Office of Chief Counsel
Internal Revenue Service

memorandum

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RVHosler

date: DEC 17 1999

to: Chief, Examination Division, Southwest District
Attn: Jackie Topping, Case Manager
Craig Joines, Team Coordinator

from: District Counsel, Southwest District, Phoenix

subject: **Taxpayer: [redacted]**
Request for Advice

DISCLOSURE STATEMENT

This advice constitutes return information subject to I.R.C. § 6103. This advice contains confidential information subject to attorney-client and deliberative process privileges and if prepared in contemplation of litigation, subject to the attorney work product privilege. Accordingly, the Collection, Examination or Appeals recipient of this document may provide it only to those persons whose official tax administration duties with respect to this case require such disclosure. In no event may this document be provided to Collection, Examination, Appeals, or other persons beyond those specifically indicated in this statement. This advice may not be disclosed to taxpayers or their representatives.

This advice is not binding on Collection, Examination or Appeals and is not a final case determination. Such advice is advisory and does not resolve Service position on an issue or provide the basis for closing a case. The determination of the Service in the case is to be made through the exercise of the independent judgment of the office with jurisdiction over the case.

ISSUE

Is the taxpayer precluded from filing a claim for additional Investment Tax Credit (ITC) for the year [redacted] when the taxpayer and the Service have previously executed a Form 870, Waiver of Restrictions on Assessment and Collection of Deficiency in Tax and Acceptance of Overassessment, which provides that the taxpayer's return for the year at issue will be accepted with no change.

FACTS

[redacted] is a holding company which files a consolidated return. [redacted] is a

first tier subsidiary of [redacted] and accounts for approximately [redacted]% of the revenues and assets of [redacted]. This issue in this case relates solely to [redacted].

[redacted] is a public utility subject to regulation by the Arizona State Corporation Commission (ASCC) and the Federal Energy Regulatory Commission (FERC).

On [redacted], the [redacted] and [redacted] of [redacted] executed a Form 870, Waiver of Restrictions on Assessment and Collection of Deficiency in Tax and Acceptance of Overassessment. The waiver covered the years ended December 31, [redacted], [redacted], and [redacted]. At the time the waiver was executed, valid Forms 872, Consent to Extend the Time to Assess Tax, were in effect for the years covered by the waiver.

For the year [redacted], the waiver stated "No change with adjustments." [redacted]'s claimed ITC for the year was examined and accepted as claimed. The sole adjustment to [redacted]'s return consisted of decreasing a NOL carryback from [redacted] by $[redacted] and increasing a NOL carryback from [redacted] by $[redacted]. The Service posted a zero assessment to [redacted]'s account for [redacted] for the no change determination on [redacted].

At a meeting on [redacted], [redacted] stated that it intended to file a claim for additional investment tax credits[1] of $[redacted] for the years [redacted], [redacted], and [redacted]. The additional ITC results from the recomputation of [redacted]'s ITC in the transition years [redacted] through [redacted][2].

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[1] Prior to amendment in 1986, the tax code provided for an investment tax credit designed to encourage investment in certain long-lived assets by providing to the investing taxpayer a one-time tax credit of 10 percent of the cost of the property. I.R.C. § 46. Use of the credit, however, was not automatic. For example, if a taxpayer had a net operating loss, there would be no tax liability, and the credit could not be utilized. I.R.C. § 38(c). Such a credit was not necessarily lost but could be either "carried back" up to three years, or "carried forward" up to fifteen (15) years to reduce tax liabilities in those years. I.R.C. § 39(a).

[2] The 1986 amendments generally repealed the investment tax credit, I.R.C. § 49(a), an exception remained for "transition property", which is property purchased prior to 1986 but placed into service in 1986 or later. I.R.C. § 49(b)(1). After the 1986 amendments, the amount of the investment tax credit for transition property depended on when the property owner placed the property into service. Although transition property placed into service in 1986 provided the full 10 percent, transition property placed into service in 1987 provided a credit of 8.25

Currently, the tax years [redacted], [redacted], [redacted], [redacted], and [redacted] for [redacted] are open under consents to extend the time to assess tax. The Appeals Office and [redacted] are presently in the process of negotiating a comprehensive settlement for these years. The Service and [redacted] previously agreed to a settlement for the years [redacted] and [redacted]. The settlements for the years [redacted], [redacted], [redacted], [redacted], and [redacted] will be set forth on Forms 870-AD, Offer of Waiver of Restriction on Assessment and Collection of Deficiency in Tax and Acceptance of Overassessment. Under the expected terms of the Appeals Office settlement, [redacted] will have no regular tax liabilities prior to the year [redacted]. [redacted] will have an assortment of carryforwards and carryovers into [redacted]. All of those tax benefits will be utilized by [redacted] during the years [redacted], [redacted], and [redacted].

