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Office of Chief Counsel
Internal Revenue Service

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memorandum

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to: Associate District Counsel, Kansas City CC:MSR:KSM:KCY

from: Assistant Chief Counsel (Income Tax & Accounting)
CC:DOM:IT&A:3

subject: Service Center Advice Request
Effect of Timely Amended Return on Period of Limitations for Assessment

This responds to your request for advice, dated April 18, 1997, in connection with questions posed by the Kansas City Service Center.

In addition to the specific question you asked, concerning the effect of a timely amended return on the "25% omission exception" in § 6501(e), we have considered a closely-related question, the effect of such a return on the "fraud exception" in § 6501(c)(1).

Disclosure Statement

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ISSUES

1. When a taxpayer omits over 25% of gross income on an original return, but corrects that omission on a timely amended return -- that is, an amended return filed by the return due date (original or extended, as the case may be) -- is the assessment period 3 years, under § 6501(a), or 6 years, under § 6501(e)?

2. When a taxpayer files a fraudulent return, followed by a timely nonfraudulent amended return, is the assessment period 3 years, under § 6501(a), or unlimited, under § 6501(c)(1)?

CONCLUSIONS

In both cases, the general 3-year period in § 6501(a) applies. Under a line of cases, rulings, and regulations exemplified by Haggar Co. v. Helvering, 308 U.S. 389 (1940), a timely amended return [1] is generally treated as the taxpayer's return for most purposes. There is no persuasive reason to depart from that rule in the statute of limitations context. A second line of authority, to the effect that a late amended return is a nullity, see, e.g., Badaracco v. Commissioner, 464 U.S. 386 (1984), is distinguishable.

EXAMPLES

The following examples illustrate the issues and our conclusions:

25% Omission - § 6501(e)

1. Timely Amended Return/Original Due Date. An individual, calendar-year taxpayer files a Year 1 income tax return on February 1, Year 2. The return omits over 25% of the taxpayer's gross income. On April 15, Year 2 (the return due date), the taxpayer files an amended return that corrects the omission (or reduces the omission to 25% or less).

2. Timely Amended Return/Extended Due Date. The facts are the same, except that the taxpayer (1) requests an automatic extension to file on April 15, Year 2; (2) files the first return, omitting gross income, on June 1; and (3) files the amended return, correcting or reducing the omission, on August 15 (the extended due date).

3. Late Amended Return/Original Due Date. The facts are the same as Example 1, except that the amended return is filed on May 15.

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[1] Note that "timely" has a different meaning when an amended return is considered as a refund claim. In this discussion of the assessment period under § 6501, the term "timely amended return" means a return filed on or before the original or extended return due date. See Haggar, 308 U.S. at 395. This differs from the usage for refund purposes in § 6511, where an amended return claiming a refund is "timely" if filed within the refund limitations period, generally 3 years from the filing of the original return. A "timely amended return" in the sense used here is sometimes referred to as a "substitute," "supplemental," or "superseding" return.

4. Late Amended Return/Extended Due Date. The facts are the same as Example 2, except that the amended return is filed on September 15.

Fraud - § 6501(c)(1)

In these examples, assume the scenarios are the same as in Examples 1-4, except that instead of a 25% omission, the original return is fraudulent and the amended return is nonfraudulent.

5. Timely Amended Return/Original Due Date.

6. Timely Amended Return/Extended Due Date.

7. Late Amended Return/Original Due Date.

8. Late Amended Return/Extended Due Date.

Under our interpretation, the general 3-year assessment period applies in Examples 1, 2, 5, and 6. The period would run from the original due date, in Examples 1 and 5, and from the date the first return was filed, in Examples 2 and 6. A 6-year period applies in Examples 3 and 4, and the period is unlimited in Examples 7 and 8.

DISCUSSION

I. Relevant Provisions

The general statute of limitations for the assessment of tax is found in § 6501(a), which states that, except as otherwise provided, tax must be assessed within 3 years after "the return" was filed, whether or not "such return" was filed on or after the date prescribed.

