



DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224
May 9, 2000

OFFICE OF
CHIEF COUNSEL

Number: **200043005**
Release Date: 10/27/2000
CC:DOM:FS:PROC
TLN-6057-99
UILC: 6611.10-00

INTERNAL REVENUE SERVICE NATIONAL OFFICE FIELD SERVICE ADVICE

MEMORANDUM FOR DISTRICT COUNSEL, NEW ENGLAND DISTRICT, BOSTON
CC:NER:NED:BOS

FROM: Deborah A. Butler
Assistant Chief Counsel (Field Service)
CC:DOM:FS -

SUBJECT: Claim for Additional Interest

This Field Service Advice responds to your memorandum received February 9, 2000. Field Service Advice is not binding on Examination or Appeals and is not a final case determination. This document is not to be cited as precedent.

LEGEND

Taxpayer =

Year 1 =

Year 2 =

Year 3 =

Year 4 =

Year 5 =

Date 1 =

Date 2 =

Date 3 =

Date 4 =

\$ a = \$

Date 5 =

\$ b = \$

Date 6 =

\$ c = \$

Date 7 =

\$ d = \$

Date 8 =

\$ e = \$

Date 9 =

\$ f = \$

Date 10 =

\$ g = \$

Date 11 =

\$ h = \$

ISSUES

1. Whether, under the described circumstances, the taxpayer is entitled to a refund of additional overpayment interest.
2. Whether under the described circumstances there is an administrative means by which the taxpayer may seek a refund of additional overpayment interest.

CONCLUSIONS

1. Under the circumstances, no additional overpayment interest may be allowed to the taxpayer, in light of the application of I.R.C. section 6611(b)(1).
2. No.

FACTS

An examination of the taxpayer resulted in a finding that there was a deficiency in tax due for Year 1. Overpayments were due to the taxpayer for Year 3, Year 4, and Year 5. Based on the agreed deficiency determination for Year 1, the Service transferred overpayment credits of tax to the Year 1 account. A transcript of the taxpayers' account reflects the following transactions. On Date 1, \$ a was transferred to the Year 1 account from the Year 3 account. On Date 2, \$ b was transferred to the Year 1 account from the Year 4 account. On Date 3, \$ c was transferred to the Year 1 account from the Year 4 account. On Date 4, \$ d was transferred to the Year 1 account from the Year 5 account. On Date 5, \$ e was transferred to the Year 1 account from the Year 5 account. On Date 6, \$ f was transferred to the Year 1 account from the Year 3 account. On Date 7, \$ g was transferred to the Year 1 account from the Year 3 account. No overpayment interest was credited to the Year 3 account before the overpayment credits were transferred to the Year 1 account.

Within the Year 1 account, however, the taxpayer claims that deficiency interest was calculated without taking into account the dates on which the transferred credits became available. The taxpayer now alleges that this was an error, and that the result of this error was an assessment of excessive deficiency interest. The taxpayer concedes that the period of limitations for claiming a refund of the excessive deficiency interest for Year 1 has now expired. Instead, casting its claim as a claim based on an account stated theory, the taxpayer argues that the Service had the use of its money for the period during which overpayment interest was owed to it but was not paid or credited to its account for Year 3. Specifically, the taxpayer claims it should be allowed overpayment interest on the amount of \$ a

from the date the overpayment became available on Date 1 to Date 8, the date the taxpayer alleges the credit was actually applied to the Year 1 account.¹ In addition, the taxpayer seeks to recover accrued interest on that amount from Date 8, until the alleged overpayment is paid. It calculated this amount, as of Date 9, to be \$ h. Taxpayer made an informal claim administratively to the Service in a letter dated Date 10. The Service responded by letter dated Date 11. In that letter the Service stated that a claim for additional interest on an overpayment is not subject to an administrative claim for refund, and that there is no administrative remedy for the taxpayer's complaint. The letter advised the taxpayer that it could file suit "within the six year statute" of 28 U.S.C. section 2401 (a), and that the six year period was not extended by the Service's administrative consideration of the case. The taxpayer sought confirmation of this position from its examining agents, who in turn sought confirmation from your office.

