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DEPARTMENT OF THE TREASURY
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FREV-113614-99

MEMORANDUM FOR DISTRICT COUNSEL, LOS ANGELES DISTRICT
ATTN: ROGER KAVE

FROM: Heather C. Maloy
Associate Chief Counsel
(Income Tax & Accounting)

SUBJECT: Section 7519 Required Payment

This responds to your inquiry concerning a required payment under § 7519 of the Internal Revenue Code.

ISSUE:

Whether a required payment under § 7519 is a tax for purposes of § 6511, which provides a period of limitation for a claim for credit or refund of an overpayment of any tax?

CONCLUSION:

A required payment under § 7519 is a tax and, therefore, the period of limitation under § 6511(a) on a claim for credit or refund of an overpayment of tax applies.

FACTS:

The taxpayer is an S corporation that elected under § 444(a) to have a taxable year other than its required taxable year. As such, the taxpayer became obligated to comply with the requirements of § 7519 and the regulations thereunder. That is, the taxpayer was required to annually file Form 8752, Required Payment or Refund Under Section 7519, and its predecessor, Form 720, Quarterly Federal Excise Tax Return, and to make required payments as necessary.

The taxpayer timely filed Forms 720 for [REDACTED] and [REDACTED] and made its required payments for those years, and timely filed Forms 8752 for [REDACTED] and [REDACTED]. It appears that Forms 8752 were not timely filed for [REDACTED] and [REDACTED], although the taxpayer contends that they were timely filed as attachments to its Forms 1120S. The Collection

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Division obtained the taxpayer's Forms 1120S for [REDACTED] and [REDACTED], but no Forms 8752 were attached. Thereafter, in [REDACTED], the taxpayer filed Forms 8752 for [REDACTED] and [REDACTED], filed amended Forms 8752 for [REDACTED] and [REDACTED], and filed Form 8752 for [REDACTED].

The Collection Division contends that under § 7519(b), the taxpayer must make a required payment for [REDACTED]. The taxpayer contends that the required payments it made for [REDACTED] and [REDACTED] resulted in a net required payment balance in excess of the amount determined under § 7519(b)(1) for [REDACTED] and thus that no required payment is due for that year. However, the Collection Division views § 6511 as barring a credit (or offset) for the [REDACTED] required payment by the total of the required payments made for [REDACTED] and [REDACTED] because the returns for the intervening years ([REDACTED] and [REDACTED]) were filed more than 3 years after the returns for [REDACTED] and [REDACTED] were filed and more than 2 years after the [REDACTED] and [REDACTED] required payments were made.

You have asked us to consider the narrow question of whether a required payment under § 7519 is a tax. If it is, then the period of limitation set forth in § 6511(a) on claims for credit or refund of an overpayment of a tax would apply to the credit (or refund) sought by the taxpayer.

LAW AND ANALYSIS:

Under § 444(a), an S corporation may elect a taxable year different than its required taxable year. Section 7519 provides, in general, that for any taxable year for which an election is in effect, an S corporation must make a required payment.¹

Under § 6511(a), a claim for credit or refund of an overpayment of any tax imposed by title 26 must be filed within 3 years from the time the return was filed or within 2 years from the time the tax was paid, whichever is later.

A tax has been defined as an enforced contribution, exacted pursuant to legislative authority in the exercise of the taxing power, and imposed and collected for the purpose of raising revenue to be used for public or governmental purposes. Whether a particular charge falls into the category of a tax depends upon its real nature. If it is in the nature of a tax, it is not material that it is called by a different name. The word "tax" should be given its ordinary and commonly accepted meaning. Rev. Rul. 71-49, 1971-1 C.B. 103 (holding that payments made to a public benefit corporation in lieu of paying real property taxes to a city or state are taxes). See also In re Farmers Frozen Food Company, 221 F. Supp. 385 (N.D. Cal. 1963), aff'd 332 F.2d 793 (9th Cir. 1964)

¹In general, a required payment is the adjusted highest § 1 rate times the net base year income, less the net required payment balance.

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(an assessment levied by a state agency on produce under a marketing order adopted pursuant to state law is a tax).

Clearly, the required payment imposed by § 7519 meets the definition of a tax as discussed above. We have carefully considered other arguments that might support a conclusion that a required payment is not a tax, but these are not persuasive. For example, there is language in § 7519 that arguably indicates that a required payment is not a tax.² One could draw from these provisions an inference that Congress did not intend for a required payment to be a tax except as specifically provided. However, these provisions are also perfectly consistent with the view that although a required payment is a tax, Congress simply wanted to provide special treatment for certain purposes, *e.g.*, that interest is not due on a refund and that certain penalties apply to the underpayment.

We also note that in Semmes, Bowen & Semmes v. United States, 30 Fed. Cl. 134 (1993), the court stated that “[a] required payment under § 7519 is not tax.” In Semmes, the plaintiff received a refund of a required payment and sought interest for the period between June 23, when the refund was received, and April 15, when the refund was due. Whether a required payment is or is not a tax was simply not relevant to the issue before the court because § 7519(f)(3) and § 1.7519-2T(a)(6)(iii) clearly state that no interest shall be allowed on a refund of a required payment, as discussed above. That the statement may be regarded as dictum is demonstrated by the court’s stated conclusion in denying the claim (“[s]ection 7519 and the regulations prohibit the relief sought by the plaintiff”), which relied on the law and regulations, not on characterization of the required payment.

Thus, we conclude that a required payment under § 7519 is a tax. The taxpayer appears not to have complied with § 6511(a), which requires that a claim for credit or refund of an overpayment of any tax shall be filed within 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever is later. We note that the taxpayer has stated that it did in fact file Forms 8752 for [REDACTED] and [REDACTED] attached to its Forms 1120S. Although the Collection Division failed to locate the Forms 8752 claimed to have been timely filed for those years, we strongly recommend that another search be undertaken for them before final resolution of this matter.

We have computed the required payments and allowable refunds for the years in question. Our figures are at variance with the figures shown in Table 2 of your memorandum. We recommend that the figures shown in the memorandum be recomputed. Finally, consideration should be given to whether at some point the

²Under § 7519(f)(3) a required payment is generally “treated” as a tax; similarly (f)(4)(B) states that for purposes of certain penalties a required payment shall be “treated” as a tax.

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taxpayer willfully disregarded the requirements of § 7519, thereby terminating its election under § 444(a) and becoming barred from making another election under § 444(a). See § 444(d)(2)(B) and 1.444-1T(a)(5)(C).

This memorandum is advisory only and is not intended to be conclusive as to the tax consequences for any specific taxpayer. For further discussion of any matter raised in our memorandum, please contact CC:IT&A:2 at (202) 622-4920.