Under § 6501(b)(1), a return filed before the last day prescribed for filing is deemed filed on the last day. Thus, for example, the returns filed in Examples 1, 3, 5, and 7 are deemed filed on April 15. (In Example 7, the filing date is actually irrelevant, because the assessment period is unlimited.) However, a return filed on extension is treated as filed on the day it is received, in the case of a return received on or before the extended due date, or on the postmark date, in the case of a return mailed before but received after the extended due date. See, e.g., First Charter Financial Corp. v. United States, 669 F.2d 1342 (9th Cir. 1982). Thus, the returns filed in Examples 2, 4, 6, and 8 are treated as filed on June 1 (although the filing date is irrelevant in Example 8).

The "25% omission exception" in § 6501(e)(1) provides, for income tax, that if a taxpayer omits from gross income an amount properly includible in gross income that is in

excess of 25% of the gross income "stated in the return," the tax may be assessed within 6 years after the return was filed. [2]

The "fraud exception" in § 6501(c)(1) states that in the case of a "false or fraudulent return" with the intent to evade tax, the tax may be assessed at any time.

The question for interpretation is whether, for purposes of § 6501(c)(1) and (e), a "return" incorporates corrections that are provided in a timely amended return. The analysis involves the interplay of principles set out in three Supreme Court cases: Zellerbach Paper Co. v. Helvering, 293 U.S. 172 (1934); Haggar; and Badaracco.

II. Zellerbach: Return That Starts Limitations Period

In Zellerbach, the Court held that an original return, despite its inaccuracy, was a "return" for limitations purposes, so that the filing of an amended return did not start a new period of limitations running:

> From [a history of administrative construction] the inference is compelling that a second return, reporting an additional tax, is an amendment or supplement to a return already upon the files, and being effective by relation does not toll a limitation which has once begun to run. Perfect accuracy or completeness is not necessary to rescue a return from nullity, if it purports to be a return, is sworn to as such, and evinces an honest and genuine endeavor to satisfy the law. This is so though at the time of filing the omissions or inaccuracies are such as to make amendment necessary.

293 U.S. at 180 (citations omitted).

The same principle has been followed in the context of the statute of limitations on refunds in § 6511. See, e.g., Kaltreider Construction, Inc. v. United States, 303 F.2d 366 (3d Cir.), cert. den., 371 U.S. 877 (1962); Rev. Rul. 72-311, 1972-1 C.B. 398.

Consistent with Zellerbach, a return that reflects a 25% omission will still trigger the running of the assessment limitations period, although the period may be 6 years rather than 3. See Examples 1-4 above.

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[2] Similar exceptions apply in the case of estate, gift, and excise taxes, under § 6501(e)(2) and (3). The conclusions in this memorandum apply equally in those contexts.

III. Haggar: Effect of Timely Amended Return

A. Haggar Case

In Haggar, for purposes of a now-obsolete capital stock tax, the taxpayer was required to declare the value of its stock on its "first return" after passage of the law. The taxpayer reported par value on a timely return and then filed an amended return declaring actual value prior to the due date.[3] Noting that the government was not prejudiced, that the taxpayer could have declared the revised amount on a single return filed before the due date, that the purposes of the statute were not thwarted, and that there was a longstanding administrative practice of accepting timely amended returns in other contexts,[4] the Court observed:

> "First return" thus means a return for the first year in which the taxpayer exercises the privilege of fixing its capital stock value for tax purposes, and includes a timely amended return for that year. A timely amended return is as much a "first return" for the purpose of fixing the capital stock value in contradistinction to returns for subsequent years, as is a single return filed by the taxpayer for the first tax year. ... To construe "first return" as meaning the first paper filed as a return, as distinguished from the paper containing a timely amendment, which, when filed is commonly known as the return for the year for which it is filed, is to defeat the purposes of the statute by dissociating the phrase from its context and from the legislative purpose ... .

