Lesson 13

REFUNDS AND REFUND LITIGATION
(March 2012)

CONTENTS

I. INTRODUCTION

The Code provides a comprehensive set of rules contained in Subtitle F that a taxpayer must follow in order to obtain a tax refund from the Service. Generally, an overpayment exists where a taxpayer makes tax payments that exceed the correct amount of tax due for the taxable period. The Service generally does not automatically issue a refund to the taxpayer, even when it recognizes that the taxpayer has overpaid the tax. The taxpayer must file a timely claim for refund. A claim for refund is timely if it is filed within three years from the filing of the return or two years from the date the tax was paid, whichever is later.

Generally, the amount of any refund on a timely filed claim is limited to the portion of the tax paid during the three preceding years, plus the period of any extension for filing a return. If a refund claim with respect to the return is filed after the three-year period, the amount of any refund is limited to the portion of the tax paid during the two years immediately preceding the filing of the claim. The refund may also be reduced by amounts the taxpayer owes in connection with certain debts.

In the event the Service denies a taxpayer's claim for refund in full or in part, or doesn't act on the claim within six months, the taxpayer may file a refund suit in either a federal district court or the Court of Federal Claims.

II. OVERPAYMENT DEFINED

No refund or credit can be made unless it has first been determined that the taxpayer made an overpayment of tax for the period, generally a tax year. Lewis v. Reynolds, 284 U.S. 281, 283 (1932) ("An overpayment must appear before refund is authorized."). Despite the central role that the term "overpayment" plays in terms of refunds, the Code provides no explicit definition of the term. In Lewis, the Supreme Court provided guidance as to the term "overpayment." In Lewis, the Service reduced the amount of the refund claimed by the taxpayer because the Service had determined that the taxpayer owed additional tax for that same year. Taxpayer argued that the period of limitation on assessment had expired and thus the Service was prohibited from reducing his refund. The Court rejected the taxpayer's argument. The Court stated that while no new assessment can be made after expiration of the period of limitation, the taxpayer is not entitled to a refund unless the tax is overpaid. The expiration of the period of limitation does not bar the Government from retaining payments already received when they do not exceed the amount which might have been properly assessed and demanded for the tax year.

A. Section 6401(a)

Section 6401(a) provides that an overpayment "includes" payment of any internal revenue tax that is assessed or collected after the applicable period of limitation has expired.

B. Section 6401(b)

Section 6401(b) provides that refundable credits that exceed the amount of income tax imposed for the year are considered overpayments of tax. Thus, excessive withholding tax and estimated tax payments are considered overpayments.

C. Section 6401(c)

Section 6401(c) provides that an amount paid as tax may constitute an overpayment even if there is no tax liability for which the tax was paid.

D. Caselaw

In 1947, the Supreme Court in Jones v. Liberty Glass, 332 U.S. 524, 531 (1947), provided a more useful description of the term "overpayment." In that case, the Court stated:

> [W]e read the word "overpayment" in its usual sense, as meaning any payment in excess of that which is properly due. Such an excess may be traced to an error in mathematics or in judgment or in interpretation of facts or law. And the error may be committed by the taxpayer or by the revenue agents. Whatever the

reason, the payment of more than is rightfully due is what characterizes an overpayment.

Based on the language in Liberty Glass, an overpayment is determined in relation to two elements: (1) the correct tax for the year and (2) the amounts paid as tax.

1. Correct Tax

a) Payment of a tax assessed or collected after the applicable period of limitation has expired is by definition an overpayment because the tax is not rightfully due. I.R.C. § 6401(a).

b) Voluntary payment of a tax assessed and paid after the expiration of the statute of limitations on assessment does not constitute a waiver by the taxpayer of the period of limitations on assessment, and such a payment is an overpayment. See Rev. Rul. 74-580, 1974-2 C.B. 400.

Note: Where taxes have been paid before the expiration of the period of limitations on assessment, the fact that the taxes were not actually assessed before such expiration does not render the payment an overpayment. See Rev. Rul. 85-67, 1985-1 C.B. 364; Crompton and Knowles Loom Works v. White, 65 F.2d 132 (1st Cir. 1933), cert. denied, 290 U.S. 669 (1933).

c) For purposes of determining whether a taxpayer has made an overpayment, the tax the taxpayer reports on his return is not necessarily the "correct" tax. Even if the Service refunds the amount the taxpayer claimed as an overpayment on the return, the tax is subject to adjustment until the applicable period of limitation expires. See Abouelnoor v. Commissioner, T.C. Summary Opinion 2005-178 (citing Clark v. Commissioner, 158 F.2d. 851 (6th Cir. 1946)) (explaining that the Service is not estopped from assessing a deficiency for a tax year in which the Service has accepted the taxpayer's return and issued a refund as claimed on the return).

2. Payment Required

a) Before a remittance can be determined to be an overpayment of tax, it must first be a payment rather than a deposit of tax. A deposit is a remittance "deposited" with the government for various purposes, including the suspension of deficiency interest on a disputed underpayment of tax. As such, it is never intended to be a payment of tax at the time the remittance is made and may not constitute an overpayment of tax.

b) Historically, the Service provided guidance regarding deposits versus payments in Rev. Proc. 84-58, 1984-2 C.B. 501, superseded by Rev. Proc.

2005-18, 2005-1 C.B. 798. Rev. Proc. 84-58 provided procedures for taxpayers to make remittances, or "deposits in the nature of a cash bond," to suspend the running of interest on deficiencies. Under that revenue procedure, a deposit in the nature of a cash bond is not a payment of tax, is not subject to a claim for credit or refund, and, if returned to the taxpayer, does not bear interest.

c) In 2004, Congress enacted section 6603, which provides for the payment of interest on a deposit. This section recognizes that deposits are not payments of tax and may not constitute an overpayment of tax.

d) Rev. Proc. 2005-18, which supersedes Rev. Proc. 84-58, provides guidance concerning deposits under section 6603 and the conversion of deposits previously made under Rev. Proc. 84-58. Any portion of a deposit in the nature of a cash bond previously made pursuant to Rev. Proc. 84-58 will not earn interest under section 6603(d) unless the Service receives a written statement from the taxpayer identifying the amount as a deposit under section 6603. The date that the Service receives the written statement will be treated as the date on which the deposit begins to earn interest for purposes of section 6603(d).

e) Under Rev. Proc. 2005-18, a deposit made pursuant to section 6603 is not subject to a claim for credit or refund as an overpayment until the deposit is applied by the Service as payment of an assessed tax of the taxpayer. A taxpayer may request the return of all or part of a deposit at any time before the Service has used the deposit for payment of a tax. The deposit will be returned to the taxpayer and, to the extent the deposit is attributable to a disputable tax, interest will be included using the Federal short-term rate per section 6621(b), compounded daily, for the period from the date of deposit to a date not more than 30 days preceding the date of the check paying the return of the deposit.

f) Revenue Procedure 2005-18 permits the reclassification of a deposit as a payment, but only if the taxpayer fails to notify the Service that the taxpayer wishes to keep the deposit as a deposit and only after the Service makes an assessment. As such, a deposit may eventually become an overpayment subject to refund.

