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**Office of Chief Counsel
Internal Revenue Service**

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memorandum

CC:DOM:IT&A:3
PACohn/TL-N-6801-97

date: FEB 4 1998
to: District Counsel, Pennsylvania
from: Assistant Chief Counsel, CC:DOM:IT&A:3

subject: Significant Service Center Advice
90-Day Letters -- Inconsistent Dates

This responds to your request for advice dated October 1, 1997, in connection with a question posed by the Philadelphia Service Center.

Disclosure Statement

Unless specifically marked "Acknowledged Significant Advice, May Be Disseminated" above, this memorandum is not to be circulated or disseminated except as provided in CCDM (35)2(13)3:(4)(d) and (35)2(13)4:(1)(e). This document may contain confidential information subject to the attorney-client and deliberative process privileges. Therefore, this document shall not be disclosed beyond the office or individual(s) who originated the question discussed herein and are working the matter with the requisite "need to know." In no event shall it be disclosed to taxpayers or their representatives.

Issue

If a notice of deficiency might not be mailed on the date specified on the face of the notice (the "notice date"), is it preferable for the notice date to be earlier or later than the date stamped by the post office on the certified mailing list (the "mailing date")?

Conclusion

If at all possible, the dates should be the same. If necessary, it is preferable for the notice date to be later than the mailing date. This assumes that the Service will not challenge the timeliness of a Tax Court petition in circumstances in which the taxpayer could have reasonably relied on the notice date. If enacted, pending legislation will require the Service to compute and state the due date on the notice, and will expressly authorize taxpayers to rely on that date.

Facts

Deficiency notices, or "90-day letters," are issued by three different units at the Philadelphia Service Center: Core Exam; Automated Substitute for Return; and Underreporter Program. Because of the volume of deficiency notices issued by the Service Center, all three units now have completely modernized systems for printing deficiency notices. Computer entries are made, including the date to be stamped on the notices, approximately two weeks before the date on which the notices are to be mailed. The notices are then mass printed, mailing lists generated, and the notices batched for delivery to the post office. The mailing list, Postal Service Form 3877, indicates the name and address of the recipient, the certified mail number, and the tax year. Quality controls are in place to ensure that the envelopes containing deficiency notices and the mailing lists to be certified by the post office are consistent. Upon receipt, a postal employee checks the batch, initials the mailing list, and dates it with a postmark indicating receipt and mailing.

Historically, deficiency notices were delivered to the post office on the same date that was stamped on the notice, and the date stamped on the certified mailing list by the post office was consistent.

Situation 1: Notice date precedes mailing date. Several years ago, a problem developed where, on occasion, post offices did not stamp the certified mailing lists until one or two days after the deficiency notices had been delivered to them. For example, a deficiency notice could be date stamped "February 1," while the certified mailing list could be date stamped "February 2" or even "February 3." (We have been informed that the date stamped on the certified mailing list has not been more than one business day later than the date the notice of deficiency was delivered to the post office.)

Situation 2: Notice date follows mailing date. To minimize the risks created by Situation 1, the Core Exam and Automated Substitute for Return units now deliver deficiency notices (all of which are dated for Mondays) to the post office on the preceding Friday. Thus, to the extent the notices are timely processed, there are now numerous deficiency notices where the mailing date precedes the notice date by as much as three days. For example, deficiency notices which bear the date March 17 could have a certified mailing date of March 14 (Situation 2). Underreporter (URP) also delivers its deficiency notices on Fridays, but still uses Friday's date on the notice. Thus, Situation 1 does still occasionally occur with URP deficiency notices.

Background

Section 6213(a) of the Internal Revenue Code states that "[w]ithin 90 days, or 150 days if the notice is addressed to a person outside the United States, after the notice of deficiency authorized in section 6212 is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the last day), the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency."

Generally, the time for filing a petition begins to run on the date of actual mailing, at least where the notice is undated or dated prior to the actual mailing date (Situation 1). See Hurst, Anthony & Watkins, 1 B.T.A. 26 (1924); United Telephone Co. v. Commissioner, 1 B.T.A. 450 (1925). Courts have fixed the date of actual mailing variously -- as the date the notice is delivered to the post office, the date on the certified mailing list (Form 3877), or the postmark date. See Traxler v. Commissioner, 61 T.C. 97 (1973). It is now fairly settled that the relevant date is the postmark date, and that in the absence of the actual postmark, the best evidence is the certified mailing list. See Coleman v. Commissioner, 94 T.C. 82, 91 (1990).

When the notice is dated subsequent to the actual mailing date, however, the Tax Court has adopted a position that strict adherence to the date of physical mailing in interpreting "mailed" under § 6213(a) would frustrate the statutory scheme, which is to give the taxpayer an opportunity to withhold payment of the tax pending determination by the Tax Court of the correctness of the proposed assessment. Accordingly, the Court may accept as timely a petition filed within 90 days of the notice date. See Jones v. Commissioner, T.C. Memo. 1984-171, 47 TCM (CCH) 1444, 1448; Loyd v. Commissioner, T.C. Memo. 1984-172.

