

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

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to: _____, Revenue Agent
(Deputy Commissioner (Domestic), Heavy Manufacturing and Pharmaceuticals)

from: Paul Colleran
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subject:

Claim for Refund: Federal Telephone Excise Tax

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

ISSUE

After the expiration of the section 6511(a) claim filing period, may a corporate taxpayer supplement a timely-filed refund claim to request an overpayment of Federal telephone excise taxes that were paid by entities that the taxpayer acquired and that were not included in the original claim for refund?

CONCLUSION

No, a taxpayer may not supplement a timely-filed refund claim after the section 6511(a) claim-filed period has lapsed to include taxes paid by other entities that the taxpayer acquired and that were not included in the original claim for refund.

FACTS¹

. Any additions to or changes to these facts could affect the conclusions set forth below under “Law and Analysis.”

¹ Our understanding of the facts of this case is limited to the information that you have provided to us unless otherwise stated. We have not undertaken any independent investigation of the facts of this case. If the facts known to us are incorrect or incomplete in any material respect, you should not rely on this advice, but instead should contact our office immediately.

LAW AND ANALYSIS

Claims for refund

Internal Revenue Code § 7422(a) provides that no suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof.

Section 6511(a) provides that a claim for credit or refund of an overpayment of any tax in respect of which the taxpayer is required to file a return shall be filed within three years from the time the return was filed or two years from the time the tax was paid, whichever of such periods expires later, or if no return is filed by the taxpayer, within two years from the time the tax was paid.

Section 6511(b)(1) provides that no credit or refund shall be allowed or made after the expiration of the period of limitation prescribed in § 6511(a), unless a claim for credit or refund is filed by the taxpayer within such period.

Section 6402(a) provides that in the case of any overpayment, the Secretary, within the applicable period of limitations, may credit the amount of such overpayment, including any interest allowed thereon, against any liability in respect of an internal revenue tax on the part of the person who made the overpayment and shall, subject to subsections (c), (d), and (e), refund any balance to such person.

Treas. Reg. § 301.6402-2(b)(1) provides that no refund or credit will be allowed after the expiration of the statutory period of limitation applicable to the filing of a claim therefor except upon one or more of the grounds set forth in a claim before the expiration of such period. The claim must set forth in detail each ground upon which a credit or refund is claimed and facts sufficient to apprise the Commissioner of the exact basis thereof. The statement of the grounds and facts must be verified by a written declaration that it is made under penalties of perjury. A claim which does not comply with this paragraph will not be considered for any purposes as a claim for refund or credit.

Treas. Reg. § 301.6402-3(a)(5) provides in part that a properly executed corporation original income tax return or an amended return constitutes a claim for refund or credit within the meaning of sections 6402 and 6511 for the amount of the overpayment disclosed by such return (or amended return). A return or amended return shall constitute a claim for refund or credit if it contains a statement setting forth the amount determined as an overpayment and advising whether such amount shall be refunded to the taxpayer or shall be applied as a credit against the taxpayer's estimated tax for the taxable year immediately succeeding the taxable year for which such return (or amended return) is filed.

Amendments to a timely claim that are filed after the period of limitations for filing a claim for refund has expired, setting forth new grounds for refund of an overpayment should be denied as untimely. United States v. Andrews, 302 U.S. 517 (1938).

Federal telephone excise tax

Section 4251(a) imposes an excise tax on amounts paid for communication services (Federal telephone excise tax).

Section 4251(b)(1) defines communication services as local telephone service, toll telephone service, and teletypewriter exchange service.

Sections 4251(a)(2) and (b)(2) provides that the excise tax is paid by the person paying for the services in an amount equal to 3 percent of amounts paid for communication services.

Section 4291 provides that the tax is collected by the person receiving the payment, which in most cases is the telecommunications company that provides the communication services.

The Internal Revenue Service ("Service") announced in Notice 2006-50 that it will follow the holdings of Am. Bankers Ins. Group v. United States, 408 F.3d 1328 (11th Cir. 2005); OfficeMax, Inc. v. United States, 428 F.3d 583 (6th Cir. 2005); Nat'l R.R. Passenger Corp. v. United States, 431 F.3d 374 (D.C. Cir. 2005); Fortis, Inc. v. United States, 447 F.3d 190 (2d Cir. 2006); and Reese Bros. v. United States, 447 F.3d 229 (3d Cir. 2006). These cases hold that a telephonic communication for which there is a toll charge that varies with elapsed transmission time and not distance (time-only service) is not taxable toll telephone service as defined in section 4252(b)(1). Accordingly, taxpayers were no longer required to pay tax under section 4251 for nontaxable service, which the notice defines as bundled service and long distance service. In addition, Notice 2006-50 notified taxpayers that they could request a refund of tax paid under section 4251 on nontaxable service that was billed to them during the period after February 28, 2003, and before August 1, 2006.