III. ADMINISTRATIVE CLAIM FOR REFUND –§§ 6402 AND 6511

To be eligible to receive a refund or credit, a taxpayer must file a timely claim for refund or credit prior to the expiration of the applicable statutory period of limitation. Treas. Reg. § 301.6402-2(a)(1).

A. Required Form for Filing a Claim

1. Generally, a claim for the credit or refund of an overpayment in income tax must be made on the return required to be filed for the year. A return qualifies as a claim for refund if it sets forth the amount of the overpayment and directions as to its refund or application as a credit. Treas. Reg. § 301.6402-3(a)(5).

2. If an income tax return has already been filed, the claim for refund must generally be made on Form 1040X, Amended U.S. Individual Income Tax Return, or Form 1120X, Amended U.S. Corporation Income Tax Return.

3. All other claims by taxpayers for the refund of income taxes, interest, penalties, and additions to tax shall be made on Form 843, Claim for Refund and Request For Abatement. Treas. Reg. § 301.6402-2(c).

4. Other forms are appropriate for claims for refund of taxes other than income tax, including excise and employment taxes.

B. Filing a Timely Claim

1. Section 6511 establishes the basic timeliness rules for refund or credit of an overpaid tax. Section 6511(b)(1) states that "no credit or refund shall be allowed or made after the expiration of the period of limitations prescribed . . . for the filing of a claim for credit or refund, unless a claim or refund is filed by the taxpayer within such period." Thus, no refund is permitted to be made at all unless a timely claim for refund is filed.

2. Section 6511(a) provides that for a claim to be timely, it must be filed within three years from the date the return was filed, or two years from the date tax was paid, whichever is later.

3. If no tax return was filed, a claim must be filed within two years from the time the tax was paid. I.R.C. § 6511(a).

C. Grounds Set Forth in Claim

1. A claim for refund must include each ground upon which a credit or refund is claimed and facts sufficient to apprise the Commissioner of the exact basis thereof. Treas. Reg. § 301.6402-2(b)(1).

2. A taxpayer is required to file a separate claim for each type of tax (income, gift, federal unemployment) for each taxable period. Treas. Reg. § 301.6402-2(d).

3. Although precision is not required, at a minimum, the taxpayer must identify

in the refund claim the essential requirements of each and every refund demand. See In re Ryan, 64 F. 3d 1516 (11th Cir. 1995).

4. There may be grounds for a motion to dismiss if the taxpayer fails to adequately state a basis for relief in a refund claim. United States v. Felt & Tarrant Mfg., 283 U.S. 269 (1931).

Note: The Service cannot, however, determine that a claim is defective after disallowing the claim for refund on its merits. Ford v. U.S., 402 F.2d 791 (6th Cir. 1968).

D. Informal Claim

1. Although the regulations prescribe the forms to be used and other rules for making a claim for refund (Treas. Reg. §§ 301.6402-2 and 6402-3), it has long been recognized that an informal claim for a refund may suffice.

2. In U.S. v. Kales, 314 U.S. 186 (1941), the taxpayer sent the Service a letter of protest with her payment of a jeopardy assessment within the statutory period for filing a refund claim. The letter stated that if the Commissioner's valuation should be set aside by the courts or administrative action, with the resulting tax she had paid being too high, she would "claim a right to a refund of said tax to the extent of such excess." The Supreme Court stated that the Commissioner could have been left in no doubt that the taxpayer was setting forth her right to a refund contingent upon future events and held that the letter constituted an informal refund claim and had been treated as such by the Service.

3. An informal claim for refund is adequate if it has a written component, is sufficient to put the Service on notice that a tax refund is sought, and focuses the Service's attention on the merits of the claim. Kales, 314 U.S. at 195. While an oral demand for refund is insufficient by itself to be considered an informal refund claim, a taxpayer's written demand for refund does not have to provide the entire framework for the informal refund claim. See Gustin v. United States, 876 F.2d 485, 488 (5th Cir. 1989). If the Service considers the refund claim on its merits, the Service is considered to have waived the defect. Alternatively, the taxpayer can perfect the claim by filing a formal refund claim before the informal refund claim is rejected. Jackson v. Commissioner, T.C. Memo. 2002-44.

4. Examples of qualifying informal claims:

a) A letter to the Service; U.S. v. Kales, 314 U.S. 186 (1941).

b) A notation on the back of a check ("This check is accepted as paid under protest pending final decision of the higher courts") paying the tax; Night Hawk Leasing v. U.S., 18 F. Supp. 938 (Ct. Cl. 1937).

c) A protest letter, along with request for suspension pending the outcome of litigation; Furst v. U.S., 678 F.2d 147 (Ct. Cl. 1982).

d) A taxpayer's oral statements made before assessment and recorded by a revenue agent; New England Elec. Sys. v. U.S., 32 Fed. Cl. 636, (Fed. Cl. 1995).

E. Protective Claims

1. Just as with the informal claim doctrine, the concept of a "protective claim" is not in the Code or regulations but is established by case law. See U.S. v. Memphis Cotton Oil, 288 U.S. 62 (1933); U.S. v. Kales, 314 U.S. 186 (1941).

2. Protective claims are filed to preserve the taxpayer's right to claim a refund when the taxpayer's right to the refund is contingent on future events that may not be determinable until after the period of limitation expires. A protective claim can be either a formal claim or an amended return for credit or refund. Protective claims are often based on current litigation or expected changes in the tax law, other legislation, or regulations. A valid protective claim need not state a particular dollar amount or demand an immediate refund; however, it must meet the criteria set forth by the Supreme Court in Kales.

