DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

OFFICE OF
CHIEF COUNSEL

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MEMORANDUM FOR WILLARD N. TIMM, ASSOCIATE AREA COUNSEL (SBSE) – ATLANTA CC:SB:3:ATL:1

FROM: Lawrence H. Schattner
Chief, Branch 3 (Collection, Bankruptcy Summonses)

SUBJECT: Claims for Refund/Abatement of Trust Fund Recovery Penalty – Handling by Collection Technical Support Groups

This responds to your request of November 30, 2000, for our review of your proposed advice to your local Collection Technical Support Group (CTSG) on a number of issues regarding their future handling of taxpayer claims for refund/abatement of Trust Fund Recovery Penalty (TFRP) assessments, pursuant to I.R.C. § 6672. As a preliminary matter, we note that your proposed advice is directed primarily at the local CTSG's future handling of taxpayer claims for "refunds" of previously paid TFRP amounts, pursuant to the procedures and limitations described in I.R.C. §§ 6511(a), 6532(a)(1), 6672(c), and 7422(a), and of any requests for abatement of uncollected TFRP amounts for periods that are related to these pending claims for refunds, rather than to taxpayer requests for "abatement" of uncollected TFRP amounts that are entirely unrelated to any pending claim for a refund, under parts of section 6404.[1] Accordingly, we suggest that you revise the subject heading of your proposed memorandum, as we have our own response, to refer to "Claims for Refund/Abatement of Trust Fund Recovery Penalties." Early in the introduction of your proposed memorandum, we also suggest that you highlight for your local CTSG that your discussion is limited to the Service's procedures for handling taxpayer claims for refund of paid TFRP

[1] We understand that the policies and procedures for the Service's handling of taxpayer requests for abatement that are unrelated to a pending claim for refund may be quite different than the procedures for considering a claim for refund. In particular, a taxpayer's opportunity to obtain judicial review of the Service's denial of a request for abatement appears to be more limited and to lie with a different court, pursuant to section 6404(i), than the opportunities for judicial review and the courts which may consider the Service's denial of a claim for refund. If you require advice regarding the Service's procedures and policies with regards to section 6404, you should contact Branch 3 of Assistant Chief Counsel (Administrative Provisions & Judicial Practice).

amounts, and that it only addresses taxpayer requests for abatement of unpaid TFRP amounts which are related to the Service's consideration of pending TFRP refund claims. As described below, we also suggest the inclusion of similar, issue limiting clarifications in other part of your proposed advice memorandum. We now consider the issues in your memorandum, slightly out of order.

ISSUES 2 & 3 – RESPONDING TO THE LOSS/DESTRUCTION OF THE SERVICE'S ADMINISTRATIVE FILES RECOMMENDING ASSERTION OF TFRP

The bulk of your proposed advice memorandum is devoted to a discussion of the issue described above. With the minor refinements to your discussion listed further below, we agree with your proposed manner of handling this issue locally.

In the past two years, our office has previously opined at some length in two other advice memoranda about how the Service could respond appropriately to the loss/destruction of the Service's administrative files recommending assertion of the TFRP, in procedural contexts that are different from the refund claim circumstances described in your present proposed advice memorandum.

In an advice memorandum dated May 13, 1999, now reproduced at 1999 IRS CCA LEXIS 172, our office previously considered how the Service's Customer Service function should conduct its general project to clean-up the Service's outstanding, aged Non-Master File accounts (including many unpaid TFRP assessments) where the Service knows or has reason to suspect that the Service's original supporting administrative files have now already been destroyed as part of the Service's ordinary document retention policy. In that prior advice memorandum, we suggested that it would <u>not</u> be appropriate for the Service on its own initiative, apart from any particular taxpayer request for relief, and as part of an effort to address the accuracy of the Service's statement of its overall accounts receivable, to (1) investigate whether the Service's administrative file recommending assertion of the TFRP in each case had been destroyed, or (2) abate the unpaid portion of every TFRP assessment on the Service's books where the Service's TFRP file recommending assessment should have or has been destroyed, pursuant to the Service's ordinary document retention policy. We gave this advice because many of a taxpayer's potential grounds for or procedural means of challenging a TFRP assessment do not require the Service's original administrative file or a reconstruction thereof in order to assert a proper defense for the Government, and because many taxpayers presumably have no issue with the merits of the Service's aged TFRP assessments, even though they may not have had the means or the desire to pay these outstanding tax liabilities to date. In our second prior advice memorandum described below, we indicated that we stood by the advice memorandum of May 13, 1999, in its context.

