



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

OFFICE OF
CHIEF COUNSEL

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FSA-N-143426-01

INTERNAL REVENUE SERVICE NATIONAL OFFICE CHIEF COUNSEL ADVICE

MEMORANDUM FOR ASSOCIATE AREA COUNSEL - AREA 3
CC:SB:3:NO

FROM: Assistant Chief Counsel
(Administrative Provisions & Judicial Practice)
CC:PA:APJP

SUBJECT: Notice Requirements for Securing Consents to Extend the
Period of Limitations

This Chief Counsel Advice responds to your memorandum dated August 17, 2001.
In accordance with I.R.C. § 6110(k)(3), this Chief Counsel Advice should not be
cited as precedent.

LEGEND

Date A =

Date B =

Date C =

Date D =

Date E =

Date F =

Date G =

Date H =

ISSUE

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Whether the Service may rely on a consent to extend the period of limitations obtained from the taxpayer if the Service did not comply with the notice requirements of section 6501(c)(4)(B).

CONCLUSIONS

We believe that the Form 872 should be valid when the purposes underlying section 6501(c)(4) are satisfied. Whether those purposes were satisfied in this case turns upon whether the taxpayer had knowledge of his right to refuse to sign or limit the scope of the extension contained in the Form 872. Determining the taxpayer's knowledge is a factual question.

FACTS

The taxpayer is a truck driver. On Date A, the Service opened an audit on the taxpayer's individual income tax returns for tax year 1997. The examination was expanded to include tax years 1998 and 1999 on Date B. After the examination report was issued, the revenue agent contacted the taxpayer directly to discuss the adjustments. After several months of discussions with the taxpayer, the revenue agent issued a 30-day letter to the taxpayer. At that time there was less than one year remaining on the period of limitations for assessment.

Subsequently, on Date C, the revenue agent solicited a Consent to Extend Time to Assess Tax, Form 872, by mailing the form to the taxpayer with a handwritten note reading:

Enclosed are consents to extend the statute of limitations on your 1997 federal tax return. The statute on your 1997 federal tax return will expire within 210 days on Date D.

I have completed an unagreed report because you have failed to respond to the report noting the adjustments to your 1997, 1998 and 1999 federal tax returns. Before I can forward the unagreed report (so that you may request an appeal or a conference with my immediate supervisor), I must secure your signature extending the statute to allow sufficient time to review your case.

If I don't hear from you within 10 days, I will have to forward the 1997 tax year for statutory notice of deficiency.

I have mailed the consents to both of the addresses I know.

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In order to extend the statute, please sign and date both of the consents and mail back to our office in the enclosed envelope.

The revenue agent did not include Letter 907 DO, Request to Extend Statute, Letter 907 SC, Statute Extension Letter, or Publication 1035, Extending the Tax Assessment Period, with the Form 872. In addition, the revenue agent did not have any communications with the taxpayer regarding his rights to refuse to sign or limit the extension.

The taxpayer signed the Form 872 on Date E extending the period to Date D, and returned it to the revenue agent. The Service received the form on Date F. A manager countersigned on Date G and a copy was mailed to the taxpayer that same day. On Date H, the taxpayer's sister called the Service on his behalf. She sought information about what he needed to do and how much he owed. According to the examination report, the taxpayer has not responded to any of the items sent after he signed the extension. As of the time of this writing, a statutory notice of deficiency has not been issued.

LAW AND ANALYSIS

Generally, the period of limitations within which the Service may assess taxes is three years from the date the return is filed. Section 6501(a). Prior to the running of the period of limitations, both the taxpayer and the Service may agree, in writing, to extend the period. Section 6501(c)(4).

Section 6501(c)(4)(B) provides that the Service shall notify the taxpayer of his or her right to refuse to extend the period of limitations, to limit an extension to a particular issue or issues, and to limit the extension to a particular period of time. Further, the statute prescribes that notice be provided each time the Service requests an extension. The legislative history underlying this provision reveals that Congress was concerned that, in some cases, taxpayers had not been fully aware of their right to refuse to extend the period of limitations, and the taxpayers felt that they had no choice but to agree to extend the period of limitations upon the request of the Service. See H.R. Conf. Rep. No. 105-599 at 286 (1998).

The Code and legislative history are silent as to the consequences for failing to comply with section 6501(c)(4)(B). An analogous situation could be section 3463 of RRA98, wherein Congress directed the Service to include the petition date on each notice of deficiency it issues. Like section 6501(c)(4)(B), section 3463 of RRA98 does not prescribe what consequences result from the Service's failure to comply with its provisions.

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Section 3463(a) states:

The Secretary of the Treasury or the Secretary's delegate shall include on each notice of deficiency under section 6212 of the Internal Revenue Code of 1986 the date determined by such Secretary (or delegate) as the last day on which the taxpayer may file a petition with the Tax Court.

