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CHIEF COUNSEL

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
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INTERNAL REVENUE SERVICE NATIONAL OFFICE FIELD SERVICE ADVICE

MEMORANDUM FOR DISTRICT COUNSEL, ,

FROM: ASSISTANT CHIEF COUNSEL (FIELD SERVICE) CC:DOM:FS

SUBJECT:

This Field Service Advice responds to your memorandum dated June 2, 1998. Field Service Advice is not binding an Examination or Appeals and is not a final case determination. This document is not to be cited as precedent.

LEGEND:

Parent	=
Sub 1	=
Year 1	=
Year 2	=
Year 3	=
Year 4	=
Year 5	=
Year 6	=
Year 7	=
Year 8	=
Day 1	=
Day 2	=
Day 3	=
Day 4	=
Day 5	=
Day 6	=

Date X =
Date Y =
State X =
State Y =

ISSUES

- (1) Whether the signature of Sub 1 on the original refund claim purportedly for the group's consolidated tax year is subject to waiver by the Service if the Service actively considers the claim on the merits.
- (2) Whether the original refund claim filed by Sub 1 constitutes an informal claim for refund on behalf of Parent.
- (3) Whether Sub 1 may file the refund claim for Parent under the rationale of Williams v. United States.
- (4) Whether Parent's loss of its charter affects the validity of Sub 1's refund claim.
- (5) Whether Sub 1's submission of substantiating information constitutes a second claim for refund.
- (6) Whether the second claim for refund is timely filed.
- (7) Whether unnecessary litigating hazards are created by disallowing Sub 1's claim on the basis that Sub 1 was not the proper party to file the refund claim.
- (8) Whether Parent can now ratify Sub 1's refund claim assuming it renews its charter by paying all state franchise taxes due.

CONCLUSIONS

- (1) No, consideration of a claim on its merits does not waive a jurisdictional requirement such as the capacity or standing of the claimant.
- (2) No, the refund claim is not an informal claim because it was not filed by the proper parties.
- (3) No, Sub 1 may not file the refund claim under the rationale of Williams v. United States.
- (4) No, Parent's loss of its charter does not affect the invalid refund claim filed by Sub 1.
- (5) Sub 1's submission of substantiating information may perfect its earlier filed claim. However, since Sub 1 was not the taxpayer, the amended claim is not valid.

(6) The second claim filed by Sub 1 is untimely.

(7) There are minimal litigating hazards associated with raising the standing issue since it is separate from the consideration of the merits of the case.

(8) Parent cannot now ratify Sub 1's refund claim under state law.

FACTS

For the taxable year ending Day 1 of Year 1, Parent and its subsidiaries filed a consolidated income tax return. Parent was organized under the law of State X, and the subsidiaries were organized under the law of State Y. One of the subsidiaries was Sub 1. Because of intervening ownership changes, on Day 1 of Year 2 and Day 1 of Year 3, Sub 1 filed separate income tax returns. Sub 1 had a net operating loss (NOL) for its Day 1, Year 3 income tax return that purports to be eligible to be carried back to its consolidated income tax return for Day 1 of Year 1.

Sub 1 and the other subsidiaries of Parent have been dissolved under State Y's law and are in bankruptcy. No trustee in bankruptcy has been appointed. The Bankruptcy Court has ordered that any federal tax refunds due the bankrupt corporations be paid to a secured creditor of those corporations. Each of the bankrupt corporations has given a power of attorney (Form 2848) for Year 1 to the attorney representing the secured creditor in the bankruptcy proceedings. On the power of attorney forms, the bankrupt corporations checked the box authorizing the authorized power of attorney to receive, but not negotiate, tax refund checks.

Parent did not file for bankruptcy. Parent is still in existence (having never filed articles of dissolution), but its charter was revoked as of Day 2 of Year 5 for failure to pay state franchise taxes. Although Parent is no longer operating, it may obtain reinstatement of its charter by paying the franchise taxes due.

