



OFFICE OF  
CHIEF COUNSEL

DEPARTMENT OF THE TREASURY  
INTERNAL REVENUE SERVICE  
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INTERNAL REVENUE SERVICE NATIONAL OFFICE FIELD SERVICE ADVICE

MEMORANDUM FOR ASSOCIATE AREA COUNSEL, BALTIMORE  
CC:SB:2:BAL

FROM: Assistant Chief Counsel, Administrative Provisions and  
Judicial Proceedings CC:P&A:APJP

SUBJECT: Validity of Form 2750, Waiver Extending Statutory Period for  
Assessment of Trust Fund Recovery Penalty

This Field Service Advice responds to your request for advice dated July 25, 2000. Field Service Advice is not binding on Examination or Appeals and is not a final case determination. This document is not to be used or cited as precedent.

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LEGEND

Taxpayer =

A =

B =

State A =

Date 1 =

Date 2 =

Date 3 =

Date 4 =

Date 5 =

Date 6 =

Date 7 =

Date 8 =

Date 9 =

Date 10 =

Date 11 =

Date 12 =

Date 13 =

Date 14 =

Date 15 =

Date 16 =

Date A =

Date B =

Date C =

Date D =

Date E =

Date F =

Date G =

Date H =

ISSUES:

- 1) Whether I.R.C. section 6501(c)(4)(B) applies to the facts of this case?
- 2) If section 6501(c)(4)(B) applies to this case, whether the Service complied with this code provision?
- 3) If the Service did not comply with section 6501(c)(4)(B), whether Form 2750, Waiver Extending Statutory Period for Assessment of Trust Fund Recovery Penalty, secured in this case is valid?

CONCLUSIONS

- 1) Section 6501(c)(4)(B) applies to the facts of this case.

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- 2) The facts of this case show that the Service did not comply with section 6501(c)(4)(B) when requesting the consents executed here.
- 3) The Form 2750, Waiver Extending Statutory Period for Assessment of Trust Fund Recovery Penalty, secured in this case is not valid.

### FACTS

Taxpayer is a State A corporation. One hundred percent of Taxpayer's stock is owned by A. On Date 1, Taxpayer filed delinquent employment tax returns for the taxable quarters ending on Date A, Date B, Date C, Date D, Date E, Date F, Date G, and Date H. These liabilities were assessed but remain unpaid. The first entry in the case history states that the case had been received in inventory on Date 2. Thereafter, the case history states that the revenue officer contacted the responsible person, A, regarding the unpaid employment tax liabilities. Subsequently, the revenue officer met with A and his representative.

The revenue officer advised A to submit Forms 433-A, Collection Information Statement for Individuals, and 433-B, Collection Information Statement for Businesses. The case history states that the Forms 433-A and 433-B were received from A's representative, although it does not note the date of receipt. The revenue officer gathered third party information regarding the assets of Taxpayer during the period from Date 3 to Date 4. The revenue officer also located the former wife of A, B, in order to determine the extent of her liability as a responsible person, if any. The case history reflects that a Letter 725, Meeting Scheduled With Taxpayer, requesting an appointment with A on Date 5, was prepared on Date 6. The case history states, in an entry dated Date 7, that A submitted a Form 656, Offer In Compromise, on Date 8. However, this Offer was determined to be incomplete ("not processable"), and therefore could not be accepted for consideration. The revenue officer returned the Form 656 to A on Date 9, and requested that A resubmit the offer within 14 days.

Also, on Date 9, the revenue officer computed the amount of the trust fund recovery penalty, noting that the amount had not yet been assessed. On Date 10, the corrected Form 656 was received back from A. The revenue officer signed the Form 656 and submitted it for processing on the same day. On Date 11, the revenue officer contacted A and B to request an appointment so that each could sign a Form 2750, Waiver Extending Statutory Period for Assessment of Trust Fund Recovery Penalty, with respect to the unassessed trust fund recovery penalties. The case history reflects that the revenue officer obtained appointments with both A and B to sign the Forms 2750 on Date 12. On Date 13, the revenue officer faxed copies of the signed Forms 2750 to her manager. On Date 14, the revenue officer annotated the case history to document that the signed Forms 2750 had been obtained in separate meetings with A and B. The Form 2750 covered the taxable

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periods ending Date A, Date B, Date C, Date D, Date E, Date F, Date G, and Date H.

On Date 16, the revenue officer updated the case history to note receipt of an email from the Southeast Region compliance function advising that consents to extend the period of limitations are subject to section 6501(c)(4)(B) and advising that cases should be coordinated with Counsel as appropriate. The revenue officer then sought advice regarding the instant consents from District Counsel. District Counsel in turn sought advice from this office. The Service did not make protective assessments of the trust fund recovery penalty against A or B.

Before the execution of the Forms 2750 on or about Date 13, the revenue officer did not mail a copy of Letter 907, Request to Extend Statute, to A or B. The revenue officer did not provide a copy of Publication 1035 to A or B. The revenue officer did not advise either A or B of the provisions of I.R.C. § 6501(c)(4)(B).

