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Cc:

Subject: FW: Lewis v. Reynolds

--my response is below. My review concurs. Let me know if you have further questions.

If the overpaid and underpaid taxes are completely separate taxes (though listed on the same return), Lewis v. Reynolds would not apply. Lewis v. Reynolds, 284 U.S. 281 (1932), addresses what is an "overpayment" of one type and period of tax. In L v. R, the Supreme Court held that the Service can retain payments which do not exceed the correct amount of tax liability, even if that liability was never assessed and the ASED has passed. The Service reduced the amount of the refund claimed by the taxpayer on the return because the Service had determined the taxpayer owed additional tax for the same year. The taxpayer is not entitled to a refund unless the tax is "overpaid", which means payment exceeds the amount which might have been properly assessed and demanded for the tax year.

For separate taxes, the question is whether the overpayment and underpayment may be offset, under section 6402(a). Section 6402(a) permits offset of an overpayment against a separate tax liability for another period. Section 6401 provides that an "overpayment" includes amounts of payments of tax assessed or collected after the ASED. And section 6514(b) provides that a credit against a liability in respect of any taxable year shall be void if any payment in respect of such liability would be considered an overpayment under section 6401(a). Under this provision, we would be prohibited from offsetting against an unassessed liability shown on a return where the assessment period has expired. Thus, we cannot offset an overpayment of one type of excise tax against an unassessed excise tax of another type, where the ASED for that tax has passed.

The Fisher case is distinguishable because it addresses offsetting a refund against unassessed interest. The offset was allowed because the analysis was that deficiency interest is deemed an integral part of the associated tax. In other words, in determining an overpayment of a particular tax liability, interest is just a component of that tax liability (an L v. R "overpayment" analysis). Here, we have separate taxes (an "offset" analysis).

You also mentioned Rev. Rul. 85-67 (1985-1 C.B. 364), which holds that an advance payment which cannot now be assessed of an agreed deficiency plus interest is not an overpayment under section 6401(a), such that the taxpayer is entitled to a refund under 6402(a). Lewis v. Reynolds is discussed in this rev. rul., as is Rev. Rul. 74-580, 1974-2 C.B. 400, which holds that payments of tax assessed and paid after passing of the ASED are overpayments. Your question does not involve a payment of the underpaid excise tax made within the assessment period so Rev. Rul. 85-67 is inapplicable.

Regarding the checks the taxpayer returned to the IRS, this was not truly a voluntary payment by the taxpayer because it was premised upon the taxpayer's incorrect assumption that the taxpayer still owed excise tax for the abstract where the ASED has run. The taxpayer would have no way of knowing the tax was never assessed. Since sections 6401 and 6514(b) preclude us from applying the overpayment from another abstract to the non-assessed abstract, the taxpayer is entitled to the refund (assuming the refund statute is still open) and we should explain the situation to the taxpayer and return the refund check or

issue a new check. There are procedures in part 21.4.3 of the IRM which address handling returned refund checks, including when the check is returned in error by the taxpayer. See IRM 21.4.3.4.4.