



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

OFFICE OF
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INTERNAL REVENUE SERVICE NATIONAL OFFICE FIELD SERVICE ADVICE

MEMORANDUM FOR:

FROM: Deborah Butler
Assistant Chief Counsel (Procedure & Administration)

SUBJECT: Accrual of overpayment interest

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

X =
X's Representative =

Year 1 =
Year 2 =
Year 3 =
Year 4 =
Year 5 =
Year 6 =
Year 7 =
Year 8 =
Year 9 =
Year 10 =
Year 11 =

Year 12 =

Year 13 =

LEGEND (continued)

\$a =

\$b =

\$c =

\$d =

\$e =

\$f =

\$g =

\$h =

\$i =

\$j =

\$k =

\$l =

\$m =

\$n =

\$o =

\$p =

\$q =

\$r =

\$s =

\$t =

\$u =

\$v =

\$w =

\$x =

\$y =

\$z =

\$aa =

\$bb =

\$cc =

\$dd =

\$ee =

\$ff =

\$gg =

ISSUE

Whether the Service must pay overpayment interest from March 15, Year 12 to March 15, Year 13, pursuant to I.R.C. § 6611, where the overpayment resulting from certain carrybacks is designated by the taxpayer as an advance payment of estimated tax before the overpayment was needed to satisfy taxpayer's estimated tax liability.

CONCLUSION

Where the taxpayer designates an overpayment resulting from certain carrybacks as an advance payment of estimated tax for a succeeding taxable year, that payment is considered as a voluntary anticipatory remittance, thus the taxpayer would not be entitled to interest on the overpayment from March 15, Year 12 through March 15, Year 13.

FACTS

In Year 11, the taxpayer incurred a net operating loss (NOL) of approximately \$a. A Form 1120 was filed on March 15, Year 12 for the Year 11 taxable year. On that same date, the taxpayer filed a Form 1139 ("First Form 1139") for the Year 11 taxable year that carried back \$b of the \$a NOL, as follows:

Taxable Year	NOL Carryback Amount	Decrease in Tax
Year 8	\$ c	\$ f
Year 9	\$ d	\$ g
Year 10	\$ <u>e</u>	\$ <u>h</u>
Total	\$ <u>b</u>	\$ <u>i</u>

As noted in the table above, the \$b carryback decreased tax by approximately \$i which resulted in an overpayment of \$i that was refunded to the taxpayer. The remaining \$j of the \$a NOL was available to be carried forward to the Year 12 taxable year, but the taxpayer did not carry this amount forward because the income tax return for that year was not yet due to be filed.

In December Year 12, the taxpayer filed a second Form 1139 ("Second Form 1139") for the Year 11 taxable year which recharacterized approximately \$k of the \$a NOL as a specified liability loss (SLL) under § 172(f) and carried the SLL back 10 years. The \$k SLL carryback amount consisted of the \$j unused portion of the NOL from the first Form 1139 and a \$l portion of the \$e NOL which had previously been

carried back to Year 10 on the First Form 1139. The effect of the Second Form 1139 on Years 1 through 4 can be summarized, as follows:

Taxable Year	NOL Carryback Amount	Decrease in Tax
Year 1	\$ m	\$ q
Year 2	\$ n	\$ r
Year 3	\$ o	\$ s
Year 4	\$ p	\$ t
Total	\$ <u>k</u>	\$ <u>u</u>

As noted in the table above, the \$k carryback decreased tax by approximately \$u which created an overpayment of \$u. However, because the taxpayer shifted \$l of the NOL from Year 10 to Years 1 through 4 (and due to a \$v payment of alternative minimum tax for Year 10), there was an \$x increase in tax for Year 10. The end result was a decrease in tax of approximately \$y (\$u minus \$x) and an overpayment in that amount.¹ The taxpayer requested a refund of \$w and elected to credit the \$ff remaining overpayment amount to its Year 12 estimated tax payments.

It should be noted that the remaining \$z of the \$a NOL which was previously carried back to Year 8, 9, and 10 was unchanged by the second Form 1139. Due to the filing of the Second Form 1139, there was no remaining NOL from Year 11 to be carried forward to Year 12.

The revenue agent's proposed adjustments disallow the § 172(f) carryback claimed on the Second Form 1139 which created deficiencies in Years 1 through 4. However, as a result of the disallowance of the § 172(f) carryback, a \$aa portion of the Year 11 NOL was available to the taxpayer which it chose to carry forward to Year 12.²

¹ As a result of the second Form 1139, general business credits became available in Year 1 through 4 and were carried back to prior taxable years. These amounts are of relatively insignificant value and are not included for the purpose of simplifying the discussion.

² The \$a NOL for Year 11 was adjusted to account for disallowance of bad debt expenses from a prior year and reduced by \$bb. The remaining \$cc (\$a minus \$bb) was carried back to Year 8 (\$dd) and Year 10 (\$ee) and carried forward to Year 12 (\$aa).

The taxpayer contends that overpayment interest should accrue on a \$gg portion of the \$ff overpayment credited to its Year 12 estimated tax payments from March 15, Year 12 through March 15, Year 13. The taxpayer cites Treas. Reg. section 1.301.6611-1(c)³ for the proposition that overpayments resulting from the carryback of losses earn interest from the due date of the return year for the year generating the loss (Year 11) and argues that overpayment interest should begin to accrue on March 15, Year 12. Alternatively, the taxpayer cites to Sequa Corporation v. United States, 99-1 USTC ¶ 50,379 (S.D.N.Y. 1998), which sets forth the use of money rule, and argues that overpayment interest should begin to accrue on March 15, Year 12, because the overpayment was money held by the government for which no corresponding tax liability was due.

