

M e m o r a n d u m**465.0827**

To: Petitions (CWP)

Date: June 26, 1979

From: Legal (DJH)

Subject: P--- A--- Inc.
SR -- XX-XXXXXX

This is in reply to your memo of May 31, 1979 which refers to an adjusted FBO dated March 28, 1979 on the above account. A determination was issued on December 28, 1978 for the period 10/1/75 to 3/31/77. The determination was not petitioned and became final.

The adjusted FBO was on a late protest basis; it results in an increase in tax. The increase results solely from sales in the fourth quarter of 1975. The FBO also reveals credits (decrease in tax) for the first and second quarters of 1976.

You realize that you cannot assert an increase or issue another notice of determination, but you question whether the taxpayer is entitled to the credits which are within the statute of limitations, or whether you may offset those credits against the debit in the fourth quarter of 1975 and thus make no adjustment.

In our opinion, no adjustment should be made. The tax increase (debit) in the fourth quarter of 1975 should be offset against the tax decreases (credits) in the first and second quarters of 1976, up to the amount of the credits, thereby resulting in an unchanged determination.

Section 6092(a) contains limitation provisions specifically applicable to determinations. In effect, Section 6902(a) states that no credit may be approved after six months from the date the determination becomes final. We interpret this to mean that, within the stated six-month period, the entire determination period is open to adjustment, i.e., debits or credit adjustment. But such adjustments are subject to Section 6563 which states that the Board may decrease or increase the determination before it becomes final. As the determination here is final, no increase is possible.

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While a decrease may result by cancellation of a portion of a determination under late protest procedures, this would not be the proper result here. If this taxpayer had filed a timely petition for redetermination, an increase in tax would have been asserted. A taxpayer who is given the discretionary benefit of a late protest is therefore in a better position than one who files a timely petition, but this benefit should not be further enlarged by allowing the determination to be reduced.

DJH:po

Attch: File