ANALYSIS

Respondent is authorized by I.R.C. § 7121 to enter into a written agreement "with any person relating to the liability of such person (or of the person or estate for whom he acts) in respect of any internal revenue tax for any taxable period." The foregoing section is the "exclusive procedure under which a final closing agreement as to the tax liability of any person can be executed." Estate of Meyer v. Commissioner, 58 T.C. 69, 70 (1972); see also Botany Worsted Mills v. United States, 278 U.S. 282, 288 (1929).[3]

Forms 870, Waiver of Restrictions on Assessment and Collection of Deficiency in Tax and Acceptance of Overassessment, and 870-AD, Offer of Waiver of Restrictions on Assessment and Collection of Deficiency in Tax and of Acceptance of Overassessment, are the general forms the Service utilizes for settlement agreements. Forms 870 and 870-AD do not constitute binding closing agreements under section 7121. The forms are

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percent, and transition property placed into service in 1988 or later provided a tax credit of only 6.5 percent. Similarly, the amendments effected a 35 percent reduction in the amount of unexpired investment tax credits that could be carried forward to 1988 or later. I.R.C. § 49(c)(2).

[3] All closing agreements shall be executed on forms prescribed by the Internal Revenue Service. I.R.C. § 301.7121-1(d). Three forms of closing agreement have been prescribed: (1) Form 866, Agreement as to Final Determination of Tax Liability; (2) Form 906, Closing Agreement as to Final Determination Covering Specific Matters; and (3) combined agreements which determine both tax liability and specific matters. Zaentz v. Commissioner, 90 T.C. 753 (1988); Rev. Proc. 68-16, 1968-1 C.B. 770.

merely waivers by taxpayer of the statutory notice requirements imposed upon respondent by section 6213(a). Consolidated Freightways, Inc. v. United States, 620 F.2d 862, 868 (Ct. Cl. 1980); Digby v. Commissioner, 103 T.C. 441 (1994); Wolf v. Commissioner, T.C. Memo. 1991-212.

Execution of a Form 870 does not waive the taxpayer's right to seek a refund in district court or in the United States Claims Court following payment of the amount listed on the Form. Nor does it effect the ability of the Service to seek additional deficiencies. See Philadelphia & Reading Corporation v. United States of America, 738 F. Supp. 143 (3d Cir. 1991); Wolf v. Commissioner, T.C. Memo. 1991-212; Maloney v. Commissioner, T.C. Memo. 1986-91. In this case, the form itself clearly says as much. The executed Form 870 reads as follows:

> I consent to the immediate assessment and collection of any deficiencies *(increase in tax and penalties)* and accept any overassessment *(decrease in tax and penalties)* shown above, plus any interest provided by law, I understand that by signing this waiver, I will not be able to contest these years in the United States Tax Court, unless additional deficiencies are determined for these years.

A Form 870 standing alone will not estop a taxpayer from later seeking a refund or credit. See Whitney v. United States, 826 F.2d 896 (9th Cir. 1987). Accordingly, either [redacted] or the Service could have subsequently modified the positions set forth in the Form 870.

The next question is whether [redacted] should be estopped from seeking an increase in its ITC for [redacted]. A Form 870 may be binding on a taxpayer if the Service changed its position in reliance on the taxpayer's representations. For equitable estoppel to be applied:

> (1) there must be false representation or wrongful misleading silence; (2) the error must originate in a statement of fact, not in an opinion or a statement of law; (3) the one claiming the benefits of estoppel must not know the true facts; and (4) that same person must be adversely affected by the acts or statements of the one against whom an estoppel is claimed.

Whitney v. United States, 826 F.2d 896 n.5 (9th Cir. 1987)[4].

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[4] Ninth Circuit precedent is the controlling case law for this case. As will be noted later, other circuits utilize a slightly different test for estoppel.

For the Service to successfully estop [redacted] from claiming the additional ITC, the Service must show that the four part test stated above is met. In the current case, it does not appear that the Service can meet requirement (1) because there is no evidence of any false representations or wrongful misleading silence. It is clear that requirements (2) and (3) are met. The issue is one of fact and the Service did not know whether Pinnacle was entitled to additional ITC. Finally, it does not appear the Service meets requirement (4) since there is no indication that the parties intended to reach a final binding settlement. If there was no intent to be bound, the Service could not justify relying on the Form 870.

The first requirement for application of estoppel is the need for evidence of a false representation or wrongful misleading silence. There is no evidence that [redacted] made a false representation or wrongfully remained silent. However, where a party has reasonably relied on a representation and a detriment to that party exists, a "false representation" is not always required. In Stair v. United States, 516 F.2d 560 (2d Cir. 1975), the court explained that a false representation was not necessary where the Service has reasonably relied on a representation and was adversely affected, particularly by the running of the statute of limitations. See also Robinson v. Commissioner, 100 F.2d 847 (6th Cir. 1938), cert. denied, 308 U.S. 567 (1939).

