



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

October 2, 2000

Number: **200101019**

Release Date: 1/5/2001

CC:PA:APJP:Br3

TL-N-1953-00

UILC: 6405.00-00

October 2, 2000

INTERNAL REVENUE SERVICE NATIONAL OFFICE FIELD SERVICE ADVICE

MEMORANDUM FOR DISTRICT COUNSEL, KENTUCKY TENNESSEE  
CC:SER:KYT:NAS

FROM: ASSISTANT CHIEF COUNSEL (ADMINISTRATIVE  
PROCEDURES & JUDICIAL PROCESS) CC:PA:APJP

SUBJECT: Modified expedited refund in Joint Committee case with  
agreed issue

This Field Service Advice responds to your memorandum dated April 27, 2000. 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.

**DISCLOSURE STATEMENT**

Field Service Advice is Chief Counsel Advice and is open to public inspection pursuant to the provisions of section 6110(i). The provisions of section 6110 require the Service to remove taxpayer identifying information and provide the taxpayer with notice of intention to disclose before it is made available for public inspection. Sec. 6110(c) and (i). Section 6110(i)(3)(B) also authorizes the Service to delete information from Field Service Advice that is protected from disclosure under 5 U.S.C. § 552 (b) and (c) before the document is provided to the taxpayer with notice of intention to disclose. Only the National Office function issuing the Field Service Advice is authorized to make such deletions and to make the redacted document available for public inspection. **Accordingly, the Examination, Appeals, or Counsel recipient of this document may not provide a copy of this unredacted document to the taxpayer or their representative.** The recipient of this document may share this unredacted document only with those persons whose official tax administration duties with respect to the case and the issues discussed in the document require inspection or disclosure of the Field Service Advice.

LEGEND:



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liabilities. Later during YEAR 1, Y redeemed some of the liabilities from X. In reporting the taxable gain or loss on the redemption, X's accountant confused the tax and book values of the liabilities. As a result, X erroneously overstated the taxable income it realized from the redemption on its income tax return for YEAR 1.

X reported its error on a timely-filed Form 1120X, Amended U.S. Corporation Income Tax Return, for YEAR 1, on which it claimed a refund of \$A, an amount in excess of \$1 million. X requested an expedited refund and is prepared to post a surety bond issued by an accepted surety company.

The Service has not surveyed X's return for YEAR 1. The Service expects to examine the return, but does not expect to complete the examination within the next year. The agent assigned to review X's refund claim has determined that the amended return is correct and that, without regard to other issues, X is entitled to a refund in the claimed amount. The error is a straightforward one that does not involve complex or technical issues.

## LEGAL ANALYSIS

### ISSUE 1: Modified expedited refunds

Section 6402(a) of the Internal Revenue Code is the sole Code provision that affirmatively authorizes the Service to make refunds to a taxpayer. Section 6402(a) provides that Service may "refund any balance" of any "tax overpayment" to a taxpayer after crediting the amount of such overpayment against any outstanding tax liabilities of the taxpayer. An overpayment, although not exhaustively defined in the Code, is the amount by which a payment of tax exceeds the correct total amount of the taxpayer's liability for a tax period or any amount that was assessed or collected after the expiration of the applicable period of limitations. Section 6401; Jones v. Liberty Glass Co., 332 U.S. 524 (1948). The Service is not required or authorized by statute to refund tax payments claimed by a taxpayer if an overpayment has not been determined. Lewis v. Reynolds, 281 U.S. 201 (1932).

Section 6511 provides the limitations period within which a taxpayer must file a claim for refund of any tax overpayments. The general procedures for making an claim for refund of income tax are found in Treas. Reg. §§ 301.6402-2, 3. The Service will issue a refund under these procedures only if it determines, based upon the grounds set forth and detailed in a timely filed refund claim, that there is an overpayment of tax.

Section 301.6402-4 of the regulations, which addresses a claim for refund included on a tax return, provides one exception to the necessity that the Service first determine that there is an overpayment of tax before making a refund. If an overpayment is claimed on the taxpayer's return to recover payments made before

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the return was filed, the Service may “credit or refund [payments in excess of the amount of tax shown on the return] without awaiting examination of the completed return and without awaiting filing of a claim for refund.” Implicit in this exception for refunds claimed on the return is the understanding that the Service must otherwise make a determination with respect to the validity of the taxpayer’s refund claim before crediting or refunding claimed overpayments under section 6402.