LAW AND ANALYSIS

The taxpayer has characterized these facts as involving the use of money analysis as articulated in May Department Stores v. United States, 36 Fed. Cl. 680 (1996), acq., AOD CC-1997-008, and Sequa Corporation v. United States, 97-1 USTC ¶ 50,317 (S.D.N.Y. 1996), summary judgment granted by, dismissed by, 99-1 USTC ¶ 50,379 (S.D.N.Y. 1998). The facts in the instant case, however, are distinguishable from May Dept. Stores and Sequa in two respects. First, this case involves the taxpayer's right to overpayment interest under section 6611, unlike May Dept. Stores and Sequa, which involved the government's right to underpayment interest under section 6601. Second, the overpayments of tax applied in the instant case are not credit elects from one taxable year to the succeeding year as permitted under section §6402(b). Instead, the plaintiff has designated overpayments resulting from taxes paid prior to March 15, Year 11, as an advanced payment of the estimated tax liability for Year 12.

In May Department Stores, the taxpayer elected to credit an overpayment shown on its 1983 tax return to the succeeding year's estimated tax liability but did not attach a statement to its return indicating the installment to which the Service should credit the overpayment. A deficiency was determined for the taxpayer's 1983 tax year, and interest was assessed by the Service on the deficiency from the due date of the first installment in accordance with Rev. Rul. 84-58, 1984-1 C.B. 254. However, the taxpayer had made estimated tax payments sufficient to avoid the addition to tax imposed by section 6655 for 1984 for the first and second installments of estimated tax due for 1984. The Court of Federal Claims agreed with the taxpayers and held that interest on the deficiencies did not begin to accrue prior to the due date of the third installment of estimated tax, notwithstanding the government's application of

³ It appears the taxpayer intended to cite Treas. Reg. section 1.301.6611-1(e) which addresses refunds of income tax caused by a carryback.

the overpayments to the first installments of estimated tax for the succeeding tax years. To the extent the taxpayers had made sufficient payments to avoid the estimated tax penalty under section 6655 for the first and second installments of estimated tax without the application of the overpayments, the court relied on the use of money principles in concluding that the taxpayers were entitled to "offset" their deficiencies by their overpayments during the period between the first and third installments of estimated income tax. 36 Fed. Cl. at 689. The court found that the purpose of section 6601 is best served if interest begins to accumulate when a tax becomes both due and unpaid. "A taxpayer who timely pays his taxes is not penalized when the government erroneously refunds those monies. Rather, the taxpayer is charged interest only for the time he had the use of funds which rightfully belonged to the United States." *Id.* at 689, citing Avon Products, Inc. v. United States, 588 U.S. 342 (2nd Cir. 1978).

In the instant case, the taxpayer has not been assessed underpayment interest under section 6601, but is requesting interest on overpayments resulting from taxes paid prior to March 15, Year 11. If the taxpayer had elected to have an overpayment shown on its Year 11 return credited against its estimated tax liability for the next year under section 6402(b), as was the case in May Dept. Stores, the regulations would expressly preclude the payment of interest on such overpayment. Treasury Regulation § 301.6611-1(h)(2)(vii), provides:

If the taxpayer elects to have all or part of the overpayment shown by his return applied to his estimated tax for his succeeding taxable year, no interest shall be allowed on such portion of the overpayment credited and such amount shall be applied as a payment on account of the estimated tax for such year or the installments thereof.

See, also, Treas. Reg. § 301.6402-3(b)(5), which includes this same provision. The validity of these regulations and of the principle they establish has been upheld by several courts, including the Second Circuit and the Court of Claims. Avon Products, Inc. v. United States, 588 F.2d at 345, citing Martin Marietta Corp v. United States, 572 F.2d 839 (Ct. Cl. 1978); Owens-Corning Fiberglass Corp. v. United States, 462 F.2d 1139 (Ct. Cl. 1972).

The taxpayer has designated overpayments resulting from taxes paid prior to March 15, Year 11, as an advanced payment of the estimated tax liability for Year 12. The taxpayer apparently believes that to the extent its designation was not a credit election under section 6402(b), the regulation is inapplicable to its case and that the use of money principles articulated in Avon Products and May Dept Stores are applicable. However, as the court noted in Avon Products, overpayment interest is not the equivalent to underpayment interest, and "[a] taxpayer initially overpaying taxes has no one to blame but himself." 572 F.2d at 345. The court went on to

state that, if the taxpayer asks the government to treat the overpayment as a contribution to his tax for a succeeding taxable year, it is reasonable to consider that payment as a voluntary anticipatory remittance, and that the taxpayer would not be entitled to interest on the overpayment. Id., citing P. Lorillard Co. v. United States, 226 F.Supp. 694, 698 (S.D.N.Y.), aff'd., 338 F.2d 499 (2d Cir. 1964). Section 6611(d) provides that with respect to advance payments of tax, section 6513 (with the exception of section 6513(c)) shall be applicable in determining the date of payment for purposes of calculating overpayment interest. Section 6513(a) provides that an advance payment of tax shall be considered as paid on the last day prescribed for payment of tax and section 6513(b)(2) provides that any amount paid as estimated income tax for any taxable year shall be deemed to have been paid on the last day prescribed for filing the return under section 6012 for such taxable year without regard to an extension of time for filing. Thus, overpayment interest would not accrue on an advance payment of tax made by the taxpayer for its Year 12 taxable year until March 15, Year 13 (unextended return due date for Year 13).

Please call if you have any further questions.

By: _____
GEORGE E. BOWDEN
Special Counsel
CC:PA