F. Amending a Claim

1. Sometimes a claim needs to be amended. For example, further information is discovered after the claim is filed or the claim was filed by another practitioner. In determining whether a supplemental claim is an amendment to the original claim rather than an untimely new claim, two considerations are relevant. If a filed claim is found inadequate or incomplete, it may be amended at any time as long as (1) the Service has not taken final action with respect to the claim, and (2) no new matters are raised by the taxpayer.

a) A supplemental claim will not be considered an amendment to an 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, 524-526 (1938); Pink v. U.S., 105 F.2d 183 (2nd Cir. 1939). Such a supplemental claim is a new claim, rather than an amendment to the existing, timely claim.

b) A supplemental claim is not considered an amendment to an original claim if the Service has taken final action on the original claim by allowing it, or by rejecting it in whole or in part. If rejected, the claim can no longer be amended because there is no claim left pending.

2. Information that either clarifies matters already within the Service's knowledge or provides information that the Service would have naturally ascertained in the course of its investigation does not constitute a new matter. A taxpayer may amend the original claim after the period of limitation for filing a refund claim has expired by providing such information. Where a late-filed amended claim relies upon the same facts as a timely claim, the amendment may constitute an acceptable clarification of the original. Memphis Cotton Oil, 288 U.S. 62 (1939).

3. If a supplemental claim is determined to be a valid amendment to an original claim, the original claim and amended claim constitute a single claim. Memphis Cotton Oil.

4. The failure of a claim for refund to set forth a ground raised in a later refund suit constitutes a variance between the claim and the suit, thus barring the taxpayer from litigating the matter not previously raised. I.R.C. § 7422; Felt & Tarrant, 283 U.S. 269 (1931) (holding that a defective claim for refund will not supply a basis for a suit against the government when there has been neither waiver by the Commissioner nor amendment by the taxpayer); Lockheed Martin v. U.S., 210 F.3d 1366, 1371 (Fed. Cir. 2000) (Under the "substantial variance rule," taxpayers are barred from presenting in a tax refund suit claims that "substantially vary the legal theories and factual bases set forth in the tax refund claim presented to the IRS").

G. Waiver Doctrine

1. The Service has no authority to ignore the statutory requirement that a timely claim be filed, but it may choose to waive the requirements of its own regulations where it has not been misled by the formal deficiency of a claim to state the ground on which refund was sought. Tucker v. Alexander, 275 U.S. 228 (1927) (government stipulated that a ground not stated in the refund claim was the only one to be decided by the court). In such cases, the Service is estopped from rejecting a claim on this basis.

2. Procedurally, the waiver issue usually arises when the government moves to dismiss the taxpayer's complaint in the refund action on the ground that the claim is insufficient. At this point, the taxpayer cannot amend the claim, but the taxpayer can argue that the claim is sufficient and that the Commissioner waived any defects.

H. Proper Parties to File Claims

1. The proper party to file a refund claim is the person who was subject to any internal revenue tax and who made an overpayment of the tax. Section 6532(a), limiting the time for instituting a refund suit, and section 6511(a), limiting the

time for filing a claim for refund, refer to actions taken by the taxpayer.

2. A person who voluntarily pays the tax of another cannot file a claim for refund. See Stahmann v. Vidal, 305 U.S. 61 (1938). Although some courts have created exceptions allowing some third parties who pay the tax of another to file suit for refund, the Service's current position, which has generally been upheld in court, is that a person not liable for the underlying tax may not file a refund action. See Rev. Rul. 2005-50; Munaco v. United States, 522 F.3d 651, 657 (6th Cir. 2008). For a discussion of this issue and the remedies that are available to such a person, see below in section XII(C), Refunds Involving Third Parties.

3. For further discussion regarding standing in district court cases or in the Court of Federal Claims, see below in section XII, Refund Litigation.

IV. LIMITATIONS ON REFUND – IRC § 6511

No credit or refund shall be allowed or made after the expiration of the period of limitation prescribed in section 6511(a) for the filing of a claim for credit or refund, unless a claim for credit or refund is filed by the taxpayer within the limitations period.

A. Limit if Claim Filed Within Three-Year Period.

If the taxpayer has filed a tax return and files a refund claim within three years of the actual filing of the return, the refund amount is limited to the tax paid within three years before the taxpayer filed the refund claim, plus any extension of time the taxpayer had for filing the tax return. I.R.C. § 6511(b)(2)(A).

B. Limit if Claim Not Filed Within Three-Year Period.

If the taxpayer has filed a return but files a claim for refund more than three years after the return was filed (plus any extension of time for filing the return), the refund amount is limited to the tax paid within two years before the taxpayer filed the refund claim. I.R.C. § 6511(b)(2)(B).

C. Limit Where no Claim Filed.

If the taxpayer has not filed a refund claim, the amount of the credit or refund allowed shall not exceed the amount that would have been allowable if a claim had been filed on the date the credit or refund is allowed. I.R.C. § 6511(b)(2)(C).

D. Limit Where no Return Filed.

If the taxpayer has not filed a return but has filed a claim for refund, the refund amount is limited to the tax paid within two years before the taxpayer filed the refund claim. I.R.C. § 6511(b)(2)(B).

E. Special Rules in Case of an Extension of Time by Agreement.

If an agreement under section 6501(c)(4) extending the period of assessment of a tax is made before the expiration of the period prescribed for the filing of a claim for credit or refund, different rules apply.

1. Time for Filing Refund Claim.

The period for filing a refund claim under section 6511(a) shall not expire prior to six months after the expiration of the period within which an assessment may be made pursuant to the agreement or any extension thereof under section 6501(c)(4). I.R.C. § 6511(c)(1); see also Treas. Reg. § 301.6511(c)-1(b).

2. Limit on Amount.

The amount of the credit or refund shall not exceed the portion of the tax paid after the execution of the agreement and before the filing of the refund claim, plus the amount that could have been properly credited or refunded under section 6511(b)(2) if a claim had been filed on the date the agreement was executed. I.R.C. § 6511(c)(2); see also Treas. Reg. § 301.6511(c)-1(c)(1).

3. Claims Not Subject to Special Rule.

These special rules do not apply in the case of a refund claim filed (or credit or refund allowed if no claim is filed) either (1) prior to the execution of the agreement or (2) more than six months after the expiration of the period within which an assessment may be made pursuant to the agreement or any extension thereof. I.R.C. § 6511(c)(3); see also Treas. Reg. § 301.6511(c)-1(a).

F. Exceptions to the general SoL for filing claims for refund.

1. Bad Debts or Worthless Securities.

A taxpayer can file a claim for refund within seven years from the date prescribed for filing the return. I.R.C. § 6511(d)(1).

