



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

April 12, 2001

OFFICE OF
CHIEF COUNSEL

Number: **200137001**
Release Date: 9/14/2001

CC:PA:CBS:Br2
GL-127877-00
UILC: 17.00.00-00
9999.98-00

MEMORANDUM FOR MICHAEL W. BITNER
ASSOCIATE AREA COUNSEL (SB/SE)

FROM: Joseph W. Clark, Senior Technician Reviewer
Branch 2 (Collection, Bankruptcy & Summonses)

SUBJECT: Advisory Opinion—Offers in Compromise / Processability

This memorandum responds to a request for advice received from your office on January 22, 2001. You have asked us to consider whether an in-business taxpayer may compel the Service to process an offer in compromise under a prior version of the processability rules which were in effect before January 1, 2000, and if not, whether the Service has the discretion to process the offer. In accordance with I.R.C. § 6110(k)(3), this Chief Counsel Advice should not be cited as precedent. This writing may contain privileged information.

ISSUE

When an in-business taxpayer submits an offer, and the processability rules pertaining to deposit, payment, and filing of employment taxes for the previous two quarters, change before the offer is accepted for processing, may the taxpayer compel the Service to apply the former processability rules? If not, may the Service exercise its discretion to process the offer?

CONCLUSION

Although the taxpayer may not compel the Service to process the offer under the prior rules, the Service may exercise its discretion to process the offer.

BACKGROUND

Your correspondence with us indicates the taxpayer, an in-business corporation, entered into an installment agreement to pay its delinquent employment taxes. After making only one payment, the taxpayer defaulted on the agreement, and after being notified by the Service that the agreement would be terminated, the taxpayer filed a Form 911 Application for Taxpayer Assistance with the Office of the Taxpayer Advocate on March 1, 1999, requesting to file an offer in compromise. Collection received the taxpayer's offer on June 1, 1999, and returned it on June 14, 1999, along with a letter characterizing the offer as non-processable, and

informing the taxpayer that in order to process the offer, an in-business taxpayer must demonstrate compliance by filing and full paying employment taxes for the preceding two quarters. The caseworker for the Taxpayer Advocate then met with Collection and the taxpayer's power of attorney to discuss the offer requirements, and the caseworker advised the power of attorney that the taxpayer needed to become current for the preceding two quarters.

On November, 12, 1999, the power of attorney requested additional time to provide proof of compliance, and after a meeting on December 8, 1999, the caseworker set a deadline of December 31, 1999. The power of attorney provided some documentation on December 23, 1999. On January 4, 2000, the caseworker called to request the remainder of the documentation, and requested the taxpayer become current by January 18, 2000, and provide the rest of the documentation by January 24, 2000. The power of attorney provided the balance of the documentation on January 22, and January 25.

On January 25, 2000, the caseworker told the power of attorney that as of January 1, 2000, the rules for processing an offer in compromise from an in-business taxpayer had changed and that the new rule required the taxpayer to be "timely" rather than "current." The taxpayer advocate then asked the manager of the offer group to bypass the timeliness requirement, but he declined to do so. You have asked our advice on whether in this situation, the taxpayer may compel the Service to process his offer in compromise under the prior rule, and if not, may the Service exercise its discretion to process the offer.

DISCUSSION

The Secretary's authority to compromise cases is contained in section 7122 of the Code, which provides, "The Secretary *may* compromise any civil or criminal case arising under the internal revenue laws prior to reference to the Department of Justice for prosecution or defense." I.R.C. § 7122(a) (emphasis added). Treasury regulations pertaining to that provision likewise state, "The Secretary may exercise his discretion to compromise any civil or criminal liability arising under the internal revenue laws. . . ." Treas. Reg. § 301.7122-1T(a)(1). The Secretary's authority to compromise is, thus, discretionary. The Secretary has delegated this discretionary authority to the Commissioner, who has then re-delegated it to various officials throughout the Service. See Delegation Order No. 11.

