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[Third Party Communication:

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**From:** [REDACTED]

**Sent:** Friday, November 17, 2023 10:45:29 AM

**To:** [REDACTED]

**Cc:** [REDACTED]

**Bcc:**

**Subject:** RE: Possible Barred Overpayment

Hi [REDACTED],

The question presented is whether the taxpayer's refund claim for an overpayment of tax in [REDACTED] is barred under Section 6512.

Section 6512(b)(3)(B) limits the Tax Court's jurisdiction to award refunds by limiting the amount of the refund to only the tax paid within the period which would be applicable under section 6511(b)(2), (c), or (d), if on the date of the mailing of the notice of deficiency a claim had been filed (whether or not filed) stating the grounds upon which the Tax Court finds that there is an overpayment. Section 6511(b)(2) limits the amount of a taxpayer's refund claim depending on whether the refund claim was filed within the three year period after they filed their return. If their refund claim was filed within the three year period, then their claim is limited to the amount of tax they paid in the three years (plus extensions) immediately preceding the filing of their claim. If their claim was not filed within the three year period or they never filed a return, then their claim is limited to the amount they paid in the two years (not including extensions) immediately preceding their claim. If they didn't file a claim, then you pretend that they filed a claim on the date the refund was allowed and then look to whether the claim would have been filed in the three year period.

In 1997, Congress added the following flush language under section 6512(b)(3): "In a case described in subparagraph (B) where the date of the mailing of the notice of deficiency is during the third year after the due date (with extensions) for filing the return of tax and no return was filed before such date, the applicable period under subsections (a) and (b)(2) of section 6511 shall be 3 years." The purpose of this addition was to give taxpayers the benefit of the lookback rule under section 6511(b)(2)(A) that applies to taxpayers who filed a claim for refund within the three year period after filing their return: a lookback of three years plus extensions in situations in which a taxpayer fails to file a return prior to receiving a SNOD. See H.R. Rep. No. 105-220, at 701 (1997) (Conf. Rep.).

In *Borenstein v. Comm'r of Internal Revenue*, 919 F.3d 746, 750 (2d Cir. 2019), the court further addressed the application of the section 6512(b)(3) flush language and its

reference back to section 6511. In *Borenstein*, the taxpayer's return was due on April 15, 2013, and by that date, she had made income tax payments for 2012, which ended up resulting in an overpayment. The taxpayer was granted a six-month extension (until October 15, 2013); however, she failed to file her return by that date and the IRS sent her a SNOD on June 19, 2015. The IRS argued that the flush language under section 6512(b)(3) applied only to taxpayers who received their SNOD in the third year after the extended due date for filing their return. This interpretation held that the three year period did not apply to taxpayers who received an extension, were issued a SNOD before filing a claim, and the SNOD was issued within between 1.5 and 2 years from the extended due date. Taxpayers in that situation had only a two-year lookback, which did not allow them to claim a refund if they paid their tax on the (non-extended) filing date. However, the court held that the section 6512(b)(3) flush language applies to taxpayers who received an extension to file and received a SNOD during the third year plus six months after the (non-extended) filing date. Taxpayers in this situation have a lookback of 3.5 years from the date on which the SNOD was issued.

claim here, falls within the six-month extension period after the third year. Under *Borenstein*, the flush language of 6512(b)(3) applies to any SNOD that is sent during the third year (plus extensions) after the original filing deadline. In this case, the flush language would apply to any SNOD sent to [REDACTED] between [REDACTED], and [REDACTED]. Because the SNOD was sent on [REDACTED], it falls within that time period and the applicable lookback period under section 6511(b)(2) would be 3 years and 6 months.

Therefore, even though [REDACTED] taxes were deemed paid on [REDACTED], because they were withheld from [REDACTED], these overpayments were within the 3 year and 6 month lookback period from when the SNOD was mailed and are thus, not barred.

Please let us know if you have any questions.

Thanks,

[REDACTED]

[REDACTED]

Attorney  
IRS, Office of Chief Counsel

[REDACTED]