308 U.S. at 395-96.

By itself, the Haggar opinion does not compel a conclusion that a timely amended return can cure a 25% omission (or fraud) for statute of limitations purposes. This is especially true in extended due date situations such as Example 2; in such situations, because the first filing starts the limitations period under Zellerbach, the period for examining a corrected return could be shortened. Haggar could be distinguished from the § 6501 context on several grounds: Haggar involved a different, obsolete statute; it concerned an essentially arbitrary declaration akin to an election, not fraud or an omission of income; it construed the term "first return" (that is, the first year's return), not "return"; it involved a blanket extension of the due date, not an extension specific to the taxpayer; and its rationale was narrowly drawn, resting on an examination of the specific statute authorizing the election, and a finding that the government was not prejudiced.

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[3] Although the opinion refers to the due date as "having been extended," 308 U.S. at 392, this was pursuant to a general extension of the filing date, not an extension requested by the specific taxpayer. See T.D. 4368, XII-1 C.B. 473 (1933). Both the original and amended returns were filed during the extended period.

[4] "[The Commissioner] concedes ... that it has long been the practice ... , in the cases of other types of tax to accept an amended return, filed within the period allowed for filing returns, as the return of the taxpayer for the taxable year." 308 U.S. at 394.

However, both before and since the opinion was issued, the principle underlying Haggar has been extended and applied in a broad range of contexts -- including situations involving extended due dates -- not only in court decisions but also by the Service in its administrative rulings.

B. Elections

For example, many elections required to be made on a timely "return" can be made or changed on a timely amended return. See, e.g., Charles Leich & Co. v. United States, 329 F.2d 649 (Ct. Cl. 1964) (excess profits tax election); National Lead Co. v. Commissioner, 336 F.2d 134 (2d Cir. 1964) (inventory accounting relief provision); Wilson v. United States, 267 F. Supp. 89 (E.D. Mo. 1967) (partnership tax year); I.T. 3775, 1946-1 C.B. 76 (election to itemize deductions). Cf. J.E. Riley Investment Co. v. Commissioner, 311 U.S. 55 (1940) (percentage depletion election on late amended return invalid; Haggar distinguished); Barber v. Commissioner 64 T.C. 314, 317 (1975) (percentage-of-completion accounting method; Haggar distinguished).

C. Estimated Tax Penalties

More significantly for present purposes, the Service has extended the Haggar rule in the penalty context, a setting closely linked to the statute of limitations. The clearest examples involve the penalties for estimated tax underpayment.

For example, in Rev. Rul. 78-256, 1978-1 C.B. 438, the Service considered these facts involving a newly-formed calendar-year corporation that had failed to make any estimated tax payments for 1976:

- On March 14, 1977, the corporation filed a timely request for an automatic extension to file its 1976 return;

- On April 11, the taxpayer filed its 1976 Form 1120, reporting $7x in tax;

- On April 15, prior to the extended June 15 due date, the taxpayer filed an amended return on Form 1120X, reporting tax of only $1x.

The issue was the amount of the underpayment of estimated tax for purposes of the penalty for corporations in § 6655; under § 6655(b), the underpayment is the difference between the amounts paid and 80% of the tax shown on "the return."

The Service concluded in Rev. Rul. 78-256 that the "tax shown on the return" is $1x, the amount on the amended return. Treating Haggar as involving an extended due date, the ruling quotes the opinion for the following broad proposition: "A timely amended return is as much a 'first return' ... as a single return filed by the taxpayer." 1978-1 C.B. at 439. A comparison of this excerpt with the actual passage, quoted in more detail above (p. 5), highlights the fact that Rev. Rul 78-256 does not restrict Haggar in any of the possible ways discussed earlier. Rather, the revenue ruling applies Haggar in an extended due date scenario that does not involve either the capital stock tax, the term "first return," or an election.