2. Loss Carrybacks.

A taxpayer can file a claim for refund within three years after the due date (including extensions) of the return for the year of the net operating loss or capital loss, or an extended period, whichever expires later. I.R.C. § 6511(d)(2)(A).

Example: If an individual files a 2009 return on or before April 15, 2010, and claims a net operating loss that is carried back to 2006, the taxpayer will normally have until April 15, 2013, to file the claim for refund, even though the claim relates to 2006.

3. Certain Credit Carrybacks.

a) In the case of an overpayment attributable to a credit carryback (including any business carryback under section 39), in lieu of the normal three-year period of limitation, a taxpayer must file a claim within three years after the due date of the return, including any extension of time to file, for the tax year of the unused credit. I.R.C. § 6511(d)(4)(A).

b) With respect to any portion of a credit carryback from a tax year attributable to a net operating loss carryback, capital loss carryback, or other credit carryback from a subsequent tax year, a taxpayer must file a claim within three years after the due date of the return for the subsequent year, including extensions. I.R.C. § 6511(d)(4)(A).

c) If a taxpayer has signed a waiver for the tax year, the applicable period of limitation is the period prescribed in the waiver or the period within which a claim for credit or refund could have been filed for that year, whichever expires later. I.R.C. § 6511(d)(4)(A). These extensions only apply to the three-year limitation period and do not change the two-years-from-payment rule. I.R.C. § 6511(d)(4)(A).

G. Prior Petition Filed in Tax Court.

Generally, under section 6512(a), if a taxpayer timely files a petition in Tax Court, the Service cannot issue a refund or post a credit for any income tax, gift tax, estate tax, or a tax under chapters 41-44, and the taxpayer is precluded from subsequently filing a refund suit for the same taxable period. There are six exceptions to this general rule. The Service may refund any:

1. Overpayment determined by a final decision of the Tax Court.

2. Amount collected in excess of an amount computed in accordance with a final decision of the Tax Court.

3. Amount collected after the period of limitation for collection had expired for making a levy or beginning a proceeding in court.

4. Overpayment attributable to partnership items.

5. Amount collected by the Service within the period during which collection is barred under section 6213(a).

6. Overpayment the Service is authorized to refund or credit pending appeal as provided by section 6512(b).

The Tax Court's ability to determine an overpayment is subject to the look-back periods in sections 6511(b) and 6512(b)(3).

H. Terminated Proceedings

Even if the Tax Court proceedings are terminated prematurely (e.g., because of a failure to prosecute), the taxpayer is still precluded from filing a subsequent refund suit because this is not one of the exceptions to the general rule. See Fiorentino v. U.S., 226 F.2d 619 (3d Cir. 1955). If the Tax Court never acquires jurisdiction (e.g., because the taxpayer did not timely file its petition), the taxpayer will not be precluded from filing a subsequent refund suit.

I. Overpayments

If the Tax Court enters a decision reflecting an overpayment, the taxpayer can file a subsequent refund suit if the Service does not pay or credit the taxpayer the overpayment. The taxpayer does not have to file a claim for refund as to the amount of overpayment in the decision. See U.S. v. Rochelle, 363 F.2d 225 (5th Cir. 1966). Under section 7422(a), the taxpayer must file a claim for refund for any amount in excess of the overpayment reflected in the decision, assuming one of the exceptions to the general rule applies.

V. OFFSETS – IRC § 6402

The Commissioner may, within the applicable period of limitation, credit any overpayment of tax, including interest thereon, against any outstanding liability for any tax (or for any interest, additional amount, addition to the tax, or assessable penalty) owed by the person making the overpayment and the balance, if any, shall be refunded, subject to the limitations set forth under section 6402.

A. Reduction of Overpayment before Refund

The Service must reduce a taxpayer's overpayment by any amount the taxpayer owes in connection with any past–due child support (I.R.C. § 6402(c)); Federal agency non–tax debts (I.R.C. § 6402(d)); state income tax obligations (I.R.C. § 6402(e)); and certain unemployment compensation debts owed to a state (I.R.C. § 6402(f)), prior to making any refund to the taxpayer.

1. Treasury's Financial Management Service (FMS) issues tax refunds. The reduction in overpayments pursuant to sections 6402(c) through (f) is accomplished through FMS's Treasury Offset Program (TOP).

2. If an agency submits a taxpayer's legally enforceable, past-due debt to TOP for offset, FMS will take as much of the taxpayer's refund as is needed to pay off the debt and will send it to the agency. FMS will issue the remaining portion of the taxpayer's refund to the taxpayer. FMS will send a notice to the taxpayer when a TOP offset occurs. The notice reflects the original refund amount, the

offset amount, the agency to which all or part of a refund has been paid, and the address and telephone number of the agency. FMS will also notify the Service of the amount taken from the taxpayer's refund.

3. Injured spouse exception. If a joint return was filed and the refund was offset to pay one spouse's past-due child support, spousal support, or a federal debt, the other spouse might qualify as an injured spouse. An injured spouse can file a claim for refund for his or her share of the overpayment that would otherwise be used to pay the past-due amount. For more details on the injured spouse rules, see Rev. Rul. 74-611, 1974-2 C.B. 399, amplified by, Rev. Rul. 85-70, 1985-1 C.B. 361; Rev. Rul. 80-7, 1980-1 C.B. 296, amplified and clarified by Rev. Rul. 87-52, 1987-1 C.B. 347; and Rev. Rul. 2004-74, 2004-2 C.B. 84; Rev. Rul. 2004-73, 2004-2 C.B. 80; Rev. Rul. 2004-72, 2004-2 C.B. 77; and Rev. Rul. 2004-71, 2004-2 C.B. 74.

B. Credit to Estimated Taxes

Section 6402(b) provides that a taxpayer may elect to credit a refund of any overpayment against the estimated tax liability for the subsequent year. If a taxpayer elects to have an overpayment refunded to him and doesn't file an amended return asking for the refund, the taxpayer is precluded from changing an election to have the overpayment applied as a payment on account of estimated income tax.

C. Section 6402(g) Actions Unreviewable

No court shall have jurisdiction to review an action taken by the Service under section 6402. I.R.C. § 6402(g).

VI. TIME RETURN DEEMED FILED

A. For purposes of section 6511, any return filed before the last day prescribed for the filing thereof shall be considered as filed on such last day. I.R.C. § 6513(a).

B. An extension of time for filing a return is not given any effect in establishing the date a return is filed for refund purposes. Treas. Reg. § 301.6513-1(a).

