



OFFICE OF
CHIEF COUNSEL

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

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MEMORANDUM FOR THE NATIONAL TAXPAYER ADVOCATE

FROM: Kirsten Wielobob *KW*
Acting Counsel to the National Taxpayer Advocate

SUBJECT: Taxpayer [REDACTED]

This is in response to a request that this office review and comment upon legal issues raised by the taxpayer identified above. We have addressed each issue individually and, where appropriate, attached supporting documents for your reference.

Issues

1. Is a Form 5601, Notice of Deficiency, bearing a stamped or facsimile signature a legally valid notice of an outstanding tax deficiency?
2. Does the failure to include a \$ [REDACTED] payment of tax in the notice of deficiency for the [REDACTED] tax year dated [REDACTED] render invalid the entire assessment of \$ [REDACTED] for that tax year?
3. Does a notice and demand addressed to the taxpayer and his wife that resulted in payment of the identified liability by the wife (who has no liability for the tax) constitute fraud? If so, should the IRS refund the sum paid, even though the refund statute of limitations has expired?
4. Did the taxpayer experience a deductible casualty loss in [REDACTED]?

Facts

According to information in a memorandum from Mark Campbell, Local Taxpayer Advocate, Virginia District, materials Mr. Campbell forwarded us and materials my office received from [REDACTED], we understand that, on [REDACTED] the Service

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issued notices of deficiency to [REDACTED] for the [REDACTED] income tax years, based on substitute returns filed by the Service. [REDACTED] filed a petition in Tax Court on [REDACTED] disputing the deficiency. The Tax Court dismissed the case in [REDACTED] because (1) [REDACTED] filed his petition [REDACTED] late and (2) it did not have jurisdiction with respect to [REDACTED].

In his various submissions, [REDACTED] does not appear to dispute that he failed to file tax returns for the years at issue and has not subsequently filed returns for the pertinent years. Further, he believes that there are no income taxes owed for the periods in which he did not file returns.

Discussion

1. Facsimile signatures

The first issue is whether a Notice of Deficiency, Form 5601, bearing a stamped or facsimile signature constitutes legally valid notice of an outstanding tax deficiency. Section 6212 of the Internal Revenue Code authorizes the Secretary or his delegate to sign and send notices of deficiency for specific types of tax deficiency. See also I.R.C. § 7701(a)(11)(B). Service Center directors are delegated the authority to sign and send a notice of deficiency. See Delegation Order No. 77 (attached). The authority to use a stamped, imprinted or facsimile signature on notices of deficiency is provided in IRM 4463.33 (also attached). The stamped signature of the Service Center Director on [REDACTED] notice of deficiency is in conformance with both the law and applicable Service procedure.

2. Conklin v. Commissioner

The second issue is whether the Service's failure to include a \$ [REDACTED] payment of tax in the notice of deficiency for the [REDACTED] tax year rendered the entire assessment of \$ [REDACTED] invalid. Apparently, [REDACTED] believes that Conklin v. Commissioner, 897 F.2d 1027 (10th Cir. 1990), supports the proposition that a notice of deficiency is invalid where a taxpayer partially pays a tax liability prior to the Service issuing a notice of deficiency that does not include the partial payment. As indicated and fully addressed in our memorandum dated September 8, 1999 (attached), that is not correct. Because [REDACTED] did not pay the tax in full prior to the Service issuing the notice of deficiency, the notice was not invalid. The notice may have been incorrect as to the amount of the tax deficiency, but a deficiency existed nonetheless. The \$ [REDACTED] payment reduced the amount of the original assessment, but did not invalidate the assessment.

3. Untimely refund claim

The third issue is whether a notice and demand addressed to [REDACTED] and his wife for [REDACTED] liability, which resulted in the payment of the liability by [REDACTED] constitutes fraud by the Service. [REDACTED] asserts that, because his wife had no liability for the identified periods, the notice and demand was fraudulent and, thus, he is entitled to a refund of the amount paid, even though the refund statute of limitations has expired. Your file does not contain a copy of the notice and demand at issue. For purposes of this memorandum, we will assume that a notice and demand was issued jointly to the taxpayer and his wife, that the taxpayer's wife had no liability for the periods identified in the notice and demand, and that [REDACTED] paid the liability.