In a similar fashion, Rev. Rul. 83-36, 1983-1 C.B. 358, further extends the Haggar principle, applying it to the estimated tax underpayment penalty for individual taxpayers in § 6654. Cf. Rev. Rul. 86-58, 1986-1 C.B. 365; Evans Cooperage Co., Inc. v. United States, 712 F.2d 199, 204 (5th Cir. 1983) (different result for late amended return; Rev. Rul. 78-256 distinguished).

D. Tax Court "Deficiency"; Negligence and Fraud "Underpayment"

The application of Haggar in Rev. Ruls. 78-256 and 83-36 was consistent with the treatment of timely amended returns in determining Tax Court jurisdiction, as well as for purposes of the negligence and fraud penalties. In these contexts, a "deficiency" or "underpayment" is determined by treating a timely amended return as relating back to, and modifying or superseding, "the return." A brief history of these provisions illustrates how the application of the principle in these contexts actually predated Haggar.

1. 1926 Regulations

Prior to 1954, the penalties for negligence and fraud were imposed on the same "deficiency" that was used to determine Tax Court jurisdiction. Then, as now, a key element in determining a deficiency under the statute was the amount shown upon "the return," which the regulations interpreted as not including amounts shown on an "amended return":

> Additional tax shown on an "amended return," so-called, is a deficiency within the meaning of the Code.

Reg. 69, Art. 1231(a) (T.D. 3922, 1926). Cf. Reg. 65, Art. 1231(a). See Mim. 3374, V-1 C.B. 118; Mim. 3428, V-1 C.B. 119 (1926) (switch of position on the effect of an amended return).

2. 1945 Revisions (T.D. 5447, 1945 C.B. 251)

That the "amended return" referred to in these pre-1954 regulations was a late amended return, not a timely one, was made clear when the regulations were rewritten in

1945 to reflect an unrelated statutory change. The provisions that applied to both pre- and post-effective-date years contained the same, clarified language:

> Additional tax shown on an "amended return," so-called, filed after the due date of the return for the taxable year, is a deficiency within the meaning of the Code.

Reg. 111, § 29.271-1(a) and (b) (emphasis added). Thus, at least as far back as 1926, a taxpayer could reduce or eliminate a deficiency, and avoid penalties, by filing a timely amended return.

As written, these pre-1954 regulations did not specify whether the "due date of the return" included an extended due date. But a combination of statutory and regulatory changes beginning in 1954 clarified this point.

3. 1954 Changes (T.D. 6268, 1957-2 C.B. 858)

In the 1954 Code, Congress for the first time defined an "underpayment," for penalty purposes, separate from a "deficiency." New § 6653(c)(1) specified that in determining an underpayment,

> the tax shown on a return ... shall be taken into account only if such return was filed before the last day prescribed for the filing of such return, determined with regard to any extension of time for such filing ... [emphasis added].

This language expressly referred to extended due dates. However, since no mention was made of amended returns, it could have been interpreted as applying only to a situation in which a single, original return is filed on extension -- especially since the new regulations under the 1954 Code no longer referred to amended returns. See former § 301.6653-1(c), 1957-2 C.B. at 864.

4. 1977 Revisions (T.D. 7498, 1977-2 C.B. 473)

In 1977, however, two regulatory changes clarified that an amended return filed on extension is still considered as amending or superseding an original return.