C. If a return is filed after the normal due date but before the extended due date, the date of filing is the date the return is actually received by the Service. Consequently, the period of limitation for filing a claim for refund begins to run from the date the return was actually received by the Service and not from the extension date. Foster v. U.S., 221 F. Supp. 291 (S.D.N.Y. 1963).

D. Where a taxpayer files an original return and then an amended return after the due date, or extended due date, the "return" referred to in section 6511 is the originally filed return. Rev. Rul. 72-311, 1972-1 CB 398.

VII. WHEN TAX IS CONSIDERED PAID

A. Under section 6511(b)(2), the amount of tax paid limits the amount of any credit or refund. Therefore, the Service must determine the point at which a tax is considered paid.

B. For purposes of sections 6511(b)(2) and (c) and section 6512, a payment of any tax made before the last day prescribed for payment is considered made on the date the payment is due, even if an extension has been granted to the taxpayer to file a return or pay the tax, or the taxpayer has elected to pay the tax in installments. I.R.C. § 6513(a).

C. For purposes of section 6511, withheld income tax deducted from wages during a calendar year is considered to have been paid by the taxpayer on April 15th of the following year. I.R.C. § 6513(b)(1).

D. An estimated income tax payment is considered to have been made on the last day for filing the return determined without regard to any extension of time for filing the return. I.R.C. § 6513(b)(2).

E. Social Security tax and income tax withholding paid during any period ending with or within a calendar year is considered paid on April 15th of the succeeding year. I.R.C. § 6513(c)(2).

Example: A taxpayer makes total quarterly estimated tax payments in the amount of $10,000 and files his 2009 return early, on March 1, 2010. On April 1, 2012, an income tax deficiency of $6,000 is assessed, which the taxpayer pays in three $2,000 installments on May 1, August 1, and November 1, 2012. A claim filed before April 15, 2013, would be timely as to all payments, including estimated tax payments made in 2009, but deemed made on April 15, 2010, when the tax return for the year was also considered to have been filed. A claim filed on April 20, 2013 would be filed more than three years from the filing period of the return, and no portion of the $10,000 tax paid could be claimed, but the claim would be timely as to all deficiency payments. A claim filed after November 1, 2014, would be untimely as to all deficiency payments, and any claim filed more than two years after each installment would be untimely as to that installment.

A. Overpayment Credits.

1. A tax is considered paid when an overpayment of one type of tax is credited against an unpaid liability for another type of tax. I.R.C. § 6402(a). A tax is also considered paid when an overpayment in one year is credited against a deficiency in tax for a different tax year. I.R.C. § 6513(d).

2. Where an overpayment in one year is applied to a deficiency for another year, the date of payment is the date the Service credits the overpayment against the deficiency, and the two-year-from-payment period begins to run on that date.

3. Where a taxpayer, reporting an overpayment for a tax year (the first year), elects to credit the overpayment to estimated tax for the next tax year (the second year), the amount credited constitutes a payment for the second year and is considered paid on the filing date for the second year's return. The overpayment ceases to exist for the first year and the taxpayer can only file a claim for refund with respect to payment in the second year, not the first year. I.R.C. § 6513(d).

VIII. CLAIMS FOR REFUND – TO FILE OR NOT TO FILE

A. Risk of Adjustment – The Service's Offensive Measures.

A claim for refund permits the Service to examine the return that is the subject of the refund claim. If the Service examines or reexamines the return, there is the potential that the Service will make adjustments to the return. For a taxpayer, it is not advisable to file a claim for refund before the period of limitation for assessment has expired unless the return has been thoroughly reviewed and the refund claim has been carefully considered. Even if the period for assessment has run, the Service can still make an adjustment to a carryover or continuing item that affects other returns. Therefore, a claim for refund could result in the following:

1. Adjustments made by the Service that could effectively reduce or eliminate the claimed overpayment by way of offset;

2. The creation of a deficiency in the year covered by the claim; or

3. An increase in tax in years other than the year for which the claim is filed.

B. Timing of the Claim – The Service's Defensive Measures.

1. To reduce the risk of an offensive adjustment by the Service, a taxpayer could make a claim for refund of a deficiency assessment after the period of limitation for assessment has expired.

Example: TP files a 2009 return on April 15, 2010. A tax deficiency of $10,000 is assessed on April 26, 2012. On May 5, 2012, the TP pays the assessment. The TP has until May 5, 2014, to file a claim for refund to contest liability for the 2012 payment. Absent an extension agreement, however, the Service is TP unable to assess any further deficiency for the 2009 tax after April 15, 2013. Therefore, if the TP delays filing a claim for refund until after April 15, 2013, (for example, filing the claim on October 1, 2013), the taxpayer can contest the deficiency assessment, but the Service cannot assess any further tax deficiency with respect to 2009.

2. Although the taxpayer's recovery in the above example is limited to the amount of the payment, the expiration of the period of limitation prevents the Service from making any further assessments. With regard to any new issues discovered by the Service, the Service is limited by way of offsetting the refund.

C. Equitable Estoppel

1. Form 870, Waiver of Restrictions on Assessment & Collection of Deficiency in Tax and Acceptance of Overassessment.

A taxpayer can file a claim for refund of the amount of a paid deficiency even after the assessment period has expired. Form 870 specifically provides that by consenting to the assessment of the deficiencies shown in the waiver, the taxpayer is not precluded from filing a claim for refund, after the tax has been paid, if the taxpayer later believes the taxpayer is entitled to it.

2. Form 870-AD, Offer to Waive Restrictions on Assessment and Collection of Tax Deficiency and to Accept Overassessment, and Equitable Estoppel.

a) The Form 870-AD provides that a taxpayer cannot file a claim for refund or credit where the taxpayer has paid a deficiency assessment resulting from a settlement of the case unless the claim is for amounts attributed to carrybacks provided by law. A Form 870-AD is not a closing agreement, however, and cannot bind taxpayers with finality. See Whitney v. U.S., 826 F.2d 896 (9th Cir. 1987) ("standing alone [the Form 870-AD] should not estop the executing taxpayer from seeking a refund").

b) Equitable estoppel prevents any party from profiting from an action that induced reliance by another party. The elements of estoppel are as follows: (1) there must be false representation or wrongful misleading silence; (2) the error must originate in a statement of fact, not in an opinion or a statement of law; (3) the one claiming the benefits of estoppel must not know the true facts; and (4) that same person must be adversely affected by the acts or statements of the one against whom an estoppel is claimed. See Whitney v. U.S., 826 F.2d 896, 898, fn. 5 (9th Cir. 1987), (citing Lignos v. U.S., 439 F.2d 1365, 1368 (2nd Cir. 1971)); Uinta Livestock v. U.S., 355 F.2d 761, 766 (10th Cir. 1966). These are also the accepted elements of equitable estoppel used by the Tax Court. Estate of Emerson v. Commissioner, 67 T.C, 612, 617-18 (1977).

