Office of Chief Counsel
Internal Revenue Service
memorandum

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to: Frederick W. Schindler, Director, Collection Policy, SBSE

from: Gary D. Gray, Deputy Associate Chief Counsel (Procedure & Administration)

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subject: TAD-2010-3

This memorandum addresses the Commissioner's authority to implement directives in Taxpayer Advocate Directive 2010-3. The TAD is concerned with taxpayers whose collection statute expiration date (CSED) was extended prior to 1998, in connection with an installment agreement, more than 15 years (plus statutory suspensions) from the date of assessment. The TAD divides these taxpayers into two categories: (1) those whose CSEDs would not yet have expired if they had originally been extended only 15 years (plus statutory suspensions) from the date of assessment and (2) those whose CSEDs would have already expired if they had originally been extended to that date. With respect to the first category of taxpayer, the TAD directs the Service to change the CSED to the date 15 years (plus statutory suspensions) from the date of assessment. With respect to the second category of taxpayer, the TAD directs the Service to abate the unpaid tax and additions to tax.

Issues

1. With respect to those taxpayers whose CSEDs would not yet have expired if they had originally been extended beyond 15 years (plus statutory suspensions) from the date of assessment, does the Commissioner have the authority to change the CSED to the date 15 years (plus statutory suspensions) from the date of assessment?

2. With respect to those taxpayers whose CSEDs would have already expired if they had originally been extended to the date 15 years (plus statutory suspensions) from the date of assessment, does the Commissioner have the authority to abate the unpaid tax and additions to tax?

Conclusions

1. No. The Commissioner does not have the authority to rescind, modify or cancel a waiver of the collection statute of limitations as directed by TAD 2010-3.

2. The Commissioner does not have the authority to abate taxes and additions to tax across the board, as the TAD appears to direct. The Commissioner does have the authority under section 6404(c), however, to abate tax on a case-by-case when "the

administrative and collection costs involved would not warrant collection of the amount due."

Background

Section 6502 prevents the Service from beginning collection action with respect to a tax more than 10 years (plus the time collection is suspended by statute) after the tax is assessed. In connection with installment agreements, however, taxpayers can waive this limitation in order to lower monthly payments by spreading them over a longer period. Prior to 1995, the Service permitted taxpayers to agree in connection with an installment agreement to extend their CSED indefinitely. In 1995, the Service changed its policy and began limiting CSED extensions in connection with an installment agreement to 15 years (plus statutory suspensions) from the date of assessment. In 1998, Congress specifically authorized the Service to extend a CSED in connection with an installment agreement to any date to which the taxpayer and the Service agree in writing. I.R.C. § 6502(a). Still, the Service continues to limit the CSED extension in such situations to 15 years (plus statutory suspensions).

Discussion

A. The Commissioner's Authority to Adjust Taxpayer Waivers of the Collection Statute

Section 6502(a) provides that a tax may be collected by levy or proceeding in court begun within 10 years after the assessment, or in connection with entering into an installment agreement, 90 days after any period for collection agreed upon in writing by the Service and the taxpayer.[1] I.R.C. § 6502(a)(2)(A).

The Commissioner lacks authority to modify, cancel, or supersede a valid waiver extending the statute of limitations on collection accepted in connection with an installment agreement. A tax collection waiver executed pursuant to section 6502(a)(2) is not a contract. See Florsheim Bros. Drygoods Co. v. United States, 280 U.S. 453, 468 (1930). Rather, it is a voluntary, unilateral waiver of a defense by a taxpayer. Courts have rejected the argument that a subsequent waiver to a date certain limits an earlier, unlimited waiver of the collection statute. See Simmons v. Westover, 76 F.Supp. 442 (S.D. Cal. 1948) ("The extension already in effect [was] not reduced by additional unilateral waivers, since the government relinquished no rights by accepting them."). Once the defense of the limitations period is validly waived, it cannot be "unwaived."

While the Commissioner lacks authority to modify or rescind the waiver, nothing prevents the Commissioner from deciding to forego collection during any part of the new collection period. We understand many of these cases are already in currently-not-collectible status, which suspends most active collection but does not prevent the

[1] The only other circumstance in which the CSED may be extended by the parties is when there is a release of levy under section 6343 after the 10-year collection period. I.R.C. § 6502(a)(2)(B).

Service from crediting tax overpayments, levying on state income tax refunds or filing Notices of Federal Tax Lien. If the Commissioner thought it appropriate, he could segregate any or all of these accounts even further into a separate noncollectible status as to which refund offset and state-income tax levy would also be suspended. Tax liabilities in such a category would remain secured by the Federal Tax Lien, however. Tax liens may be released only if the liability has been satisfied or has become legally unenforceable, or if a bond is posted. I.R.C.§ 6325(a).

With regard to NFTLs, the Commissioner is authorized to withdraw a notice of lien filed where it is determined (1) the filing of the notice was premature; (2) the taxpayer has entered into an installment agreement; (3) withdrawal of the lien will facilitate collection of the liability secured by the lien; or (4) where withdrawal of the notice is in the best interest of the taxpayer and the government. I.R.C. § 6323(j). The first three grounds for withdrawal would not provide a basis for withdrawal in the category of cases at issue. Whether the Commissioner could determine that withdrawal might, in some cases, be in the best interest of the taxpayer and the government should depend on an examination of the facts of each case. The Treasury Regulations do not define best interests under this provision, except to provide one example in which withdrawal of the NFTL would facilitate collection. Treas. Reg. § 301.6323(j)-1(b)(4).