Section 6411 also provides a special procedure under which a taxpayer may apply for the tentative carryback adjustment of tax for a prior taxable year affected by certain carrybacks from another taxable year. Because the Service must quickly respond to these carryback applications, the Service makes a limited review of the application only for material omissions and computational errors before either disallowing the application or making a tentative refund under section 6411. Treas. Reg. § 1.6411-3(b). The application for a carryback adjustment must be filed within twelve months after the source year in which the loss or credit to be carried back arose. Except for purposes of determining overpayment interest, the application is not a claim for credit or refund. Section 6411 (last sentence); see Thompson v. United States, 99-1 U.S.T.C. ¶ 504,886 (Fed. Cl. 1999); Thrif-Tee, Inc. v. United States, 492 F.Supp. 530 (N.C. 1979), aff’d without pub. op., 638 F.2d 1351 (4<sup>th</sup> Cir. 1980). X’s refund claim is not an application under section 6411.

In general, except with respect to refunds claimed on the taxpayer’s original tax return or on an application for tentative carryback on which a taxpayer claims an overpayment of tax, the Service does not make refunds of tax, unless it has first determined that there is an overpayment of tax to be refunded. Refund claims submitted pursuant to Treas. Reg. §§ 301.6402-2 and 3, do not, in themselves, provide a basis for making a refund of tax, until the Service determines that an overpayment exists and that the taxpayer is entitled to the refund.

In this case, the Service is prepared to make a determination that X has overpaid its income tax for YEAR 1 based upon its claim for refund. Once the Service makes such a determination, it can refund the overpayment it has determined to X.

Because the anticipated refund exceeds \$1 million, the Service must first comply with section 6405(a), which supplements the refund authorization in section 6402 by prohibiting the refund or credit of income tax in excess of \$1,000,000 until after a report is submitted to the Joint Committee on Taxation. Neither section 6405 nor the Joint Committee Handbook permit the making of refunds that are not authorized under section 6402.

The provisions of IRM 4.3.5, the Joint Committee Handbook (Rev. 4/30/99), provide the Service’s current procedures for submitting proposed refunds for approval by

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the Joint Committee in implementation of section 6405(a). Under the normal Joint Committee review procedure, a report is prepared and a case is submitted for Joint Committee review only if there is a net overpayment to be refunded or credited to the taxpayer in excess of \$1 million after the Service has completed an examination of one or more tax years. A “regular report” is used if refunds have already been made (e.g., in response to a section 6411 tentative refund claim) so that less than \$1 million is left to be refunded, and an “expedited report” is made if there is a net unpaid refund in excess of \$1 million to be made. See IRM 4.3.5.1.2; 4.3.5.5.2; and 4.3.5.5.3. A “supplemental report” is filed if further adjustments are made after one report has been filed. See IRM 4.3.5.5.5.

IRM 4.3.5.5.4 also provides for a “modified expedite refund report” to be prepared when the Service has not completed action on a case. Chapter 6 of the Joint Committee Handbook contains the procedures for using the modified expedited report. Per IRM 4.3.5.5.4, the modified expedite refund report may be used when there are “unagreed issues, as shown in Section 6.2” or “unexamined source years, as shown in section 6.3.” As defined in section 6.2, cases involving unagreed issues are those in which the taxpayer and the Service are prepared to make a partial agreement for the assessment or abatement of some tax liabilities without resolving all of the pending issues for a tax period. Cases involving unexamined source years are, per section 6.3, those in which the Service and the taxpayer have resolved the issues for the tax year with the exception of carrybacks or carryforwards from other “source years” that are still being examined. In both situations, the modified procedures are authorized for use in obtaining Joint Committee approval for an “expedited refund” without waiting for the completion of survey or examination action to be completed. IRM 4.3.5.6.5.