The Secretary has set the threshold requirements for consideration of a proposed compromise, and all offers in compromise must be submitted according to the prescribed procedures. See Treas. Reg. § 301.7122-1T(c)(1). Further, a taxpayer may not compel the Service to accept an offer for processing. See United States v. Garden State National Bank, 607 F.2d 61, 73 (3d Cir. 1979) ("the refusal of the Service to enter into compromise negotiations, standing alone, does not amount to 'bad faith'"); United States v. Smith, 1979 U.S. Dist. LEXIS 12471 (S.D.N.Y. 1979)(the decision whether to discuss settlement is discretionary and cannot be

compelled by a court); Leonhard v. Mitchell, 473 F.2d 709, 713 (2^d Cir.) cert. denied, 412 U.S. 949 (1973)(mandamus cannot force a discretionary act).

In keeping with the twin policy goals of the offer in compromise program to obtain the amount potentially collectible at the earliest possible time and at the least cost to the government, IRM 5.8.3.1(2) now provides that Service personnel will “work with taxpayers to provide an opportunity to perfect . . . defects or errors . . . rather than returning the offers as unprocessable.” The manual provides that as soon as possible upon receipt, offers should be sorted into three categories: processable, non-processable, and those which need to be perfected (usually due to missing information). IRM 5.8.3.3. If it is processable, the offer becomes pending, and if the offer is not processable, then the Service returns it to the taxpayer along with a letter detailing the reason. Treas. Reg. § 301.7122-1T(c)(2); IRM 5.8.3.3(1).

In order for the Service to process an offer to compromise employment taxes from an in-business taxpayer, the manual requires the taxpayer “must have demonstrated compliance by having *timely* filed and *timely* deposited the preceding two quarters,” and “*timely* paid all federal tax deposits due in the quarter in which the offer was submitted.” IRM 5.8.3.3(4) (emphasis added). Prior to January 1, 2000, the manual required the taxpayer be “current” for the past two quarters. The manual further provides the Service may not deviate from the processability criteria without obtaining written approval from the National Office. IRM 5.8.3.3.1(1).

In the current case, the facts as you have presented them indicate the taxpayer first submitted the offer in compromise on June 14, 1999. When the Service sent its first letter to the taxpayer indicating non-processability, it requested the taxpayer demonstrate compliance by filing and full paying its employment taxes for the preceding two quarters. For several months, the caseworker worked with the taxpayer’s power of attorney to perfect errors in the offer so that it could be processed. On several occasions, the caseworker requested the taxpayer become “current,” and on January 25th, the power of attorney submitted documentation that the taxpayer had done so. Although the criteria changed before the taxpayer submitted documentation of compliance, nothing in the Code or the Regulations prevents the Service from exercising its discretion to process an offer in such a case based on the criteria existing when the offer was first submitted. Further, policy considerations favor such processing, because neither the Service nor the taxpayer would benefit from lengthening the process by requiring timeliness for the next two quarters before allowing the offer to be processed. Such a requirement in this case would have no practical effect on the taxpayer’s future compliance, because Form 656 requires as a condition to the offer that taxpayers agree to comply with future filing and payment requirements in order to avoid default of the compromise agreement.

Furthermore, once a taxpayer’s offer has been accepted for processing, the Service’s procedures do not establish a presumption that the offer will be accepted, nor do they presume rejection as the likely result. Rather, each proposed

compromise should be evaluated and considered on its own merits, in light of the facts and circumstances of the case. In each case, the Service has the discretion to decide whether to accept or reject the offer. Provided the Service exercises sound judgment and discretion when exercising its authority to compromise, we do not believe processing this offer undercuts the Service's overall compromise policy and objectives, and therefore, would not be an abuse of its discretion. Thus, provided the Service obtains the required written permission from the National Office pursuant to IRM 5.8.3.3.1(1), the Service has authority to process the offer.

If you have any further questions, please contact the attorney assigned to this matter at (202) 622-3620.