OFFICE OF
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MEMORANDUM FOR ASSOCIATE DISTRICT COUNSEL
ROCKY MOUNTAIN DISTRICT

FROM: Lawrence H. Schattner
Chief, Branch 3 (General Litigation)

SUBJECT: Period for Making an I.R.C. § 6201(a)(3) Assessment

This responds to your memorandum dated March 25, 1998. We have coordinated this memorandum with Assistant Chief Counsel (Field Service) and Assistant Chief Counsel (Income Tax and Accounting). This document is not to be cited as precedent.

ISSUES:

(1) Is an assessment under I.R.C. § 6201(a)(3) (for recovery of an overstatement of prepayment credits for income tax withholding and estimated income tax) an assessment of a tax imposed by this title (Title 26, the Internal Revenue Code)?

(2) Is the statute of limitations for making an assessment under section 6201(a)(3) governed by the provisions of I.R.C. § 6501?

CONCLUSIONS:

(1) A section 6201(a)(3) assessment is an assessment of a tax imposed by the Internal Revenue Code.

(2) The statute of limitations for making assessments set forth in section 6501 governs assessments made under section 6201(a)(3).

FACTS:

Income tax returns or claims for refund sometimes show overstated amounts for income tax prepayment credits for income tax withheld at the source or for amounts paid as estimated income tax. 1/ The overstatements addressed by section 6201(a)(3) do not include overstatements resulting from keypunch errors of the Service. Errors of the withholding agent (employer) are included only to the extent the error is reflected in the amount claimed by the taxpayer.

LAW AND ANALYSIS:

The assessment authority contained in section 6201(a) includes assessment of overstatements of income tax prepayment credits:

> (a) The Secretary is authorized and required to make the inquiries, determinations, and assessments of all taxes (including ... additional amounts ...) imposed by this title ... . Such authority shall extend to and include the following: ...
>
> (3) Erroneous Income Tax Prepayment Credits. – If on any return or claim for refund of income taxes under subtitle A there is an overstatement of the credit for income tax withheld at the source, or of the amount paid as estimated income tax, the amount so overstated which is allowed against the tax shown on the return or which is allowed as a credit or refund may be assessed by the Secretary in the same manner as in the case of a mathematical or clerical error appearing upon the return, except that the provisions of section 6213(b)(2) (relating to abatement of mathematical or clerical error assessments) shall not apply with regard to any assessment under this paragraph.

See, also, Treas. Reg. § 301.6201(a). Hence, the Secretary is authorized under section 6201(a) to assess only taxes imposed by the Code (including the additional amounts enumerated therein). This is reinforced in section 6203, which provides that the assessment shall be made by recording the liability of the taxpayer in the office of the Secretary. Also, section 6303 provides that after making the assessment of a tax pursuant to section 6203, the Secretary shall give notice to each person liable for the unpaid tax, stating the amount and demanding payment thereof. Therefore, it is our view that by extending the assessment authority to the

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1/ The credits referred to are provided by I.R.C. §§ 31(a)(1) and 6315.

overstatement of withholding credits in subsection (3) of section 6201, Congress intended to treat such amounts as taxes. To hold that such amounts are not taxes would render the language in section 6203 inoperable to those persons liable for the overstatement who would not be taxpayers as defined in section 7701(a)(14) as any person subject to any internal revenue tax, and would create the anomalous result that the Service is authorized to assess overstated credits in subsection (3), but is not required to send notice and demand under section 6303, which is limited to persons liable for unpaid taxes, and could not employ its administrative collection powers to collect such amounts because these powers are likewise limited to the collection of taxes.

The Congressional intent that a section 6201(a)(3) assessment is of a tax is also evidenced by the legislative history, which provides:

> There is also a material change from existing law in subsection (a)(3) of this section, relating to erroneous credits for prepayment of income tax (prepayment through credit for tax withheld at source and payments of estimated tax). Under this new paragraph refunds caused by erroneous prepayment credits may be recovered by assessment in the same manner as in the case of a mathematical error on the return. For example, assume a case in which the tax shown on the return is $100, the claimed prepayment credit is $125, and refund of $25 is made, and that it is later determined that the prepayment credits should have been only $70. Under existing law, $30 (the tax shown on the return less the $70 credit) can be immediately assessed as tax shown on the return which was not paid, but the remaining $25 must be recovered by suit in court. Under the new provision, the entire $55 can be assessed and collected.