The first change was to redefine a "deficiency" to include additional tax reported even on a late amended return as an amount "shown upon the return" (unless the taxpayer is protesting the additional tax). See § 301.6211-1(a); 1977-2 C.B. at 473. At the same time, however, in order to prevent taxpayers from avoiding penalties in situations involving late amended returns, former § 301.6653-1(c), defining an "underpayment" for

penalty purposes, was also amended, reintroducing the pre-1954 language:

> (c) *Definition of underpayment* --
>
> (1) *Income, Estate, and gift taxes.* [A]n underpayment for purposes of section 6653 and this section is --
>
> (i) the total amount of all deficiencies as defined in section 6211, if a return was filed on or before the last date (determined with regard to any extension of time) prescribed for filing such return,
>
> * * *
>
> However, for purposes of paragraph (c)(1)(i) of this section, any amount of additional tax shown on an amended return, so-called, filed after the due date of the return is a deficiency. [5]

5. Current Regulations (T.D. 8381, 1992-1 C.B. 374)

Finally, the regulations governing the "accuracy-related" penalty that replaced former § 6653 continue this treatment. Current § 6664 contains a uniform definition of "underpayment" for penalty purposes. The regulations under that provision go beyond prior law and permit taxpayers, in specified circumstances, to cure a (nonfraudulent) underpayment by filing a late, "qualified" amended return, prior to contact by the Service. In defining such an amended return, the regulations delineate what constitutes a timely amended return as well:

> A qualified amended return is an amended return ... filed after the due date of the return for the taxable year (determined with regard to extensions of time to file) ... ."

§ 1.6664-2(b)(2), (b)(4) (emphasis added); 1992-1 C.B. at 388. See § 6664(a)(1)(A).

E. Fraudulent Intent: King's Court

Consistent with this uniform, longstanding administrative practice in the context of determining "deficiencies" and "underpayments," the element of fraudulent intent -- along with an "underpayment," a prerequisite for imposing a fraud penalty -- is based on, and may be cured by, a timely, nonfraudulent amended return filed on extension. See King's Court Mobile Home Park v. Commissioner, 98 T.C. 511, 516-17 (1992). [6]

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[5] As discussed above, in 1978 the Service announced in Rev. Rul. 78-256 that the "tax shown on a return," for purposes of determining underpayments of estimated tax, includes tax shown on an amended return filed on or before an extended due date.

[6] "Petitioner's amended fiscal 1986 return was filed on or about December 29, 1986, well before the February 15, 1987, date set forth in the automatic extension of time to file. ... Thus, petitioner's amended fiscal 1986 return was timely filed and is petitioner's return for the year at issue. See section 6653(c) ... ." (Emphasis added.) In addition to § 301.6653-1(c), the court cited Haggar, Evans Cooperage (estimated tax penalty), and Goldstone v. Commissioner, 65 T.C. 113 (1975), an elections (continued...)

IV. Badaracco: Effect of Late Amended Return

In Badaracco, the Supreme Court resolved a longstanding judicial conflict concerning whether a taxpayer who has filed a fraudulent return can later, by filing a nonfraudulent amended return, terminate the indefinite limitations period in § 6501(c)(1) and start the running of the general 3-year period. The Court held that in these circumstances the "return" described in § 6501(c)(1) is the taxpayer's original, fraudulent return. In addition to reviewing the statutory scheme, and the purpose and function of § 6501(c)(1), the court observed that the Code does not explicitly provide for or require the filing of an amended return, which the Court characterized as "a creature of administrative origin and grace." 464 U.S. at 393.

The Badaracco opinion referred to, and was consistent with, an extensive body of law cited for the general proposition that an "amended return" is a nullity for most purposes (apart from refund claims). For example, without specific authorization an election required to be made on a "return" generally cannot be made or modified on an amended return. See, e.g., Riley; Pacific National Co. v. Welch, 304 U.S. 191, 194 (1938); Goldstone; Rev. Rul. 77-217, 1977-1 CB 64. A taxpayer cannot create Tax Court jurisdiction by filing an amended return reflecting a decrease in tax. Koch v. Alexander, 561 F.2d 1115 (4th Cir. 1977). The filing of a correct amended return does not cure an earlier defective filing so as to avoid the penalty for failure to file. Plunkett v. Commissioner, 41 B.T.A. 700, (1940), aff'd, 118 F.2d 644 (1st Cir. 1941). A fraud penalty may be imposed based on the filing of an initial, fraudulent, return, regardless of a subsequent, voluntary nonfraudulent amended return, see Plunkett v. Commissioner, 465 F.2d 299, 302-303 (7th Cir. 1972), and the filing of such an amended return does not reduce the underpayment for purposes of computing the penalty, George M. Still, Inc. v. Commissioner, 19 T.C. 1072, 1077 (1953), aff'd, 218 F.2d 639 (2d Cir. 1955); Rev. Rul. 56-54, 1956-1 C.B. 654. Finally, and significantly for present purposes, the filing of an amended return curing a 25% omission does not shorten the 6-year assessment period under § 6501(e). Goldring v. Commissioner, 20 T.C. 79 (1953). See also Houston v. Commissioner, 38 T.C. 486 (1963).