In a second advice memorandum dated October 16, 2000, now reproduced at 2000 IRS CCA LEXIS 134, our office considered how the Appeals function and the

Collection function may appropriately respond to the loss/destruction of the Service's original administrative file recommending assessment of the TFRP in the context of a Collection Due Process (CDP) hearing or "equivalent hearing" under the Collection Due Process regulation (Temp. Treas. Reg. § 301.6330-1T). In this second advice memorandum, we indicated that the Appeals function did not need the Service's TFRP assessment file in order to verify the Service's compliance with the requirements of applicable law and administrative procedures, for purposes of I.R.C. § 6330(c)(1) – that an IRS Form 4340 could be relied upon by Appeals for this purpose. We also predicted that many taxpayers would not be eligible to receive a CDP hearing or equivalent hearing regarding the existence or amount of their unpaid TFRP liabilities, because these taxpayers should already have received a prior opportunity for a conference with Appeals to dispute their liability for the TFRP.[2] Issues 4 and 5 of this second advice memorandum consider how the Appeals and Collection functions may respond to the loss/destruction of the Service's original TFRP recommendation files when a taxpayer is eligible to contest and has, in fact, chosen to contest the existence or amount of the taxpayer's unpaid TFRP liabilities in a CDP hearing or equivalent hearing. After considering and relying upon many of the same cases discussed in your present advice memorandum, we concluded that the Service's loss/destruction of its original administrative file recommending the TFRP is not fatal to the Service's case, that the absence of this file may affect the Service's hazards of litigation in defending the merits of its TFRP assessment, and that the Service may nevertheless often successfully reconstruct its lost/destroyed file or an adequate, alternative factual/legal basis for its old TFRP assessment at issue. We further concluded that in a CDP hearing or equivalent hearing context, the initial responsibility for deciding whether to attempt to reconstruct the Service's lost/destroyed TFRP recommendation file and how much time and resources to expend in the effort should lie with the Collection function, and that the affected Service functions, through coordination within the new SBSE structure, could also develop selection tolerances to guide them in making these future resource allocation decisions.

We regard your present proposed advice to your local CTSG, in the different context of considering a taxpayer's claim for refund with respect to the TFRP, as fully consistent with our two prior advice memoranda discussed above. In your

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[2] In footnote 6 to this second memorandum, we acknowledged that going forward with a levy to collect a TFRP liability which a taxpayer hoped to contest as to existence or amount in a CDP or equivalent hearing, but was ineligible to do so because of a prior opportunity for an Appeals hearing, could result in the taxpayer obtaining an opportunity to file a claim for refund and thereby obtain a hearing with regards to the existence or amount of a disputed TFRP liability. Notwithstanding this refund claim possibility, which is the subject covered by your present proposed discussion, we concluded that it would not be appropriate for the Appeals function to consider the merits of the TFRP in these issue preclusion circumstances in a CDP hearing or equivalent hearing context.

present context of a taxpayer's claim for refund, a taxpayer who has filed a timely claim will frequently have put the existence and amount of the recently paid (within the last two years) TFRP liabilities at issue. In this context, there are clearly some hazards of litigation to the Service in defending its TFRP assessments when the Service's original TFRP recommendation file has been lost/destroyed. However, as you note, the Service may expend its time and resources in efforts to reconstruct the file or to develop an alternative, adequate factual/legal basis for the TFRP liability and the Service may ordinarily do so without any change in the applicable burden of proof allocation rules for the refund case. It is appropriate, as you have done, for your office to make itself available to advise your local CTSG about the TFRP hazards of litigation and the Collection function's lost file reconstruction efforts on a case by case basis. If your local CTSG considers a system of local selection tolerances to guide them in making future resource allocation decisions about the types of TFRP missing file cases where it is not likely to be cost effective to pursue file reconstruction/development efforts, then we assume your office would also be involved in assisting your local CTSG in that task, as well.

The minor refinements that we suggest you consider with regards to your discussion of issues 2 and 3 in your proposed memorandum are as follows:

(1) On page 1, at the end of the first line of your restatement of issue 3, we suggest that you add the words "in refund claim situations" so that it is clear that you are only addressing the Service's TFRP file reconstruction efforts that are appropriate in this particular context.

(2) On page 2, at the end of the last line of your statement of the conclusion with respect to issues 2 and 3, we suggest that you add the words "in connection with refund claims the Service intends to deny."

(3) On page 4, on line 4 of the first paragraph discussing issues 2 and 3, we believe you intended to cite the discussion at page "15" of the Michaud opinion.

(4) On page 7, on line 9 of the first full paragraph, we believe you intended to say "burden of proving."

