July 28, 2008

Hon. Douglas Shulman  
Commissioner  
Internal Revenue Service  
1111 Constitution Avenue, N.W.  
Washington, DC 20224  

Re: Comments Concerning Proposed Regulations Under Section 6503(j) Relating to the Suspension of the Limitations Period for Corporations Facing Designated or Related Summons

Dear Commissioner Shulman:

Enclosed are comments concerning proposed regulations under section 6503(j) of the Internal Revenue Code relating to the suspension of the limitations period for corporations facing designated or related summons. These comments represent the views of the American Bar Association Section of Taxation. They have not been approved by the Board of Governors or the House of Delegates of the American Bar Association, and should not be construed as representing the policy of the American Bar Association.

Sincerely,

Stanley L. Blend  
Chair, Section of Taxation

Enclosures

cc:  Hon. Donald L. Korb, Chief Counsel, Internal Revenue Service  
Hon. Eric Solomon, Assistant Secretary (Tax Policy), Department of the Treasury
The following comments (“Comments”) concerning proposed regulations to suspend the statute of limitations for corporations facing designated summonses are submitted on behalf of the American Bar Association Section of Taxation (the “Section”) and have not been approved by the House of Delegates or Board of Governors of the American Bar Association. Accordingly, they should not be construed as representing the position of the American Bar Association.

Principal responsibility for preparing these Comments was exercised by Sheri A. Dillon, Vice-Chair of the Section’s Administrative Practice Committee (the “Committee”). Substantive contributions were made by Kevin Johnson, Kevin R. Stults and Daniel Nicholas. The Comments were reviewed by Ronald Buch, Jr., Chair of the Committee, Thomas J. Callahan, of the Section’s Committee on Government Submissions and Emily Parker, Council Director for the Committee.

Although the members of the Section of Taxation who participated in preparing these Comments have clients who might be affected by the federal income tax principles addressed by these Comments, no such member (or the firm or organization to which such member belongs) has been engaged by a client to make a government submission with respect to, or otherwise to influence the development or outcome of, the specific subject matter of these Comments.

Contact person:

Sheri A. Dillon  
Phone: (202) 775-8657  
Email: sdillon@mckeenelson.com

Date: July 28, 2008
EXECUTIVE SUMMARY

On July 31, 2003, the U.S. Department of Treasury (“Treasury”) and the Internal Revenue Service (the “IRS”) issued proposed regulations (the “2003 Proposed Regulations”) that would “generally provide that the period of limitations on assessment provided for in section 65011 is suspended with respect to any return of tax by a corporation that is the subject of a designated or related summons if a court proceeding to enforce or quash is instituted with respect to that summons.”2 On April 28, 2008, Treasury issued new proposed regulations (the “2008 Proposed Regulations”) that withdrew the 2003 Proposed Regulations and replaced them with similar but amended regulations with the same general purpose.3 The 2008 Proposed Regulations, however, change the definition of the compliance date and lack the notice procedures by which a cooperative taxpayer can ascertain the date of compliance with a designated or related summons issued to the taxpayer or a third party.

We commend Treasury and the IRS for publishing the 2008 Proposed Regulations and note that, in general, the 2008 Proposed Regulations provide greater certainty to section 6503(j) and will have a beneficial effect on effective tax administration. However, we believe that the changes made in the 2008 Proposed Regulations inadequately protect the interests of cooperative taxpayers. Specifically, we believe that the failure of the newly issued 2008 Proposed Regulations to include a procedure to verify the date of compliance with a designated or related summons, especially when such summons has been issued to a third party, and the change to the definition of the date of compliance is likely to result in an administrative burden on cooperative taxpayers. We therefore recommend that the 2008 Proposed Regulations be amended to properly achieve the balance Congress desired between effective tax administration and protecting cooperative taxpayers. We believe that this could be easily accomplished by restoring the procedures under sections 301.6503(j)-1(d)(6) and (7), with one modification, and the definition of the compliance date under section 301.6503(j)-1(c)(5)(ii), of the 2003 Proposed Regulations.

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1 Unless otherwise expressly stated herein, all references to sections are to sections of the Internal Revenue Code of 1986, as amended (the “Code”), and all references to regulations are to the Treasury Regulations promulgated under the Code.

2 Preamble to Proposed Regulations on Suspension of Running of Period of Limitations During a Proceeding to Enforce or Quash a Designated or Related Summons. Prop. Reg. § 301.6503(j)-1, 68 Fed. Reg. 44,905 (2003).

