



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

June 28, 2001

OFFICE OF
CHIEF COUNSEL

Number: **200141013**

Release Date: 10/12/2001

CC:PA:APJP:Br2

TL-N-1671-01

UILC: 6166.00-00, 6401.00-00, 6402.00-00, 6402.01-00, 6403.00-00, 7422.06-00

INTERNAL REVENUE SERVICE NATIONAL OFFICE CHIEF COUNSEL ADVICE

MEMORANDUM FOR: ASSOCIATE AREA COUNSEL
(Small Business/Self-Employed)
Area 3 - Nashville
CC:SB:3:NAS:2

FROM: Assistant Chief Counsel (Administrative Provisions &
Judicial Practice) CC:PA:APJP

SUBJECT: Refund of Estate Tax Overpayment vs. Crediting
Overpayment to Remaining I.R.C. § 6166 Installments

This Chief Counsel Advice responds to your memorandum dated March 29, 2001. In accordance with I.R.C. § 6110(k)(3), this Chief Counsel Advice is not to be used or cited as precedent.

LEGEND

Decedent =
Date 1 =
Date 2 =
T =
U =
V =
W =
X =
Y =

TL-N-1671-01

Z =
ISSUES

1. Whether Decedent's estate can obtain a refund of a portion of the estate tax paid when the estate filed an extension request (Form 4768), which preceded the filing of the estate tax return and the making of an election under section 6166 to pay the tax in installments.
2. Whether section 6403, relating to overpaid installments of tax, is applicable to Decedent's estate's \$V overpayment of the portion of the tax not eligible for deferral under section 6166.

CONCLUSIONS

1. In order for the Service to refund an amount of tax paid, section 6402 requires that there be an overpayment. An overpayment exists when an amount of tax has been paid that exceeds the amount of tax properly due. The amount of tax properly due in this case is \$X, while the amount of tax paid with the extension request was only \$Y. Thus, there is no overpayment of tax which can be refunded.
2. Section 6403 does not apply in this case because the \$Y was paid before the section 6166 election was made. The \$Y was paid when Decedent's estate filed Form 4768 (extension of time to file return and pay tax), which preceded the filing of the estate tax return and the making of the section 6166 election. Thus, the \$V overpayment should be applied to reduce the amount of tax deferred under section 6166. As a result, \$Z is deferred under section 6166.

FACTS

Decedent died on Date 1. Decedent's estate timely applied for, and was granted, an extension of time to file Decedent's estate tax return and pay the estate tax due until Date 2. Along with the extension request (Form 4768), Decedent's estate remitted \$Y as a payment of estimated estate tax.

Decedent's estate filed the estate tax return (Form 706) within the extended due date, showing an estate tax liability of \$W. The Form 706 included an election under section 6166 to pay in installments the portion of the estate tax attributable to Decedent's interest in a closely held business. Decedent's estate also included a refund claim with the Form 706, seeking a refund of the overpaid portion of the estate tax ineligible for deferral under section 6166.

Decedent's return was selected for examination, and at the conclusion of the examination, the parties agreed that (1) \$X was the corrected estate tax liability; and (2) \$U of the estate tax liability was eligible for deferral under section 6166.

TL-N-1671-01

Thus, \$T (\$X minus \$U) was not eligible for deferral and was properly due with the filing of the estate tax return. The estate overpaid this amount by \$V when it remitted the \$Y. The estate seeks a refund of the \$V, net of the two past-due interest payments.

Although the Service granted the section 6166 installment election, the Service failed to send Decedent's estate notices of when the first two interest payments were due. Consequently, the estate has not yet made any interest payments. However, the Service has not issued notice and demand for the unpaid interest amounts, and therefore, acceleration within the meaning of section 6166(g) has not yet occurred.

At issue is whether the Service may issue a refund (net of the two past-due interest payments) to Decedent's estate.

LAW AND ANALYSIS

As a general rule, the estate tax return (Form 706) and payment of the estate tax liability of a decedent is due within nine months of the decedent's death. I.R.C. §§ 6075(a); 6151(a). As an exception to the general rule, section 6166(a) of the Internal Revenue Code provides that if the value of an interest in a closely held business included in determining the gross estate of a decedent exceeds 35 percent of the adjusted gross estate, the executor of the estate may elect to pay part or all of the tax imposed by section 2001 (estate tax) in two or more (but not exceeding ten) equal installments. The first installment of tax must be paid on or before the date selected by the executor which is not more than 5 years after the date prescribed by section 6151(a) for payment of the tax. An executor electing to defer estate taxes under section 6166 must make annual payments of interest during the deferral period. In particular, interest must be paid annually during the period before the first installment of tax is due. I.R.C. § 6166(f). When an estate fails to make payments of principal or interest the Service may terminate the deferred payment election and force an acceleration of payment of the estate tax by issuing notice and demand. I.R.C. § 6166(g)(3).

Section 6402(a) authorizes the Secretary of the Treasury to "credit the amount of [an] overpayment, including any interest allowed thereon, against any liability in respect of an internal revenue tax on the part of the person who made the overpayment and [subject to certain limitations], refund any balance to such person." I.R.C. § 6402(a). The regulations on Procedure and Administration provide that "refunds of overpayments may not be allowed or made after the expiration of the statutory period of limitation properly applicable, unless, before the expiration of such period, a claim therefor has been filed by the taxpayer." Treas. Reg. § 301.6402-2(a)(1). In this case, Decedent's estate filed a timely claim for refund.