Sub 1 obtained an extension to Day 6 of Year 3 for filing its federal income tax return for its taxable year ending Day 1 of Year 3 (the loss year), but did not file the return until Day 4 of Year 4. That return reported the net operating loss (NOL) in question. No Forms 872 Consent to extend the statute of limitations on assessment were executed with respect to the loss year. On Day 5 of Year 4, Sub 1 filed a timely amended return to carry back the NOL for the loss year to the consolidated return for Day 1 of Year 1, claiming a refund (hereafter referred to as the "original claim for refund"). Sub 1 filed the amended claim for refund in its name with its EIN.

On Day 3 of Year 6, the Service issued a statutory notice of disallowance of the claim by certified mail. The IRS noted that Sub 1 did not carry back its NOL for the loss year three

years, but rather carried it back to Year 1. The IRS also noted that the consolidated return had losses which could be carried over to Day 1 of Year 1 and carried back to Day 1 of Year 1.

In addition, it was noted that at least one other subsidiary filing on Day 1 of Year 2 had NOLs which could be carried back to the consolidated group's Day 1 of Year 1 income. The Service concluded that it was impossible to determine the correct amount of refund attributable to Sub 1's NOL carrybacks based on the information provided. On Date X, Sub 1 supplied the IRS information to substantiate the disallowed claim (hereafter referred to as the "amended claim"). Sub 1 and the Service entered into an agreement to extend the I. R. C. ' 6532 two year period for filing a refund suit to Date Y. In the waiver, the Service specifically reserved the right to raise any defenses available to it, including that the wrong party filed the return for the consolidated group.

In this case, Sub 1 filed an amended income tax return on behalf of Parent carrying back its separate NOL for its Day 1, Year 3 return into Day 1, Year 1 of the group. In the Field Service Advice to you dated _____, we concluded that the common parent is the proper party to file a claim with the Service seeking a refund of taxes paid in a consolidated tax return year based on an NOL arising in a subsequent separate return year. Under Treas. Reg. ' 1.1502-77(a), only the Parent, or its agent, is entitled to file an amended return for the group. Parent did not file a power of attorney appointing Sub 1 as its agent. As a consequence, we concluded that Parent should have filed the refund claim because it was still in existence, it still had its charter, and it was still operating at the time Sub 1 filed the claim.

LAW AND ANALYSIS

Issue 1 - Whether the IRS waived its right to object to Sub 1's lack of authority

You ask whether the Service can be deemed to have waived Sub 1's lack of authority to file a claim if a court concludes that the Service disallowed the claim on its merits.

Section 6402(a) provides that the overpayment of tax will be credited and the excess of such credit will be refunded only to the "person who made the overpayment." Under I.R.C. ' 7422(a) of the Code, a claim for refund must be aduly filed before a refund action may be maintained in any court. To be aduly filed, within the meaning of I.R.C. ' 7422, a claim must comply with the requirements of I.R.C. ' 6511. Wall Industries, Inc. v. United States, 10 Cl. Ct. 86, 95 (1986). Section 6511 requires a claim for refund for overpayment of tax imposed, in respect of which tax the taxpayer is required to file a return must be filed by the taxpayer within a specific time period. (Emphasis supplied). Section 7701(a)(14) defines the taxpayer as any person subject to any internal revenue tax. In the case of affiliated group of corporations that files a consolidated income tax returns, the common parent of the group is the agent for all the members of the group. Treas. Reg. ' 1.1502-77(a).

As the agent for the affiliated group, the common parent must file all claims for refunds on behalf of each member of the group. Treas. Reg. 1.1502-77(a). In this case, Parent did not file a claim for refund. We have not found any cases directly addressing the Aproper@person to file a claim, under the facts present. The logical reasoning for this is that if the improper Aperson@files a claim and subsequently brings suit for a refund based on the claim, the issue raised by the procedural posture of the case is not whether the plaintiff is the proper person to file a claim, but whether plaintiff is the proper person to maintain suit. The courts addressing this issue have all been faced with a motion to dismiss for lack of jurisdiction.