In all these cases, however, the "amended return" in question is a late amended return. Whether these authorities distinguish the Haggar rule explicitly, see, e.g.,

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[6](...continued)
case -- thus pulling together the various contexts in which the principle has been established.

Goldring, 20 T.C. at 82, [7] or, like Badaracco, simply discuss "amended returns" without reference to Haggar or the timely/untimely distinction, they cannot be read as intended to overturn or limit the Haggar rule.

The Houston opinion merits further discussion. In that case, the taxpayer's wife filed a timely joint return for 1953 in 1954, while the taxpayer was stationed abroad working for a United Nations agency during the Korean War. The return did not report his income from the agency, an omission of over 25%. In June of 1955 the taxpayer submitted another return for 1953, reporting the omitted income. Describing the 1955 document as "at best an amended return," the court, citing Goldring, held that the 25% omission exception applied. 38 T.C. at 489. In response to the taxpayer's argument that the second return was timely, because of the "combat zone" postponement provision now in § 7508, the court ruled that the provision did not apply where a return, although defective, was timely filed. Thus, the case does not involve a timely amended return.

Zellerbach and related authorities can be viewed as an exception to the Haggar rule in that, under Zellerbach, no amended return, timely or untimely, is "effective" -- in the sense that it can start or restart the assessment or refund period. However, it is possible to view a timely amended return as effective to modify or supersede an original return, under Haggar, and still treat it as relating back to the date of the original return, for timing purposes, under Zellerbach. In fact, the Zellerbach opinion does not treat the amended return as ineffective for all purposes: "[A] second return, reporting an additional tax, is an amendment or supplement to a return already upon the files, and being effective by relation does not toll a limitation which has once begun to run." 293 U.S. at 180 (emphasis added).

VI. Summary

Given that, under Haggar and related authorities, the statutory term "return" has uniformly been interpreted to include a timely amended return, in Uåvariety of contexts, and given that situations involving late amended returns have been and can be distinguished, the presumption is that Haggar applies in construing the term "return" in § 6501(c)(1) and (e) as well. This presumption might conceivably be overcome,

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[7] "Petitioners herein filed their amended returns more than a year after the due date. There is no suggestion that any extension was granted, and in any event the amended returns were filed long after the time amended returns might have been permitted. ... Had they been filed seasonably, the amended returns might have been treated as parts of the original returns. Haggar Co. v. Helvering ... ." 20 T.C. at 82 (emphasis added). See also Goldstone, 65 T.C. at 116.

however, if the application of Haggar were shown to be inconsistent with the purposes of those provisions.[8]

Taking first the situation in which both documents are filed prior to the original due date (Examples 1 and 5 above), it is clear that no significant governmental interest is harmed if taxpayers can correct fraud, or a 25% omission, by a timely amended return. Because § 6501(b)(1) deems the return due date to be the filing date in any event, the Service has the full 3-year period to examine a nonfraudulent or corrected return, and is not at a "special disadvantage."[9] In such situations taxpayers cannot use the Haggar rule to play the audit lottery, by filing a fraudulent or defective return but retaining the option to shorten the limitations period with an amended return if an examination seems imminent. See Goldring, 20 T.C. at 83. Cf. Badaracco, 464 U.S. at 394.

