

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

Release Number: 20123905F

Release Date: 9/28/2012

CC:LB&I:RFPH:ATL:GBO:

POSTF-124887-12

UILC: 6511.03-06, 172.01-00

date: July 10, 2012

to: , Team Manager
 , Sr. Team Coordinator

from: Associate Area Counsel (Atlanta)
(Large Business & International)

subject: ("Taxpayer") and Subsidiaries
Refund Claim for tax years 2003/12 and 2004/12

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This document should not be used or cited as precedent.

ISSUES

You asked:

- (1) Whether an extension of the assessment period under I.R.C. § 6501(c)(4) that is restricted to certain items extends the refund period under I.R.C. § 6511(c) for items other than the restricted items?
- (2) If a refund is not allowed, whether the deductions giving rise to the refund claims are considered in any net operating loss ("NOL") carried over to 2005?¹

CONCLUSIONS

- (1) No, the extension of an assessment period restricted to certain items does not extend the refund period for items not extended.
- (2) Yes, the barred deductions are considered in determining the amount of the NOL carried over to 2005, as explained herein.

STATEMENT OF FACTS

On September 19, 2004, Taxpayer filed Form 1120, U.S. Corporation Tax Return, for its 2003 tax year. On September 19, 2005, Taxpayer filed Form 1120 for its 2004 tax year.

In 2003, Taxpayer had taxable income of \$ ². In 2004, Taxpayer had a NOL of \$ ³. In 2005, Taxpayer had taxable income of \$ ⁴. Taxpayer carried the 2004 NOL back to 2003 to offset all of the taxable income reported in 2003,

¹ This advice assumes, but does not conclude, that you have correctly concluded that a deduction for dividends paid by the ESOP is allowable.

² Taxpayer's 2003 taxable income is based on its taxable income of \$, per the prior IRS examination, less a adjustment (unrelated to this issue) of \$.

³ Taxpayer's 2004 NOL is based on its NOL of \$, per the prior IRS examination, less a adjustment (unrelated to this issue) of \$.

⁴ Taxpayer's 2005 taxable income is based on its taxable income of \$, less a dividends received deduction of \$.

then carried over the remaining 2004 NOL to 2005.⁵

Taxpayer and the IRS entered into a series of agreements under I.R.C. § 6501(c)(4) to extend the period of limitations on assessment for 2003 and 2004. Those agreements are on Forms 872, Consent to Extend the Time to Assess Tax, described in the following table.⁶

Years Covered	Date Executed ⁷	Extended Assessment Date	Restricted?
2003	May 21, 2007	Dec. 31, 2007	No
2003 and 2004	Sept. 4, 2007	Dec. 31, 2008	Yes
2003 and 2004	Aug. 7, 2008	Mar. 31, 2009	Yes
2003 and 2004	Oct. 10, 2008	June 30, 2009	Yes
2003 and 2004	Jan. 30, 2009	Dec. 31, 2009	Yes

The Forms 872 executed through January 30, 2009, state: "The taxpayer may file a claim for a credit or refund and the Service may credit or refund the tax within 6 months after this agreement ends." The Forms 872 executed on September 4, 2007, August 7, 2008, October 10, 2008, and January 30, 2009, contained the following restrictions:

The amount of any deficiency assessment is to be limited to that resulting from any of the following adjustments, any penalties and additions to tax attributable thereto and any consequential changes to other items based upon any such adjustments:

1. Any adjustments relating to disallowance of deductions for contributions to 401(k) plans of the taxpayer;
2. Any adjustment to interest on long term contracts computed under the look back method;
3. Correlative and conforming adjustments to deductions for commissions payable to , a foreign sales corporation, as necessary, to accommodate adjustment to taxable income.
4. Correlative and conforming adjustments to any tax credits, including foreign tax credits, general business credits and research and development credits, also including carryforwards and carrybacks, as necessary, to accommodate adjustments to taxable

⁵ Taxpayer had a separate NOL in 2002.

⁶ IRS records of Taxpayer's account reflect that in September 2009, the IRS and Taxpayer signed a Form 872 extending the period of limitations on assessment until May 30, 2010. Neither the IRS nor Taxpayer, however, has been able to locate a copy of the Form 872.

⁷ The "Date Executed" is the date the IRS countersigned the Form 872.

- income;
5. Any adjustment to interest reported under certain gain recognition agreements filed with the IRS pursuant to regulations under Section 367 of the Code;
 6. Any adjustments to net operating losses, including carryforwards and carrybacks;
 7. Any adjustments relating to or arising from a certain competent authority proceeding under the U.S.- [redacted] income tax treaty initiated by [redacted], a wholly owned subsidiary of [redacted].