(5) On page 8, regarding your willingness to defend statement at the end of the second full paragraph, we suggest that you first consult with the Tax Division's Civil Trial Section serving your area, in order to determine whether it distinguishes between "defense" of TFRP cases with lost/destroyed files, on the one hand, and situations where the Service makes an affirmative request to pursue a suit to reduce its tax claims to judgment or to foreclose its tax liens. If the original TFRP recommendation files no longer exist, if the files have not already been reconstructed or alternatively recreated by the Service, and if the taxpayer would not be precluded by *res judicata* from

attempting to contest the existence or amount of the TFRP in an affirmative action of this type, then the Civil Trial Section serving your area may believe the Service would be inappropriately shifting the onus of developing the facts to the Tax Division. If the Civil Trial Section serving your area requires the Service to recreate the lost TFRP files before making a request for the Tax Division to bring an independent suit requesting affirmative relief of this type, then you may wish to add a footnote to this effect, along with an explanation of the Tax Division's reasons for such an approach.

(6) Also on page 8, on the second line of the final paragraph, we suggest the line end with the words "in the refund/abatement request cases."

ISSUE 1 – TIME LIMIT FOR FILING CLAIMS FOR REFUND FOR TFRP

We agree with your answer – that section 6511(a) requires that a claim for refund for a TFRP liability be filed within two years of payment – and the cases you have cited for this principle. Kuznitsky v. United States, 17 F.3d 1029, 1032 (7th Cir. 1994); Clark v. United States, 76 A.F.T.R.2d 7831 (11th Cir. 1995). As you have indicated, a taxpayer (responsible person) does not file a return that establishes his liability for the TFRP, so any claim for a refund of an overpayment of the TFRP must be filed by the taxpayer within two years from the time the tax was paid, as described at the end of the first sentence of I.R.C. § 6511(a) and in Treas. Reg. § 301-6511(a)-1:(a)(2). However, we do suggest that you consider the minor modifications described below to your discussion of this issue.

In framing the issue initially, you apparently relied upon and repeated the client's wording to describe the issue. However, we find this statement of the issue a little confusing, in light of the wording and structure of section 6511(a). In place of your proposed statement of the issue on page 1 and your statement of the conclusion on page 2, we suggest you consider something along the following lines:

ISSUES

Issue 1. What is the time limit for a taxpayer (responsible person) to file a claim for refund of the trust fund recovery penalty, pursuant to section 6511(a)?

CONCLUSION

Issue 1. The trust fund recovery penalty (TFRP) is not a tax for which the taxpayer (responsible person) files a return to establish his liability. Accordingly, under section 6511(a), a claim for refund of an overpayment of the TFRP must be filed by the taxpayer no later than two years from the time the payment was made against the TFRP liability. Taxpayer claims for

> refund of overpayments of the TFRP are limited to those amounts paid no earlier than two years before the claim for refund is filed. A narrow exception to these limitations may exist when a taxpayer shows he was "financially disabled" during the applicable two year period, within the meaning of section 6511(h). See IRM 8.5.1.2:(2).

In addition to considering the revision described above, we also believe that you were referring to section 6511(a) on page 3, lines 5 and 17, and on page 4, lines 6 and 7.

ISSUE 4 – AN APPROPRIATE CTSG FORM LETTER TO ADVISE TAXPAYERS THE IRS HAS DENIED THEIR REFUND/ABATEMENT CLAIMS FOR THE TFRP

First, consistent with our introductory comments, we suggest that you revise the proposed statement of issue 4 on page 1 of your memorandum to indicate that the form letter being considered is to notify a taxpayer that the taxpayer's claim for "refund/abatement" has been disallowed.

Second, thank you again for calling to our attention several of the mistakes you found in IRM 5.7.7.7:(4) and for also providing us with an opportunity to review your proposed form letter from CTSG to advise taxpayers that the Service has denied their refund/abatement claims with respect to the TFRP. Coincidentally, it happens that the Service is now in the process of updating/revising chapters 3 through 7 of IRM 5.7 and our office has been asked by the Service to comment on the new proposed drafts of these chapters of the manual. In the course of our review, we will try to correct the errors you have pointed out in the manual and we intend to suggest that the Service include a form letter (as a new exhibit to Chapter 7 of IRM 5.7.) along the lines of that you provided to us for review, with the revisions discussed further below.

Third, you make a good point on the last lines of page 9 of your memorandum that the Service should send its letters disallowing a taxpayer's claim for refund via certified or registered mail to the taxpayer. As authority for this advice, you may want to add a citation at the end of the sentence to I.R.C. § 6532(a)(1).