Section 5(a)(1) of Notice 2006-50 provides that the Service agrees to credit or refund the amounts paid for nontaxable service if the taxpayer requests the credit or refund in the manner prescribed in the notice.

Section 5(a)(2) of Notice 2006-50 provides that taxpayers may request a credit or refund of tax on nontaxable service that was billed after February 28, 2003, and before August 1, 2006, only on their 2006 federal income tax returns.

Section 5(a)(3) of Notice 2006-50 provides that the instructions to the applicable Federal income tax return forms will provide additional guidance. The tax forms and instructions require taxpayers to certify that (1) the taxpayer has not received from the collector a credit or refund of the tax paid on nontaxable service billed during the relevant period and (2) the taxpayer will not ask the collector for a credit or refund of that tax and has withdrawn any such request that was previously submitted. The instructions also require that taxpayers, except for those individuals using the safe harbor amount, retain records that substantiate the request. These records should include bills from the collector that show the amount of tax charged for nontaxable service for each month during the relevant period and receipts, canceled checks, or other evidence that the amount requested was actually paid.

Section 5(d)(2) of Notice 2006-50 provides that taxpayers other than individual taxpayers may request only the actual amount of tax paid on nontaxable service billed during the relevant period; no safe harbor amount is allowed for entities.

On November 16, 2006, the Service announced a formula to allow businesses and tax-exempt organizations to estimate their federal telephone excise tax refunds (“Business and Nonprofit Estimation Method”). “The formula will provide a less burdensome option than gathering up to 41 months of old phone records,” said then IRS Commissioner Mark W. Everson. IR- 2006-179 (November 16, 2006).

In Notice 2007-11, 2007-1 C.B. 405, the Service provided guidance regarding the Business and Nonprofit Estimation Method announced in IR- 2006-179.

Section 12 of Notice 2007-11 provides the rules for the Business and Nonprofit Estimation Method (“EM”) that eligible entities including corporations may use to determine the amount of their communications excise tax credit or refund for nontaxable service. Corporations may, but are not required to, use the EM instead of the actual amount of federal communications excise tax they paid on nontaxable services to calculate the amount of their credit or refund. A corporation may determine the amount of its total telephone expenses by examining its books and records, including, for example, its general ledger, check register, and cancelled checks. Notice 2007-11, § 12(b)(2).

Section 12(c) of Notice 2007-11, details how to use the EM to determine the amount of the Federal telephone excise tax credit or refund:

First, the taxpayer determines the federal excise tax as a percentage of the telephone bill. To ascertain this amount the taxpayer determines the amount of federal communications excise tax on all telephone bills dated in April 2006 and all telephone bills dated in September 2006. Next, for all the April telephone bills and all the September telephone bills, the amount of federal communications excise tax included on the bills is divided by the total telephone expenses on the bills. The resulting amounts are the April and September percentages, respectively. Next, the September percentage is subtracted from the April percentage, yielding for purposes of the notice the federal excise tax percentage (FETP). For taxpayers with more than 250 employees, the FETP is capped at 1 percent.

The calculation of the amount of the credit is then made using one of two methods, depending on whether the taxpayer maintains its telephone expense records on a monthly or annual basis. If the taxpayer has maintained its telephone expense records on a monthly basis, the FETP amount is multiplied by the taxpayer's monthly total telephone expenses for each month of the 41 month period from March 2003 through July 2006. The product of this calculation is the taxpayer's credit or refund

amount. If the taxpayer has maintained its telephone expense records on an annual basis rather than a monthly basis, its annual amount is prorated equally to each month of that year. Next, the taxpayer would use that monthly amount to complete the calculations for the credit or refund amount for that tax year.

The taxpayer must report the federal communications excise tax credit or refund on Form 8913. The Form 8913 requires reporting of the credit or refund amount in 13 three-month intervals and one two-month interval. The Form 8913 is then attached to the taxpayer's 2006 Federal income tax return.

Businesses may compute their refund amount by comparing two telephone bills from the calendar year 2006 to determine the percentage of their telephone expenses attributable to the long-distance excise tax. Taxpayer should use a bill with a statement date in April 2006 and a bill with a statement date in September 2006. The taxpayer must first figure the telephone tax as a percentage of their April 2006 telephone bills (which included the excise tax for both local and long-distance service) and their September 2006 telephone bills (which only included the tax on local service). The difference between these two percentages should then be applied to the quarterly or annual telephone expenses to determine the amount of their refund.

