

**Office of Chief Counsel
Internal Revenue Service
Memorandum**

Number: **201216033**

Release Date: 4/20/2012

CC:NTA:SLHartford

POSTN-136718-11

UILC: 6511.05-00, 6511.09-00

date: January 05, 2012

to: Frederic M. Blinn
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from: Susan L. Hartford
Technical Advisor to the Special Counsel
(National Taxpayer Advocate)

subject: Timeliness of Refund Claim

This Chief Counsel Advice responds to your request for assistance. This advice may not be used or cited as precedent.

LEGEND

Taxpayer =

Amount1 = \$

Amount2 = \$

Amount3 = \$

Amount4 = \$

Amount5 = \$

Date 1 =

Date 2 =

Date 3 =

Date 4 =

Date 5 =

Date 6 =

ISSUE

Whether Taxpayer's Form 843 was a permissible amendment to her timely filed Form 1040X rather than a new, untimely claim for refund for tax year 2003.

CONCLUSION

Section 6511(b)(1) provides that a refund cannot be allowed unless a timely claim for refund is filed. Taxpayer timely filed a Form 1040X for tax year 2003. The facts upon which the later-filed Form 843 did not require an investigation of new matters, as Taxpayer was merely reiterating the claim she had made on Form 1040X. Moreover, the Commissioner had overlooked the grounds upon which she was claiming a refund in the Form 1040X. Therefore, the Form 843 should be viewed as a permissible amendment to the Form 1040X, and her refund for tax year 2003 is not time-barred.

FACTS

Beginning in 2003 and continuing until sometime in early 2006, Taxpayer invested \$Amount1 with a businessman. For tax year 2003, Taxpayer received a Form 1099-INT, reporting \$Amount2 in interest income, and reported that amount on her 2003 Form 1040 filed on April 15, 2004.

In 2006, Taxpayer learned the businessman had been embezzling funds and the investment was a Ponzi scheme. Taxpayer filed Form 1040X for 2003, eliminating the \$Amount2 as interest income, as she had never actually received any interest income. As a result, Taxpayer timely claimed a refund for 2003 of \$Amount3. The IRS received the Form 1040X on Date 1. Because Taxpayer was able to recover \$Amount4 of the \$Amount1 she had invested, Taxpayer claimed the remaining \$Amount5 as a theft loss on Form 1040 for tax year 2006.

On Date 2, the IRS issued Letter 906 to Taxpayer, disallowing her claim for refund for the 2003 tax year. The explanation for the denial was as follows:

Any loss arising from theft is treated as sustained in the year in which the taxpayer discovers the loss. See IRC Sec. 165(e). The amount of a theft loss is reduced by any recovery. In addition, a taxpayer is not entitled to a theft loss if she has a claim for reimbursement and there is a reasonable prospect of recovery. See Treas. Reg. 1.165-1(d)(2)(i) and (3); 1.165-8(a)(2).

On Date 3, Taxpayer filed Form 843 for tax year 2003, again requesting a refund for that year on the theory that the interest income originally reported was fictitious and the

money Taxpayer actually received was a return of capital. The IRS received Form 843 on Date 4.

On Date 5, Taxpayer contacted the IRS to ascertain the status of the Form 843. The IRS responded on Date 6, indicating the IRS was still doing research. Taxpayer never heard anything further from the IRS.

LAW AND ANALYSIS

As a preliminary matter, we note that our analysis focuses on the timeliness of a refund claim, not the proper income tax treatment of the losses resulting from this failed investment scheme. We have confirmed with CC:ITA that Taxpayer's treatment of the fictitious interest income for 2003 and 2004¹, was properly reflected on her Forms 1040X. In addition, we have confirmed with CC:ITA that the amount of funds Taxpayer did not recover from the scheme (\$Amount5) was properly claimed as a loss on Taxpayer's 2006 Form 1040.

Section 6402(a) of the Internal Revenue Code authorizes the Secretary of the Treasury to make refunds when a taxpayer overpays taxes. The regulations on Procedure and Administration under section 6402 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).

Section 6511(a) provides that a claim for credit or refund of an overpayment of any tax in respect of which the taxpayer is required to file a return shall be filed within three years from the time the return was filed or two years from the time the tax was paid, whichever of such periods expires later, or if no return is filed by the taxpayer, within two years from the time the tax was paid. Section 6511(b)(1) provides that no credit or refund shall be allowed or made after the expiration of the period of limitation prescribed in section 6511(a), unless a claim for credit or refund is filed by the taxpayer within such period.

In the present case, the three-year period prescribed by section 6511(a) in which to file a claim for refund for 2003 expired on April 17, 2007.² Thus, the Form 1040X for 2003 that the IRS received on Date 1, was a timely refund claim for 2003. The Form 843 for

¹ Taxpayer had initially reported interest income on her 2004 tax return as well, and subsequently filed a Form 1040X for that year, claiming zero interest income. The IRS issued a partial notice of claim disallowance for 2004, but the explanation for the partial disallowance was not attached to the notice we received, and we have been unable to locate a copy. Therefore, we have focused our analysis on the 2003 tax year.