TL-N-1671-01

Section 6403 further provides,

[i]n the case of a tax payable in installments, if the taxpayer has paid as an installment of the tax more than the amount determined to be the correct amount of such installment, the overpayment shall be credited against the unpaid installments, if any. If the amount already paid, whether or not on the basis of installments, exceeds the amount determined to be the correct amount of the tax, the overpayment shall be credited or refunded as provided in section 6402.

I.R.C. § 6403. The Code and Treasury regulations do not contain an all-inclusive definition of the term “overpayment.” The United States Supreme Court, however, has defined the term as,

any payment in excess of that which is properly due. Such an excess payment may be traced to an error in mathematics or in judgment or in interpretation of facts or law. And the error may be committed by the taxpayer or by the revenue agents. Whatever the reason, the payment of more than is rightfully due is what characterizes an overpayment.

Jones v. Liberty Glass Co., 332 U.S. 524, 531 (1947). In United States v. Dalm, 494 U.S. 596, 609 n. 6 (1990), the Supreme Court again addressed the meaning of the term “overpayment,” stating that “[t]he commonsense interpretation is that a tax is overpaid when a taxpayer pays more than is owed, for whatever reason or no reason at all.” Although a taxpayer may overpay an installment of the tax, this is not an overpayment within the meaning of section 6402. See Estate of Baumgardner v. Commissioner, 85 T.C. 445, 461 (1985), acq., 1986-2 C.B. 1 (stating that “an overpayment of an installment is not an ‘overpayment of tax’ until the entire amount of the tax has been paid”) (citing Blair v. Birkenstock, 271 U.S. 348 (1926); Flora v. United States, 357 U.S. 63 (1958)).

Section 7422 provides the authority for a taxpayer to institute a civil action for refund of overpaid taxes. As a general rule, a taxpayer can obtain judicial review under the refund method by instituting a suit for refund in a federal district court or the United States Claims Court, having first paid the full amount of the taxes that the Service has determined are due. Flora v. United States, 362 U.S. 145 (1960). Under this so-called “full payment rule,” it has generally been accepted by the courts that there can be no deviation from the requirement that full payment of the disputed tax be made. Thus, in order to gain access to the courts to file a refund claim, an estate previously had to pay the entire estate tax liability; payment of the section 6166 installments due prior to instituting suit was insufficient to invoke jurisdiction. Rocovich v. United States, 933 F.2d 991 (Fed. Cir. 1991); Abruzzo v. United States, 24 Cl. Ct. 668 (1991).

TL-N-1671-01

The Internal Revenue Service Restructuring and Reform Act of 1998 enacted section 7422(j), thereby creating an exception to the “full payment rule.” Pub. L. No. 105-206, § 3104. Section 7422(j) provides that the district courts of the United States and the United States Court of Federal Claims have jurisdiction to determine the correct amount of estate tax liability (including any refund of estate taxes), notwithstanding that the full amount of the estate tax liability has not been paid by reason of an election under section 6166. Section 7422(j) is effective for refund claims filed after July 22, 1998. The additional jurisdiction granted to the district courts and the Court of Federal Claims under section 7422(j) is invoked only when the lack of full payment is the sole reason why refund jurisdiction would have been denied under prior law. The enactment of section 7422(j) does not change the fact that there must be an overpayment of the entire estate tax liability in order to obtain a refund. Nothing in section 7422(j) authorizes the payment of a refund merely because one or more estate tax installments have been overpaid or because the amount not eligible for deferral has been overpaid.

In the present situation, the \$Y paid by Decedent’s estate with the Form 4768 extension request does not exceed the correct tax liability for the tax year (\$X). Although Decedent’s estate paid more than the portion of the tax not eligible for deferral, the entire estate tax liability was not satisfied by the \$Y payment. Consequently, applying the rationale of Jones, supra, there is no overpayment upon which to issue a refund because Decedent’s estate did not overpay its entire estate tax liability. Moreover, section 6403 is not applicable to the \$V (the overpayment of the portion of tax not eligible for deferral) because the \$V was paid prior to making the section 6166 installment election and was not paid as an installment of the tax. Compare Estate of Bell v. Commissioner, 92 T.C. 714 (1989), aff’d, 928 F.2d 901 (9th Cir. 1991) (holding that section 6403 applies to overpaid installments). Thus, the Service should use the \$V to reduce the amount of tax that would otherwise be deferred (\$U). Consequently, the amount which should be deferred is \$Z and each installment of principal due in years five through fourteen of the deferral period is one-tenth of \$Z. Interest in years one through four at the rate of 2% is computed upon \$Z, the amount being deferred. Then, because Decedent’s estate failed to pay its interest payments in years one and two, interest at the underpayment rate prescribed by section 6621 will be computed on those delinquent interest payments. See I.R.C. §§ 6601(a); 6621(a)(2). Although Decedent’s estate is in default on the interest payments due in years one and two, we suggest that the Service give Decedent’s estate time to cure the default (i.e., pay the delinquent amounts) before issuing notice and demand and terminating the section 6166 installment privilege.

TL-N-1671-01

CASE DEVELOPMENT, HAZARDS AND OTHER CONSIDERATIONS

This writing may contain privileged information. Any unauthorized disclosure of this writing may have an adverse effect on privileges, such as the attorney client privilege. If disclosure becomes necessary, please contact this office for our views. If you have questions, please contact Susan L. Hartford at (202) 622-4940.

CURTIS G. WILSON

By: _____
Michael L. Gompertz,
Assistant to the Branch Chief
Branch 2