Office of Chief Counsel
Internal Revenue Service
memorandum

CC:PA:APJP:2/TLeibowitz
POSTN-101598-04

Number: **200421002**
Release Date: 5/21/04

UILC: 6020.00-00, 6020.01-00, 6020.02-00, 6404.00-00, 6502.00-00, 6401.01-00

date: April 09, 2004

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subject: Section 6020(b) and the Collection Statute Expiration Date

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

Issues

1. Whether the Internal Revenue Service (Service) may completely abate an assessment based upon a defaulted statutory notice of deficiency (SNOD) prepared from a substitute for return made under the authority of section 6020(b) and assess the tax shown on a taxpayer's later-filed "original" return to have the limitations period on collections run from the later assessment date.

2. Whether the answer to Issue 1 would change if the Service assessed the tax reflected on the "original" return and subsequently abated the assessment made on the defaulted SNOD.

3. Whether a taxpayer is legally entitled to a refund if the Service collects beyond the collection statute expiration date (CSED).

4. Whether a taxpayer is legally entitled to a refund if the taxpayer voluntarily submits payment beyond the CSED.

Conclusions

1. There is no authority to abate an assessment based on a defaulted SNOD prepared from a section 6020(b) return just because a taxpayer later files a return reporting tax already assessed.

2. There is no authority to make an assessment on a taxpayer's later-filed return if the Service has already assessed the tax based on a defaulted SNOD prepared from a section 6020(b) return.

3. A taxpayer is legally entitled to a refund if the Service collects beyond the CSED.

4. A taxpayer is legally entitled to a refund if the taxpayer voluntarily submits payment beyond the CSED.

Facts

After Taxpayer A fails to file a timely income tax return, the Service executes a substitute for return made under the authority of section 6020(b) and issues Taxpayer A a SNOD. Taxpayer A later defaults on the SNOD. The Service then makes a deficiency assessment. Subsequently, Taxpayer A files his own "original" late return showing a liability smaller than the assessed liability. The Service reduces the assessed deficiency to the amount shown on Taxpayer A's "original" return and sets the CSED on its computers to expire ten years from the date Taxpayer A filed its return. The Service then collects on Taxpayer A's account more than 10 years after the deficiency assessment, but less than 10 years from the date Taxpayer A filed its return.

Law and Analysis

Section 6020(b) and Assessments

Section 6020(b)(1) provides that the Service may execute a return for a taxpayer who fails to make any return required by any internal revenue law or regulation at the time prescribed, or who makes, willfully or otherwise, a false or fraudulent return. Preparing a section 6020(b) return, however, does not allow the Service to assess without deficiency procedures if the tax is a type subject to deficiency procedures. See Spurlock v. Commissioner, 118 T.C. 155, 161 (2002).

If the Service issues a SNOD based on a section 6020(b) return and the taxpayer does not petition the Tax Court or a Tax Court decision has become final, the Service may assess the deficiency. The execution of a section 6020(b) return, however, will not start the running of the period of limitations on assessment and collection without

assessment. I.R.C. § 6501(b)(3). Accordingly, until the taxpayer files his own return, there will be no deadline by which the Service must assess the tax or file a suit to collect without assessment. Once the Service chooses to assess the tax, however, a 10-year period of limitations on collection begins. I.R.C. § 6502(a)(1).

Abatement

If the Service prepares a return under the authority of section 6020(b), and the taxpayer later files his own "original" return, a certain portion of tax assessed may be abated. Section 6404(a) allows for the abatement of tax where it is erroneous, excessive, or illegal. If a taxpayer files an original return reporting tax less than the amount shown on the section 6020(b) return and the Service determines the taxpayer's calculations are correct, the Service abates the original assessment to reflect the amount the taxpayer reported on the "original" return. There would be no statutory authorization to abate the entire deficiency assessment and make a subsequent assessment of the tax reported on the return. The deficiency assessment would not be erroneous, illegal, or excessive in its entirety. Because no new assessment is involved, the only assessment to trigger the limitations period of collection is the deficiency assessment and the taxpayer's filed "original" return will not alter the CSED.

Further, the Service may not avoid this result by first assessing the tax shown on the taxpayer's filed "original" return and then abating the earlier deficiency assessment as excessive. There is no new tax to assess. The Service should not assess the amount of tax the taxpayer reports after having already assessed that tax pursuant to deficiency procedures. When the Service assesses tax and determines that no more tax is due, any additional assessment would be excessive and should not intentionally occur.

If the taxpayer's "original" return reflects more tax than that assessed from the statutory notice based on the section 6020(b) return, then an additional assessment is needed for the difference. In this scenario, there are two different assessment dates for purposes of the statute of limitations on collections. The Service should not, however, completely abate the deficiency assessment of tax related to the section 6020(b) return in favor of making a new assessment of the entire amount of tax shown on the taxpayer's later-filed "original" return for purposes of extending CSED.

In United States v. Updike, 281 U.S. 489 (1930),[1] the Supreme Court construed the predecessor to section 6502(a), which had language virtually identical to the language of section 6502(a). In considering whether the limitations period on collection had

[1] Although the Supreme Court decided Updike more than 70 years ago, it's vitality continues; the Supreme Court recently relied upon another aspect of the case in deciding United States v. Galletti, 72 U.S.L.W. 4252, 4255 (U.S. Mar. 23, 2004).

begun when the Service had assessed a tax to which no limitations period on assessment applied, the Court stated:

> An actual assessment having been made, it must be assumed that the government was in possession of the facts which gave rise to the liability upon which the assessment was predicated. In such case to allow an indefinite time for proceeding to collect the tax would be out of harmony with the obvious policy of the act to promote repose by fixing a definite period after assessment within which suits and proceedings for the collection of taxes must be brought.

That same policy is present here. The Service would violate that policy if it attempted to manipulate abatements and assessments to extend the limitations period on collection.

Refunds

If the Service collects beyond the CSED on tax assessed from a statutory notice based on a section 6020(b) return, the taxpayer is entitled to a refund. Section 6402(a) provides that in the case of any overpayment, the Secretary, within the applicable period of limitations, may credit the amount of such overpayment, including any interest, against any liability in respect to the person who made the overpayment, and shall refund any balance to such person. The Service may credit an overpayment to a liability for a different year only if the applicable period of limitation has not expired. I.R.C. § 6402(a). Further, the Service is not required or authorized by statute to refund tax payments claimed by a taxpayer if an overpayment has not been determined. Lewis v. Reynolds, 284 U.S. 281 (1932).

Section 6401(a) provides that the term overpayment includes that part of the amount of the payment of any tax that is assessed and collected after the expiration of the period of limitations. The Tax Court has stated that "any payment by a taxpayer of a barred tax liability, whether voluntarily or involuntarily, automatically becomes an 'overpayment' and hence subject to a mandatory refund." Diamond Gardner v. Commissioner, 38 T.C. 875, 881 (1962); see also Hoffman v. Commissioner, 119 T.C. 140 (2002). Accordingly, when the Service makes a post-CSED payment on behalf of the taxpayer, such as a refund offset, that activity constitutes an overpayment. If a taxpayer makes a voluntary payment of tax and interest, that submission also constitutes an overpayment under section 6401(a). The Service should refund both types of overpayments under the authority of section 6402(a).

IRM Procedural Update 00230 provides that the CSED shall be calculated from the date of the taxpayer's later-filed original return rather than the date the Service originally assessed under deficiency procedures. We will be contacting the appropriate Service official to request a change of IRM Procedural Update 00230.

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.

Please call Tracey Leibowitz at (202) 622-4940 if you have any further questions.