DISCUSSION

I. Background.

A. Section 6503 (j) Extension in Case of Certain Summons.

Section 6501 provides that the statute of limitations on assessment with respect to any tax return is generally three years after the return was filed or the tax was paid. Stating that “[i]t is inappropriate for the statute of limitations to continue to run during the period of time that a corporation and the IRS are in court litigating the issue of whether the corporation must comply with an IRS summons,” Congress enacted then-new section 6503(k) under section 11311 of the Omnibus Budget Reconciliation Act of 1990 (Pub. L. No. 101-508, 104 Stat. 1388, 1388-453).

Congress reasoned that in certain situations corporations could use the expiration of the statute of limitations “to prolong the litigation over a procedural dispute so that little or no time remains in the statute of limitations for examination of the substantive issues raised by positions taken on the tax return.” Nevertheless, Congress expressly limited the circumstances under which the statute would be suspended so as to “provide safeguards to corporations attempting to comply with an IRS summons.” Later, Congress redesignated section 6503(k) as section 6503(j) by section 1702(h)(17)(A) of the Small Business Job Protection Act of 1996 (Pub. L. No. 104-188, 110 Stat. 1755, 1874). Finally, Congress incorporated further taxpayer safeguards into section 6503(j) by requiring high-level IRS review of designated summonses, and by restricting the class of corporate taxpayers that would be subject to a designated summons.

Section 6503(j) is structured in three separate paragraphs. Paragraph (1) describes the effect of the issuance of a designated summons “on the running of any period of limitations provided in section 6501 . . . .” Paragraphs (2) and (3) provide definitions of “designated summons” and “judicial enforcement period,” respectively.

Rather than providing independent authority to issue a summons, section 6503(j)(2) defines a designated summons as “any summons issued for purposes of determining the amount of any tax imposed by this title . . . .” Thus, a summons for purposes of section 6503(j) includes a summons under section 7602(a)(1) or a third-party summons under section 7609. Subparagraph (A) of section 6503(j)(2) imposes three requirements for a summons to be considered a designated summons. First, under section 6503(j)(2)(A)(i), the issuance of a designated summons must be preceded by a review from “the regional counsel of the Office of

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5 Id.
6 Id.
8 See United States v. Derr, 968 F.2d 943, 947 (9th Cir. 1992) (describing the application of § 6503(j)).
Chief Counsel for the region in which the examination of the corporation is being conducted.”

Second, pursuant to section 6503(j)(2)(A)(ii), a designated summons must be issued at least 60 days before the expiration of the section 6501 statute of limitation, including extensions. Third, section 6503(j)(2)(A)(iii) requires that a designated summons must clearly state that it is a designated summons for the purposes of section 6503(j). Section 6503(j)(2)(B) limits the number of designated summonses, stating that where a prior summons relating to any return was treated as a designated summons for the purposes of subsection 6503(j), a subsequent summons relating to the same return will not be treated as a designated summons.

Under section 6503(j)(1), a designated summons may only be issued by the Secretary “to a corporation (or to any other person to whom the corporation has transferred records) with respect to any return of tax by such corporation for a taxable year (or other period) . . . .” In addition, section 6503(j) only applies where the corporation in question is being examined under the “coordinated examination program (or any successor program) . . . .” The current successor program is the coordinated industry case (“CIC”) program.

Where these conditions are met, the issuance of a designated summons will suspend “the running of any period of limitations provided in section 6501 on the assessment of such tax . . . .” during the judicial enforcement period\(^{11}\) of the designated summons in question or “with respect to any other summons which is issued during the 30-day period which begins on the date on which such designated summons is issued and which relates to the same return as such designated summons . . . .”\(^{12}\) Section 6503(j)(3) defines the judicial enforcement period as being the period between “the day on which a court proceeding with respect to such summons is brought”\(^{13}\) and “the day on which there is a final resolution as to the summoned person’s response to such summons.”\(^{14}\) Thus, the mere issuance of a designated summons does not suspend the running of the statute of limitations; rather, the suspension only commences where compliance with a designated or related summons is being litigated.\(^{15}\)

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9 The IRS Office of Chief Counsel was reorganized in 2000, and this title no longer exists within the organization. The 2008 Proposed Regulations administratively reassigned the approval authority to “the Division Commissioner and the Division Counsel of the Office of Chief Counsel (or their successors) for the organizations that have jurisdiction over the corporation whose liability is the subject of the summons.” Preamble to Proposed Regulations on Suspension of Running of Period of Limitations During a Proceeding To Enforce or Quash a Designated or Related Summons. Prop. Reg. § 301.6503(j)-1, 73 Fed. Reg. 22,879 (2008).

