

Part III — Administrative, Procedural, and Miscellaneous

Limited Reexamination of Estate Tax Return Applicable to Certain Section 2053 Claims for Refund

Notice 2009-84

PURPOSE

This notice provides a limited administrative exception to the ability of the Internal Revenue Service (Service) to examine a Form 706 (United States Estate (and Generation-Skipping Transfer) Tax Return) in connection with certain protective claims for refund filed within the time prescribed in section 6511(a) of the Internal Revenue Code (Code). Specifically, in processing a timely-filed protective claim for refund of tax based on a deduction under section 2053 of the Code, if the claim for refund ripens and becomes ready for consideration after the expiration of the period of limitations on assessment prescribed in section 6501, the Service will limit its review of the Form 706 to the evidence relating to the deduction under section 2053 that was the subject of the protective claim.

BACKGROUND

Concurrently with the issuance of this notice, the Treasury Department and the Service are issuing final regulations under section 2053 of the Code (T.D. 9468) to provide guidance in determining the deductible amount of a claim against a decedent's

estate under section 2053. Section 20.2053-1(d)(1) of the final regulations provides the general rule that a deduction for any claim or expense described in section 2053 and the final regulations is limited, with several exceptions, to the amount actually paid in settlement or satisfaction of the claim or expense.

Under the final regulations, if a claim or expense that would have been deductible under section 2053 had it already been paid is not fully deductible within the period of limitation prescribed in section 6511(a), the estate may file a protective claim for refund to preserve the estate's right to claim a refund of tax attributable to the deduction of such claim or expense in the event that it becomes deductible in whole or in part after the expiration of the period of limitation prescribed in section 6511(a).

Section 20.2053-1(d)(5). A protective claim for refund may be filed at any time before the expiration of the period of limitation prescribed in section 6511(a) for the filing of a claim for credit or refund. See section 6514. Once the claim or expense has been paid or otherwise has become deductible under section 2053, the executor may notify the Service that the decedent's estate is ready to pursue the claim for refund.

In considering a claim for refund, the Service must determine if there is an overpayment of tax for purposes of section 6402. An overpayment exists to the extent the amount of tax paid exceeds the correct tax liability. To determine the correct tax liability, the Service has the authority to examine each item on the return regardless of whether the period of limitations on assessment has expired. See [Lewis v. Reynolds, 284 U.S. 281, 283 \(1932\)](#). Even if the Service is barred from assessing any additional amount of tax by reason of the expiration of the period of limitations on assessment

under section 6501, the Service may reject the claim for refund to the extent the Service determines there is no overpayment of tax.

DISCUSSION

Commentators responding to the proposed regulations (published in the Federal Register on April 23, 2007 (REG-143316-03, 72 FR 20080)) expressed concerns that the protective claim procedures effectively would keep the period of limitations on assessment open to the extent of the amount of the claim for refund and, therefore, would impede the goal of achieving finality in the administration of a decedent's estate. In cases in which the Service accepts the Form 706 as filed or in which any disputes between the estate and the Service are resolved without a judicial determination, the executor generally relies on the estate tax closing letter (Letter 627) that is issued by the Service to advise the estate that the Form 706 has been accepted, either as filed or after an adjustment to which the estate has agreed. Practitioners are concerned that, if an estate must file a protective claim for refund in order to claim a deduction for a claim or expense under section 2053 of the Code, executors will be unable to rely on the estate tax closing letter because the Service has the ability to examine the entire Form 706 when a timely-filed claim for refund is ready for consideration by the Service.

The final regulations under section 2053, issued concurrently with this notice, provide several exceptions to the general rule that a deduction for a claim or expense is limited to the amount paid in settlement or satisfaction of that claim or expense. As a result of these exceptions, the Treasury Department and the Service anticipate that the number of protective refund claims filed to preserve a deduction under section 2053 will

be significantly smaller than was anticipated by commentators to the proposed regulations. The Treasury Department and the Service, nevertheless, acknowledge the value in achieving finality in the administration of estates and in making the regulations under section 2053 more administrable.

Accordingly, if the period of limitations on assessment has expired and the Service is notified that a timely-filed protective claim for refund of tax based on a deduction under section 2053 has ripened and is ready for consideration, the Service generally will refrain from exercising its authority to examine each item on the Form 706 to determine if there is an overpayment of tax for purposes of section 6402. Instead, when such a timely-filed claim for refund ripens after the expiration of the period of limitations on assessment, the Service will limit its examination of the Form 706 to the evidence relating to the deduction under section 2053 that was the subject of the protective claim.

To the extent that the Service determines the deduction under section 2053 is allowable, the Service will recompute the estate tax liability of the estate (and the marital and charitable deductions, and all other amounts determined as part of that process) by allowing that deduction.

SCOPE

The Service's decision to limit its examination of the Form 706 to the evidence relating to the deduction under section 2053 of the Code applies only to estates in which a timely protective refund claim was filed to preserve an estate's ability to claim a deduction under section 2053 for a claim or expense that subsequently is paid or

otherwise meets the requirements for deductibility under the final regulations. This administrative exception does not apply, however, when the Service is considering a protective claim for refund based on a deduction under section 2053 and, in the same estate, is considering a claim for refund not based on a protective claim regarding a deduction under section 2053. In addition, the Service's decision to limit its examination of the Form 706 applies only if the protective claim for refund ripens after the expiration of the period of limitations on assessment and does not apply if there is evidence of fraud, malfeasance, collusion, concealment, or misrepresentation of a material fact.

EFFECTIVE DATE

This notice is applicable with respect to protective claims for refund filed on behalf of estates of decedents dying on or after October 20, 2009.

DRAFTING INFORMATION

The principal author of this notice is Karlene Lesho of the Office of Associate Chief Counsel (Passthroughs and Special Industries). For further information regarding this notice, contact Karlene Lesho at (202) 622-3090 (not a toll-free call).