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From:

Sent: Monday, December 15, 2008 3:42 PM

To:

Cc:

Subject: [REDACTED]

You sent in a memorandum for post-review for each of the two cases referenced above. In the first case, we agree the purported client would not be entitled to a refund for the reasons stated in the memorandum. Furthermore, we agree that the Service may return to the payor what the payor remitted out of its own funds. [REDACTED]

[REDACTED] the Service may rely on Williams in part in deciding to return the funds to the payor. However, in light of our position on the limited applicability of Williams, if any, after the issuance of the revenue rulings and subsequent case law following Williams, the better legal rationale for returning the funds is restitution, based on the theory that there is no tax owed and no tax paid. See Rev. Rul. 2005-50; Rev. Rul. 2005-49; EC Term of Years Trust, 550 U.S. 429 (2007). In that regard, money had and received by the Service is still in its possession, and if the allegations are true, there never was an obligation to withhold or deposit tax from the fraudulent and fictitious payroll.

Similarly, in the second case [REDACTED] we do not disagree with the memorandum insofar as it states that the funds may be returned. But, as in the first case, we think the legal rationale for returning the funds would be restitution. If the deposits here were induced by fraud, there was no obligation to withhold or deposit tax for the fictitious payrolls. Regarding the refund claims, if any, mentioned on page 7 of the memorandum, for the reasons stated there we agree with your recommendation that the Service deny those claims.

Please call me if you have any questions.