



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

OFFICE OF
CHIEF COUNSEL

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INTERNAL REVENUE SERVICE NATIONAL OFFICE FIELD SERVICE ADVICE

MEMORANDUM FOR: ASSOCIATE AREA COUNSEL - AREA 5
CC:LM:CTM:SF

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

SUBJECT: Termination of Form 872-A by a Final Determination of Tax

This Chief Counsel Advice responds to your memorandum dated October 22, 2001. In accordance with I.R.C. § 6110(k)(3), this Chief Counsel Advice should not be cited as precedent.

LEGEND

Taxpayer =

ISSUES

Whether the assessment of tax liabilities reflected on Forms 870, "Waiver of Restrictions on Assessment & Collection of Deficiency in Tax & Acceptance of Overassessment," terminated Forms 872-A, "Special Consent to Extend the Time to Assess Tax" corresponding to the same taxable years.

CONCLUSIONS

No. Under the facts of this case, the assessment, pursuant to the execution of Forms 870, did not terminate Forms 872-A relating to the same tax periods. The execution of the Forms 870 was neither one of the specific methods Form 872-A identifies as terminating the extension of the period of limitations nor was it a final determination of tax effective to terminate a Form 872-A.

FACTS

Prior to the expiration of the statute of limitations for each of the years 1991, 1992, and 1993, a representative of the Internal Revenue Service (Service) and Taxpayer executed Forms 872-A, Special Consent to Extend the Time to Assess Tax, extending the periods of limitation on assessment indefinitely. Paragraph (1) of

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Form 872-A specifies three acts that will terminate the extension of the period of limitations pursuant to Form 872-A. The Service's receipt of a Form 872-T, "Notice of Termination of Special Consent to Extend the Time to Assess Tax," the Service's mailing the taxpayer a Form 872-T, or the Service's mailing of a notice of deficiency for the applicable tax periods all operate to end the period of limitations within a specified period of time after any of the three acts. In addition to the termination provided by paragraph (1) of Form 872-A, paragraph (2) of the Form further provides that the agreement ends at any earlier "assessment date of an increase in the . . . tax or the overassessment date of a decrease in the . . . tax that reflects the final determination of tax and the administrative appeals consideration." Form 872-A also provides that the taxpayer may file a claim for credit or refund within six months after the extension agreement ends.

On October 23, 2000, the taxpayer executed the Form 870, "Waiver of Restrictions on Assessment and Collection of Deficiency in Tax and Acceptance of Overassessment," for the years 1991 through 1993. With the execution of the Form 870, the examination team believed that the government and the taxpayer were reaching agreement on all of the issues for the years 1991 through 1993, with the exception of a bond issue, which Appeals was considering. The examination team also understood that the taxpayer would file a claim for refund with respect to the bond issue.

On November 27, 2000, the government made assessments for the years 1991, 1992 and 1993. On December 18, 2000, the assessments were corrected due to a clerical error to conform to the amounts set forth in the Form 870. Taxpayer filed a protective claim on Form 1120X, Amended U.S. Corporation Income Tax Return, for the years 1991 through 1993 on December 20, 2000, claiming entitlement to refunds with respect to the bond issue. These claims for refund were filed within six months of the assessment pursuant to the Form 870.

On June 29, 2001, the taxpayer filed additional Forms 1120X, for the years 1991 through 1993 claiming large refunds with respect to a life insurance reserve issue. Taxpayer filed these claims more than six months after the assessment was made with respect to the Form 870.

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. I.R.C. § 6501(a). Prior to the running of the period of limitations, however, both the taxpayer and the Service may agree, in writing, to extend the period. I.R.C. § 6501(c)(4).

Form 872-A, Special Consent to Extend the Time to Assess Tax, is one of the forms that the Service uses to extend the period of limitations pursuant to section 6501(c)(4). By its terms, Form 872-A extends the period for assessment indefinitely, until either the Service or the taxpayer take an action to terminate the

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extension. Several courts have held that the Form 872-A may be terminated only by the methods prescribed in paragraph (1) of the form. See Estate of Camara v. Commissioner, 91 T.C. 957 (1988); Kemen v. Commissioner, 902 F.2d 17 (9th Cir. 1990); Stenclik v. Commissioner, 907 F.2d 25 (2d Cir. 1990); Wall v. Commissioner, 875 F.2d 812 (10th Cir. 1989).

None of the foregoing cases consider the effect of paragraph (2) of Form 872-A. In all the cases that do consider paragraph (2) of the Form 872-A, as revised after 1979, we found none that involved circumstances in which the court concluded that there was an assessment of tax “that reflect[ed] the final determination of tax and the administrative appeals consideration.” Generally, where the Service and taxpayer executed a form that did not preclude the Service from assessing tax at some future date, the courts have found that execution of the form was not a final determination of tax. See Gmelin v. Commissioner, T.C. Memo 1988-338, aff’d without published opinion, 891 F.2d 280 (3d Cir. 1989) (there was no final determination because Form 4089 provided that it would not prevent the Service from later determining additional tax is owed); Jones v. Commissioner, T.C. Memo 1996-101 (Closing agreement did not terminate Form 872-A because the closing agreement concerned only one issue and did not reflect a final determination for the entire tax year); Drummond Co. v. United States, 70 AFTR2d 5185 (N.D. Ala 1992) (Because both parties had expressly modified a Form 872-AD to preserve an interest-netting issue, they recognized that there might be a later administrative review and redetermination of tax and the Form 872-AD did not constitute a final determination of tax).

Applying the same kind of analysis as applied in the cases above, the court in Loyd v. Commissioner, T.C. Memo 1984-172, held that execution of a Form 870 did not constitute a final determination of tax. The court noted that the form expressly provides that the Service may later determine additional tax. Furthermore, a letter accompanied the form stated that the Service would provide the taxpayer future notification if a settlement was approved. Under those circumstances, where issues before the Service remained outstanding, the Form 870 was not a final determination of tax by the Service.

In the present case, the Form 870 contains the same language as the Form 870 at issue in Loyd; it expressly provides that the execution of the form does not prevent the Service from later determining that the taxpayer owes additional tax. Furthermore, the parties also understood that the Service would continue to consider the bond issue after execution of the Form 870. As the courts above have noted, execution of a form cannot be a final determination of tax where the parties acknowledge that they will continue to consider issues related to the same taxable year. Accordingly, execution of the Form 870 in this case does not constitute a final determination and assessment pursuant to the consent Taxpayer provided by signing the Form 870 did not terminate the Form 872-A.

CASE DEVELOPMENT, HAZARDS AND OTHER CONSIDERATIONS

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

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