Taxpayer and the IRS extended the assessment period for Taxpayer's 2005 tax year until at least December 31, 2010. The extensions were not restricted.

On or about June 15, 2010, Taxpayer filed Forms 1120X, Amended U.S. Corporation Tax Return, on which Taxpayer requested a refund of tax for its 2003 and 2004 tax years. Taxpayer's refund claim for its 2003 tax year "includes a claim for a deduction for dividends paid during the year on stock held by [redacted] [Taxpayer's] employee stock ownership plan ("ESOP"), and a Net Operating Loss ("NOL") carryback from the 2004 taxable year." Specifically:

- (1) Employee Stock Ownership Plan ("ESOP") 404(k) Dividend Issue -- \$**
[redacted] Under Code section 404(k), [redacted] is entitled to a deduction in the 2003 tax year for dividends paid during the year on stock held by ESOP.
- (2) Increase in NOL Carryback from the 2004 tax year, as detailed in Form 1120X for the 2004 tax year and attachment to same, included herewith and filed concurrently (portion only, remainder will be carried forward to the 2005 tax year) -- \$**

Taxpayer's refund claim for its 2004 tax year includes an adjustment for:

- (1) Employee Stock Ownership Plan ("ESOP") 404(k) Dividend Issue -- \$**
[redacted] Under Code section 404(k), [redacted] is entitled to a deduction in the 2004 tax year for dividends paid during the year on stock held by ESOP.

Taxpayer maintains that its right to file a refund claim was stated generally in the

Form 872, with no additional language restricting the right to any particular issues. For support, Taxpayer cited an IRS Field Service Memorandum, 1995 FSA LEXIS 570, 1997 WL 33324355. Specifically, Taxpayer stated:

The guidance provided by the IRS National Office as to how a restricted consent affects the statute of limitations for filing refund claims is clear and consistent. In a Field Service Advice Memorandum, dated March 10, 1995, the IRS addressed this question directly and held that despite the existence of a restricted Form 872, the statute of limitations remained open for claims for refund to be filed on any issue, for six months after the Form 872 agreement ended. See 1995 FSA LEXIS 570. The facts of that FSA were similar to [Taxpayer's] facts: (i) the taxpayer and the IRS entered into a Form 872, which restricted assessments to certain enumerated issues; and (ii) the language concerning claims for refund was not similarly restricted. In its analysis, the IRS National Office noted only one case that had considered the issue, *Liberty National Life Ins. Co. v. United States*, 77-1 U.S.T.C. ¶ 9107 (N.D. Ala. 1976), *rev'd on other grounds*, 600 F.2d 1106 (5th Cir. 1979), in which the lower court held that "a refund claim for any unrelated issue was timely even where the consent agreement extending the time for assessment was restricted to a particular issue."

The IRS National Office went on to state that:

We believe the reasoning of the Court in *Liberty National* to be correct. It is well settled that the waiver of right, such as the right to file a claim for a refund within a certain time period, must be clear and unequivocal. In the present case, if it was the intention of the parties to restrict the issues for which a claim for refund could be filed ... [the Form 872] could have been modified to provide for such restriction. [The Form 872], however, includes no such restriction. Therefore, it is our opinion that a refund claim on any issue could be filed within the six month period prescribed in the agreement.

See 1995 FSA LEXIS 570 (internal citations omitted). Taxpayer and the IRS extended the assessment period for Taxpayer's 2005 tax year until at least December 31, 2010. The extensions were not restricted.

The Internal Revenue Manual (IRM) also follows the holding in *Liberty National*, and notes specific language that should be included on Form 872 (in addition to the "basic restrictive statement"¹) in order to restrict a taxpayer's right to file refund claims:

The provisions of Section 6511(c) of the Internal Revenue Code are limited to any refund or credit resulting from an adjustment for which the period for assessment is extended under the agreement.

See IRM § 25.6.22.8.12(2).

¹The basic restrictive statement included in IRM § 25.6.22.8.12(1) is: "The amount of any deficiency assessment is to be limited to that resulting from any additional adjustment to (description of the area(s) of consideration), any penalties and additions to tax attributable thereto, and any consequential changes to other items based on such adjustment."

Taxpayer concludes that the language in restrictive statement does not contain the additional language recommended by the IRM to limit refund claims, and that the IRS, in its informal guidance, has "uniformly held that Forms 872 limiting assessments to enumerated issues via the 'basic restrictive statement' do not also limit refund claims to those same issues."