² April 15, 2007, was a Sunday, and April 16, 2007, was Emancipation Day (a legal holiday in the District of Columbia). Pursuant to section 7503, a claim for refund for the 2003 tax year is considered timely filed if filed on the next succeeding day that is not a Saturday, Sunday, or legal holiday.

2003, however, was received by the IRS on Date 4, and was therefore an untimely refund claim unless it relates back to the timely refund claim filed on Form 1040X.

Two considerations are relevant in determining whether a supplemental claim for refund is considered an amendment to the original claim, rather than an untimely new claim. If these two requirements are satisfied, there is no specific time period within which a supplemental claim must be filed. First, the supplemental claim will not be considered an amendment to the original claim if it would require the investigation of new matters that would not have been disclosed by the investigation of the original claim. United States v. Andrews, 302 U.S. 517, 524-26 (1938); Pink v. United States, 105 F.2d 183, 187 (2d Cir. 1939). Such a supplemental claim is a new claim, rather than an amendment to the existing timely claim. The policy ground for not allowing time-barred claims that vary from timely claims is that “[t]he Commissioner does not possess the time or resources to perform extensive investigations into the precise reasons and facts supporting every taxpayer=s claim for refund.” Stoller v. United States, 444 F.2d 1391, 1393 (5th Cir. 1971).

Second, a supplemental claim will not generally be considered an amendment if the IRS took final action on the original claim by either rejecting or allowing the claim in whole or in part. In either case, the supplemental claim is untimely because once the IRS has taken final action on the original claim, there is no longer any claim left to amend. Mondshein v. United States, 338 F.Supp. 786 (E.D.N.Y. 1971), aff’d, 469 F.2d 1394 (2d Cir. 1973); Edwards v. Malley, 109 F.2d 640 (1st Cir. 1940), aff’g 38-1 U.S.T.C. (CCH) & 9026 (D. Mass. 1937).

There are certain narrow exceptions to the rule concerning final action by the IRS. For example, the IRS’s disallowance of a claim will not constitute final action by the IRS if the IRS did not fully consider all grounds for the refund. Bemis Bros. Bag Co. v. United States, 289 U.S. 28 (1933). In Bemis Bros. Bag Co., the IRS denied a claim for refund by rejecting one of the three grounds stated in the claim, while overlooking two independent grounds for the claim. Id. at 31-32. The taxpayer then submitted an amended claim, reiterating the grounds stated in the original claim. The Supreme Court held that the claim as amended was timely. The IRS has adopted this exception. In this regard, the IRM contains the following:

Exception Where the Service’s Final Action Was Insufficient. There is a narrow exception to the rule concerning the effect of the Service’s disallowance of a claim. The disallowance will not constitute final action if the Service did not fully consider all grounds for the refund and the taxpayer asks for “reconsideration” of those grounds. Bemis Bros. Bag Co. v. United States, 289 U.S. 28 (1933) (the Service overlooked two independent grounds for the claim).

IRM 25.6.1.10.2.6.4(2)(b). Moreover, the IRM notes that “[o]verlooking a ground in the claim for refund is not the same as making an incorrect determination regarding the facts or law of a claim.” Id.

Applying the logic of United States v. Andrews and Pink v. United States, *supra*, Taxpayer's Form 843 for tax year 2003 did not require investigation of new matters; the Form 843 and the Form 1040X claimed the same basis for a refund – namely, that Taxpayer was claiming zero interest income rather than the interest income amount initially reported on her Form 1040. The facts upon which the Form 843 was based would have been ascertained by the Commissioner in determining the merits of the Form 1040X if the Commissioner had evaluated the precise grounds in the Form 1040X rather than concluding that Taxpayer was trying to recoup her entire loss from the investment scheme.

In addition, although the IRS acted on the Form 1040X by issuing a notice of claim disallowance for 2003, that was not “final action” because the IRS overlooked the grounds stated in the Form 1040X. Taxpayer was not seeking to claim the amount of her loss from the investment scheme when she filed Form 1040X; rather, Taxpayer was seeking a refund as a result of improperly including a fictitious amount of interest income on her original return for tax year 2003. Thus, applying the Supreme Court's logic, Taxpayer's “claim as amended does not differ in matter of substance from the claim as first presented.” Bemis Bro. Bag Co., 289 U.S. at 33. Taxpayer reiterated that she was claiming zero interest income for those two years, and therefore was requesting a refund – a refund which had nothing to do with the amount of her loss from the investment scheme that she was unable to recover. Consequently, Taxpayer's Form 843 should be viewed as a permissible amendment to the timely filed Form 1040X, and therefore her refund for tax year 2003 is not time-barred.

In providing this advice, we coordinated with CC:PA:1 and they concur with the conclusion set forth above.

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Please call (202) 622-7852 if you have any further questions.