Pub. L. 105-206, 112 Stat. 685, 767.¹

In Smith v. Commissioner, 2001 U.S. App. LEXIS 27144 (10th Cir. 2001), aff'g 114 T.C. 489 (2000), the Service sent petitioners a notice of deficiency that failed to comply with section 3463 of RRA98. The petitioners claimed that the failure rendered the statutory notice invalid. Noting that the petitioners had received the notice and filed a timely petition therefrom, the court found the notice to be valid despite the technical violation of RRA98. Both the Tax Court and the Tenth Circuit did not believe that the statute was intended to provide relief to petitioners who suffered no prejudice. Furthermore, the Tenth Circuit noted that the legislative purpose of section 3463 was to ensure that taxpayers did not miss their filing deadlines because of a simple miscalculation. Thus, where a petition was timely filed, invalidation of the notice of deficiency would not serve section 3463's purpose.

Rochelle v. Commissioner, 116 T.C. 356 (2001), appeal docketed, No. 01-60684 (5th Cir. October 31, 2001), presented a similar issue. In Rochelle, the taxpayer claimed that the notice of deficiency was invalid because the Service failed to comply with section 3463(a). The case differed from Smith, however, in that Rochelle did not file a timely petition. Instead, Rochelle mailed his petition 56 days after the filing deadline. In considering whether the deficiency notice was valid, the court examined the legislative history of section 3463. It found that Congress wanted taxpayers to receive assistance in determining the time period in which they must file a petition in the Tax Court and that taxpayers should be able to rely on the computation of that period by the Service. Because the Service did not compute any date, the notice of deficiency did not provide any misleading information on which the taxpayer would have relied. Additionally, there was no evidence that the lack of assistance in calculating the filing deadline contributed to the untimeliness of the petition. Further, the taxpayer presented no evidence that he suffered

¹ While this section has not been incorporated as a provision of the Internal Revenue Code it nonetheless has the force of law. See Smith v. Commissioner, 114 T.C. 489, 491 (2000).

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prejudice because of the Service's failure. Thus, the court found that there was no prejudice and ruled that the notice was valid.

While the Tax Court held that technical noncompliance with a statutory directive did not invalidate the notices at issue in Smith and Rochelle, the critical factor in reaching the holdings was that the technical noncompliance did not frustrate the underlying purpose for which Congress enacted the statutory directive. The court believed that the purpose of the statute was not intended to provide relief to taxpayers in the circumstances of the petitioners in Smith and Rochelle. In Smith, the Tenth Circuit affirmed the Tax Court's decision.

By analogy, the Service's failure to provide a taxpayer the information required by section 6501(c)(4)(B) should invalidate a taxpayer's consent to an extension only when the purpose of section 6501(c)(4)(B) is frustrated. As explained above, section 6501(c)(4)(B) was intended to inform those taxpayers who are not familiar with the tax laws of their rights. Taxpayers who are uninformed, lack specific knowledge of the tax law, and have no reason to know of their rights are the type of taxpayers Congress intended to protect. When a taxpayer does not know his rights and the Service fails to inform that taxpayer of his rights, the taxpayer may not have the opportunity to make an informed decision about whether to sign the Form 872.

Conversely, when a taxpayer has knowledge of his rights, noncompliance with section 6501(c)(4)(B) is merely technical, like the violations in Smith and Rochelle. Any consent given would be fully informed and the purpose of section 6501(c)(4)(B) would be served. Therefore, where a taxpayer is knowledgeable of his rights, the reasoning of Smith and Rochelle support the conclusion that failure to provide a taxpayer notice under section 6501(c)(4)(B) does not invalidate a taxpayer's consent.

Under the above analysis, the validity of the Form 872 turns upon the facts and circumstances of the case, including the taxpayer's knowledge of his rights.

CASE DEVELOPMENT, HAZARDS AND OTHER CONSIDERATIONS

One hazard to the above analysis is Shea v. Commissioner, 112 T.C. 183 (1999), nonacq., 2000-44 I.R.B. 429, where the Tax Court held that the Commissioner would bear the burden of proof where the statutory notice did not comply with the requirements of section 7522 to describe the basis of the tax determined to be due. Like section 6502(c)(4)(B), section 7522 does not contain an explicit remedy for the Commissioner's failure to meet its requirements. We do not believe that the Shea analysis should be applied to section 6501(c)(4)(B). We will provide further discussion of Shea, should you determine that the factual analysis described below

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would support determining that the Form 872 is valid and the matter proceed to litigation.



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Please contact us at 202-622-4940 if you have any further questions.

By: _____
Ashton P. Trice
Senior Technician Reviewer
APJP Branch 2