

ACKNOWLEDGED SIGNIFICANT ADVICE, MAY BE DISSEMINATED

**Office of Chief Counsel
Internal Revenue Service**

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memorandum

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CAProhofsky TL-N-1768-97

date: SEP 4 1997

to: Associate District Counsel, Salt Lake City, CC:WR:RMD:SLA

from: Assistant Chief Counsel, CC:DOM:IT&A

subject: Significant Service Center Advice

This responds to your request for Significant Advice dated, May 23, 1997, in connection with questions posed by the Ogden Service Center.

Disclosure Statement

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ISSUES

- 1) Does a tax-decreasing entry on an amended return that also contains a tax-increasing entry constitute a refund claim under § 6402 of the Code?
- 2) Should the Service make refunds based on the tax-decreasing entries on an amended return when there is no overpayment because of offsetting adjustments also shown on the return?

CONCLUSIONS

- 1) A return or amended return that shows a net increase in tax does not constitute a valid claim for refund or credit since no overpayment is disclosed on the return or amended return.

- 2) The Service cannot make refunds based upon only tax-decreasing entries on amended returns where there is no overpayment.

FACTS

Amended returns that show a net increase in tax often contain both tax-increasing and tax-decreasing entries. Service Centers frequently receive these amended returns after the expiration of the period of limitation, although they are postmarked before expiration.

You have described two different views on how such an amended return should be handled. The first view is that the net increase in tax should be assessed because the period is extended pursuant to § 7502 and § 6501(c)(7). According to the second view, the tax-increasing entries on the return cannot be assessed because the period of limitation has expired. This view further provides that the Service must refund or credit amounts based solely upon the tax-decreasing adjustments because the period of limitation has been extended on these items by the timely mailed timely filed rule of § 7502.

DISCUSSION

Section 7502 does not apply to a timely mailed amended return that shows an additional tax due and that is received after the limitations period so as to extend the period under § 6501(c)(7). This is because taxpayers are not required to file amended returns showing an additional tax due. In fact, an amended return showing an additional tax due may be filed after the period of limitations has expired; therefore, such a return does not constitute a return required to be filed within a prescribed period. Thus, the first view articulated above should not be followed. Because § 7502 does not apply, the increase in tax should not be assessed.

Nevertheless, § 7502 would apply to an amended return that entails a claim for refund because taxpayers are required to file such returns within a prescribed period in order to retrieve overpayments of tax. Thus, you have asked whether the tax-decreasing entries on amended returns that show a net increase in tax constitute refund claims.

Pursuant to § 301.6402-3(a)(5) of the Regulations on Procedure and Administration, a properly executed individual, fiduciary, or corporation original income tax return or an amended return (on Form 1040X or Form 1120X if applicable) constitutes a claim for refund or credit within the meaning of § 6402 and § 6511 for the amount of overpayment shown on the return or amended return. For purposes of § 6511, the claim is

considered filed on the date the return or amended return is considered filed, except that if the requirements of § 301.7502-1 are met, the claim shall be considered as filed on the date of the postmark. A return or an amended return shall constitute a claim for refund or credit if it contains a statement setting forth the amount determined as an overpayment and advising whether such amount shall be refunded to the taxpayer or applied to the succeeding year's estimated taxes.

A return or amended return that shows a net increase in tax would not constitute a valid claim for refund or credit, under § 301.6402-3(a)(5), since no overpayment would be disclosed on the return or amended return. Nor could such a document be perfected as a claim. The concept of "perfecting" a claim arises in the context of an informal claim that is sufficient to toll the period of limitations, but that is otherwise insufficient to support the allowance of the claimed refund. A return or amended return that shows a tax due is not a claim for refund (informal or otherwise) that can be "perfected." See Clement v. United States, 472 F.2d 776 (1st Cir. 1973).

Your second question was whether the Service should make refunds based on an amended return when there is no overpayment because of offsetting adjustments shown on the return. The Service is not required to "unbundle" an amended return in order to treat the various items according to their respective periods of limitations. Even if unbundling was proper, the Service is nevertheless not required to make a refund under § 6402 unless the taxpayer has overpaid the tax. In this respect the situation would be the same as the situation in which the taxpayer files a timely claim for refund based on items that decrease the tax liability and, after the period of limitations under § 6501 has expired, the Service discovers other items that increase the tax liability. Because there is no overpayment, no refund can be made. "An overpayment must appear before refund is authorized. Although the statute of limitations may have barred the assessment and collection of any additional sum, it does not obliterate the right of the United States to retain payments already received when they do not exceed the amount which might have been properly assessed and demanded." Lewis v. Reynolds, 284 U.S. 281, 283 (1932), XI-1 C.B. 130.

Thus, neither of the suggested views is correct. Sections 7502 and 6501(c)(7) do not extend the period of limitations for an amended return that shows a net tax increase, received after the assessment period. Thus, the Service Center cannot make an assessment, as the first view suggests. However, in contradiction to the second view, the Service Center cannot make refunds based upon only the tax-decreasing adjustments. A tax-decreasing entry on an amended return that shows a net increase in tax does not constitute a refund claim under § 6402 of the

Code, and the Service cannot make refunds where there is no overpayment.

If you have any comments or further questions, please call Catherine Prohofsky at (202) 622-4930.

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by _____/s/_____
Michael D. Finley
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