10 Under section 6503(j)(1)(A)(ii), if the subsequent summons relating to the same return of the corporation is issued within 30 days of the issuance of the designated summons, the subsequent summons, although not treated as a designated summons, has the identical effect on the statute of limitations. See infra text accompanying notes 10-12. The 2008 Proposed Regulations define such a summons as a “related summons.” Prop. Reg. § 301.6503(j)-1(c)(2) (2008).

11 Section 6503(j)(1).

12 Sections 6503(j)(1)(A)(i) and (ii).

13 Section 6503(j)(3)(A).

14 Section 6503(j)(3)(B).

15 Section 6503(j) does not provide an independent means to enforce or quash a designated summons, relying instead upon the authority granted by the section under which the summons is issued. For example, authority to
In addition to suspending the running of the statute of limitations during the judicial enforcement period, section 6503(j)(1)(B) mandates that, where the court proceeding referred to in section 6503(j)(3)(A) “requires any compliance” with a designated summons or a related summons as described in section 6503(j)(1)(A) (i) or (ii), the statute will be suspended a further 120 days after the end of the judicial enforcement period. Finally, under section 6503(j)(1), where the court proceeding does not mandate compliance with the designated summons, the statute of limitations will not expire until at least 60 days from the end of the judicial enforcement period.

B. Proposed Regulations.

On July 31, 2003, the IRS issued the 2003 Proposed Regulations. These regulations would “generally provide that the period of limitations on assessment provided for in section 6501 is suspended with respect to any return of tax by a corporation that is the subject of a designated or related summons if a court proceeding to enforce or quash is instituted with respect to that summons.”\(^\text{16}\) The proposed regulations provided clarification of the statute by introducing the term “period of suspension” to describe “the time during which the running of the applicable period of limitations on assessment provided for in section 6501 is suspended under section 6503(j).”\(^\text{17}\) In addition, the proposed regulations provided the IRS’s interpretation of several relevant terms including: designated summons,\(^\text{18}\) related summons,\(^\text{19}\) judicial enforcement period,\(^\text{20}\) court proceeding,\(^\text{21}\) compliance,\(^\text{22}\) and final resolution.\(^\text{23}\)

Further, the proposed regulations provided several discrete rules regarding the number of designated and related summonses that may be issued,\(^\text{24}\) the time within which a court proceeding must be brought,\(^\text{25}\) the computation of the suspension period where multiple court proceedings are instituted,\(^\text{26}\) the relationship of the suspension period provided for in section

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\(^\text{16}\) Preamble to Proposed Regulations on Suspension of Running of Period of Limitations During a Proceeding To Enforce or Quash a Designated or Related Summons. Prop. Reg. § 301.6503(j)-1, 68 Fed. Reg. 44,905 (2003).

\(^\text{17}\) Prop. Reg. § 301.6503(j)-1(b) (2003).


\(^\text{19}\) Prop. Reg. § 301.6503(j)-1(c)(2) (2003).


6503(j) with other suspension provisions in the Code (including two examples),\textsuperscript{27} the computation of the 60-day period when the last day of assessment period falls on a weekend or holiday,\textsuperscript{28} the determination of compliance with designated and related summonses where a court proceeding has been instituted,\textsuperscript{29} and the statement of compliance with a court order issued by the Commissioner.\textsuperscript{30}

Until recently, no action was taken with respect to the 2003 Proposed Regulations; concurrent temporary regulations were not issued, and final regulations were never promulgated. In addition, no comments or hearing requests were received by the IRS. On April 28, 2008, the IRS issued new proposed regulations — the 2008 Proposed Regulations — that withdrew the 2003 Proposed Regulations and replaced them with similar but amended regulations with the same general purpose.\textsuperscript{31}

The two significant differences between the 2003 Proposed Regulations and the 2008 proposed regulations are: (1) a change in the definition of the date “compliance” occurs, from “as soon as practicable” after testimony or production to “within a reasonable time;”\textsuperscript{32} and (2) removal of the mechanism by which a summoned party can ascertain compliance with a designated summons or related summons, instead proposing a set of internal, non-binding procedures to be published in the Internal Revenue Manual (the “IRM”).\textsuperscript{33} These two modifications create potential uncertainty for a taxpayer as to when the suspension of the statute of limitations under section 6503(j) has ended.

