



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

OFFICE OF  
CHIEF COUNSEL

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MEMORANDUM FOR ASSOCIATE AREA COUNSEL (SBSE) – FT. LAUDERDALE

FROM: Joseph W. Clark  
Chief, Branch 3 (Collection, Bankruptcy Summonses)

SUBJECT: Timely Written Protests under I.R.C. § 6672(b)(3)(B)

This Chief Counsel Advice (CCA) responds to your office's request that we reconsider or confirm in writing the informal advice that we previously provided to you on the above subject. As described further below, we are herewith confirming our prior informal advice. In accordance with I.R.C. § 6110(k)(3), this CCA should not be cited as precedent.

#### BACKGROUND

The Service determined that a taxpayer was responsible for the trust fund recovery penalty (TFRP) under I.R.C. § 6672 for certain quarters during the years and . The taxpayer did not sign a waiver (Form 2750) to extend the ordinary assessment statute expiration date (ASED) for the TFRP, pursuant to I.R.C. § 6501(c)(4). No other event caused the ASED for the and quarters to be extended or suspended beyond , and , respectively, up until the date the Service properly mailed the taxpayer the notice described in I.R.C. § 6672(b).

In early , the Service gave the taxpayer the notice described in section 6672(b) by sending the taxpayer a Letter 1153 (DO) by mail to the taxpayer's last known address at a location within the United States. The Service sent this Letter 1153 to the taxpayer by certified mail, and the taxpayer failed to pick up the certified mail containing this Letter 1153 from the U.S. Post Office after the postal carriers had attempted delivery in hand. The Letter 1153 advises a taxpayer that he has a right to appeal or protest the proposed assessment of the TFRP described in the letter. The Letter 1153 further states that to preserve appeal rights, a taxpayer needs to mail (to the Service's designated contact person) a written protest or appeal within 60 days from the date of the Letter 1153 (75 days if the letter is addressed to the taxpayer outside the United States). The Service's Letter 1153 is ordinarily signed by a revenue officer.

Mailing the Letter 1153 to the taxpayer's last known address (or delivering it to the taxpayer in person) before the ASED occurs has the effect of suspending the ASED to a date at least 90 days after the letter was mailed (or delivered in person) to the taxpayer, under I.R.C. § 6672(b)(3)(A). If the taxpayer files a "timely protest" to the

Letter 1153, then the ASED is further suspended to a date 30 days after the Service (the Appeals office) makes a final administrative determination with respect to such protest, under I.R.C. § 6672(b)(3)(B). The Letter 1153 mailed to the taxpayer in this case within the United States described the date for the taxpayer to timely mail a written protest to the Service as 60 days from the date of the letter, in order to preserve his appeal rights regarding the TFRP.

When the taxpayer failed to pick up the certified mail containing the timely Letter 1153 from the U.S. Post Office, presumably the undelivered mail was returned to the Service. On day 56 after the Letter 1153 was mailed to the taxpayer originally, a revenue officer delivered the letter in person to the taxpayer. At that time, the taxpayer advised the revenue officer that he intended to appeal the proposed TFRP determination and he apparently asked the revenue officer for a 10-day extension to submit his written protest. The revenue officer agreed to this extension, but failed to request that the taxpayer in turn provide the Service with a Form 2750 to extend the ASED for the quarters at issue. The taxpayer gave the revenue officer his written protest on day 70 after the Letter 1153 had been mailed to him originally.

Between days 70 and 90, the taxpayer was not asked for and did not provide the Service with a Form 2750 waiver to extend the ASED for either of the two years at issue. For nine months after the revenue officer received the taxpayer's written protest, no action was taken by the Service to forward the taxpayer's appeal to the Service's Appeals office for consideration for either the            or the            quarters. With fewer than 10 days remaining on the ordinary ASED for the            quarters, the Service contacted your office for advice and you called us for informal advice.