LAW AND ANALYSIS

1. Whether the taxpayer has a claim for additional overpayment interest.

The Service is authorized to refund overpayments of tax to taxpayers under section 6402(a). An overpayment of tax is the amount by which the tax payments made by a taxpayer exceed the taxpayer's liability for taxes, interest and penalties for a given type of tax and tax period; there is no overpayment until the entire amount of tax is satisfied. See Treas. Reg. § 301.6401-1(a). An overpayment can result from the overpayment of estimated taxes, carrybacks of net operating losses or other adjustments made on an amended return, adjustments made as the result of an audit, or by the payment of tax that is assessed or collected after the relevant limitations period has expired. See Interest Handbook, IRM § 121.1.4.2. Overpayments of tax can be refunded to a taxpayer at the request of the taxpayer in a formal or informal claim for refund or upon the Service's initiative. Treas. Reg. § 301.6402-2. In lieu of actually refunding such overpayments to a taxpayer, section 6402(a) also allows the Service to credit an overpayment against existing liabilities when it provides:

In the case of any overpayment, the Secretary, within the applicable period of limitations, may credit the amount of such overpayment, including any interest thereon, against any liability in respect of an internal revenue tax on the part of the person who made the

¹ The transcript reflects that the credit transfers detailed above were actually processed during the third week of 1995. We assume for purposes of this discussion that the taxpayer has chosen Date 8 based on the date it agreed to the assessment of the agreed deficiency. Since the date is not material to the result reached here, we have not ascertained the source of Date 8.

overpayment and shall, subject to subsections (c) or (d), refund any balance to such person.

No credit or refund of an overpayment can be made, however, after the expiration of the statute of limitations on refunds unless, before the expiration of the statutory period, the taxpayer files a timely claim for refund with the Service. Section 6511(b)(1).

Treas. Reg. § 301.6611-1(h) defines "due date" in a number of situations for purposes of computing interest. In general, the term "due date" means the last day fixed by law or regulations for the payment of the tax, determined without regard to any extension of time, and not the date of a notice and demand for payment issued by the Service. Treas. Reg. § 301.6611-1(h)(2)(i). In the case of a credit against interest that accrues for any period beginning on or after December 31, 1982, such interest is due as it economically accrues on a daily basis, rather than when it is assessed. Treas. Reg. § 301.6611-1(h)(2)(v). In the case of a credit against an additional amount, addition to the tax, or assessable penalty, the due date is the earlier of the date of assessment or the date from which such amount would bear interest if not satisfied by payment or credit. Treas. Reg. § 301.6611-1(h)(2)(vi).

When, as in this case, an overpayment is credited against another tax liability, section 6611(b)(1) provides that interest is to be allowed and paid on the overpayment "from the date of the overpayment to the due date of the amount against which the credit is taken." In this case, the taxpayer's Year 1 tax liability is "the amount against which the credit is taken." Section 6611(b)(1). Payment of the Year 1 tax liability was due March 15, Year 2. Treas. Reg. § 301.6611-1(h)(2)(i). Because the due date for payment of the Year 1 tax liability, March 15, Year 2, preceded the date, Date 1, on which the overpayment for Year 3 arose, there was no period on which overpayment interest was allowable. Section 6611(b)(1). In contrast, section 6611(b)(2) allows interest on overpayments from the date the overpayment arises, until a date preceding the date of a refund check by no more than 30 days. The taxpayer would have been entitled to overpayment interest if its Year 3 overpayment had been refunded to it, rather than credited against the agreed deficiency for Year 1. See Rev. Proc. 84-58, 1984-2 C.B. 401.

