**DEPARTMENT OF THE TREASURY**
**INTERNAL REVENUE SERVICE**
**WASHINGTON, D.C. 20224**

OFFICE OF
CHIEF COUNSEL

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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, 1/ 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

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

certain individuals, including District Directors. 2/ 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. 3/ 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 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.

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

3/ 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.

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). 4/

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 by Service policy. 5/ 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

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4/ 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).

5/ 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.

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. 6/ 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, 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

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

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. 7/

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7/ 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).

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], 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, 8/ 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, 9/ 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.

If you have any further questions, please call 202-622-3610.

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

9/ I.R.C. § 6159(b)(5)(A).