Our informal advice was that the taxpayer's written appeal on Day 70 after the Letter 1153 was mailed to the taxpayer was not a "timely protest," within the meaning of I.R.C. § 6672(b)(3)(B). Accordingly, we advised you that only a few days remained to make a timely assessment of the TFRP for the            quarters at issue. The            quarters for the TFRP were thereafter timely assessed. We also advised that it would be appropriate to afford the taxpayer post-assessment appeal rights with the Service's Appeals office for the            quarters under the circumstances.

## ISSUES & DISCUSSION

As indicated above, we are herein affirming our prior informal advice on these matters. For purposes of clarity, we have also rephrased your proposed statements of the issues.

Issue 1: When the Service properly mails or hand delivers a Letter 1153 to a taxpayer and the taxpayer requests more time than that stated in the Letter 1153 for filing a written protest, may a revenue officer agree to refrain from submitting the proposed TFRP determination for immediate assessment if the taxpayer files the written protest by a certain date beyond that stated in the Letter 1153?

Discussion of Issue 1: Yes. Present IRM 5.7.6.5:(1)c and 8.11.1.8.6:(2) contemplate circumstances where a taxpayer's written protest of a proposed TFRP determination may be considered by the Service's Appeals office on a pre-assessment basis, even though a "timely protest" was not filed. However, these IRM provisions also caution Service employees not to consider these untimely protests in a pre-assessment status unless the ASED is adequately protected independent of I.R.C. § 6672(b)(3)(B) (added by "TBOR 2"). This adequate independent protection of the ASED could exist because sufficient time exists on the original ASED or because the taxpayer and the Service have timely extended the ASED to a date suitable to allow consideration by the Appeals office. We expect that the 120-day ASED cushion described in present IRM 5.7.6.5:(1)c will soon be formally revised to a 180-day minimum ASED cushion before a TFRP case in this status should be forwarded to the Service's Appeals office.

Issue 2: When a revenue officer tells a taxpayer that the taxpayer may submit a written protest outside of the time frames stated in the Letter 1153 – i.e., more than 60 days after the Letter 1153 is addressed to the taxpayer within the United States – may the written protest qualify as "a timely protest" for purposes of I.R.C. § 6672(b)(3)(B) which may suspend the ASED while the case is considered by the Appeals office?

Discussion of Issue 2: No. You are correct that a "timely protest" for purposes of section 6672(b)(3)(B) is not defined in the Code, by regulation, or in the legislative history. Nevertheless, the Service has consistently described the meaning of a "timely protest" for this section by reference to the time frames identified in the Letter 1153 "notice" that is provided to the taxpayer in accordance with section 6672(b). Since the effective date of section 6672(b) on June 30, 1996, the Service's form Letters 1153 have consistently identified 60 days<sup>1</sup> from the date of the letter as the time period for a taxpayer (within the United States) to provide the Service with a written protest or appeal in order to preserve the taxpayer's pre-assessment appeal rights. No case law exists on this issue, in part, because the Service has maintained a consistent administrative position on this issue. The IRM also repeatedly identifies 60 days as the time period for the taxpayer to submit a timely protest. See IRM 5.7.6.3:(2), 5.7.6.4:(1) (Note in chart), 8.11.1.8.5:(2), 8.11.1.8.7:(1) & (4), and 8.11.1.8.8:(2). We expect this position to be further emphasized in pending revisions to IRM 5.7.6.

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<sup>1</sup> We believe the Service settled upon the ordinary 60 day time period, in part, because it represented a continuation of the Service's pre-enactment, administrative practice. Section 6672(b)(2) prescribes a 60 day time period for another TFRP related purpose. An ordinary 60 day period for the taxpayer to file a timely written protest is set forth within the minimum 90 day suspension period described in I.R.C. § 6672(b)(3)(A), thus providing a suitable 30 day period of time thereafter for the Service to evaluate whether the taxpayer has submitted a timely protest and to respond (by making TFRP assessments) when the taxpayer defaults on a Letter 1153.

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