Office of Chief Counsel
Internal Revenue Service
memorandum

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to: Rebecca L. Harrigal
Director, Tax-Exempt Bonds
SE:T:GE:TEB

from: Pamela W. Fuller
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(Procedure & Administration)

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subject: Claims for refundable credit under section 6431(a) by issuers of qualified bonds issued under section 54AA(g).

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

ISSUE

What is the period within which issuers of qualified bonds issued under section 54AA(g) may request a payment of the refundable credit determined under section 6431(a)?

CONCLUSION

A claim for credit or refund of the refundable credit for qualified bonds must be filed within 3 years from the time the Form 8038-CP was filed or 2 years from the time the issuer made the bond interest payment, whichever of such periods expires later.

FACTS

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LAW AND ANALYSIS

Section 54AA(a) provides that if a taxpayer holds a build America bond on one or more interest payment dates of the bond during any taxable year, there shall be allowed as a credit against the income tax imposed for the taxable year an amount equal to the sum of the credits determined under section 54AA(b) with respect to such dates. Section 54AA(b) provides that the amount of the credit determined under this subsection with respect to any interest payment date for a build America bond is 35 percent of the amount of interest payable by the issuer with respect to such date.

Section 54AA(d)(1) provides that, for purposes of section 54, the term “build America bond” means any obligation (other than a private activity bond) if: (A) the interest on such obligation would (but for section 54AA) be excludable from gross income under section 103; (B) such obligation is issued before January 1, 2011; and (C) the issuer makes an irrevocable election to have section 54AA apply.

Section 54AA(g)(1) provides that in the case of a qualified bond issued before January 1, 2011, in lieu of any credit allowed under section 54AA with respect to such bond, the issuer of such bond shall be allowed a refundable[1] credit as provided in section 6431. For purposes of section 54AA(g), the term “qualified bond” means any build America bond issued as part of an issue if (A) 100 percent of the excess of the available project proceeds (as defined in section 54A) of such issue, over the amounts in a reasonably required reserve (within the meaning of section 150(a)(3)) with respect to such issue, are to be used for capital expenditures; and (B) the issuer makes an irrevocable election to have section 54AA(g) apply.

Section 6431 provides in the case of a qualified bond issued before January 1, 2011, the issuer of such bond shall be allowed a credit with respect to each interest payment under such bond which shall be payable by the Secretary (of the Treasury) as provided in section 6431(b). Section 6431(b) provides that the Secretary shall pay (contemporaneously with each interest payment date under such bond) to the issuer of such bond (or to any person who makes such interest payment on behalf of the issuer) 35 percent of the interest payable under such bond on such date.

Section 1531(c) of Division B of the American Recovery and Reinvestment Act of 2009, 111 Pub. L. No. 111-5, 123 Stat. 115 (2009), provides conforming amendments to certain provisions of the Code relating to sections 54AA and 6431. Section 1531(c)(5) adds a reference to build America bond provisions under section 54AA as a conforming amendment to section 6401(b)(1) regarding amounts treated as overpayments. Thus, section 6431 credits are refundable credit payments that are treated as overpayments of tax. Accordingly, rules relating to overpayments of tax, including limitations on credits or refunds of overpayments of tax under section 6511 also apply to refundable credit

[1] Reference to “refundable credit” is found in the heading of section 54AA(g).

payments with respect to build America bonds under section 6431. See § 3.3 of Notice 2009-26, 2009-16 I.R.B. 833, 836 (April 20, 2009).

Section 3.1(a) of Notice 2009-26 provides that issuers of qualified bonds must submit a Form 8038-CP, Return for Credit Payments to Issuers of Qualified Bonds, to request payment of the amount of the credit within a prescribed time before or after each applicable interest payment date depending on whether the bonds are fixed rate or variable rate bonds. For purposes of applying procedures under the Code, Form 8038-CP is a tax return or a claim for refund, as applicable. The term "return" is not defined in the Code. Swanson v. Commissioner, 121 T.C. 111, 122-23 (2003). Based on the Supreme Court's decisions in Germantown Trust Co. v. Commissioner, 309 U.S. 304 (1940) and Zellerbach Paper Co. v. Helvering, 293 U.S. 172 (1934), the Tax Court developed a four-factor test to determine whether a document is a return. Id. To qualify as a return, a document must: (1) purport to be a return; (2) be executed under penalties of perjury; (3) contain sufficient data to allow calculation of tax; and (4) represent an honest and reasonable attempt to satisfy the requirements of the tax law. Beard v. Commissioner, 82 T.C. 766, 777 (1984). The "Beard test" applies to determine if a document is a return for purposes of section 6511. See Galuska v. Commissioner, 98 T.C. 661 (1992); see also Mendes v. Commissioner, 121 T.C. 308, 329-30 (2003) (Vasquez, J. concurring) (citing Turco v. Commissioner, T.C. Memo. 1997-564). Assuming the Forms 8038-CP comply with the instructions to the form, we believe they meet the definition of "return" provided in Beard.

Section 6511(a) provides that a claim for credit or refund of an overpayment of any tax imposed by the Code for which a taxpayer is required to file a return must be filed by the taxpayer within 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever of such periods expires later. If no return was filed, a claim must be filed within 2 years from the time the tax was paid.

Section 6511(b)(2) limits the amount of the refund to payments made within three years of the date of the claim for refund if the claim was filed within three years after the return was filed. If the claim is not filed within three years from the time the return was filed, the refund is limited to payments made within two years of the claim. For purposes of section 6511, the date of the bond interest payment to which a section 6431 credit relates is the date on which the tax was paid with respect to the section 6431 credit. The Form 8038-CP functions as both a return and a claim for refund. Thus, if a bond issuer files a Form 8038-CP more than three years after it makes a bond interest payment, the claim is timely for purposes of section 6511(a) because it is filed simultaneously with the return. See Murdock v. United States, 103 Fed. Cl. 389, 394-95 (Fed. Cl. 2012); see also Galuska, 98 T.C. at 670-72. The amount of the refund will be limited, pursuant to section 6511(b)(2)(A), however, to the amounts paid within three years of the claim.

The claims listed in the table above are all timely for purposes of section 6511(a) because the claim for refund was filed simultaneously with the return. In each instance, the issuer will be entitled to a credit or refund limited to the amount of tax paid within three years of the claim being filed. The section 6431 credits are deemed to be overpayments of tax as of the date of the bond interest payment. Thus, the date of the bond interest payment is the date of the payment of tax for purposes of section 6511(b)(2)(A). Assuming the bond interest payments were made on the dates scheduled, the amount of the credit will be limited only for bond interest payments made more than three years before the Form 8038-CP was filed. ***

Section 6511(b)(1) provides that no credit or refund shall be allowed or made after the expiration of the period prescribed in section 6511(a) for the filing of a claim for credit or refund, unless a claim is filed by the taxpayer within that period. Under section 7422, a civil action may not be commenced against the United States to recover any internal revenue tax, any applicable penalty, or any sum alleged to have been excessive or in any manner wrongly collected until a claim for refund has been filed.

CONCLUSION

A claim for credit or refund of the refundable credit for qualified bonds must be filed within 3 years from the time the Form 8038-CP was filed or 2 years from the time the issuer made the bond interest payment, whichever of such periods expires later. Because Forms 8038-CP can function as both a return and a claim for refund, an initial Form 8038-CP filed more than three years after the date of the bond interest payment date may be timely for purposes of section 6511(a), but the amount of the credit or refund will be limited, pursuant to section 6511(b)(2)(A), to the amount of the bond interest payment made within three years of the date the form was filed.

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Please call (202) 317-6844 if you have any further questions.