LAW AND ANALYSIS

Timeliness of Refund Claims

The period of limitations for filing a refund claim of an overpayment of tax is generally the later of (1) within three years of the time that the tax return was filed, or (2) within two years of the time that the tax was paid. I.R.C. § 6511(a).

Section 6511(c) provides an exception whereby, if the IRS and the taxpayer agreed to extend the period of assessment of tax under I.R.C. § 6501(c)(4), then the time for filing a refund claim is within six months after the expiration of the period of limitations on assessment, as extended. I.R.C. § 6511(c)(1). This paragraph (c)(1) states: "The period for filing claim for credit or refund ... shall not expire prior to the 6 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)."

Under the general rule, the refund period for Taxpayer's 2003 tax year expired in September 2007 (*i.e.*, three years after September 2004) and the refund period for Taxpayer's 2004 tax year expired in September 2008 (*i.e.*, three years after September 2005). Looking only at the general (unrestricted) extension under § 6501(c)(4) for Taxpayer's 2003 tax year, the refund period expired in June 2008 (*i.e.*, six months after the assessment period ended on December 31, 2007). Without considering the restricted extensions, the assessment period for 2004 expired in September 2008. Therefore, Taxpayer's refund claim is timely only if the restricted extensions kept the refund period open for every issue, and not just those to which the assessment period was restricted.

When interpreting the language of a statute, the plain meaning governs. U.S. v. Springer, 609 F.3d 885, 889 (6th Cir. 2010). Section 6511(c)(1) states that the refund period 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 § 6501(c)(4).” I.R.C. § 6511(c)(1) (emphasis added). Under this statutory language, any extension of the refund period must be based upon an extension of the assessment period. In the case of restricted extensions, the assessment period for non-restricted items is not extended. As a result, the refund period for the non-restricted items is not, and could not be extended. There is no provision in I.R.C. § 6511 for an extension of the refund period of limitations by agreement independent of an extension of the corresponding assessment period of limitations by agreement.

This conclusion is supported by the holding in Indiana Nat'l Corp. v. U.S., 980 F.2d 1098 (7th Cir. 1992). In that case, the Court of Appeals for the Seventh Circuit considered the effect of a consent to extend the assessment period for excise taxes on the refund period for income taxes. The taxpayer argued that because excise taxes and income taxes were both in Title 26 of the United States Code, that an agreement to extend the assessment period for excise taxes automatically extended the refund period for income taxes (or any other tax under Title 26). The court held:

The Code provision allows extensions by agreement for any tax imposed under Title 26. That does not mean, however, that parties may not limit the terms of their agreement to a specific tax. In this case, the Consent was expressly limited to the assessment of excise taxes. Therefore, the agreement does not affect the appellant's claims for refund of income taxes.

Indiana Nat'l Corp. v. U.S., 980 F.2d at 1103-1104.

Here, the restricted extensions did not extend the assessment period for the ESOP dividends and, accordingly, did not extend the refund period for the ESOP dividends. Because the restricted extensions did not keep the refund period open for the non-listed items, the last day for Taxpayer to file a refund claim for 2003 was June 2008 and for 2004 was September 2008. Therefore, Taxpayer's Forms 1120X filed on or about June 15, 2010, were untimely.⁸

Taxpayer's reliance on IRS Field Service Memorandum, 1995 FSA LEXIS 570, 1997 WL 33324355, which dealt with a different case, is inappropriate both because it is not precedential and because it misconstrues the court's holding in Liberty Nat'l Life Ins.

⁸ Because Taxpayer's refund claim was filed within 6 months after the Form 872 executed on January 30, 2009, it is unnecessary to consider or make assumptions about any subsequent extension, as reflected on IRS transcripts of Taxpayer's account (i.e., the Form 872 extending the period of limitations on May 30, 2010).

Co. v. U.S., 77-1 U.S.T.C. ¶ 9107 (N.D. Ala. 1976).⁹ In this unreported opinion, the District Court for the Northern District of Alabama held that the restricted extensions on the assessment period did not limit the amount recoverable in a refund suit because the issue was one of the restricted items in the extension. In Taxpayer's case, the ESOP deductions are not restricted items in the extensions.