S. Rep. No. 1622, 83d Cong., 2d Sess., at page 572 (1954); H. Rep. No. 1337, 83d Cong., 2d Sess., at page A404 (1954); attachment, dated May 18, 1972, to G.C.M. 34508. Thus, the legislative history identifies the $25, which previously could only be recovered by suit, with the $30 assessable as tax shown on the return which was not paid. The limitations period for assessment in section 6501(a) applies to "the amount of any tax imposed by this title." At first blush, it would seem that an overstatement of withholding credits is not a tax imposed by the Code because it is not determined by a tax table or rate. By making the overstatement immediately assessable and treating it in the same manner as a mathematical error, Congress has clearly indicated its intent that an overstatement of income tax prepayment credits is assessable as a tax and may be collected in the same manner as a tax.

We recognize that the holding in deRochemont v. United States, 23 Cls. Ct. 80 (1991), suggests that the amount of the overstatement in section 6201(a)(3) is not a tax subject to a limitation period of section 6501. In deRochemont, the plaintiff brought a refund action seeking, among other things, amounts that were assessed and collected against him as a result of a refund generated by an individual income tax return plaintiff prepared and executed appropriating the identity of a third party taxpayer. Plaintiff appropriated this other taxpayer's identity to file a return claiming false withholding credits to generate a refund which he in turn had the Service direct to him. The Service discovered plaintiff's fraud and assessed him for this overstatement of withholding credits under section 6201(a)(3).

Plaintiff argued that the assessment was untimely since it was outside the three year assessment period of section 6501(a). The court stated that section 6201(a) applies to assessment of tax and that section 6201(a)(3) was not an assessment of tax. The court found that the Code does not expressly provide a limitations period for assessment under section 6201(a)(3) to recover an erroneous refund. The court used what it thought was the most closely analogous provision, section 6532(b), which allows the government to bring an erroneous refund suit within five years of the refund if it appears that any part of the refund was induced by fraud or misrepresentation of a material fact. In arriving at this five year period, the court based its rationale on Board of Regents v. Tomanio, 446 U.S. 478, 483-484 (1980) (where cause of action does not contain a limitations period look to the limitations period governing the most closely analogous state cause of action) and the fact that a refund of an amount to which section 6201(a)(3) applies is an erroneous refund.

The current viability of deRochemont is extremely questionable given the decision in Brister v. United States, 35 Fed. Cl. 214 (1996), 77 AFTR 2d 96-1492, at 96-1499 n. 12. In Brister, the plaintiff claimed withholding credits on his returns for amounts that were never paid to the government and obtained refunds for the years at issue. The Service reversed the withholding credits for these years under section 6201(a)(3), creating a liability equal to the amount of the refunds. Although the reversals were performed outside the three year period of limitations on assessment set out in section 6501(a), the government asserted that the reversals were timely under the unlimited period of section 6501(c)(1). The court in concluding that the government could utilize the tolling provisions of section 6501(c)(1), clearly recognized the application of section 6501 to section 6201(a)(3) assessments.

Furthermore, the deRochemont court's use of Tomanio was misplaced since the latter involved a statute of limitations for filing a lawsuit and the former addressed

the statute of limitations on assessment. Also, Tomanio did not involve a federal government action. An assessment has been held not to be an action, lawsuit or

proceeding. Thus, you cannot look to a statute of limitations for filing a lawsuit as an analog for determining the statute of limitations on assessment. Capozzi v. United States, 980 F.2d 872, 874 (2d Cir. 1992). No statute of limitations will block federal government actions unless Congress clearly and specifically says so. Id. at 875.

Finally, since an overstatement within section 6201(a)(3) is claimed on an income tax return, and since the government has the ability to match tax payments shown by W-2s and estimated tax vouchers, it appears likely that Congress intended that the assessment of section 6201(a)(3) overstatements be in the same manner as the tax reported on the return. See, also, Phillips v. Stoepler, 421 F.2d 105 (6th Cir. 1970) (section 6201(a)(3) assessment upheld where made within the section 6501(a) period).

If section 6501 were determined not to apply, it would appear to us that the rationale of Capozzi would apply. In Capozzi, the court of appeals had to determine the correct statute of limitations on the assessment period for penalties under section 6700 for promotion of abusive tax shelters. The court of appeals held that there would be an unlimited statute of limitations on the assessment period when Congress does not clearly specify whether a limitation period applies to a particular provision. Id. at 875; see, also, Mullikin v. United States, 952 F.2d 920 (6th Cir. 1992) (unlimited statute of limitations on assessment furthers the interests of Congress in combating fraud relating to the filing of various tax documents). It appears to us that if section 6501 does not apply, then the rationale of Capozzi would (rather than deRochemont) since there is no other specific section of the Code that deals with making assessments pursuant to section 6201(a)(3).

If you have any questions, please call 202-622-3630.