It could be argued that refusing to give effect to a timely amended return would be an incentive for taxpayers to file correct returns in the first instance. However, this argument loses force in the case of the exception for 25% omissions in § 6501(e), which does not incorporate an intent requirement and can apply to honest, non-negligent errors. Even in the case of fraud, an exception to Haggar for statute of limitations purposes is difficult to justify, as a behavior modification measure, when the penalty provisions specifically intended to address such behavior follow the Haggar rule.[10] If anything, application of Haggar in the statute of limitations context may function as a mild incentive for taxpayers to correct their returns in a voluntary, timely fashion.

Generally speaking, these considerations apply equally in situations like those in Examples 2 and 6, involving documents filed during an extension period. However, because, under Zellerbach, the limitations period begins with the filing of the first return, it can be argued that in these situations the Service may be at a slight disadvantage. For example, the period within which the Service could examine a corrected return might be

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[8] The Haggar opinion itself suggests that a different rule might apply where the purposes of the statute might be thwarted, or the interests of the Government harmed. See 308 U.S. at 394.

[9] Cf. Colony, Inc. v. Commissioner, 357 U.S. 28, 36 (1958). In fact, it can be argued that application of Haggar is specifically compelled in an original due date situation by the terms of § 6501(b)(1).

[10] The parallel between the statute of limitations and the corresponding penalty provisions has been emphasized in support of the Service's position regarding late amended returns: "It is established that a taxpayer who submits a fraudulent return does not purge the fraud by subsequent voluntary disclosure; the fraud was committed, and the offense completed, when the original return was prepared and filed." Badaracco, 464 U.S. at 394. It follows from this analogy that, in the case of a timely amended return, which does "purge the fraud," an extended assessment period should not apply.

effectively shortened -- by as much as 6 months in the case of a corporate taxpayer -- if the taxpayer filed the defective return immediately after the extension request, and waited until the extended due date to file the amended return.

In our view, this possibility does not call for a result that varies depending on whether the filing date has been extended (a difficult feat of statutory construction to begin with). Essentially, the possible reduction of the assessment period stems from the Zellerbach rule, and the Court addressed a similar objection in the Zellerbach opinion itself:

> In the argument for the Government much is made of the point that in giving effect for any purpose to the original return we cut down the period available to the Bureau for audit and assessment. The reduction, however, is not serious. ... The curtailment is too slight, the inconvenience too nearly negligible, to affect the process of construction.

172 U.S. at 180.

Likewise, in the present situations the Service can, and generally will, immediately assess any increased tax reported on the nonfraudulent or corrected amended returns. The question of a reduced assessment period, a limited reduction in any case, will normally arise only (1) if the Service mistakenly fails to make the additional assessment within the 3-year period, or (2) with respect to matters that would not, by themselves, justify a 6-year or unlimited assessment period. Further, any incentive for taxpayers to play the audit lottery is remote, since -- with the possible exception of certain situations, such as taxpayers under continual examination -- it is unlikely that an audit would commence prior to the extended due date in any event. Finally, consistent with the rule for penalties, which can be avoided by amending during a filing extension period, application of Haggar in the limitations context may encourage prompt, voluntary correction and compliance.

We have also considered whether application of Haggar could be justified in the case of the 25% omission exception in § 6501(e), but not in the case of fraud, under § 6501(c)(1). As discussed above, unlike § 6501(e), § 6501(c)(1) requires an intent to evade tax. Arguably, a situation in which, for example, a taxpayer makes an unintentional omission one day, but discovers and corrects it the next, reflects less need for an extended examination period than one in which the taxpayer originally intended to commit fraud. However, the policy argument is not strong, and we find no support in the statute, administrative interpretations, or case law for drawing such a distinction.

If you have questions concerning this advice, please contact Sandy Irving, of this office, at (202) 622-4930.

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