Taxpayer accurately described the current provisions of the IRM that direct use of both the basic and additional restrictive statements. These provisions, however, are internal rules of agency procedure. See Groder v. U.S., 816 F.2d 139, 142 (4th Cir. 1987). The fact that the extensions did not include the additional restrictive statement does not mean that the refund period remained open for items other than those listed on the attachment to Forms 872. This point is illustrated by the fact that the IRM added the directive to include the additional statement in August 2003, notwithstanding the holding, in 1992, of Indiana Nat'l Corp v. U.S., *supra* (holding that an extension of the assessment period for excise tax did not also extend the refund period for income tax).

Effect on NOL Computation

The rules governing NOLs are in I.R.C. § 172. Generally, the amount of a NOL for the loss year is carried back to the earliest taxable year to which the loss may be carried. I.R.C. § 172(b)(2). The portion of the loss that is carried to each of the other years is the excess, if any, of the amount of the loss over the sum of the taxable income for each of the prior taxable years to which the loss may be carried. I.R.C. § 172(b)(2).

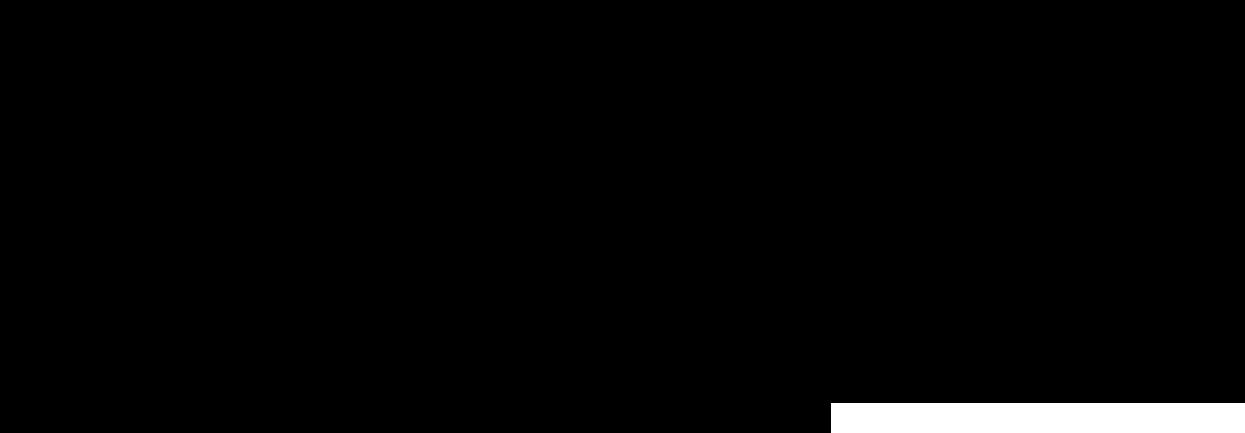
"Taxable income" for purposes of I.R.C. § 172 means correct taxable income, even if the applicable period of limitations expired on any allowable adjustments. See, e.g., Phoenix Coal Co. v. Comm'r, 231 F.2d 420, 421-422 (2d Cir. 1956) (allowing recomputation of taxable income in a closed year to determine the amount of the NOL to be carried back); Comm'r v. Van Bergh, 209 F.2d 23 (2d Cir. 1954) (same); Springfield St. Ry. Co. v. U.S., 312 F.2d 754, 759 (Ct. Cl. 1963) (stating "deductions which were allowable if taken, but are now barred by the statute of limitations, still have to be considered when applying a carryback loss, is the same principle we are applying in this case.")

In 2004, Taxpayer had a NOL of \$. The NOL amount to be carried back to 2003, then forward to 2005 is calculated by including the deduction for the ESOP dividend payments of \$, which increases the 2004 NOL to \$.

In 2003, Taxpayer had taxable income of \$. To determine the amount of income to be offset by the NOL, Taxpayer's 2003 income is reduced by the deduction for the ESOP dividend payments of \$, which decreases Taxpayer's 2003 taxable income to \$. This amount is entirely offset by the 2004 NOL carried

⁹ Moreover, we note that the FSA cited by Taxpayer was issued by a field office (not the National Office). Also, Taxpayer states it is "uniform" advice by the IRS, but cites only one FSA.

back to 2003, leaving the balance of the 2004 NOL, \$ [REDACTED], to be carried over to 2005.

CASE DEVELOPMENT, HAZARDS, AND OTHER CONSIDERATIONS


This advice was reviewed prior to issuance by Procedure and Administration and Income Tax & Accounting.

If you have any questions, please contact the undersigned.

GWENDOLYN C. WALKER
Associate Area Counsel
(Large Business & International)

By:

Senior Attorney (Greensboro)