c) In cases involving Form 870-AD agreements the circuits are split, with a majority finding that the equitable estoppel principles can estop a taxpayer from claiming a refund. Guggenheim v. U.S., 77 F. Supp. 186 (Ct. Cl. 1948), cert denied, 335 U.S. 908 (1949); Ihnen v. U.S., 272 F.3d 577 (8th Cir. 2001), cert. denied, 537 U.S. 825 (2002); Aronsohn v. Comm'r, 988 F.2d 454, 456-57 (3d Cir. 1993); Elbo Coals v. U.S., 763

F.2d 818, 820 (6th Cir. 1985); Stair v. U.S., 516 F.2d 560, 564-65 (2d Cir. 1975); General Split v. U.S., 500 F.2d 998, 1003-04 (7th Cir. 1974); Cain v. U.S., 255 F.2d 193, 199 (8th Cir. 1958); and Daugette v. Patterson, 250 F.2d 753, 756 (5th Cir. 1957). In these cases, the courts have generally found that there was some form of misrepresentation by the taxpayer in claiming a refund based on an issue that was resolved in the Form 870-AD.

d) Where a taxpayer takes action contrary to the agreed terms of a previously executed Form 870-AD, the Service's only recourse is to assert that, due to additional factors, the taxpayer should be estopped from doing so.

IX. INTEREST ON OVERPAYMENTS – IRC § 6611

A. The Code provides for the payment of interest on overpayments of tax. I.R.C. § 6611.

B. Incorrect Amount of Interest Paid on Overpayment.

1. When a taxpayer believes that the Service has not paid the correct amount of interest on an overpayment, the taxpayer can ask the Service to pay the additional overpayment interest. Although the taxpayer may use a Form 843 to make the request, the request for additional overpayment interest is not a claim for refund as the overpayment interest is not interest that the taxpayer previously paid.

2. It is the government's position that a suit against the government for a refund of interest or the payment of additional interest must be brought in either the Court of Federal Claims or a federal district court. 28 U.S.C. §§ 1491(a)(1) and 1346(a)(1). The Tax Court has held, however, that it has subject matter jurisdiction over a taxpayer's claim for overpayment interest. See Sunoco Inc. v. Commissioner, 663 F.3d 181 (3d Cir. 2011) (overturning the Tax Court's assertion of jurisdiction).

3. A suit for overpayment interest must be commenced within six years from the date the Service authorizes the scheduling of an overassessment. 28 U.S.C. § 2401(a) (". . . every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues."); 28 U.S.C. § 2501 ("Every claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues."); see also I.R.C. § 6407. Making a request for additional overpayment interest from the Service will not suspend the six year period within which suit must be filed. To fully protect their interests, taxpayers must timely file suit. See Rev. Rul. 56-506, 1956-2 C.B. 959.

X. REPORTS OF REFUNDS AND CREDITS – IRC § 6405

A. No refund or credit of income, estate, gift, or certain other taxes in excess of $2,000,000 can be authorized until a report has been made to the Joint Committee on Taxation. I.R.C. § 6405.

B. No report is required when an overpayment results from timely payments of tax which exceed the amount of tax shown on a timely return. Treas. Reg. § 301.6402-4.

C. No report is required for refunds made pursuant to section 6411 until an examination of the return has been completed.

D. For more information regarding refunds subject to section 6405, see IRM 4.36.

XI. TENTATIVE CARRYBACK ADJUSTMENTS -- IRC § 6411

A. Under section 6411, a taxpayer may apply for what is referred to as a quick refund based on a tentative carryback adjustment if the taxpayer is entitled to carry back a loss or credit to a prior year.

B. An application or request under section 6411 does not constitute a claim for credit or refund and the amount carried back results in only the tentative allowance of any refunded overpayment. After a tentative quick refund, the Service may make a full examination of the return under its regular auditing procedures.

C. If the Service later determines that the amount refunded or credited as a tentative allowance was greater than the actual amount of the overassessment for the year, the Service can either (1) immediately assess the amount of the excessive refund as if were a math error (section 6213(b)(2)); (2) send a statutory notice of deficiency (SNOD) within the three-year period during which a deficiency may be assessed (section 6501(h)); and/or (3) commence an action for the recovery of an erroneous refund within the two-year period under section 6532(b) (section 7405).

D. An application filed under section 6411 is filed on Form 1139 for corporations and Form 1045 for individuals.

E. Treasury regulation § 1.6411-3(d)(1)(iii) provides that the Commissioner may credit or reduce a tentative adjustment by any assessed tax liabilities, unassessed liabilities determined in a statutory notice of deficiency (SNOD), unassessed liabilities identified in a proof of claim filed in a bankruptcy proceeding, or other unassessed liabilities in rare and unusual circumstances. For unassessed liabilities determined in a SNOD, see Rev. Rul. 2007-51, 2007-2 C.C. 573. For unassessed liabilities identified in a proof of claim filed in a bankruptcy proceeding, see Rev. Rul. 2007-52, 2007-37 I.R.B. 575.

XII. REFUND LITIGATION

Taxpayers may challenge the validity of the Service's tax determination by paying the disputed tax and commencing a suit for a refund in a federal district court or in the Court of Federal Claims. I.R.C. § 7422; 28 U.S.C. §§ 1346, 1491.

A. Full Payment Rule.

1. A federal district court or the Court of Federal Claims does not have jurisdiction over a suit for refund unless the taxpayer has made full payment of the amount of the assessment. See Flora v. U.S., 362 U.S. 145 (1960) (the Court concluded that the language of 28 USC § 1346(a)(1) as applicable to the district courts, the legislative history, and the history of the Tax Court create "a system in which there is one tribunal for prepayment litigation {the Tax Court} and another {the district courts and Court of Federal Claims} for postpayment litigation, with no room . . . for a hybrid.").

2. If the taxpayer is contesting interest or penalties, he or she must pay the interest or penalties in full. The government's position, however, is that Flora does not require the full payment of interest or penalties that follow automatically from the tax computation if the taxpayer is not disputing the interest or penalties. See Shore v. U.S., 9 F.3d 1524, 1527 (Fed. Cir. 1993) (finding that "only if the taxpayers assert a claim over assessed interest or penalties on grounds not fully determined by the claim for recovery of principal must they prepay such interest and penalties in order to satisfy the full payment requirement.").