B. The Commissioner's Authority to Abate Taxes and Additions to Tax

The Commissioner's authority to abate tax or any liability in respect thereof is found in section 6404. This provision sets forth the circumstances in which the Commissioner may abate tax, interest or penalties. The statute does not grant the Commissioner unfettered power to abate at his discretion. Specifically it authorizes the Commissioner to abate –

- the unpaid tax or any liability in respect thereof that is excessive in amount, assessed after the expiration of the statute of limitations or erroneously or illegally assessed (IRC § 6404(a));
- the unpaid portion of any tax or any liability in respect thereof where the value of the tax outweighs the cost of collection (IRC § 6404(c));
- assessments attributable to certain math errors by the Service (IRC § 6404(d));
- interest on any deficiency attributable to an unreasonable error or delay by the Service in the performance of a ministerial or managerial act (IRC § 6404(e)); and
- penalties or additions to tax where they are attributable to erroneous written advice by the Service (IRC § 6404(f)).

In addition, the Service must suspend interest and certain penalties in certain circumstances when the Service has failed to contact a taxpayer. IRC § 6404(g). The Commissioner's authority to abate tax, additions to tax and interest is limited to the situations enumerated in the statute. None of those would allow the Commissioner to abate liabilities as to which the CSED was lawfully extended.

The NTA argues that the Commissioner has "plenary" authority to abate unpaid tax and additions to tax where enforcement would be unfair or unjust. She points to section 6404(a)(1) and (c). Section 6404(a)(1) grants the Commissioner authority to abate the unpaid portion of an assessment that is "excessive in amount." Section 6404(c) grants the Commissioner authority to abate liabilities when he "determines under uniform rules . . . that the administrative and collection costs involved would not warrant collection of the amount due."

The authority granted in section 6404(a)(1) to abate "excessive" assessments does not give the Commissioner discretion to abate on grounds of unfairness. Rather, as the Treasury Regulations make clear, an assessment that is "excessive in amount" is an assessment that is "in excess of the correct liability." Treas. Reg. § 301.6404-1(a). The Fifth Circuit addressed the limits of the Commissioner's authority to abate a tax that is "excessive in amount" in Matter of Bugge, 99 F.3d 740 (5th Cir 1996). In that case, the Service had inadvertently assessed the same tax twice. In response to Collection's request to abate one of the assessments, the service center incorrectly abated both assessments, leaving the liability completely unassessed. The court held that Collection's request for abatement of one assessment was "in accord with the IRS's discretionary authority under section 6404(a)(1) to abate an assessment that is 'excessive in amount.'" However, "by abating Bugge's actual and correct tax liability, [the service center] failed to act within the IRS's statutory authority to abate an excessive assessment. IRC § 6404(a)(1)." 99 F.3d at 745. See In re Burns, 974 F.2d 1064 (9th Cir 1992) ("excessive in amount" refers to a tax that has been correctly assessed in all respects other than in amount).

Contrary to the NTA's suggestion, Senator Howe's 1864 floor objection that the precursor of section 6404 would vest too much power in the Commissioner does not warrant a broader interpretation of the Commissioner's abatement authority. The fact that his comments did not provoke another Senator to speak up is an ambiguous auspice at best. His colleagues may have concluded the comment did not warrant any response other than a vote for the bill, an apparent repudiation of the Senator's objection. At all events, the views of a single member of a bicameral legislative body are not considered a reliable measure of the intentions of Congress about the legislation it enacts, and "[t]he fears and doubts of the opposition are no authoritative guide to the construction of legislation." Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 483 (1981), quoting Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 394 (1951).

The NTA's reliance on the memorandum opinion in H&H Trim & Upholstery Co. v. Commissioner, T.C. Memo. 2003-9, is also unpersuasive. In H&H Trim, the Tax Court interpreted "excessive" in section 6404(a)(1) to mean "unjust" or "inequitable." A narrower interpretation, reasoned the court, would render section 6404(a)(1) superfluous, because section 6404(a)(3) already addresses taxes that were "erroneously or illegally" assessed. But there is a difference between the (a)(1) authority to abate assessments "excessive in amount" and the (a)(3) authority to abate assessments "erroneously or illegally" made. The first provision, as the Treasury

Regulations make clear, addresses assessments that exceed "the correct liability." Treas. Reg. § 301.6404-1(a). The second provision addresses assessments that are procedurally erroneous or illegal. In fact, the court's reading of "excessive" in section 6404(a) to mean "unjust" would convert it to an abatement panacea and render other abatement provisions, such as sections 6404(c), (d), (e), (g) or (f), superfluous. There would be no need for enumeration of specific abatement authority if the Commissioner was empowered to abate any tax or related liability on the grounds that it is unjust. Likewise, there would be no need for section 7122 ETA offers in compromise, or the myriad of reasonable cause exceptions that Congress has enacted. See also Woodral v. Commissioner, 112 T.C. 19 (1999) (interest was not excessive under section 6404(a) where the Service had properly assessed the tax but waited for seven years before collecting).

The Commissioner's authority under section 6404(c) to abate tax "under uniform rules" when "the administrative and collection costs involved would not warrant collection of the amount due" would not authorize a blanket abatements of the sort directed by the NTA. These abatements are typically made on a case-by-case basis, as the financial situations of taxpayers vary. It is unclear whether the NTA wants to limit section 6404(c) abatements only to those taxpayers in CNC status or whether she wants to use section 6404(c) as a blanket tool for any taxpayer with an installment agreement spanning more than 15 years. As the group of taxpayers has been defined by the NTA, it is not possible to know whether individual taxpayers would qualify for abatement under section 6404(c). Even among taxpayers who have been determined to be currently not collectible, the Service may well decide that the administrative and collection costs of keeping a NFTL in place are not so significant as to outweigh the improved prospects of collection over time that an NFTL provides. Section 6404(c) does not authorize the Commissioner to abate liabilities for all taxpayers in the identified group.