If [REDACTED] had no liability for the periods identified in the Service's demand for payment, the notice and demand letter was incorrectly addressed. The taxpayer contends that this constitutes fraud. As with any allegation of fraud or false representation, the burden of proving fraud rests with the moving party. Therefore, [REDACTED] would have to substantiate some intentional action on the part of the Service designed to deceive the taxpayer's wife and to induce specific action (payment of the liability) that otherwise would not have been done. See generally Gardner v. Gardner, 527 N.W.2d 701 (Wis. App. 1994). None of the materials we reviewed corroborates [REDACTED] allegation of fraud.¹

Regardless of the fraud allegation, however, the Service is unable to refund [REDACTED] money. The period for asserting a refund claim is statutory. Section 6511(a) of the Internal Revenue Code provides that claims for refund must be filed within three years from the date the return was filed or two years from the time the tax was paid, whichever period expires later. Section 6511(b) provides that no refund shall be allowed after the expiration of the limitations period for the filing of a claim specified in section 6511(a).² In this case, because no return was filed, the taxpayer would have had to assert a claim for refund within two years from date

¹ According to the chronology provided by [REDACTED], a balance due notice addressed to [REDACTED] for \$ [REDACTED] was received by the [REDACTED] on [REDACTED]. The taxpayer contacted the Service, but the jointly addressed letters demanding payment continued to be received. [REDACTED] asserts that his wife was "terrified" and "unnerved" by the letters and mailed a personal check for \$ [REDACTED] (or \$ [REDACTED]) to the Service without his knowledge. This appears to be a better argument for duress than fraud, however, the result would be the same.

² There are a number of exceptions to the limitation periods in section 6511(b), however, none are applicable on the known facts of this case.

payment was made in mid-██████████ by the taxpayer's wife. The taxpayer apparently acknowledges that any claim for refund filed now would be inconsistent with the statutory requirements and thus, would be untimely. ██████████, however, seems to be seeking some "equitable" exception to the refund statute of limitations based on the allegedly fraudulent actions of the Service.

The Service does not have the authority to waive the statute of limitations for refunds under I.R.C. § 6511. See Angelus Milling Co. v. Commissioner, 325 U.S. 293, 296 (1945). Any exceptions to the limitations period identified in section 6511 appear in the statute itself and, as recently recognized by the Supreme Court, even when the equities weigh heavily in favor of the taxpayer, the provisions of the section 6511 cannot be tolled for "nonstatutory equitable reasons". United States v. Brockamp, 519 U.S. 347 (1997). The Court's holding in Brockamp reaffirms the position taken by numerous lower courts that addressed the theories of "equitable tolling" and "equitable estoppel" as they relate to tax claims. The courts have consistently recognized that hardships, mistakes, incorrect information, and detrimental reliance on incorrect information do not operate to suspend the refund limitations period.³ See Webb v. United States, 66 F.3d 691 (4th Cir. 1995) (fraudulent transfers by third parties from assets of the taxpayer resulting in wrongfully paid taxes did not entail taxpayer to a refund of amounts paid more than two years prior to the filing of refund claim); Burns v. U.S., 97-1 U.S.T.C. ¶ 50,331 (M.D. Fla. 1997) (being misled by IRS agent to believe that disability income was taxable does not allow time barred refund claim); Bryan v. U.S., 22 F. Supp. 232 (N.D. Okla. 1938) (concealment of overpayment of income tax by revenue agents does not stop the running of statutory period of limitations on filing refund claim). Accordingly, regardless of the circumstances surrounding the issuance of the notice and demand, ██████████ had two years from the date of payment to make a claim for refund.

4. Casualty loss claim

The fourth issue is whether ██████████ experienced a deductible casualty loss in the ██████████ tax year relating to his eviction from his home. We believe that he did not

³ In response to the decision in Brockamp, the IRS Restructuring and Reform Act of 1998 added subsection (h) to section 6511 of the Code. Section 6511(h) suspends the refund limitations period while (1) the taxpayer is unable to manage his/her financial affairs due to a medically determined mental or physical disability and (2) there is no party authorized to act in financial matters on behalf of the taxpayer during this period.

for two reasons. First, the taxpayer did not prove his losses. Second, the loss the documents show the taxpayer experienced is not a casualty loss for tax purposes.