3. With respect to divisible taxes, such as employment taxes, Flora requires full payment of the tax assessed with respect to a single transaction or event. For example, to sue for a refund of employment tax, the taxpayer must first pay the tax or penalty assessed for one employee for a single quarter.

4. While partial payment permits the taxpayer to maintain a refund suit for divisible taxes, the filing of the complaint does not prevent the Service from counterclaiming for the unpaid balance.

Note: Section 6331(i), with certain exceptions, prohibits levy to collect the unpaid portion of a divisible tax that is the subject of a refund suit from the plaintiff or plaintiffs in that suit. The section also prohibits the commencement of a proceeding in court to collect the unpaid tax. Consequently, in refund litigation cases involving divisible taxes, the appropriate Area Director/Director of Field Operations must suspend collection unless jeopardy is found or another exception applies. The field attorney should contact the appropriate Area Director/Director of Field Operations to suspend collection. If jeopardy is identified, Field Counsel should be contacted prior to any collection action being taken to assure that section 6331(i) is not violated.

B. Standing.

The district courts have jurisdiction to hear refund suits "for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected." 28 U.S.C. § 1346(a)(1). Section 1346 does not specifically limit the persons eligible to file suit. The rules regarding standing as to who may bring a tax refund suit in the district court, described below, are equally applicable to the Court of Federal Claims. 28 U.S.C. § 1491(a)(1).

C. Refunds Involving Third Parties.

Traditionally, only "taxpayers" had standing to bring a refund suit. See Busse v. U.S., 542 F.2d 421, 424 (7th Cir. 1976) ("Both parties agree that only 'the taxpayer' can bring a refund suit.") Section 7701(a)(14) defines "Taxpayer" as "any person subject to any internal revenue tax." At one point, individuals who paid the tax of another could maintain suits for refund of the tax paid if it was paid under certain circumstances that were not "voluntary." See, e.g., United States v. Williams, 514 U.S. 527 (1995). In 1998, however, Congress amended the Code to provide a remedy for such individuals. Consequently, the Service's current position, which has generally been upheld by courts that have addressed the issue, is that only a "taxpayer" may file a refund action. See Rev. Rul. 2005-50; Munaco v. United States, 522 F.3d 651 (6th Cir. 2008) (and cases cited therein).

1. United States v. Williams

a) In U.S. v. Williams, 514 U.S. 527 (1995), the United States Supreme Court explored the outer boundaries of who could be considered a "taxpayer." Ms. Williams had bought the marital home from her ex-husband, only to have a notice of federal tax lien filed against it a few weeks later by the Service to secure the ex-husband's outstanding tax debt. Ms. Williams tried to contest the validity of the lien, but the Service argued that she was not a "taxpayer" within the meaning of section 7701(a)(14). The Court disagreed, stating, "In placing a lien on her home and then accepting her tax payment under protest, the Government surely subjected Williams to a tax, even though she was not the assessed party." Id. at 535. The Court also observed that without an expansive interpretation of the refund provisions, third parties in the position of Ms. Williams would not be able to obtain meaningful relief. Id. at 536.

b) The Williams Court acknowledged that generally a party may not challenge the tax liability of another, but noted that the rule already has exceptions for fiduciaries and certain transferees.

c) The Court noted that it was not deciding when a volunteer who paid a tax assessed against someone else could sue for refund.

2. Newly-Created Statutory Remedies for Third Parties

a) In response to the Supreme Court decision in Williams, Congress amended the Internal Revenue Code in 1998 to provide a remedy for third parties such as Ms. Williams. The amendments added subsection 6325(b)(4) and subsection 7426(a)(4).

b) Pursuant to section 6325(b)(4)(A), a third party has the right to obtain a certificate of discharge by applying to the Secretary of the Treasury (delegated to the Service) for such a certificate after either depositing cash or furnishing a bond sufficient to protect the lien interest of the United States. The Secretary does not have the discretion to refuse to issue a certificate of discharge if the procedure is followed. After the property owner follows the procedure under section 6325(b)(4)(A), the Secretary must refund the amount deposited or release the bond, to the extent that the Secretary determines that the taxpayer's unsatisfied liability giving rise to the lien can be satisfied from a source other than property owned by the third party, or the value of the interest of the United States in the property is less than the Secretary's prior determination of its value. I.R.C. § 6325(b)(4)(B).

c) Section 7426(a)(4) provides a judicial remedy to resolve disagreements between the Service and third parties about the value of the tax lien and whether the tax lien attaches to the subject property. Once the owner of the property obtains a certificate of discharge pursuant to I.R.C. § 6325(b)(4)(A), the owner has 120 days after the certificate is issued to bring a civil action in federal district court to challenge the Secretary's determination of the value of the government's interest in the property. I.R.C. § 7426(a)(4). If no action is filed within the 120-day period, the Secretary has 60 days to apply the amount deposited or collected on the bond, to the extent necessary to satisfy the unsatisfied liability secured by the lien and refund any amount which is not used to satisfy the liability. I.R.C. § 6325(b)(4)(C). The judicial remedy available to third parties to challenge the value or attachment of a tax lien to their property is exclusive. Section 7426(a)(4) provides that "No other action may be brought by [a claimant]."

3. Current Law

In light of the new remedies described above, it is the Service's position that a person not liable for the underlying tax may not file a refund action. Rev. Rul. 2005-50. This position has generally been upheld by courts that have addressed the issue. See Munaco v. United States, 522 F.3d 651 (6th Cir. 2008) (and cases cited therein); see also EC Term of Years Trust v. United States, 550 U.S. 429 (2007) (holding that wrongful levy action pursuant to section 7426(a)(1) was the claimant's exclusive remedy and declining to expand its holding in Williams). In circumstances where a third party has paid the tax liabilities of another under duress, however,

courts may assert jurisdiction on a theory of implied contract rather than hearing the case as a refund suit. See Robinson v. United States, 95 Fed. Cl. 480, 488 (Fed. Cl. 2011).

D. Period of Limitation for Filing Suit.

A revenue agent or tax auditor will review a claim for refund and inform the taxpayer, by letter, if the Service will accept the claim or disallow the claim in full or in part. A taxpayer can then request a conference with the Appeals Office if the claim is disallowed in whole or in part. If the Appeals Officer agrees with the revenue agent's determination or if the taxpayer does not request a conference, the Service will generally issue a statutory notice of claim disallowance.

