

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

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subject: Forms 2751-AD as Final Administrative Determinations

This memorandum responds to your request for assistance. This advice may not be used or cited as precedent.

FACTS

In a Trust Fund Recovery Penalty (TFRP) case with a timely protest, the Assessment Statutory Expiration Date (ASED) is suspended until 30 days from the date the Appeals Team Manager (ATM) approves the case decision by signing Form 5402, Appeals Transmittal and Case Memo. The ASED, which is suspended during the appeals process, begins running on the date of the ATM's signature, commonly known as the "final administrative determination."

Appeals often secures Form 2751-AD, Trust Fund Recovery Penalty – Offer of Agreement to Assessment and Collection. This is an agreement form that is secured when all parties agree with the proposed settlement. This form is also signed by the ATM.

ISSUE

Could an Appeals Team Manager's signature approving a Form 2751-AD, Trust Fund Recovery Penalty – Offer of Agreement to Assessment and Collection, be deemed to be

the final administrative determination sufficient to start the running of the statute of limitations for assessment under section 6672(b)?

### CONCLUSION

No. An Appeals Team Manager's signature approving a Form 2751-AD, Trust Fund Recovery Penalty – Offer of Agreement to Assessment and Collection, cannot be deemed to be the final administrative determination sufficient to start the running of the statute of limitations for assessment under section 6672(b).

### LAW AND ANALYSIS

Section 6672(a) imposes a penalty against any person required to collect, truthfully account for, and pay over any tax imposed by the Code who willfully fails to collect, or truthfully account for and pay over the tax, or who willfully attempts in any manner to evade or defeat the tax.

Section 6672(b), as amended by the Taxpayer Bill of Rights 2, Pub. L. No. 104-168, 110 Stat. 1465 (TBOR 2), is applicable to proposed assessments made after June 30, 1996. It states, in pertinent part, as follows:

**(3) Statute of limitations.**--If a notice described in paragraph (1) with respect to any penalty is mailed or delivered in person before the expiration of the period provided by section 6501 for the assessment of such penalty (determined without regard to this paragraph), the period provided by such section for the assessment of such penalty shall not expire before the later of--

**(A)** the date 90 days after the date on which such notice was mailed or delivered in person, or

**(B)** if there is a timely protest of the proposed assessment, the date 30 days after the Secretary makes a final administrative determination with respect to such protest.

The term "final administrative determination" is not defined in the statute or its corresponding regulations. Under the current TFRP procedures, Appeals is the only function that can make the final administrative determination for purposes of section 6672(b)(3)(B). IRM 8.1.1.4(6), 8.25.1.1(1)(b), and 8.25.1.2.1(3). The date the ATM signs the customized Form 5402 sustaining the liability constitutes the final administrative determination for purposes of section 6672(b)(3)(B). IRM 8.25.1.2.1(6).

When an Appeals employee closes **any** TFRP case, that employee must complete a Form 5402. I.R.M. 8.25.3.4(1). See also I.R.M. 8.25.3.3.4. A Form 5402 explains the reasons upon which the final administrative determination is based. See Form 5402. A Form 2751-AD is used only in cases in which each responsible person agrees with the

proposed settlement of the TFRP liability. I.R.M. 8.25.2.6(3); 8.25.3.4(3). It merely identifies the tax periods, the type of tax, the penalty to be assessed, and any overassessment of the penalty. It does not provide any explanation as to how these items were determined. See Form 2751-AD. It also contains the following statement which the responsible party is required to sign: "Once it has been signed, the case will not be reopened unless fraud, misconduct, concealment, or misrepresentation of material fact is shown. The case may be reopened, however, if an important mistake in the mathematical calculation is made. I also agree that I will not file or prosecute a claim for abatement, credit, or refund for the periods shown other than for any overassessment shown above." Id. A Form 2751-AD is used in addition to a Form 5402. It is not issued independent of a Form 5402. I.R.M. 8.25.3.4(3).

We have previously opined that a closing agreement on Form 866, Agreement as to Final Determination of Tax Liability, or Form 906, Closing Agreement On Final Determination Concerning Specific Matters, signed by the ATM constitutes a final administrative determination. At least one federal court which has analyzed Forms 2751-AD has held that they do not constitute closing agreements. See Stutz v. United States, 846 F.Supp. 25, 26 (D.N.J. 1994). In Stutz, the Court held Form 2751-AD "lacks any reference, prescribed by the IRS regulations, either in the caption or in the text, suggesting that the proposed agreement is a "final determination" with respect to tax liability; and the clause paralleling the language of § 7121 barring reopening of the case except in the event of "fraud, malfeasance, or misrepresentation of material fact" lacks any reference to the "final and conclusive" effect respecting liability, or to the Internal Revenue Code itself." Id. at 26-27. Form 2751-AD is not prescribed by the IRS to be used as a closing agreement. The Form 2751-AD itself does not purport to be a closing agreement and contains no language suggesting that it represents a taxpayer's final agreement concerning the tax liability periods at issue. Id. at 27.

A Form 2751-AD does not constitute a closing agreement and cannot be issued independent of a Form 5402. We conclude, therefore, that the signing of a Form 2751-AD by an ATM cannot be deemed to be the final administrative determination sufficient to start the running of the statute of limitations for assessment under section 6672(b).

This writing may contain privileged information. Any unauthorized disclosure of this writing may undermine our ability to protect the privileged information. If disclosure is determined to be necessary, please contact this office for our views.

If you have any questions regarding this advice, please contact the attorney assigned to this case at (202) 622-3600.