OFFICE OF
CHIEF COUNSEL

DEPARTMENT OF THE TREASURY
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MEMORANDUM FOR ASSOCIATE AREA COUNSEL (SB/SE), AREA 2, NEWARK

FROM: Lawrence H. Schattner
Chief, Branch 2 (Collection, Bankruptcy & Summonses)

SUBJECT: Effect of Offers in Compromise on Collection Statute of Limitations

This Chief Counsel Advice responds to your request dated June 13, 2001. In accordance with I.R.C. § 6110(k)(3), this Chief Counsel Advice should not be cited as precedent.

ISSUE:

Whether the completion of a second Form 656, Offer in Compromise, by a taxpayer prior to the Service having had an opportunity to consider the offer has the effect of rescinding the waiver of the collection statute of limitations contained in the original Form 656.

CONCLUSION:

An agreement on the part of the taxpayer to extend the collection statute is a unilateral waiver of a defense by the taxpayer. Because execution of the waiver was a unilateral act on the part of the taxpayer and not a contract for which consideration is necessary, the Service's failure to act on the compromise has no effect on the validity or effect of the waiver.

BACKGROUND:

It has long been the policy of the Internal Revenue Service to suspend enforced collection efforts when a taxpayer submits an offer in compromise, unless collection of the tax would be jeopardized or the offer was made merely as a delay tactic. See Policy Statement P-5-97 (Approved July 10, 1959); Treas. Reg. § 301.7122-1(d)(2) (1960). To insure that the Government's eventual ability to collect was not harmed by withholding collection efforts, consideration of an offer was conditioned upon the execution by the taxpayer of a waiver of the statute of limitations for collection for the period the offer was being considered, while any term of an accepted offer was not completed, and for one additional year. See Treas. Reg. § 301.7122-1(f) (1960); Form 656, Offer in Compromise, Item 8(e) & (n) (Rev. 1-97).

The IRS Restructuring and Reform Act of 1998 (RRA) required several changes to this scheme. First, RRA section 3462 codified the practice of withholding collection while an offer to compromise is being considered by adding section 6331(k) to the Code. See P.L. 105-206, 112 Stat. 685, 764 (1998). Effective January 1, 2000, that section prohibits levy while an offer is pending, for thirty days after an offer is rejected, and while a timely filed appeal of that rejection is pending with the IRS Office of Appeals. See I.R.C. § 6331(k)(1); Temp. Treas. Reg. § 301.7122-1T(f)(2).

Second, RRA section 3461 amended section 6502 of the Code, also 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 P.L. 105-206, 112 Stat. 685, 763-64 (1998). The Service and taxpayers can now only agree to an extension of the statute of limitations for collection under 6502(a) in 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).

Finally, RRA contained a non-Code "sunset" provision which governs the continued effect of waivers of the collection statute executed prior to January 1, 2000. If a waiver was secured in conjunction with the granting of an installment agreement, the period for collection will expire ninety days after the date specified in the waiver. 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 § 3461(c)(2).

The Service's policies and procedures for the consideration and disposition of offers in compromise have been revised to reflect these changes in the law. However, some confusion exists with respect to the effect these changes in the law will have on offers that were accepted for processing prior to December 31, 1999, but remained pending after that date. Because the Service was authorized to secure waivers of the statute of limitations at the time the Forms 656 in such cases were submitted, those waivers had the effect of extending the time during which the Service can collect, subject to the "sunset" provision described above. For compromises submitted prior to December 31, 1999, but pending after that date, the Service's practice is to secure new forms. Forms 656 with revision dates of January 2000 or later include several changes to the terms of the offer. The securing of new forms insures that all offers accepted after these policy changes are subject to the revised terms and conditions. Consistent with the changes made by RRA, the revised forms do not contain language waiving the collection statute.

Your office has asked whether the submission of the new form prior to the Service's taking action on the offer has the effect of rescinding the previously executed waiver of the collection statute. For the reasons stated below, we conclude that the subsequent submission of a revised Form 656 has no effect on an otherwise valid waiver of the collection statute contained in the original Form 656.

DISCUSSION:

As is discussed above, prior to the enactment of RRA, the Service could extend the statute of limitations under section 6502 of the Code by agreement with the taxpayer at any time prior to the expiration of the ten-year statutory period. The statutory period, once extended, could be further extended by agreement at any time prior to the expiration date specified in the previous agreement. These agreements took the form of a waiver of the collection statute by the taxpayer, most often accomplished through a Form 900, Tax Collection Waiver. Although the statute refers to an extension by agreement, the courts have uniformly held that, since the statute of limitations is a defense available to the taxpayer in the event the Service attempts to collect beyond the statutory time period, extension of the time to collect is accomplished via a unilateral waiver of that defense by the taxpayer, and that a tax collection waiver is not a contract. See Strange v. United States, 282 U.S. 270, 276 (1931); Florsheim Bros. Drygoods Co. v. United States, 280 U.S. 453, 468 (1930).

Your request acknowledges this principle, but focuses on language in several lower court opinions stating that waiver of the collection statute is a "quid pro quo" for consideration of the offer. See United States v. Harris Trust & Sav. Bank, 390 F.2d 285, 288 (7th Cir. 1968); United States v. Havner, 101 F.2d 161, 163 (8th Cir. 1939). You conclude that since the waiver was in exchange for consideration of the offer, failure to consider the offer prior to a new form being submitted changed the effect of the previously signed waiver.

We cannot agree with this conclusion. The Seventh Circuit faced this precise argument in a later case than that cited above. The taxpayer submitted an offer in compromise based on doubt as to liability, which included the waiver language. The Service eventually rejected the offer because liability has been established in a prior court judgment.[1] The taxpayer argued that since rejection was preordained, the Service's agreement to consider the offer was illusory and that the waiver executed in exchange for such consideration was therefore unenforceable. In revisiting its opinion in Harris Trust, the court stated that the "quid pro quo" language should not be read in contractual terms: "Harris Trust does not state that contract principles govern the validity of a waiver and, of course, it could not do so without directly contradicting the Supreme Court's decisions in Florsheim Bros. and Stange." United States v. McGaughey, 977 F.2d 1067, 1073 (7th Cir 1992).

The court's conclusion was perhaps made less clear by what it went on to say. The court concluded that the waiver was valid "because contract principles do not apply and because the IRS did consider the offer, even if rejection was preordained." Id. (emphasis added). While this could be read to indicate that the failure to consider the

[1] See Treas. Reg. § 301.7122-1T(b)(2) ("Doubt as to liability does not exist where the liability has been established by a final court decision or judgment concerning the existence or amount of the liability.")

offer would have had some effect on the validity of the waiver, we believe, reading the statement in context, it was more of a signal from the court that the waiver would have been found valid even if some quid pro quo on the part of the Service was needed.

We think the same can be said of the scenario you have presented. When the offer was countersigned by a Service official with authority to acknowledge the waiver, the offer became "pending." Although not required by law prior to January 1, 2000, the Service suspended collection by levy so that the offer could be processed and considered. Even if the Service had not yet begun to weigh the merits of the offer, this stay of collection by the Service was a benefit to the taxpayer. No such benefit flowing from the Service to the taxpayer would be needed for the waiver to be valid. The existence of such a benefit, however, undercuts any suggestion that the taxpayer would not have signed the waiver had he known that the offer would not immediately be considered on its merits.

If you have any questions, please contact the attorney assigned to this case at 202-622-3620.