We find further support for this conclusion by considering the interdependence between I.R.C. sections 6601 and 6611. Section 6601(a) provides that interest on an underpayment of tax that is not paid on or before the last date prescribed for payment accrues from the prescribed payment date until the date on which the tax is paid. Section 6601 (e) provides that the interest on any tax-

shall be assessed, collected and paid in the same manner as taxes. Any reference in this title ... to any tax imposed by this title shall be deemed to refer to interest imposed by this section on such tax.

Underpayment interest on a tax may be assessed and collected at any time during the period within which the tax to which such interest relates may be collected. See section 6601(g). Under this provision, the agreed deficiency would accrue interest from the due date of the return for which it was due until it was paid.

To parallel section 6611(b)(1), section 6601(f) provides that:

[i]f any portion of a tax is satisfied by credit of an overpayment, then no interest shall be imposed under this section on the portion of the tax so satisfied for any period during which, if the credit had not been made, interest would have been allowable with respect to such overpayment.

Interest on the agreed deficiency for Year 1 began to run on the due date of the Year 1 tax payment, March 15, Year 2, and continued to accrue until the liability was paid in full. On Date 1, the date on which the Year 3 overpayment became available to be applied to the Year 1 agreed deficiency, interest stopped accruing on the portion of the agreed deficiency that was paid by the credit transfer. Interest on the agreed deficiency for Year 1 continued to accrue, from Date 1, until the agreed deficiency was paid in full. Taxpayer claims that date is Date 8. Under section 6601(f), since overpayment interest was not allowed after Date 1, on the Year 3 overpayments, accrual of underpayment interest on the Year 1 agreed deficiency that was paid with the Year 3 overpayment should likewise have stopped, to the extent the liability was paid, as of Date 1. Although we have not reviewed the interest computations, we were advised, for purposes of providing this advice, that the Service assessed and collected underpayment interest on the Year 1 agreed deficiency for the period after Date 1. We do not know the date on which the Service stopped accruing interest on the Year 1 agreed deficiency.

It has been long established that the crediting of an overpayment of tax from one year against an underpayment of another tax liability constitutes a payment of tax as effectively as a payment of the underpaid tax in cash. McEachern v. Rose, 302 U.S. 56 (1937); United States v. Swift & Co., 282 U.S. 468, 475 (1931); United States v. Botany Worsted Mills, 98 F.2d 880, 883 (3d Cir. 1938). Inasmuch as the amount of the credit is transferred from the overpaid account as a full or partial payment to the underpaid account, the credited amount ceases to be a payment in the overpayment account. In this case, the tax liability for Year 3 was no longer overpaid once the Service credited the overpayment amount in that account to the agreed deficiency account for Year 1.

Once an overpayment has been credited in payment of another tax liability, the proper remedy for contesting the validity and legality of the tax against which the overpayment has been credited lies in a timely claim for refund of the tax paid by means of the credit. Treas. Reg. § 301.6402-2; see Donahue v. United States, 33 Fed. Cl. 600, 609 (1995). A claim must be filed within two years from the date on which the tax was paid. Section 6511(a). For purposes of claiming a refund, the payment of a tax deficiency for one year is made when the overpayment from another tax year is actually credited to the deficiency year. See Republic Petroleum Corporation v. United States, 613 F.2d 518, 525 n.19 (5th Cir. 1980); Donahue v. United States, 33 Fed. Cl. 600 (1995); Bazargani v. United States, 92-1 U.S.T.C. ¶ 50,312 (E.D. Pa. 1992); Rev. Rul. 56-506, 1956-2 C.B. 959. It is undisputed that the period of limitations on the making of a refund claim for Year 1 has expired.