The court addressing this issue has held the Aproper taxpayer@is the person subject to and legally liable for paying the tax. Conversely, Aa nontaxpayer@cannot overpay taxes. La Courte Oreilles Chippewa Indians, 845 F.2d 139, 142 (7th Cir. 1988), citing, Economy Plumbing and Heating v. United States, 470 F.2d 585, 589 (Ct. Cl. 1972); Evans v. United States, 618 F. Supp. 621, 623 (E.D. Pa. 1985); Bruce v. United States, 759 F.2d 755, 758-759 (9th Cir. 1985); Cindy's Inc. v. United States, 740 F.2d 851, 854 (11th Cir. 1984). The underlying premise of these cases is the issue of sovereign immunity. In setting the conditions, under which the United States has consented to be sued, however, I.R.C. ' ' 7422 and 6511 must be strictly construed since the statutory terms define the court jurisdiction. United States v. Dalm 494 U.S. 696 (1990); United States v. Sherwood, 312 U.S. 584, 586-87 (1941).

CASE DEVELOPMENT, HAZARDS AND OTHER CONSIDERATIONS

Thus, we believe the requirement that taxpayer file the refund claim is not subject to waiver. Since Sub 1 was not the "taxpayer" for purposes of the consolidated return regulations, no claim for refund was filed by the "taxpayer."

Issue 2 - Whether the refund claim filed by Sub 1 constitutes an informal claim for refund on behalf of Parent

CASE DEVELOPMENT, HAZARDS AND OTHER CONSIDERATIONS

As discussed in Issue 1, a claim for refund must be filed by the taxpayer (the person subject to the tax). Here, the claim for refund was filed by Sub 1. You have advised us that under the consolidated return regulations, only the common parent has authority to act for the consolidated group. Parent has not appointed Sub 1 as its agent.¹ In addition, Sub 1 was not the "taxpayer" for the purposes of the consolidated return regulations. Thus, no formal or informal claim for refund was filed by the "taxpayer," Parent, in this case.

¹ We note that no facts have been provided to us that would indicate that Parent has filed a power of attorney appointing Sub 1 as its agent.

Issue 3 - Whether Sub 1 can file a claim for refund on its own behalf under the rationale established in Williams v. United States

Under Williams v. United States, 514 U.S. 527 (1995), the Supreme Court held that when a person pays an assessed tax to remove a federal tax lien on their property, they have standing to bring a refund action even through the tax paid was assessed against a third party.

In Williams, the taxpayer/husband was liable for unpaid employment taxes. After the assessment of the tax, but before the Service had filed any notices of federal tax lien against the couple's home, the taxpayer/husband transferred his interest in the home to his wife as part of a division of the marital assets in contemplation of a divorce settlement. Subsequently, the wife contracted to sell the home. One week prior to closing, the Service filed a notice of tax lien against the wife as nominee. To avoid a lawsuit by the prospective purchaser of the home, the wife authorized the disbursement of funds to pay the taxpayer/husband's liability. The wife then filed a claim and suit for refund. The Supreme Court held that refund jurisdiction extends to any person from whom a tax is involuntarily and erroneously collected, and who has no other reasonable remedy.

CASE DEVELOPMENT, HAZARDS AND OTHER CONSIDERATIONS

The facts provided reveal that Sub 1 has not paid Parent's tax. Sub 1 merely filed a claim for refund on behalf of Parent. We do not believe the rationale of Williams applies to this factual scenario. First, there has been no tax involuntarily or erroneously collected. Second, this is not a situation where Parent was without a reasonable remedy to recover its tax overpayment. Since Parent was the taxpayer, it should have filed a claim for refund on its own behalf.

Issue 4 - Whether Parent's loss of its charter affects the validity of Sub 1's Refund Claim

In this case, Parent was incorporated under State X law. Therefore, we look to State X law for the effect of revocation of Parent's charter. According to _____, the Court _____ shall have jurisdiction to revoke the charter of any corporation for misuse or nonuse of privileges or franchises.

