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INTERNAL REVENUE SERVICE
EMPLOYEE PLANS
TECHNICAL ADVICE MEMORANDUM
FOR MANAGER, EP EXAMINATIONS, PROGRAMS & REVIEW

T: EP: RA

Taxpayer's Name:

Taxpayer's Address:

Taxpayer's Identification Number:

Date of Conference:

Years Involved:

ISSUES

1. Whether Technical Advice Memorandum 8210014 should be revoked.
2. Whether relief under section 7805(b) of the Internal Revenue Code ("Code") should be granted to (the "Taxpayer").

FACTS

Taxpayer is a calendar year taxpayer and contributes to defined benefit pension plans and welfare programs pursuant to collective bargaining agreements with unions. Generally, monthly contributions are based on hours worked in the prior month. For [REDACTED] the taxpayer deducted under Code section 404 contributions for the current year (contributions of amounts based on hours worked during [REDACTED] plus amounts based on hours worked during the period from January 1 to August 31, [REDACTED]. These contributions were made by September 15, [REDACTED] the Taxpayer's due date (including extensions) for filing its return. The taxpayer has continued, through the present, extending the due date for its return and deducting for contributions made from September 16 of the prior year to September 15 of the current year. No accounting method change was sought.

Taxpayer's corporate predecessor received Technical Advice Memorandum 8210014 in November 1981 ("1981 TAM"). The facts in the 1981 TAM indicate that contributions were based on the hours worked by plan participants. The 1981 TAM incorrectly concluded that amounts contributed to union negotiated defined benefit plans during [REDACTED] but prior to the date (with extensions) that the [REDACTED] tax return had to be filed, could be considered to be on account of the [REDACTED] tax year and thus deductible in accordance with Code section 404(a)(6).

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Taxpayer was audited in [REDACTED] for the [REDACTED] years. Field Service Advice TL-N-8313-97, WLI #3 ("FSA"), issued on March 11, 1998, addressed whether the Service was precluded from pursuing a case relating to certain tax years based on a theory contrary to the 1981 TAM previously issued to the same taxpayer on the same issue. The FSA noted that the factors in section 17 of Revenue Procedure 98-5, 1998-1 I.R.B. 155 (the predecessor of section 18.06 of Revenue Procedure 2005-5, discussed below) were satisfied, and that accordingly, the 1981 TAM should continue to be applicable to the Taxpayer unless and until specifically revoked or modified in accordance with established procedures. However, the FSA also stated that the Taxpayer would not be justified in continued reliance on the 1981 TAM, given the recent Tax Court decisions in Lucky Stores and American Stores (discussed below). The FSA concluded that the Service is not legally precluded from disallowing the grace period deductions claimed by Taxpayer based on a theory contrary to the 1981 TAM previously issued to the same taxpayer on the same issue. The FSA further stated that, as a policy matter, it would be ill advised to pursue the issue in this case since the favorable 1981 TAM involved the identical issue and identical facts.

The 1981 TAM was never revoked. On October 12, 2004, a request for technical advice ("Request") was submitted by Large and Mid-size Business ("LMSB") through Employee Plans Examinations, Programs and Review. The Request does not indicate that any action was taken by the Service in response to the FSA. LMSB recommends in Exhibit A of the Request that the proposed revocation be effective prospectively.

LAW AND RATIONALE

Code section 404(a)(6) provides, in general, that a taxpayer shall be deemed to have made a payment on the last day of the preceding tax year if the payment is on account of (emphasis added) such tax year and is made not later than the time prescribed by law for filing the return for such tax year (including extensions thereof).

Lucky Stores, Inc. v. Commissioner, 107 T.C. 1 (1996), aff'd 153 F.3d 964 (9th Cir. 1998), cert. denied, 523 U.S. 1111 (May 17, 1999), held that the "bare language" of Code section 404(a)(6) precludes an employer from deducting, for its current taxable year, payments made to collectively bargained multiemployer plans that were attributable to compensation earned by plan participants after the end of that taxable year. The court focused on "the procedures that employers and administrators use to determine contribution amounts" (e.g., determined by the hours or weeks of employee service rendered during the immediately preceding month) and noted that each remittance was treated as the fulfillment of the employer's required contribution for a discrete month. The court concluded that such contributions, made in 1987, were not made "on account of" the employer's 1986 taxable year as required by Code section 404(a)(6).