[REDACTED]

taxpayer apparently was forcibly evicted from his residence, (where he asserts he also maintained [REDACTED], as a result of the enforcement of the [REDACTED] contends that his eviction was unexpected and that many of his personal and professional possessions "could not be salvaged from the unexpected and bitter seizure"

In asserting his entitlement to a casualty loss, [REDACTED] describes the eviction as "a personal disaster" and as "a major financial loss." It appears, however, that the taxpayer has not provided any proof of his losses or any support for his position that eviction gives rise to a deductible casualty loss. [REDACTED] seems to believe mistakenly that the burden rests with the Service to disprove his loss claims rather than on him to document his alleged losses. See New Colonial Ice Co. v. Helvering, 292 U.S. 435, 440 (1934); Bennett v. Commissioner, 139 F.2d 961 (8th Cir. 1944); Bartlett v. Commissioner, 114 F.2d 634 (4th Cir. 1940). Without proof, the taxpayer is not entitled to the casualty loss.

Further, while the taxpayer's eviction from his home may have been devastating personally, it is not the type of sudden, unexpected loss generally referred to or allowed as a casualty loss. To the extent the taxpayer is not compensated by insurance or otherwise, section 165(a) of the Code allows a deduction for losses sustained during the taxable year. Section 165(c) provides for losses in the case of an individual and limits those losses to those incurred in a trade or business, or losses unrelated to a trade or business, but related to transactions entered into for profit, or to losses not incurred in a trade or business, if such losses arise from fire, storm, shipwreck, or other casualty for the taxable year in which the loss is sustained. I.R.C. § 165(c)(1)-(3). Since the taxpayer did not file a return identifying the specific items lost or the amount of his claim, it is difficult to ascertain what type of loss claim the taxpayer is asserting. However, based on the taxpayer's continual reference to a casualty loss claim in the file documents and the overall personal

nature of the taxpayer's loss, we assume that [REDACTED] is asserting a subsection (c)(3) casualty loss claim.⁴

[REDACTED] eviction argument is fairly novel, but not unprecedented. In Washington v. Commissioner, 60 T.C.M. 258 (1990) (copy attached), aff'd, Washington v. Commissioner, 930 F.2d 919 (6th Cir. 1991) (unpub.), taxpayers who, following a foreclosure proceeding, were evicted from their residence for failing to pay outstanding mortgage liabilities argued that they were entitled to a casualty loss deduction. The taxpayers asserted that the eviction was unlawful and subsequently filed a casualty loss claim for \$ [REDACTED] based on both the eviction and the damage and theft of personal property during the eviction. The Tax Court determined that deductions for casualty losses are limited to losses that are caused by some sudden, unexpected, and external force. The court held that the taxpayers' "loss of their home and furnishings in their eviction was not caused by any sudden, unexpected, and external event, but by their own failure to make proper payments on their mortgage loan. Accordingly, petitioners are not entitled to deduct the value of their home and furnishings as a casualty loss on their...income tax return." Washington v. Commissioner, 60 T.C.M. at 260.

[REDACTED] we believe that the taxpayer is not entitled to a casualty loss under section 165(c)(3). See Washington, supra.

Conclusions

1. A Notice of Deficiency bearing a facsimile signature of a party delegated the authority to issue a notice of deficiency is a legally valid deficiency notice.

⁴ If [REDACTED] is asserting some type of business loss, [REDACTED] would have to substantiate that his residence was regularly used as a principal place of business, what the basis of the portion of the property used as a business was, and whether the eviction (and we assume subsequent sale of the property) provided any proceeds in excess of the basis to [REDACTED]. In other words, [REDACTED] would have to establish the actual loss.

2. The failure to include a partial payment amount in a notice of deficiency does not invalidate the total tax assessment and Conklin has no applicability on the facts of this taxpayer's case.

3. [REDACTED] has the burden to show that the Service fraudulently issued the notice and demand to Mrs. [REDACTED]. Regardless of the circumstances, however, the statute of limitations bars a refund of the amount paid by Mrs. [REDACTED].

4. Even if [REDACTED] had filed a return for [REDACTED], he would not be entitled to deduct as a casualty loss amounts related to his eviction without proof that he suffered specific losses. Further, losses of property related to an eviction from a personal residence in which the taxpayer was aware of the [REDACTED] [REDACTED] would not constitute casualty losses since the eviction was not a sudden, unexpected or external event.

Please call me if you have questions or need additional information.

Attachments (4)

cc: National Director, Customer Account Operations
Local Taxpayer Advocate, Virginia District