The refund is capped at 1 percent for those with more than 250 employees. Most organizations in this category typically are able to figure the actual amount they paid in long-distance excise tax. However, the formula was designed to provide a more limited, but simpler, approach for those large employers who wish to use it.

To request a refund, businesses including corporations must complete Form 8913, Credit for Federal Telephone Excise Tax Paid. To complete this form, businesses may determine the actual amount of refundable long-distance telephone excise taxes they paid for the 41 months from March 2003 through July 2006, or use an estimation formula to figure their refunds. Businesses must attach Form 8913 to their regular 2006 income tax returns.

Announcement 2012-16, 2012-18 I.R.B. 876, provides that taxpayers had until July 27, 2012, to request refunds of the telephone excise tax. The announcement also states that the Service will not process refund requests submitted after July 27, 2012.

Protective claims for refund

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 and may not be determinable until after the statute of limitations has expired. IRM 25.6.1.10.2.6.5 (05-17-2004), Protective Claims. Protective claims are based on expected changes in the Code, regulations, other legislation, or case law. IRM 21.5.3.4.7.3 (10-01-2002), Protective Claims. The concept of a "protective claim" is not used in the Internal Revenue Code or Treasury Regulations, but comes from case law. See, e.g. United States v. Kales, 314 U.S. 186, 194 (1941); Bokum v. Commissioner, 992 F.2d 1136, 1139-40 (11th Cir. 1993); Cooper v. United States, No. Civ. 3:97CV502, 1999 WL 907415 (W.D.N.C. Aug. 17, 1999); Axtell v. United States, 860 F. Supp. 795, 799-801 (D. Wyo. 1994); Pickett v. United States, No.88-30342-RV, 1990 WL 300669 (N.D. Fla. July 3, 1990); Kellogg-Citizens Nat'l Bank of Green Bay, Wis. v. United States, 165 Ct. Cl. 452 (Ct. Cl. 1964).

A valid protective claim need not state a particular dollar amount or demand an immediate refund; however, the claim must have a written component, must identify and describe the contingencies affecting the claim; must be sufficiently clear and definite to alert the Service as to the essential nature of the claim; and must identify a specific year or years for which a refund is sought. Kales, 314 U.S. at 194.

In TETR situations, the "claims" were already allowed when the Commissioner signed the certificate recognizing that there were overassessments, which is why taxpayers were allowed to come in more than three years after a payment date to "request" a refund of the (previously) allowed claim. As an administrative matter, the Service continued to process "requests" only up to the announced deadline. Accordingly, there is no concept of a protective claim in this situation, because although the administrative "request" may have been timely pursuant to the notice, there is no "claim" that is actually timely under the Code. To be valid, a "protective" claim still needs to be timely. Moreover, the Service should not view a claim as a valid protective claim merely because the taxpayer labels it as such.

. The government has recognized the concept of protective claims because it prevents unnecessary use of both taxpayer and Service resources until a contingency beyond the control of the taxpayer or the Service is resolved. Protective claims do not provide a mechanism for taxpayers to avoid the consequences of their own failures to organize their own records and submit timely informative claims.

Supplemental claim for refunds and amendments to original claims

Two considerations are relevant in determining whether a supplemental claim for refund is considered an amendment to the original timely claim, rather than an untimely new claim. First, the supplemental claim will not be considered an amendment to the original claim if it would require the investigation of new matters that would not have been disclosed by the investigation of the original claim. Andrews, 302 U.S. at 524-26; Pink v. United States, 105 F.2d 183, 187 (2d Cir. 1939). Such a supplemental claim is a new claim, rather than an amendment to the existing timely claim. Second, a supplemental claim will not generally be considered an amendment if the Service took final action on the original claim by either allowing the claim, or by rejecting it in whole or in part. In either case, the supplemental claim is untimely because once the IRS has taken final action on the original claim, there is no longer any claim left to amend. Mondschein v. United States, 338 F. Supp. 786 (E.D.N.Y. 1971), aff'd, 469 F.2d 1394 (2d Cir. 1973). Since the Service has not issued a notice of formal claim disallowance in this case, the second condition is not relevant for this determination.

After the statute of limitations on refund claims has expired, a taxpayer may amend the original claim with 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. The claim cannot be amended after the statute of limitations expires if the amendment would require the investigation of new matters that would not have been disclosed by the investigation of the original claim. Andrews, 302 U.S. at 524-26; Pink, 105 F.2d at 187.

CASE DEVELOPMENT, HAZARDS AND OTHER CONSIDERATIONS

This writing may contain privileged information. Any unauthorized disclosure of this writing may undermine our ability to protect the privileged information. If disclosure is determined to be necessary, please contact this office for our views.

Please call (617) 788-0804 if you have any further questions.

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