According to State X law, corporate powers are in suspension after a revocation of the charter. Wax v. Riverview Cemetery Co., 24 A.2d 431, 437 (Del. Super. Ct. 1942); Stewart v. Commissioner, T.C. Memo. 1992-211, aff'd without op., 986 F.2d 1424 (10th Cir. 1993); and United States v. Northeastern Pharmaceutical and Chemical Co., Inc., 810 F.2d 726 (8th Cir. 1987). Reinstatement of its charter (by payment of past fees) restores all of the corporation's powers and validates a corporation's acts, including acts done while its charter was suspended. Frederic G. Krapf & Son, Inc. v. Gorson, 243 A.2d 713, 715 (Del. 1968).

CASE DEVELOPMENT, HAZARDS AND OTHER CONSIDERATIONS

In the instant case, Parent's charter was revoked on Day 2 of Year 5. Thereafter, under State X law, it is treated as if it was in a suspended state from which it can be later revived upon compliance with certain state law provisions. However, even if Parent later has its charter restored, this will not affect the claim for refund filed by Sub 1. This is the case because Sub 1 was not the Ataxpayer@ for the purposes of the consolidated return regulations. (See Issue 1 discussion). Therefore, Parent cannot ratify Sub 1's second refund claim. Parent's only recourse would have been to file a claim for refund in its own name.

Issue 5 - Whether submission of substantiating information constitutes a second claim

As we understand the facts, the original refund claim was filed by Sub 1 and was disallowed by the Service, because it was impossible to determine the correct amount of the refund based on the information supplied. Thereafter, Sub 1 submitted additional substantiating information.

There is no limit to the number of refund claims that a taxpayer may file with the Service. See e.g., Kellogg-Citizens National Bank of Green Bay, Wisconsin v. United States, 330 F.2d 635 639 (Ct. Cl. 1964). If two claims are identical, the first claim will not trigger the two year period of limitations to file suit under I.R.C. ' 6532(a)(1), if it was so poorly prepared as to be a nullity. Union Commerce Bank v. United States, 463 F. Supp. 842, 844 (N.D. Ohio 1978), aff d, 638 F.2d 962 (6th Cir. 1981); and W.A. Schemmer Limestone Quarry, Inc. v. United States, 240 F. Supp. 356 (S.D. Iowa 1964).

The Union Commerce Bank case stands for the proposition that if the Service rejects a claim for lack of specific information detailing the factual and legal basis of the claim (hereafter the "specificity" requirement), the claim is a nullity. Therefore, the two year period for filing suit after a disallowance of a claim is inapplicable because the claim is still imperfect and therefore, invalid.

CASE DEVELOPMENT, HAZARDS AND OTHER CONSIDERATIONS

In the instant case, the examiner stated that the taxpayer had failed to carry back the NOL to the proper year. This could be construed to be a consideration on the merits. We feel, however, that the court would most likely consider the disallowance as based on lack of specificity. This is because the examiner states that "it is impossible to determine the correct amount of refund attributable to Sub 1's NOL carrybacks based on the information provided."

Based on the foregoing, since the Service disallowed Sub 1's claim for lack of specificity, then Sub 1 could submit substantiating information and amend its original claim. This amended claim will be considered a new claim and will start the two year period of limitations for filing suit under I.R.C. ' 6532. However, as discussed in Issue 1, the problem of the proper party filing the refund claim still exists. Thus, the amended claim for refund is not valid because it was not filed by the Ataxpayer@.

Issue 6 - Whether the amended claim for refund is timely filed

Section 6511(d)(2)(A) of the Code provides the period of limitations for filing refund claims attributable to net operating loss carrybacks. Section 6511(d)(2)(A) provides that if the claim for refund relates to an overpayment attributable to a net operating loss carryback, the three year period for filing a claim for refund begins from the due date (including extensions) for the year of the loss which results in the carryback. The year of the net operating loss for the purpose of filing a refund claim is the year in which the loss is incurred, not the year in which the loss is used to reduce taxes. Glenwood Cooperative, Inc. v. United States, 73 F.3d 334 (Fed. Cir. 1996).

CASE DEVELOPMENT, HAZARDS AND OTHER CONSIDERATIONS

In this case, the loss year return (ending on Day 1 of Year 3) was extended to Day 6 of Year 3. Three years after that date is Day 6 of Year 6. Therefore, any claim for refund filed after that date carrying back an NOL is untimely unless an extension was obtained for the loss year return by executing a Form 872 consent. In this case, no consents were executed. The amended claim for refund was filed on Date X, which was after Day 6 of Year 6. In addition, as discussed in Issue 1, the amended claim was not filed by the taxpayer; therefore, it was invalid.