Chapter 6 of the handbook requires certain conditions to be met before a “modified expedited refund report” can be prepared and sent to the Joint Committee:

- A. There must be a claimed section 6405(a) refund amount subject to Joint Committee Review in excess of \$1,000,000.00 in an unexamined or unsurveyed source or carryback year, IRM 4.3.5.6.5.1;
- B. The examination of the unagreed issues or the source year will require a substantial period of time (six months or more) to resolve, and “the delay would deprive the taxpayer of a timely refund to which the taxpayer is clearly entitled,” IRM 4.3.5.6.5.1, 4.3.5.6.2(1), and 4.3.5.6.3(1);
- C. The taxpayer must post an acceptable bond or similar security, if required, IRM 4.3.5.6.5.1 and IRM 4.3.5.6.3(1);

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- D. The report must contain an explanation of why the refund is being issued before the case is completed or surveyed, including a conclusion that no disadvantage to the government will occur as a result of the early refund, IRM 4.3.5.6.5.2, 4.3.5.6.2(2), and 4.3.5.6.3.(2);
- E. The refund may reflect only the minimum amount to which the taxpayer is entitled, regardless of the outcome of the unagreed issue, IRM 4.3.5.6.2(1), 4.3.5.6.2.(4), 4.3.5.6.3(1), and 4.3.5.6.3(5);
- F. A supplemental report must be submitted at the end of the examination or survey, IRM 4.3.5.6.2(3) and 4.3.5.6.3(4); and
- G. The refund may not be one involving tentative refunds. IRM 4.3.5.6.2(1) and 4.3.5.6.3(2).

The key requirement for both unagreed issue cases and unexamined source year cases is that the modified expedite report procedures apply only to “the minimum amount to which the taxpayer is entitled” and only if that amount is over \$1 million. IRM 4.3.5.6.2(1). In this case, the Service is ready to determine that X is entitled to recover the claimed refund amount in its entirety.

On the facts presented, the Service can determine that X’s income tax for YEAR 1 is overpaid based upon a partial agreement with X. Thus, provided that it obtains Joint Committee approval, the Service may refund a portion of the previously paid tax to X under the expedited refund procedures for Joint Committee cases.

#### ISSUE 2: Authority to accept a bond

The Service’s administrative directives, in IRM 4.3.5.6.5.1(1), require a taxpayer to post a bond or other security as a condition for submitting a modified expedited refund report. IRM 4.3.4.6.5.3 sets forth the requirements for such a bond or similar security, giving the district director with jurisdiction over the return the responsibility for securing the bond or other security.

The authority of the district director with jurisdiction over the return to act on both the claim for refund and the authority to report to the Joint Committee on Taxation under I.R.C. section 6405 are provided in two delegation orders. Order Number 40 (Rev. 6), effective 5/20/1997 and updated 11/24/99 to reflect new organization titles, gives delegated officials the authority:

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After compliance with all requirements of existing procedures for review, to make credits or refunds, within the applicable period of limitations, of overpayments in any amount, of any internal revenue tax, additional amount, addition to the tax, assessable penalty and allowable interest thereon, including those cases requiring a report to the Joint Committee on Taxation.

Delegation Order Number 154 (Rev. 10), effective 9/17/1997 and also updated 11/24/99, provides the authority:

To make the decision and report refunds and credits to the Joint Committee on Taxation as required by IRC section 6405 on cases within their jurisdiction.

Both Orders have been revised to allow activity by officials within the Large and Mid-Sized Business Division (LMSB) and other new units during the transition period of the Internal Revenue Service restructuring. These designated officials have authority that parallels that within the antecedent Internal Revenue Service hierarchy. See IRM 1.2.2 (11/24/99). Thus, the appropriate L/MSB Area Director has the same authority as a District Director to make refunds and credits in cases within their jurisdiction and Senior Technical Advisors to the L/MSB Division Commissioner have authority that parallels that of Quality Measurement Staff Chiefs to make decisions and reports refunds and credits to the Joint Committee on Taxation under section 6405. The authority for making decisions and reporting to the Joint Committee may be redelegated to Team Leaders, Team Managers, and Team Case Managers.

#### CASE DEVELOPMENT, HAZARDS AND OTHER CONSIDERATIONS:

We believe that the Service can rely upon the current provisions of Chapter 6 of the Joint Committee Handbook to allow the taxpayers' refund request to be submitted for Joint Committee review. The handbook reflects the Service's limited authority to issue refunds of overpayments under section 6402. The proposed refund exceeds \$1 million and represents a minimum amount to which the Service has determined the taxpayer is immediately entitled. The case potentially involves either additional unagreed issues for the same tax year or carrybacks or carryforwards from unexamined source years. A "modified expedite refund report" should be submitted for Joint Committee approval before the refund is issued.

Please call if you have any further questions.