

INTERNAL REVENUE SERVICE  
NATIONAL OFFICE TECHNICAL ADVICE MEMORANDUM

July 29, 2010

Third Party Communication: None  
Date of Communication: Not Applicable

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Index (UIL) No.: 6611.00-00, 6611.04-00  
CASE-MIS No.: TAM-108254-10

Director  
Appeals, Area 7

Taxpayer's Name:  
Taxpayer's Address:

Taxpayer's Identification No.:  
Year(s) Involved:  
Date of Conference:

LEGEND:

Taxpayer =  
TY1 =  
TY2 =  
TY3 =  
Date 1 =  
Date 2 =  
Date 3 =  
Date 4 =  
Amount 1 =  
Amount 2 =  
Amount 3 =  
Amount 4 =  
Amount 5 =  
Amount 6 =

ISSUE:

Whether in allowing interest under section 6611 on an overpayment of tax that resulted from a Service-initiated general adjustment that was preceded by a net operating loss

(NOL) carryback and tentative refund that the Service later disallowed, the interest period ends on the date of the tentative refund or on the filing date of the tax return for the year of the NOL.

#### CONCLUSION:

Because under the particular facts of this case the overpayment was attributable to the Service's general adjustment to Taxpayer's TY1 federal income tax liability, and the overpayment was effectively refunded to Taxpayer, overpayment interest is allowable under section 6611 from the date of the overpayment to the date of the tentative refund, subject to administrative adjustments.

#### FACTS:

Taxpayer timely filed a federal income tax return for TY1 reporting a liability of Amount 1. Taxpayer paid the liability prior to the due date of the return, which was Date 1. On Date 2, the Service issued a tentative refund of Amount 2 to Taxpayer for TY1. This tentative refund resulted from an NOL carryback from TY2. As the amount requested was paid within 45 days of the taxpayer's request for a tentative refund, no overpayment interest was paid in accordance with section 6611(e)(2).

In a subsequent examination, the Service disallowed the entire NOL carryback and assessed on Date 3 the amount previously refunded. Simultaneously, the Service made a general adjustment to Taxpayer's TY1 liability that reduced the liability by Amount 3, from Amount 1 to Amount 4. Also around the same time, the Service abated an additional Amount 5 for TY1, evidently resulting from a carryback from TY3. The combined amount of the general adjustment decrease and the other abatement was slightly more than the disallowed NOL carryback, an additional Amount 6.

The Service allowed interest on the Amount 3 overpayment for the period of Date 1 (the filing and payment due date for TY1) to Date 4 (the due date of Taxpayer's liability for TY2). Taxpayer's position is that overpayment interest on Amount 3 is allowable to Date 2, when the Service issued the tentative refund. The issue of the correct ending date for computation of overpayment interest is currently before Appeals. Taxpayer requested Technical Advice on the issue.

#### LAW AND ANALYSIS:

Section 6611(a) provides that "[i]nterest shall be allowed and paid upon any overpayment in respect of any internal revenue tax at the overpayment rate established under section 6621." Section 6611(b) specifies the period for interest on overpayments. Specifically, in the case of a refund, subsection (b)(2) provides that interest runs "from the date of the overpayment to a date (to be determined by the Secretary) preceding the date of the refund check by not more than 30 days . . . ." The Service administratively establishes an end date of less than 30 days. See, e.g., IRM 20.2.4.7.1.1(1) (03-01-

2002) (instructing that for IMF accounts, overpayment interest stops 13 days before the refund, while for BMF accounts, interest stops nine days before the refund). When an overpayment is credited to another tax liability, interest on the overpayment runs from the overpayment date to the due date of the liability to which the overpayment is credited. I.R.C. § 6611(b)(1). The due date of the liability credited is the last day fixed by law or regulations for the payment of the tax (determined without regard to any extension of time). Treas. Reg. § 301.6611-1(h)(2). In most cases, the payment due date will be the unextended due date of the return on which the tax is required to be reported. I.R.C. § 6151(a); Treas. Reg. § 1.6151-1(a). In addition, under section 6611(e)(3), interest on an overpayment that results from a Service-initiated adjustment is computed by subtracting 45 days from the period for which interest is allowable.

The date of an overpayment is generally the point in time when a payment of tax or an aggregate of payments first exceeds the liability. Treas. Reg. § 301.6611-1(b) (“the dates of overpayment of any tax are the date of payment of the first amount which (when added to previous payments) is in excess of the tax liability” and the dates of any payments after that); Jones v. Liberty Glass Co., 332 U.S. 524, 531 (1947) (defining “overpayment” as “meaning any payment in excess of that which is properly due”). When a payment of tax that results in an overpayment is made before the last day prescribed for payment, the payment is treated as made (and hence the overpayment arises) on the payment due date. I.R.C. §§ 6513(a), 6611(d). Additionally, if an overpayment results from an NOL carryback, the date of the overpayment is deemed under section 6611(f)(1) to be no earlier than the filing date for the taxable year in which the NOL is claimed. See also Treas. Reg. § 301.6611-1(e).