II. Protecting Cooperative Taxpayers.

We recommend that the language under section 301.6503(j)-1(d)(5)(ii) be restored to “as soon as practicable” (2003 Proposed Regulations) from the currently proposed “within a reasonable time” (2008 Proposed Regulations), and that sections 301.6503(j)-1(d)(6) and (7) of the 2003 Proposed Regulations be reinstated in full with one modification. As discussed above, Congress’ dual purpose in enacting section 6503(j) was to prevent recalcitrant taxpayers from balking at routine discovery while still enjoying the benefit of the running of the statute of limitations on assessment, and, at the same time, to protect cooperative taxpayers from uncertainty and unjustified suspension of the statute of limitations.\textsuperscript{34} However, at least one

\begin{itemize}
\item \textsuperscript{27} Prop. Reg. § 301.6503(j)-1(d)(4) (2003).
\item \textsuperscript{28} Prop. Reg. § 301.6503(j)-1(d)(5) (2003).
\item \textsuperscript{29} Prop. Reg. § 301.6503(j)-1(d)(6) (2003).
\item \textsuperscript{30} Prop. Reg. § 301.6503(j)-1(d)(7) (2003).
\item \textsuperscript{31} Proposed Regulations on Suspension of Running of Period of Limitations During a Proceeding To Enforce or Quash a Designated or Related Summons. Prop. Reg. § 301.6503(j)-1, 73 Fed. Reg. 22,879 (2008).
\item \textsuperscript{32} Prop. Reg. § 301.6503(j)-1(d)(5)(ii) (2008).
\item \textsuperscript{33} Preamble to Proposed Regulations on Suspension of Running of Period of Limitations During a Proceeding To Enforce or Quash a Designated or Related Summons. Prop. Reg. § 301.6503(j)-1, 73 Fed. Reg. 22,879 (2008).
\end{itemize}
court has held that cooperative taxpayers are not immune from receiving designated summonses. Accordingly, we believe that the language and procedures in these sections of the 2003 Proposed Regulations strike a better balance between these objectives.

Under the 2008 Proposed Regulations, compliance with a court order granting enforcement is determined “within a reasonable time, given the volume and complexity of the records produced, after the later of the giving of all testimony or the production of all records requested by the summons or required by any order enforcing any part of the summons.” In addition, the 2008 Proposed Regulations have removed the specific reference to the “Commissioner or his delegate” as the party making this decision and replaced it with the ambiguous “it is determined.” There is no indication of who within the IRS will make this determination, and no current IRM procedures govern the situation.

This discretion causes uncertainty because it is impossible for a cooperative taxpayer to predict the remaining term of the statute of limitations under section 6501 when it believes it has complied with the court order. This uncertainty is even greater where the relevant designated or related summons has been issued to a third-party record keeper, over which the taxpayer will often have no control. When combined with the lack of procedures to ascertain the date of compliance, a cooperative taxpayer has almost no ability to know or to learn whether the third party has sufficiently complied with a court order granting enforcement.

The date of compliance is of vital importance to a taxpayer, as this is the date of “final resolution” (assuming the time for any appeals or further review has expired), and therefore the ending of the judicial enforcement period and the beginning of the final 120 days of the suspension of the statute of limitations. Without being able to ascertain whether there has been a final resolution, a taxpayer is unable to determine whether the statute of limitations on assessment is running, when it will expire, or has in fact expired. Thus, the taxpayer is unable to determine with certainty its potential tax liability which has far reaching ramifications on a taxpayer’s business planning and financial accounting.

We believe that this uncertainty was better balanced in the 2003 Proposed Regulations, as they contained notice provisions by which the taxpayer was made aware of compliance with a court ordered summons. First, the 2003 Proposed Regulations provided that the taxpayer would receive timely notice of the IRS’s determination that the summoned party had fully complied with the court order. Second, they provided a procedure by which the summoned party could

35 See United States v. Derr, 968 F.2d at 946-47 (holding that the IRS need not make a showing concerning “the taxpayer’s cooperativeness” in order to obtain enforcement of a designated summons).
37 Id.
38 See United States v. Derr, 968 F.2d at 946.
39 See, e.g., Financial Accounting Standards Board Interpretation (FIN) No. 48, Accounting for Uncertainty in Income Taxes.
submit a statement of self-determined compliance with the court order and receive a response from the IRS (with a copy to the taxpayer where the summons was issued to a third party) confirming or denying this determination within 180 days. Where the Commissioner failed to respond to a properly submitted statement of compliance within 180 days “or such longer period as agreed to in writing,” compliance with the court order would be deemed as of the expiration of an additional 180 days.