In this case, there is no evidence that the Service relied on any representations by [redacted]. The Form 870 does not put any limitations on claims for refunds or credits, except that such claims will not be litigated in the U.S. Tax Court. Accordingly, it does not appear that the Service can meet the first requirement to estop [redacted] from claiming additional ITC.

The fourth requirement for the application of estoppel is the need for the party asserting estoppel to be adversely affected by the acts or representations of the one against whom estoppel is sought. In Consolidated Freightways, Inc. v. United States, 620 F.2d 862 (Ct. Cl. 1980), the court held the government was not estopped from placing in issue the taxpayer's right to an ITC. The parties executed a Form 870 which stated it was not a final closing agreement and that its execution would not preclude the further assertion of deficiencies or a timely claim for refund or credit. The court reasoned that (1) Form 870 was merely a waiver of the statutory notice requirements for assessment and (2) no agreements purporting to bind the government were ever reached by the parties. Since the taxpayer was never prevented from asserting its claim, there was no reasonable reliance by the taxpayer to justify equitable relief.

Similarly, in the present case, the Form 870 executed by [redacted] indicates that neither [redacted] nor the Service were

bound by its terms. Thus, the Service could have asserted its claim and there could be no reasonable reliance by the Service to justify equitable relief.

In contrast, in Guggenheim v. United States, 111 Ct. Cl. 165 (1948), the court held that a taxpayer was estopped where the Form 870 stated it would be reopened only in the event of fraud, malfeasance, concealment or misrepresentation of material fact. The court found that the parties intended a settlement with no reopening except in the case of a particular occurrence. In D.D.I., Inc. v. United States, 199 Ct. Cl. 380, 467 F.2d 497 (1972), cert. denied, 414 U.S. 830 (1973), the court held that a taxpayer was estopped where a Form 870 and additional letters were found to constitute an offer and acceptance of a final settlement.

In the current case, no facts were presented which would indicate that the parties intended the Form 870 to constitute a final binding settlement. In fact, the circumstances indicate that the parties did not intend the form to constitute a final binding settlement, as the Form 870 itself states the Service could find additional deficiencies. As previously noted, the only restrictions on claims for refund or credit were that they not be litigated in the U.S Tax Court. Therefore, the Service would not be justified in relying on the form as a final settlement.

Although the Ninth Circuit applies the estoppel requirements set forth above, other courts have applied slightly different requirements. In Kretchmar v. United States, 9 Cl. Ct. 191 (1985) and Lowenstein v. United States, 27 Fed. Cl. 38 (1992), the taxpayers were equitably estopped from litigating refund claims because of their execution of Forms 870-AD.[5] Both courts held that the taxpayers should be held to their bargains because the following three criteria were established: (1) the execution of the Form 870-AD was the result of mutual concessions or compromise; (2) there was a meeting of the minds that the claims be extinguished; and (3) that to allow the taxpayer to reopen the case would be prejudicial given the government's reliance thereon. In both of these cases, the statute of limitations on additional assessments had expired. Prejudice to the government is presumed where the statute of limitations has passed on additional tax assessments for the years in question. Guggenheim v. United States, 111 Ct. Cl. 165 (1948). (It would obviously be inequitable to allow the plaintiff to renounce the agreement when the Commissioner cannot be placed in the same position he was when the agreement was executed.")

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[5] The Forms 870-AD stated that the taxpayer could not file a claim for refund or credit, except in the event of carrybacks.

In the current case, there is no evidence that the execution of the Form 870 was the result of "mutual concessions or compromise" or that there was a meeting of the minds that any claims be eliminated. There is no evidence that [redacted] or the Service conceded any issues in return for the execution of the Form 870. Nor is there any evidence that the parties mutually agreed the Form 870 resolved all claims. Accordingly, even under this test, [redacted] would not be equitably estopped from asserting its claims.

CONCLUSION

A Form 870 standing alone will not prevent a taxpayer from later seeking a refund or credit. For equitable estoppel to be applied (1) there must be false representation or wrongful misleading silence; (2) the error must originate in a statement of fact, not in an opinion or a statement of law; (3) the one claiming the benefits of estoppel must not know the true facts; and (4) that same person must be adversely affected by the acts or statements of the one against whom an estoppel is claimed.

In this case, there is no evidence that [redacted] made a false representation or was wrongfully silent. Further, there is no evidence that the Service was adversely affected by the acts or statements of [redacted]. Therefore, it is our view that [redacted] is not precluded from filing a claim for additional Investment Tax Credit for the year [redacted].

We consider the statements of law expressed in this memorandum to be significant large case advice. Therefore, we request that you refrain from acting on this memorandum for ten (10) working days to allow the Assistant Chief Counsel (Field Service) an opportunity to comment. If you have any questions regarding the above, please contact me at (602) 207-8056.

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