Applying these rules to the overpayment at issue, interest is allowable on the Amount 3 overpayment for the period that begins on the date the overpayment arose, which was Date 1 (the date when Amount 1 is considered to have been paid), to a date not more than 30 days before the overpayment was refunded to Taxpayer, *i.e.*, nine days before Date 2. In other words, TY1 was overpaid as of Date 1 and remained so until the overpayment amount was returned to Taxpayer on Date 2. Accordingly, section 6611(b)(2) prescribes the interest period. In computing overpayment interest for that period, 45 days must also be subtracted pursuant to section 6611(e)(3).

Because section 6611(b)(2) controls in this instance, the period prescribed in section 6611(b)(1) for interest on an overpayment that is credited to a liability does not apply, as the overpayment was not credited to a liability. Nor do the rules for determining the interest period in cases of NOL carrybacks apply. Although the Service tentatively refunded an overpayment claimed by Taxpayer based on an NOL carryback, there was, in fact, no such overpayment. The actual overpayment, which is the one in question, is based on an adjustment to Taxpayer’s liability for the taxable year and is not the result of an NOL carried back from another tax year.

Likewise, the two cases raised in the request for advice--AT&T Corp. & Subsidiaries v. United States, 62 Fed.Cl. 490 (2004), and Marsh & McLennan Cos. v. United States, 302 F.3d 1369 (Fed. Cir. 2002)--are inapposite because they involved facts and legal issues different from those dealt with in this Technical Advice Memorandum. The fundamental difference is that both of the reported cases focused on applying section 6611(b)(1).

More specifically, in the earlier of the two case, Marsh & McLennan, the issue before the court was whether the taxpayer was entitled to interest on overpayments of income tax for taxable years 1985 and 1986 running to the date on which each overpayment was credited to a subsequent taxable year's liability or, alternatively, to the date on which the tax was due for the year of the liability credited. In 1994, the Service credited the 1985 tax overpayment and a portion of the 1986 overpayment to the taxpayer's 1987 tax liability as of March 15, 1989, which was the date that a credit elect overpayment for 1987 was applied to tax year 1988 (after the credit election, the Service determined an underpayment for 1987). The Service computed interest on the 1985 overpayment and the relevant portion of the 1986 overpayment to April 15, 1988, representing the March 15, 1988, due date of the 1987 tax return, plus, mistakenly, one additional month. The Service credited the remainder of the 1986 overpayment to Marsh & McLennan's 1988 liability as of September 15, 1989, and March 15, 1990, the dates that a credit elect overpayment for 1988 was applied to 1989. The Service allowed interest on this portion of the 1986 overpayment up to April 15, 1989, which was the 1988 return due date, plus one month. Marsh & McLennan contended that the correct end date for interest on the 1985 and partial 1986 overpayments was March 15, 1989, as that was the date the overpayments were credited, and the correct date for the second piece of the 1986 overpayment was March 15, 1990, which was the date of the credit to the 1988 account. The court disagreed and held that section 6611(b)(1) and section 301.6611-1(h)(2) of the regulations dictate that the closing date for overpayment interest is the due date for payment of the tax for the year in which the credit was taken. 302 F.3d at 1375-77. Therefore, the taxpayer was only entitled to (and had already received) overpayment interest to March 15, 1988, and March 15, 1989.

In AT&T, the Service credited a portion of an overpayment from taxable year 1978 to a deficiency for taxable year 1981 that resulted from an erroneous tentative refund that was paid on March 25, 1985. The tentative refund was based on a carryback from the 1984 tax year. The overpayment of 1978's tax also resulted from a carryback from the 1984 year, making the effective date of the 1978 overpayment March 15, 1985, the filing and payment due date for 1984. Although there was an erroneous tentative refund, the case did not involve an overpayment for the year of the refund. Correspondingly, the overpayment year, 1978, did not include a tentative refund and subsequent recapture. And the issue to be decided was not the duration of the period for interest on an account that is overpaid from the filing date of the return until the date of an erroneous refund. Rather, the issue was the interest period, if any, for an overpayment that was credited to another year's liability that arose after the due date of the year to which the

credit was made. AT&T argued that it should be paid interest on the 1978 overpayment from the overpayment date (March 15, 1985) to the date of the erroneous refund (March 25, 1985). Relying on Marsh & McLennan and the same statutory and regulatory provisions, the court held that March 15, 1982, was “the appropriate to-date for purposes of calculating overpayment interest” because that was the due date for the year credited. 62 Fed. Cl. at 496. As a consequence of the ending date for interest being earlier than the start date, AT&T was entitled to zero overpayment interest.

Unlike the present situation, the overpayments for which interest was disputed in each case were credited pursuant to section 6402(a) to liabilities for other taxable years. Section 6611(b)(1) and the related paragraphs of the regulations establish the interest period for an overpayment that is credited against a liability, and they determined the outcomes of Marsh & McLennan and AT&T. The same rules do not determine the conclusion reached in this Technical Advice, which addresses an issue different from the proper ending date for interest allowable on a credited overpayment. Nor, for that matter, does this advice address any situation other than the precise one described herein.

A copy of this technical advice memorandum is to be given to the taxpayer. Section 6110(k)(3) provides that it may not be used or cited as precedent.