Although we recognize that these notice provisions provided some certainty to the taxpayer, we also believe that the second provision should be modified so as to protect the taxpayer in all situations where a designated summons or related summons may be issued, including those summonses issued to third-party record keepers. While the 2003 Proposed Regulations provided the taxpayer who was issued a designated summons a mechanism for initiating a process whereby it could achieve certainty of compliance and thus reinitiate the running of the statute of limitations, they provided no similar mechanism where the summoned party was a third-party record keeper. In that case, the taxpayer (i.e., the real party in interest) had no ability to file a statement of compliance, and was thus unable to avail itself of the protection provided by the procedure. We propose that this gap be filled by allowing a taxpayer to file a third-party statement of compliance in substantially the same form as a statement of compliance that can be filed by the summoned party. Such a procedure would be in keeping with the manifest intention to provide protection to the taxpayer.

The 2008 Proposed Regulations provide no mechanism or procedure against the uncertainty surrounding the date of compliance, and therefore dilute taxpayer protections that were intended to be a part of section 6503(j). In addition, the degree of protection, if any, that the as yet unpublished IRM procedures would provide is unclear, as they have not yet been published. Further, the IRS is under no particular duty to follow through with its intention to draft such procedures in the IRM or elsewhere. Finally, even if similar procedures were published by the IRS in the IRM, they would not afford the same degree of protection as procedures embedded in the Treasury Regulations.

Furthermore, setting forth procedures for ascertaining the date of compliance in the Treasury Regulations themselves would also provide a benefit to the IRS and the courts because it would reduce the need for burdensome collateral proceedings. In the absence of such

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44 See, e.g., Prop. Reg. § 301.6503(j)-1(d)(6)(ii) (2003) (providing notice “to the summoned party and the taxpayer under examination (if the taxpayer is not the summoned party)”) and Prop. Reg. § 301.6503(j)-1(d)(7)(iii) (2003) (providing “a copy of the response to the summoned party (and a copy of the response to the taxpayer, if the summoned party is not the taxpayer”).
45 See, e.g., TIBOR 2. Insofar as the IRS intends to create similar procedures in the IRM, these would be inherently less protective because the taxpayer would not have a clear mechanism of enforcement.
46 First Fed’l Sav. & Loan Ass’n of Pittsburgh v. Goldman, 644 F. Supp. 101, 103 (W.D. Pa. 1986) (“procedures set forth in the IRM do not have the effect of a rule of law and, therefore, are not binding upon the IRS”).
enforceable procedures, a taxpayer who believes it (or its third-party record keeper) has fully complied with an enforcement order could file a collateral judicial proceeding seeking a determination of compliance in order to gain certainty and closure as to the date of compliance. In the alternative, the court enforcing the summons might retain jurisdiction in order to
determine when compliance has occurred. In either case, such collateral proceedings would create a significant burden, requiring the court to cull through often voluminous and complex records produced by the taxpayer to determine their sufficiency and requiring the IRS to defend against such proceedings. If the Treasury Regulations provide a clear mechanism or procedure, such as that contained in the 2003 Proposed Regulations, a collateral proceeding would be a last resort rather than the routine method by which certification of compliance was obtained. Even if the IRS were to publish similar procedures in the IRM, courts would be more likely to defer to regulations developed through the normal rulemaking process, thus giving taxpayers an incentive to resolve questions of compliance without resorting to collateral judicial proceedings.

Finally, we do not believe that the two justifications given by the IRS for removing the procedures under sections 301.6503(j)-1(d)(6) and (7) of the 2003 Proposed Regulations are compelling. First, the Preamble to the 2008 Proposed Regulations notes that “no comments were received with respect to this procedure or any other aspect of the 2003 proposed regulations, and no hearing was requested or held.” It cannot be the case that a negative inference about the content of proposed regulations can be made solely on the basis of a lack of commentary. In fact, the lack of commentary likely indicates that the proposed regulations were generally understood to be a proper interpretation of the statutory language and that any inference made should be that of tacit approval. Second, the Preamble to the 2008 Proposed Regulations states that “in the interest of effective tax administration, the procedure in the 2003 proposed regulations is not warranted.” Without further explanation or elaboration of the new IRM procedures envisioned by the IRS, however, it is difficult to understand what positive effect on tax administration the removal of these procedures might yield.