### LAW AND ANALYSIS

Issue 1): Whether section 6501(c)(4)(B) applies to the facts of this case?

Section 6501(c)(4)(B) was added to the Code by section 3461(b) of the IRS Restructuring and Reform Act of 1998 (RRA 98), Pub. L. 105-206, 112 Stat. 685. Section 6501(c)(4)(B) provides that the Service shall notify the taxpayer of their right to refuse to extend the period of limitations for assessment, or to limit such extension to particular issues or to a particular period of time, on each occasion when the taxpayer is requested to provide an extension. The legislative history of this provision states that Congress believed that taxpayers should be fully informed of their rights with respect to the statute of limitations on assessment. Congress expressed concern that, in some cases, taxpayers were not fully aware of their rights to refuse to extend the statute of limitations, and have felt that they had no choice, but to agree to extend the statute of limitations upon the request of the Service. See H.R. Conf. Rep. No. 105-599 at 286 (1998). Section 6501(c)(4)(B) applies to each request to extend the period of limitations for assessment made after December 31, 1999.

Because the request that A and B extend the period of limitations for assessment of the trust fund recovery penalty occurred on February 29, 2000, after the effective date of section 6501(c)(4)(B), we conclude that § 6501(c)(4)(B) applies here.

In addition, we believe the requirement of section 6501(c)(4)(B) to advise the taxpayer applies to the period of limitations for assessment of the trust fund recovery penalty. Section 6672, Failure To Collect or Pay Over Tax, Or Attempt To Evade or Defeat Tax, also commonly referred to as the trust fund recovery “penalty”, imposes a one-hundred percent penalty on “responsible persons” if the

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responsible person willfully fails to pay over to the government the amount of taxes otherwise due. Wood v. United States, 808 F.2d 411 (5<sup>th</sup> Cir. 1987). Courts have held that the section 6672 penalty is a return based penalty, because it is not separate and distinct from the underlying employment tax liability. Rather, the penalty is a mechanism for collecting the underlying employment tax liability. Therefore, the assessment of the section 6672 penalty is subject to the period of limitations on assessment provided in section 6501. See, e.g., Lauckner v. United States, 68 F.3d 69 (3d Cir. 1995), aff'g 1994 U.S. Dist. LEXIS 17187 (D.N.J. 1994), acq., A.O.D. 1996-006, 1996-2 C.B. 1.

Issue 2) If section 6501(c)(4)(B) applies to this case, whether the Service complied with this code provision.

Since we have concluded section 6501(c)(4)(B) applies to the period of limitations for assessment of the trust fund recovery penalty, the issue becomes whether the Service has complied with this Code provision. The Service must satisfy the requirements of section 6501(c)(4)(B) by advising the taxpayers of the provisions set forth in section 6501(c)(4)(B). Congress intended that the Service follow section 6501(c)(4)(B) when soliciting consents to extend the period of limitations on assessment. Here, neither A or B was advised of section 6501(c)(4)(B) when the consents that were later executed were requested. The facts show that the revenue officer did not advise the responsible persons or their representative of the section 6501(c)(4)(B) provision either orally or in writing, or by providing the taxpayer with a copy of Publication 1035, Extending the Tax Assessment Period. Accordingly, we believe the Service has not complied with section 6501(c)(4)(B).

Issue 3) If the Service did not comply with section 6501(c)(4)(B), whether Form 2750, Waiver Extending Statutory Period for Assessment of Trust Fund Recovery Penalty, secured in this case is valid?

Since we have already concluded that section 6501(c)(4)(B) was not complied with, we conclude that the waiver secured here is not valid.

#### CASE DEVELOPMENT, HAZARDS, AND OTHER CONSIDERATIONS

We have concluded that the Forms 2750 secured in this case are not valid. We understand from the case history that Letter 1153, which requests that the taxpayer execute a consent to the assessment of the trust fund recovery penalty, and Forms 2751, Proposed Assessment of Trust Fund Recovery Penalty, were mailed to A and B on Date 15. We have been advised that neither A or B returned a signed Form 2751 to the Service. [REDACTED]

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Your request for advice states that the revenue officer recalls telling both A and B that the waiver was being sought as an alternative to assessment of the trust fund recovery penalty. You suggest that this statement shows that the request for the consent complied with the spirit of section 6501(c)(4)(B). In our view, however, advising a taxpayer that the Internal Revenue Code provides him with certain rights, and advising the taxpayer that the Service will not assess a penalty if he executes a consent to extend the period of limitations are different matters. Moreover, the code does not provide an exception to its requirements that the Service advise the taxpayer of the § 6501(c)(4)(B) provisions.

The legislative history suggests that Congress intended to prevent the Service from overreaching taxpayers. This case presents the litigating hazard that the Service did not advise A or B of the provisions of § 6501(c)(4)(B). Moreover, the revenue officer concluded that B could be held liable as a responsible person for only two of the taxable quarters at issue. B signed a Form 2750 agreeing to extend the period of limitations for assessment of the trust fund recovery penalty for a total of eight taxable quarters. [REDACTED]

Please call the branch number if you have any further questions.