ACKNOWLEDGED SIGNIFICANT ADVICE, MAY BE DISSEMINATED

Office of Chief Counsel **Released 9/9/98**
Internal Revenue Service **SCA 1998-023**

memorandum

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JSMusen: TL-N-6869-97

date: January 28, 1998

to: District Counsel, Brooklyn CC:NER:BRK

from: Assistant Chief Counsel (Field Service) CC:DOM:FS

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subject: Significant Service Center Advice

This responds to your request for Significant Advice dated October 28, 1997, in connection with a question posed by the Examination Division at the Brookhaven Service Center.

Disclosure Statement

Unless specifically marked "Acknowledged Significant Advice, May Be Disseminated" above, this memorandum is not to be circulated or disseminated except as provided in Paragraphs III.D.4. and IV.A.5. of Part (35) of the CCDM. (See Office of Chief Counsel Notice dated February 10, 1997, regarding Service Center Advice Procedures.) This document may contain confidential information subject to the attorney-client and deliberative process privileges. Therefore, this document shall not be disclosed beyond the office or individual(s) who originated the question discussed herein and are working the matter with the requisite "need to know." In no event shall it be disclosed to taxpayers or their representatives.

Issue

Whether to redetermine a deficiency mailed more than 90 days from the issuance of a first notice of deficiency, but within 90 days from the issuance of a second notice of deficiency is timely for purposes of I.R.C. § 6213(a).

Conclusion

We think it is likely that a court would find that the taxpayer would have 90 days to file a petition from the mailing date of the second notice of deficiency.

Facts

The Examination Division at the Brookhaven Service Center has discovered instances where, after a valid notice of deficiency has been ,ailed to the taxpayer, the taxpayer provides the examiner additional documentation, which results in the preparation of a revised income tax report and the mailing of a second notice of deficiency. The second notice determines a reduced deficiency and is mailed within 90 days of the date of the first statutory notice.

Discussion

Section 6213(a) of the Internal Revenue Code provides that within 90 days after a notice of deficiency is mailed to the taxpayer, a petition for redetermination of the deficiency may be filed with the Tax Court. Tax Court jurisdiction depends, in part, on a timely mailed notice of deficiency. Traxler v. Commissioner, 61 T.C. 97 (1973). Section 6112(c) provides that:

> If the Secretary has mailed to the taxpayer a notice of deficiency. . ., and the taxpayer files a petition in the Tax Court within the time prescribed in section 6213(a), the Secretary shall have no right to determine any additional deficiency of income tax for the same taxable year . . . to which such petition relates . . . .

This provision is generally read to preclude the Service from issuing more than one notice of deficiency for a tax year for a particular taxpayer where the taxpayer has filed a timely Tax Court petition from the first notice. Your request discusses at some length the issue of whether a second notice of deficiency is a nullity because the Commissioner is without authority to issue it as a result of section 6212(c). On the facts as presented in your request for advice, however, section 6212(c0 is inapplicable because the Commissioner is not attempting to determine an additional deficiency. Accordingly, it does not appear that section 6212(c) restricts the issuance of such notices.

Notwithstanding that there is no statutory prohibition against second statutory notices for reduced deficiencies, their issuance should be avoided because of the uncertainties they create. One uncertainity is identified in your request for advice: whether a petition filed within 90 days of the second notice will be timely. Taxpayers who wish to petition the Tax Court may file petitions from both notices in order to fully protect themselves. Another issue os whether the Service may assess the amount determined in the first notice after the expiration of 90 days from its issuance, but prior to the expiration of 90 days from the second notice.

In 1986, Congress enacted section 6213(d) which provides a mechanism for the taxpayer and the Service to agree to the rescission of a statutory notice. Once the first notice is rescinded, it becomes null and void and the Service may issue a second statutory notice if it desires to do so. This is the procedure that the Service Center examiners should follow if they wish to make the first notice ineffective.

If, however, the first notice has not been rescinded and a second notice is issued for a reduced amount prior to the expiration of 90 days from the mailing of the first notice, the taxpayer would have the full 90 day period from the mailing date of the second notice provided by section 6213(a) to file a petition in the Tax Court based on the second notice. This is because, as discussed above, the second notice is a valid notice of deficiency. Inasmuch as the second notice is a valid independent determination of tax from the first notice, cases are inapplicable. See, e.g., Pfeffer v. Commissioner, 272 F.2d 383 (2d. Cir. 1959) (No second 90 day period where Commissioner simply provided copy of notice of deficiency that had been properly mailed to taxpayer's last known address.

Even where the second notice of deficiency determines a greater deficiency, such that section 62129c) is applicable, our answer would remain the same, although the analysis is slightly different. The Tax Court has held that the second notice is a valid notice so long as the taxpayer does not petition from the first notice. Gmelin v. Commissioner, T.C. Memo. 1988-338, aff'd without published opinion, 891 F.2d 280 (3d Cir. 1989). In the Gmelin opinion, the court distinguished its earlier opinion, McCue v. Commissioner, 1 t.C. 986 (1943), and rejected as dicta its language that suggested that the second notice was a nullity regardless of whether the taxpayer petitioned from the first notice. The position that the second notice is valid unless the taxpayer petitions the Tax Court from the first notice is consistent with the discussion of secondary statutory notices in CCDM(35)(231 and GCM 33366. If the taxpayer fails to petition timely from the first notice, the second notice remains valid and the taxpayer will have the full statutory 90 day period to petition from it. AS is well settled, however, if the taxpayer petitions timely from the first notice, the second notice is a nullity and no valid petition may be filed from it. Stamm International Corp. v. Commissioner, 84 T.C. 248 (1985); McCue v. Commissioner.

In conclusion, we strongly recommend that the Service not issue second statutory notices of deficiency during the 90 day period allowed to petition without first rescinding the original notice. Finally, if a taxpayer does petition from a second statutory notice issued for a reduced deficiency, the petition

will be timely so long as it is filed within 90 days of the mailing of the second notice.

/s/
DEBORAH A. BUTLER

cc: Executive Office for Service Center Operations
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