Issue 7 - Whether there are any litigating hazards to disallowing Sub 1's claim based on lack of authority

The Internal Revenue Code contains various provisions for obtaining a refund. First, under I.R.C. ' 7422, a claim for refund must be filed with the Secretary of the Treasury. Second, under I.R.C. ' 6511(a), the claim must be filed by the "taxpayer." Third, under I.R.C. ' 6402(a), if an overpayment is made, the refund shall be made to "the person who made the overpayment." See, Bruce v. United States, 759 F.2d 755, 758 n.2 (9th. Cir. 1985). According to the Bruce case, standing is a threshold jurisdictional question in every federal case. A taxpayer may have a valid claim on the merits and nonetheless lack standing to receive the refund. Because the standing issue is independent from the merits determination, it is proper for the court to decide that issue independently. A basic rule of standing is that one person cannot raise the claim of another. Bethel Baptist Church v. United States, 629 F. Supp. 1073, 1079 (M.D. Pa. 1986), aff=d, 822 F.2d 1334 (3rd Cir. 1987). As discussed above, a refund claim can only be filed by the taxpayer.[@] The purpose of the standing doctrine is to ensure that refunds are paid to the proper parties.

CASE DEVELOPMENT, HAZARDS AND OTHER CONSIDERATIONS

In the instant case, Sub 1 does not have standing to sue for a refund because Sub 1 is not the taxpayer or a proper agent for the taxpayer. Only Parent can file for a refund of its own taxes on its own return. We believe there are minimal litigating hazards to raising the standing issue.

Ensuring that the refund goes to the proper party avoids the necessity for multiple payments and multiple lawsuits.

If Sub 1 wants to demonstrate that it was the proper party to file a claim for refund, it must show that it was an agent for Parent. Treas. Reg. ' 301.6402-2(c) provides that an authorized agent may file a refund claim for the taxpayer. If a claim is filed by an agent, a power of attorney must be attached. Treas. Reg. ' 302.6402-2(e). Finally, under Treas. Reg. ' 601.502(b), the agent cannot prosecute the claim unless it is authorized to practice before the IRS. Since Sub 1 has made no showing that it was an agent, we believe it is proper to raise the standing issue.

Issue 8 - Whether Parent can ratify Sub 1's refund claim if it renews its charter

Ratification is the express or implied adoption or confirmation by one person, with knowledge of all material matters, of an act performed on his behalf by another who lacked all authority to so. 1 Restatement, Agency 2d, Sections 82 and 100A (1958).

Ratification serves to authorize an action which was preauthorized when taken.

Under the agency law for State 1, if the principal ratifies unauthorized acts of its agent, the ratification relates back to the time of the acts and is equivalent to original authority. Hannigan v. Italo Petroleum Corp., 47 A.2d 169, 172 (Del. 1945). Ratification relates back and is the equivalent of authority at the commencement of the act and is the equivalent of authority at the commencement of the Act. Newman v. Schiff, 778 F.2d 460, 462 (8th Cir. 1985). However, an after the fact ratification does not relate back to the unauthorized filing so as to make it timely. FEC v. NRA Political Victory Fund, 513 U.S. 88, 98 (1994). The filing of a cause of action cannot be ratified after the statute of limitations for filing has expired unless waived by the intervening third party. The reason for such doctrine is that intervening rights of a third party cannot be defeated by the ratification. In other words, it is essential that the party ratifying should be able not merely to do the act ratified at the time the act was done, but also at the time of ratification.

CASE DEVELOPMENT, HAZARDS AND OTHER CONSIDERATIONS

Based on the above, we conclude that Parent could only ratify the filing of the refund claim if the claim had been filed while Parent-s charter was restored.

If you have any questions concerning the above, please call.

cc: Regional Counsel, CC:SER
Assistant Regional Counsel (TL), CC:SER