American Stores Co. v. Commissioner, 108 T.C. 178 (1997), aff'd 170 F.3d 1267 (10th Cir. 1999), cert denied, 528 U.S. 875 (October 4, 1999), also addressed the issue of whether certain payments to collectively bargained multiemployer plans made after the close of the taxable year, calculated based on work performed by covered employees after the close of the taxable year, were made "on account of" the taxable year. The court stated that the very purpose of including the "on account of" requirement in a statute such as section 404(a)(6) is to ensure that grace-period deductions claimed for a particular taxable year are in every respect subject to maximum deduction limits in the same way that a contribution made on the last day of the taxable year would be. The court concluded that the taxpayer may deduct as "on account of" its 1988 fiscal taxable year only those grace-period contributions which were attributable to services performed during its taxable year.

Section 7805(b) of the Code provides that the Secretary may prescribe the extent to which a ruling or regulation, relating to the internal revenue laws, shall be applied without retroactive effect.

Section 18.06 of Revenue Procedure 2005-5, 2005-1 I.R.B. 170 ("Rev. Proc. 2005-5"), states in pertinent part that, generally, a TAM that modifies or revokes another TAM is not applied retroactively either to the taxpayer to whom or for whom the TAM was originally issued, or to a taxpayer whose tax liability was involved directly in such TAM if: (1) there has been no misstatement or omission of material facts; (2) the facts at the time of the transaction are not materially different from the facts on which the TAM was based; (3) there has been no change in the applicable law; (4) in the case of a letter ruling, it was originally issued on a prospective or proposed transaction; and (5) the taxpayer directly involved in the TAM acted in good faith in relying on the TAM, and the retroactive revocation would be to the taxpayer's detriment.

Section 19.01 of Rev. Proc. 2005-5 provides that the Commissioner or the Commissioner's delegate has the discretion to prescribe the extent, if any, to which a technical advice memorandum ("TAM") will be applied without retroactive effect.

With respect to Taxpayer, the facts submitted in the Request and also reflected in the 1981 TAM state that monthly contributions are based on hours worked in the prior month. Under Code section 404(a)(6), such contributions are not made on account of the employer's current taxable year. For example, if the current taxable year is 2007, deductions for that year could not be taken for contributions made in 2008 (other than in January) based on employee service rendered during the immediately preceding month. Despite the language of section 404(a)(6), the 1981 TAM's conclusion was incorrectly favorable to Taxpayer.

At the time the 1981 TAM was issued, the Service had all the information necessary to dispose of the issue correctly. There has been no change in the applicable law. Moreover, the Taxpayer and its authorized representatives could reasonably expect to, and in fact did, rely on the 1981 TAM as a declaration by the Service that the Taxpayer was allowed to take deductions for contributions made after the close of the Taxpayer's tax year. The Taxpayer's right to rely on the 1981 TAM was not affected by the FSA because the FSA stated that the 1981 TAM should continue to be applicable to the Taxpayer until revoked or modified, neither of which has occurred. The Taxpayer was therefore entitled to believe that its audit in 1997 was concluded in its favor. We also note that the Tax Court cases cited in the FSA were appealed by the taxpayers involved. Accordingly, the Taxpayer meets the criteria for relief under section 7805(b) of the Code.

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CONCLUSION

1. The 1981 TAM is revoked.
2. The Taxpayer is entitled to rely on the 1981 TAM and is entitled to relief under section 7805(b) of the Code. Accordingly, this technical advice memorandum is applied without retroactive effect. The revocation of the 1981 TAM will be prospective in application, commencing with the first taxable year ending after the date of this technical advice memorandum.