Regarding this as primarily a matter for the Tax Court to decide,¹ the Service has only raised the issue in unusual circumstances, such as when there is evidence to suggest the notice was tampered with, see Gonzalez v. Commissioner, T.C. Memo. 1992-313, or when the date on the notice is clearly erroneous, see Lundy v. Commissioner, T.C. Memo. 1997-14.

¹ See the memorandum brief in Jones, quoted in the opinion at fn. 4:

Respondent, by filing of his motion to dismiss, was not attempting to deny petitioners the opportunity to litigate their case in the Court, but was concerned about the jurisdiction of the Court in this case. Should the Court be satisfied that petitioners were misled by the erroneous date on the notice of deficiency, respondent would have no objection to the Court finding that it has jurisdiction.

Legislation now under consideration may essentially codify the Tax Court's interpretation, as well as require the Service to compute the actual due date. Section 347 of the Internal Revenue Service Restructuring and Reform Act of 1997, H.R. 2676, 105th Cong., 1st Sess. (1997), passed by the House and now under consideration in the Senate, provides as follows, effective for notices mailed after December 31, 1998:

(a) IN GENERAL.--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.

(b) LATER FILING DEADLINES SPECIFIED ON NOTICE OF DEFICIENCY TO BE BINDING.--Subsection (a) of section 6213 (relating to restrictions applicable to deficiencies; petition to Tax Court) is amended by adding at the end the following new sentence: "Any petition filed with the Tax Court on or before the last date specified for filing such petition by the Secretary in the notice of deficiency shall be treated as timely filed."²

Discussion

At the outset, we should stress that, if at all possible, every effort should be made to ensure that the notice date corresponds with the date of actual mailing. This avoids confusion and bolsters the credibility of the Service with the Tax Court. While, as described above, the Tax Court has fashioned a solution to protect taxpayers when notices are physically mailed prior to the notice date, it is not clear that the Court would look with favor on a widespread practice that routinely results in such situations.

For example, in Pietanza v. Commissioner, 92 T.C. 729 (1989), aff'd 935 F.2d 1282 (3d Cir. 1991), the petitioner taxpayers contended that a deficiency notice had never been mailed to them at their last known address. Unable to locate the administrative file containing a copy of the notice, the Service attempted to establish the fact, date, and address of mailing through an entry on the certified mailing list, coupled with a draft of the notice and affidavits from the preparer and her supervisor. The court held for the petitioners, finding that while the postal form may be sufficient to prove the mailing of a deficiency notice, by itself the form cannot establish that a

² The House Committee Report states:

The Committee believes that taxpayers should receive assistance in determining the time period within 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 IRS.

notice existed. See 92 T.C. at 740. Cf. Keado v. United States, 853 F.2d 1209 (5th Cir. 1988).

The presumption of official regularity which the court considered in Pietanza would be seriously undermined by evidence that notices of deficiency are routinely mailed other than on the notice date. In addition, any decision of the court on the merits in such a situation may be subject to a collateral attack on jurisdictional grounds.

Having said that, we recognize the practical difficulties involved in coordinating and processing a large volume of notices, and the inability of the Service Center Director to control the operations of the post office. We also agree with the desire of the Service Center to select an alternative, when necessary, that best protects the interests of taxpayers.

We agree that a procedure that may result in Situation 1 -- notices being dated prior to actual mailing -- disadvantages taxpayers to the extent that they might forgo petitioning the Tax Court, based on the notice date, unaware that they may have one or two additional days in the petition period. There is also the possibility that a District Counsel office might file an unnecessary motion to dismiss, based on the notice date, only to discover later that the petition was timely, based on the Form 3877. Finally, when a notice is mailed on the last day of the assessment limitations period, a delay in actual mailing may result in the Service losing the assessment.

There are also problems with routinely stamping notices with a date later than the date the notices are delivered to the post office, creating the likelihood that Situation 2 will occur. As discussed, the Service may lose credibility with the Tax Court. In addition, a District Counsel office may decide to file a motion to dismiss a petition filed on the last day based on the notice date. However, in assessing the reaction of the Tax Court, it should be remembered that the Court originated the interpretation that sanctions the use of the notice date as the mailing date in Situation 2. So long as the circumstances are made clear to the Tax Court, occasional minor discrepancies between the notice date and the date on the certified mailing list may not undermine the probative value of the certified mailing list itself. And, as you state, preventing the Service from filing motions to dismiss when the taxpayer could have reasonably relied on the notice date is largely a matter of education.

On balance, we agree that a Service Center practice that is more likely to lead to Situation 2 is preferable, if necessary, to one that might lead to Situation 1. If the pending

legislation is passed in its current form, the risks in Situation 1 will remain, but those in Situation 2 will be further reduced.

If you have questions regarding this advice, please contact Peter Cohn of this office, at (202) 622-4930.

Sincerely,

Assistant Chief Counsel
(Income Tax & Accounting)

By _____/s/_____
Michael D. Finley
Chief, Branch 3