Office of Chief Counsel
Internal Revenue Service
Memorandum

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subject: Calculating Tolling of the Period of Suspension under I.R.C. § 7609(e)(2)

This Chief Counsel Advice responds to your request for assistance. This advice may not be used or cited as precedent. This Chief Counsel Advice is meant to supplement advice previously given in this case.

ISSUE

How should the I.R.C. § 7609(e)(2) period of suspension be calculated.

CONCLUSIONS

When I.R.C. § 7609(e)(2) applies in a third-party summons situation, the assessment statute expiration date ("ASED") may be recalculated to reflect the period of suspension. The sixth-month waiting period begins on the day the summons is served. The suspension period starts on the day that is exactly six months after the service of the summons. The suspension continues through the day of the final resolution. The period of limitations resumes running the day after the day of the final resolution.

FACTS

The facts are described in our prior advice.

LAW AND ANALYSIS

Section 7609(e)(2) provides that if the third-party recipient of a summons fails to comply with the summons for six months after service, then the periods of limitations under I.R.C. §§ 6501 and 6531 are suspended, with respect to any person with respect to whose liability the summons was issued. The period of suspension begins six months after the summons was served and ends when the dispute is resolved. This suspension provision applies to third-party summonses that are subject to the notice requirements of section 7609(a), to a John Doe summons under section 7690(f), and to a third-party summons issued without notice after court approval under section 7609(g). See also Treas. Reg. § 301.7609-5(d). Final resolution of a summoned party's response to a third-party summons or any order enforcing any part of a third-party summons occurs when the Service determines that the summoned person has fully complied with that summons or any order enforcing any part of the summons and when all appeals are disposed of or the period in which an appeal may be taken or a request for further review may be made has expired. See I.R.C. § 7609(e)(2)(B); Treas. Reg. § 301.7609-5(e)(3); IRM 25.5.6.6.3.3.

We have previously determined that section 7609(e)(2) applies in this case. The issue you have asked us to now address is how the suspension of the period of limitations actually works. The statute states that the period of limitations begins six months after the summons was served and ends when the dispute is resolved, and the applicable regulation provides an illustrative example. Treas. Reg. § 301.7609-5 provides an example of how the suspension of the period of limitations begins on the date that is six months after the service of the summons and ends on the date on which the response to the summons is finally resolved. The example provides that a John Doe summons is issued on April 1, 2004, with respect to tax years 2001 and 2002. The district court approves service of the summons on April 30, 2004, and the summons is served on the promoter on May 3, 2004. The promoter does not provide the names of the participants. The periods of limitation for the participants' income tax liabilities and criminal prosecution for 2001 and 2002 are suspended under section 7609(e)(2) beginning on November 3, 2004, the date which is six months after the date the John Doe summons was served until the date on which the promoter's response to the summons is finally resolved. Treas. Reg. § 301.7609-5(d)(2).

Two cases demonstrate how the tolling is meant to work. In Kligfeld Holdings v. Commissioner, 128 T.C. 192 (2007), the IRS served Jenkens & Gilchrist with a John Doe summons on June 18, 2003. The tolling of section 6501's three-year limit began on December 18, 2003, six months after the service of the summons, and continued until May 17, 2004, when the responsive information was provided with respect to the summons. When the tolling began, there were 133 days remaining in the limitations period for this John Doe taxpayer; therefore, when the tolling ended, there were still 133 days remaining and the limitations period was extended for this John Doe taxpayer from April 29, 2004 to September 26, 2004. The court found the period of limitations was suspended starting six months after the service of the summons. The tolling period ended on the date of final resolution and the period began running the next day. The court then applied the suspended period to the original ASED in order to calculate the new ASED. The court engaged in a similar calculation in Highwood Partners v. Commissioner, 133 T.C. 1 (2009), involving the same John Doe summons served upon Jenkins & Gilchrist and different John Doe taxpayers. The court adhered to the same method of calculation as the Kligfeld court, but started with one day later for service of the John Doe summons. These cases demonstrate that the six-month waiting period begins on the actual day that the summons is served and the period of limitations begins the day that is exactly six months after the service of the summons. When this period is tacked on to the date of the original ASED, the length of the period of suspension begins the day after the original ASED. In other words, the date that is one day after the date of the original ASED is day one for counting out the period of suspension in order to calculate the new ASED.

In summary, when section 7609(e)(2) applies, the requisite six-month waiting period begins on the exact date that the summons is served and the suspension period starts exactly six months after that. The suspension continues through the date of final resolution and the period of limitations resumes running the day of the final resolution. If the last day for mailing the notice of deficiency is a weekend or a holiday, then it should be shifted to the next weekday, pursuant to I.R.C. § 7503.

CASE DEVELOPMENT, HAZARDS AND OTHER CONSIDERATIONS

[redacted]

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Please call (202) 622-7950 if you have any further questions.