Fourth, we have made a few changes to the revised form letter described in the body of your proposed memorandum to provide taxpayers with notice that the Service has denied their claims for refund/abatement of the TFRP. Our revised proposed form letter for this purpose is attached hereto at the end of this memorandum as Exhibit 1. In keeping with the instruction in IRM 5.7.7.7:(4) that the Service should modify its usual Letter 1875(P) in TFRP refund disallowance cases in order to explain taxpayer rights related to section 6672 tax liabilities, our two offices have added to the typical Letter 1875(P) some further paragraphs which are intended to provide the taxpayer with a plain English notice of the taxpayer's rights and obligations to: (1) request a conference with the local office of Appeals;

(2) continue the protections of section 6672(c)(1) after claim disallowance, by filing suit within 30 days of the letter disallowing the claim; and (3) cause the Service, pursuant to new I.R.C. § 6331(i), to suspend most of its otherwise allowable collection activities with respect to unpaid TFRP liabilities for periods beginning or transaction occurring after December 31, 1998, by filing a proper lawsuit seeking a refund of the TFRP paid for such periods.

You will note that our proposed Exhibit 1 strikes the following sentence that was suggested by your local CTSG for this new letter to describe the information a taxpayer should submit in order to obtain a conference with the office of Appeals: "Your request must contain new or additional facts that were not previously considered, and a statement explaining why you believe the claim should be reconsidered." We believe that this proposed description of what is required of a taxpayer to obtain an Appeals conference with respect to a disallowed TFRP refund claim is not consistent with the independent review role the office of Appeals serves in these cases. See IRM 8.5.1.6.1-4; IRS Policy Statement P-8-50; Prop. Proc. Rule 601.106:(b)(4)(ii). The third paragraph of our attached Exhibit 1 contains a revised description of what we understand the taxpayer should provide to request a conference with the office of Appeals to discuss a disallowed TFRP refund claim.

We hope that the reasons for the remainder of our suggested revisions to this proposed letter will be self-explanatory from our earlier comments. This revised proposed letter should be suitable for your local CTSG to use for its TFRP refund cases where claims for refund are denied, until the Service prescribes a national form letter for this purpose (e.g., as an exhibit to revised chapter 7 of IRM 5.7).

If you have any questions regarding this advice, please call the attorney assigned to this case at 202-622-3630.

EXHIBIT 1

Person to Contact: <Name>
Contact Telephone Number: <Number>

CERTIFIED MAIL

<Salutation>

We have considered your request for a refund of $<amount> and abatement of $<amount> assessed against you for the tax period(s) ended <date(s)>.

We assessed this amount under Internal Revenue Code section 6672 because <taxpayer name primarily responsible for the tax (e.g., the employer)> did not pay the federal <type of tax (e.g., employment, excise)> tax(es) due for the tax period(s) ended <dates>. This is your legal notice that your claim for refund and abatement is disallowed.

If you do not accept our conclusion, you may request reconsideration with the Internal Revenue Service's local office of Appeals. You should make the request for an Appeals conference within 30 days of the date of this letter. A request for an Appeals conference should describe the reasons why you do not agree with our determination and should contain identifying information regarding the tax liability you wish to discuss, along the lines contained in this letter. You should provide a statement containing your view of the facts. Please mail your request for an Appeals conference to:

<the appropriate address>

If you wish to bring suit or proceedings for the recovery of any tax, penalties, or other moneys that were paid and for which this notice of disallowance is issued, you may do so by filing such a suit with the United States District Court having jurisdiction, or the United States Court of Federal Claims. The law permits you to do this within two years of the mailing date of this letter.

Please note, however, that even if you have previously complied with the requirements of Internal Revenue Code section 6672(c)(1) up to this point, the Internal Revenue Service may initiate collection action for the remaining unpaid portion of this liability if you now fail to file suit in the appropriate court within 30 days from the date of this letter.

For any part of your unpaid section 6672 liability that arises from periods beginning or transactions occurring after December 31, 1998, the Internal Revenue Service is also required to suspend most of its otherwise allowable collection activities if you file a proper lawsuit seeking a refund with respect to your disallowed refund claim for the 6672 liability.

While the Internal Revenue Service is prohibited from collecting the unpaid portion of your liability by levy, the limitation period for the Internal Revenue Service to collect this liability is also suspended, pursuant to sections 6331(i)(5) and 6672(c)(4).

If you have any questions, please contact the person whose name and telephone number are shown above.

<Appropriate Signature Block>