Relying upon the section 6601(e)(1) prescription that references to tax also refer to underpayment interest on such tax, the United States Court of Federal Claims has held that a taxpayer is required to follow the refund procedures for taxes with respect to claims for refund of underpayment interest before any suit can be filed to recover underpayment interest: "deficiency interest has been so closely braided to principal that it has been deemed an integral part of the tax." Alexander Proudfoot Co. v. United States, 454 F.2d 1379, 1382 (Ct. Cl. 1972). In that case, the court expressly rejected the taxpayer's argument that the refund procedures of the Code do not apply to underpayment interest. Instead, the court held that the general provisions governing suits against the government, including the 6-year statute of limitations provided in 28 U.S.C. § 2501, apply. Citing the acknowledged purposes of the refund claim requirement and the shorter limitations period for tax refund suits -- to prevent surprise, to give adequate notice to the Service of the nature of the claim, and to allow the Service to address the claim administratively prior to litigation -- the court observed, "All of these goals are advanced by adhering to the claim requirement (as well as truncated limitations) even where deficiency interest alone is at stake." Alexander at 1383 (emphasis added).

Taxpayer has styled its claim as a claim based on an account stated theory for the recovery of additional overpayment interest on the overpayment for Year 3. This argument disregards the fact that the overpayment was properly credited to the agreed deficiency for Year 1. Once the overpayment was applied to that agreed deficiency, there was no longer any overpayment in the account for Year 3 that was subject to refund or to the accrual of interest. The only overpayment interest provided under section 6611 is that allowable under section 6611(b)(1) or 6611(b)(2). Section 6611(b)(1) provides for the payment of interest on an overpayment only when the overpayment is credited to a tax liability for a year subsequent to the year the overpayment arises. Section 6611(b)(2) provides for the payment of interest from the date of an overpayment to the date thirty days

before a refund check is issued to the taxpayer. However, in this example, section 6611(b)(1) does not provide for the payment of interest on the overpayment. Since the Internal Revenue Code does not provide for interest to be paid on an overpayment where the overpayment is credited to a prior year's liability, no interest may be paid to the taxpayer. Section 6611(b)(1). This result is the same whether the taxpayer describes its complaint as a claim based on an account stated theory or a claim for refund.

2. Whether under the described circumstances there is an administrative means by which the taxpayer may seek a refund of additional overpayment interest.

A suit for the recovery of an account stated brought under 28 U.S.C. 2401 is based on the common law concept that an implied contract arises when the Service, as debtor, submits to the taxpayer, as creditor, a statement of the final balance due on an account and the creditor agrees to accept the proposed balance to close the account. West Publishing Co. v. United States, 198 Ct. Cl. 668, 675 (1972). To constitute an account stated, the Service must have agreed with the taxpayer that he has overpaid his taxes in a definite amount, and must have communicated to him its intention to repay. Id. A suit on an account stated theory must be brought within six years from the date the right of action first accrues. 28 U.S.C. 2401 & 2501. A cause of action for overpayment interest first accrues on the date the related credit is allowed, and this is the date the IRS authorizes the scheduling of an overassessment. See I.R.C. § 6407. See also Daube v. United States, 289 U.S. 367 (1933).

The proper method for a taxpayer to request additional overpayment interest is to file Form 843, Claim for Refund. However, a request filed by a taxpayer on Form 843 does not toll the six year statute of limitations. See Rev. Rul. 55-477, 1955-2 C.B. 498, superseded by Rev. Rul. 76-74, 1976-1 C.B. 388; Rev. Rul. 57-242, 1957-1 C.B. 452. Since the suit on an account stated is not a refund suit, there is no requirement imposed by the Internal Revenue Code that an administrative claim be filed. See 28 U.S.C. 2401, 2501; Bonwit Teller & Co. v. United States, 283 U.S. 258 (1931). We agree with your conclusion that such a claim should be considered as if it were a refund claim. It correctly communicated, however, the Service's position, that such a claim for additional overpayment interest does not extend the six year period for filing suit. See Rev. Rul. 57-242. To the extent that the examination personnel handling this case may believe that the Service will not administratively consider a claim for additional interest, or is prohibited from considering such a claim administratively, that belief is not correct.

The Service will consider an administrative claim for additional interest and could pay such additional interest were it determined to be due to the taxpayer. As noted above, however, this taxpayer is not entitled to a payment of additional interest.

CASE DEVELOPMENT, HAZARDS AND OTHER CONSIDERATIONS



Please call if you have any further questions.