and a more deliberated and thorough consideration of his claim in abatement, and where the waiver is regular in form, except in the respect which we have enumerated [the waiver was missing the affected tax year],

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[13] The cases detailed are Schenk v. Commissioner, 35 T.C. Memo 1976-373 (1976) (taxpayer-altered Form 872-A invalid to extend collections statute); United States v. Grabscheid, 82-1 U.S.T.C. ¶ 9382 (E.D. Ill. 1982) (waiver invalid as to periods owed by taxpayer but not listed on Form 900); McGinty v. United States, 568 F. Supp. 818 (N.D. Tex. 1983) (waiver which did not list tax periods and amount separately but had correct totals held valid when taxpayer admitted liability) and Rosenblum v. United States, 699 F. Supp. 284 (S.D. Fla. 1988) (Form 900 with incorrect tax period and balance due upheld by court, no particular form or words necessary for valid waiver).

> and is in possession of the proper governmental bureau, every presumption should be taken in favor of its validity and binding effect.

Given that the taxpayer has signed the waiver, has received other notice of his tax liabilities, and has benefitted from the Government's forbearance of collection, we believe it unlikely a court would invalidate a collection waiver solely on the basis of a clerical error.

Issue 4: Waiver on Full Pay IA

Until it has been signed (and thus becomes effective), the Service may decline to accept a waiver where the waiver is unnecessary since the IA will full pay within the CSED. IRM 5.14.1.7(1). There is no statutory requirement that a waiver, once requested by a taxpayer, must be granted. However, once an IA has been entered into, the Service has adopted a policy that it cannot subsequently request a waiver. IRM 5.14.1.7(2) Thus, if the Service errs in determining that the IA will full pay within the CSED, or the taxpayer and the Service enter into a subsequent IA covering the same tax period, the Service no longer can request a CSED waiver. IRM 5.14.1.7(2)(c) & (5); 21.9.1.3.3.5(1)(b). For this reason, we agree with your recommendation that a revenue officer not enter into a waiver unless otherwise necessary.

Issue 5: Invalid Waiver's Effect on IA

I.R.C. § 6159(b) provides that an installment agreement remains in effect for its term unless: (1) information which the taxpayer provided to the Service prior to the date the agreement was entered into was inaccurate or incomplete; (2) collection of the tax is in jeopardy; (3) the financial condition of the taxpayer has significantly changed; or (4) the taxpayer fails to pay an installment, to pay any other tax liability when due, or provide financial information requested by the Service. I.R.C. § 6159(b); see also I.R.M. 5.14.8.3. These are the sole grounds for termination. There is no basis in the statute, Treas. Reg. § 301.6159-1, or the legislative history, to permit the Service to terminate an installment agreement because the associated CSED waiver is invalid.

Issue 6: Effect of I.R.C. § 6331(k)

Your advisory notes that, under section 6331(k)(2), the Service may not levy on property or rights to property of a taxpayer during any period in which an installment agreement is in effect, or during the period the installment agreement is pending (until 30 days after it is rejected). Prior to December 21, 2000, section 6331(k)(3) further provided that the statute of limitations for collection after assessment under section 6502 was suspended for the period in which the Service was prohibited from levying. The Service, as a matter of policy, never adopted this suspension period. Instead, the Service considered only a valid waiver via Form 900 as extending the CSED. In any case, this statutory exception was recently removed by a technical correction in section 313(b)(3) of P.L. 106-554, 114 Stats. ____ (2000). Effective December 21, 2000, the statute of limitations for collection after assessment will not be suspended because the Service is prohibited from levy.

We therefore recommend that the portion of your November 22, 2000 memorandum titled "I.R.C. § 6331(k) Extends the Collection Statute During the Period the IRS Cannot Collect Due to the Pendency of an IA," found on page 18, and the entirety of your December 15, 2000 memorandum, [14] be withdrawn. SB/SE should instead be advised to follow the procedures set forth in IRM 5.14.1.7.

Additional Comments:

On page 19 of the memorandum, the last sentence reads in part, "... Congress has statutorily provided for tolling of the statute during the pendency of the IA, for **30** days after the IRS terminates an IA, ..." Although the Service must provide the taxpayer at least 30 days notice prior to terminating an IA, [15] the CSED is tolled for a period of **90** days after the expiration of the term stated in the IA (and any applicable written extension). I.R.C. § 6502(a)(2)(A).

CONCLUSION

On question one, we agree with your November 22 memorandum that a Form 900 waiver signed by a revenue officer but not a Branch Chief would be valid if an appropriate delegation order exists. On question two, we disagree with your office that, under the facts presented, a waiver for multiple tax periods which contains a single extension of the CSED date is invalid, either under I.R.C. § 6502(a) or current Service policy. As to question three, we believe that a factual error involving the assessment date or amount due would not invalidate a waiver, absent affirmative misconduct by the Service. We agree, in question four, that the Service need not accept or sign a waiver where the IA provides for full payment within the original CSED (and further agree with your office that it is to the taxpayer's benefit in case of default that such a waiver not be signed). On question five, we agree that the Service cannot request another waiver once the IA has been accepted, nor can the Service terminate the IA based on an invalid waiver.

Finally, we recommend that your response to the last question posed by Technical Support, dealing with the effect of I.R.C. § 6331(k) on the CSED, in both the November 22 and December 15 memoranda be withdrawn, and a supplemental response detailing the effect of the recent legislative change to section 6331(k) be provided to Collection.

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[14] This memorandum clarified the preceding discussion of section 6331(k) for a Form 900 entered into before the effective date of section 6331(k).

[15] I.R.C. § 6159(b)(5)(A).