1. Under section 6532, the taxpayer has two years from the date of a notice of claim disallowance in which to bring suit. The period of limitation for filing suit does not begin to run until the Service issues a notice of claim disallowance. Rev. Rul. 56-381.

2. If the Service does not send the taxpayer a notice of claim disallowance, the taxpayer must wait at least six months from the date a claim was filed before filing suit. I.R.C. § 6532(a)(1).

3. Under section 6532(a)(3), a taxpayer may waive a notice of disallowance regarding a claim for refund. If this occurs, the two year period for filing a suit begins on the date the taxpayer files such waiver.

E. Role of Counsel in Refund Litigation -- CCDM 34.5.2.4

1. The attorney should immediately examine the complaint to determine which tax returns and related documents will be needed. In particular, the attorney should ascertain the following:

a) The name and address of the taxpayer and any related entity (such as a partnership or subchapter S corporation) whose returns the attorney will need.

b) The taxpayer's social security or employer identification number.

c) The type of tax in suit.

d) The tax periods for which the returns will be required.

2. Using this information, the attorney (or paralegal) should promptly prepare a memorandum requesting the administrative files. The admin file normally contains the taxpayer's tax returns, administrative reports, correspondence with the taxpayer, and the transcript of account. A transcript of account is a chronological record of tax assessments, abatements, payments, and refunds.

3. The attorney should address the memorandum to the appropriate Internal Revenue Service Campus or Director of Field Operations/Area Director office where the taxpayer filed its returns, as identified on the complaint. If an attorney cannot get this information from the complaint, the attorney should send the Memorandum to the Campus or Director of Field Operations/Area Director that has jurisdiction over the city and state where the taxpayer resides or where a corporation has its principal place of business.

4. After an attorney sends a request for tax returns in a refund case, the appropriate Campus will generally freeze the taxpayer's accounts for the subject years. Normally, once the Campus freezes the taxpayer's account, the Service will not issue any refunds or post credits on the frozen account. If returns or documents relating to another taxpayer or taxable period are requested, the attorney should indicate that the Service should not freeze the accounts for these related taxpayers/years.

5. Attorneys should request only copies, and not originals, of the returns for related years or taxpayers. If originals are requested, the attorney should ensure that the responsible office monitors the periods of limitation on any open year.

6. If an attorney nevertheless receives original returns for related years or taxpayers, the attorney should make copies and return the originals to the Campus or the office of the Director of Field Operations or Area Director. If the attorney has to keep the originals, the attorney should write to the Area Director/ Director of Field Operations' office no later than 40 days prior to the expiration of the assessment period and ask it to obtain consents extending the periods of limitation. If the consents cannot be obtained, the Area Director/Director of Field Operations should take any steps appropriate to protect the periods of limitation for assessment, including issuing a statutory notice of deficiency.

7. An attorney can request additional files by calling the appropriate Campus in trust fund recovery penalty cases and sending a confirming memorandum of the supplemental request for files.

F. Defense Letter - IRM 34.5.1.

1. The attorney should determine whether the administrative file includes all documents needed to write the defense letter and all documents the Department of Justice (DJ) will need to review jurisdiction in the case. The following items are normally in the administrative file:

- Tax Returns for all years in the refund suit
- Claims for Refund
- Revenue Agent's Report (if IRS audited the years in suit)

- Appeals Division Report
- Taxpayer Protest
- Form 872, Consent To Extend the Time to Assess Tax, or Form 872-A, Special consent to Extend the Time to Assess Tax, (extension agreement with no fixed expiration date). Forms 872 are generally attached to the returns for the years for which extensions were secured.
- Statutory notice of deficiency
- Form 870 or Form 870-AD
- Transcripts of Account
- Notice of Claim Disallowance

2. A Revenue Agent's Report (RAR) consists of introductory and explanatory T-pages (T-1, T-2, T-3, etc.), which are confidential and have not been sent to the taxpayer, followed by normally numbered pages (1, 2, 3, etc.), which have been sent to the taxpayer. Even if the suit is for the refund of original tax, the filing of the claim for refund should have triggered an audit. Normally, the file will contain an extensive RAR for the years in suit and a very limited RAR with respect to the claims for refund. The RAR on the claims for refund may refer only to the earlier RAR.

3. Form 870 is a Waiver of Restrictions on Assessment and Collection of Deficiency in Tax and Acceptance of Overassessment; Form 870-AD is an Offer to Waive Restrictions on Assessment and Collection of Tax Deficiency and to Accept Overassessment. The Service can assess the tax after the taxpayer signs a Form 870 or Form 870-AD.

4. Due Dates concerning defense letters.

a) Due with Department of Justice Tax Division

Within 50 days after taxpayer files a complaint or 40 days after Field Counsel receives the complaint, whichever is later, a defense letter must be sent to the Tax Division.

b) Due with Reviewing Division

If a defense letter requires national office review, it must be sent for review no later than 10 days before the DJ due date.

c) Cannot Locate File

If a defense letter and administrative file cannot be timely sent to DJ, the attorney should call or write his counterpart in DJ to provide estimates of when the attorney can complete the letter. In the meantime, the Field Counsel attorney should offer to assist the DJ attorney in preparing an answer to the complaint. For example, the Field Counsel attorney can review the administrative file to verify dates and payments that the taxpayer alleged in the complaint, or can make copies

of documents in the administrative file if DJ did not receive a complete duplicate file. If it is practical to do so, an attorney may give the DJ attorney access to the administrative files. An attorney should avoid sending DJ the original files and suspending work on the case until the files are returned. If DJ needs the original files, the attorney should retain an entire duplicate administrative file in order to complete the defense letter.

G. Coordination

Attorneys should coordinate Tax Court cases and refund suits to establish a consistent litigation position in all the courts. Under some circumstances, the attorney may give DJ a statement of the facts proposed to be stipulated, or a statement of the facts proposed to be introduced into evidence if the Tax Court case will be tried. If the refund suit case is going to trial, the attorney can give DJ a letter setting forth factors involved in the related Tax Court case.

An attorney should determine the nature of the related case and its impact upon any newly assigned case and coordinate with the other office any action or proposed action that might affect the related case. If an attorney in the same Field Counsel office is handling the related case, informal coordination is appropriate. The attorney should advise the attorney who has the related case of the legal position being taken and any significant developments in the refund case. If different Field Counsel offices are involved, or if an attorney is coordinating with an Associate office, the attorney should advise the attorney in the other office of the related case and provide a copy of the defense letter.