2018 GL1 - Lesson 13
REFUNDS AND REFUND LITIGATION
(June 2018)

Contents

I. INTRODUCTION

The Code provides a comprehensive set of rules that a taxpayer must follow to obtain a refund or credit of overpaid tax. Generally, an overpayment exists when a taxpayer makes payments exceeding the correct amount of tax due for the taxable period. The Service generally does not issue a refund, though, until the taxpayer files a timely claim for refund, even when it recognizes that the taxpayer has overpaid the tax. This lesson explains the rules for how the Service determines whether a refund should be issued and the rules for how the taxpayer can recover a refund through a refund suit.

II. OVERPAYMENT DEFINED

A. In General

- No refund or credit can be made unless it has first been determined that the taxpayer has made an overpayment of tax for the period at issue. Lewis v. Reynolds, 284 U.S. 281, 283 (1932) ("An overpayment must appear before refund is authorized.").

- The Code does not explicitly define the term "overpayment," but it does treat certain items as overpayments:

  - An overpayment "includes" any internal revenue tax assessed or collected after the applicable statute of limitations has expired. I.R.C. § 6401(a).
  - Refundable credits that exceed the amount of income tax imposed for the year are "considered" overpayments. I.R.C. § 6401(b).
  - An amount paid as tax constitutes an overpayment even if there is no tax liability in respect of which the amount was paid. I.R.C. § 6401(c).

- A more useful description of the term "overpayment" has developed under case law. In Jones v. Liberty Glass, 332 U.S. 524, 531 (1947), the Supreme Court gave the following general definition of the word "overpayment":

- The word "overpayment," in its usual sense, means "any payment in excess of that which is properly due."
- The Court went on to explain that "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."

- Using that definition, the existence of an overpayment depends on two things:

  - The correct tax for the period at issue and
  - The amounts paid as tax

B. Correct Tax

- According to Liberty Glass, the correct tax is the amount "rightfully due."

- 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. See section 6401(a).

  - Note 1: Voluntary payment of a tax assessed and paid after the expiration of the period of limitation on assessment does not constitute a waiver by the taxpayer of the period of limitation on assessment, and such a payment is an overpayment. See Rev. Rul. 74-580, 1974-2 C.B. 400.
  - Note 2: Where taxes have been paid before the expiration of the period of limitation 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; see also Crompton & Knowles Loom Works v. White, 65 F.2d 132 (1st Cir. 1933), cert. denied, 290 U.S. 669 (1933).

- The tax reported on a 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).

C. Payment Required

- An overpayment cannot exist unless the taxpayer has remitted an amount as a payment of tax.

- A remittance is not a payment if it is a deposit. A deposit is a remittance that can be

made for various purposes, such as the suspension of interest on a disputed underpayment of tax, that was not intended to be a payment of tax at the time it was made.

- Section 6603 authorizes taxpayers to make deposits that are not payments of tax and has rules regarding underpayment and overpayment interest and for when a deposit can be returned. This section does not apply to all types of deposits. For example, it does not apply to employment tax deposits.

- Guidance Concerning Deposits

  - Revenue Procedure 84-58

    - Issued before section 6603 was enacted.
    - 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.

  - Revenue Procedure 2005-18

    - Superseded Revenue Procedure 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).

III. ADMINISTRATIVE CLAIM FOR REFUND

A. Requirement that Claim be Filed

- 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 taxpayer also cannot bring a refund suit under section 7422 unless a claim has been filed within the applicable period of limitation. Treas. Reg. § 301.6402-2(a)(1).

B. Required Form for Filing a Claim

- 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).

- 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, Form 1120X, Amended U.S. Corporation Income Tax Return, or other form prescribed for a particular type of income tax. Treas. Reg. § 301.6402-3(a)(2) and (3).

- Other forms are appropriate for claims for refund of taxes other than income tax, such as excise and employment taxes. Treas. Reg. § 301.6402-2(c).

- All other claims by taxpayers for the refund of taxes, interest, penalties, and additions to tax for which a specific form has not been prescribed shall be made on Form 843, Claim for Refund and Request For Abatement. Treas. Reg. § 301.6402-2(c).

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

C. Grounds Set Forth in Claim

- No refund or credit will be allowed after the period of limitations for filing a refund claim expires except upon one or more of the grounds set forth in a timely filed refund claim. Treas. Reg. § 301.6402-2(b)(1).

- A refund claim 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).

- Although precision is not required, the taxpayer must identify in the refund claim, at a minimum, the essential requirements of each and every refund demand. See In re Ryan, 64 F.3d 1516 (11th Cir. 1995).
- If the taxpayer chooses to file a refund suit, the suit may be dismissed 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).

- The statement of the grounds and facts must be verified by a written declaration that it is made under penalties of perjury. Treas. Reg. § 301.6402-2(b)(1).

- A claim that does not set forth in detail the grounds and facts supporting the claim will not be considered for any purpose as a claim for refund or credit. Treas. Reg. § 301.6402-2(b)(1). The Service cannot, however, determine that a claim is defective after disallowing the claim for refund on its merits. Ford v. United States, 402 F.2d 791 (6th Cir. 1968).

D. Informal Claim

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

  - The Supreme Court recognized the concept of an informal claim for refund in United States v. Kales, 314 U.S. 186 (1941).
  - In Kales, 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.

- A timely filed 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.

- 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. PALA, Inc. Employees Profit Sharing Plan and Trust Agreement v. United States, 234 F.3d 873, 879–80 (5th Cir. 2000) (citing Angelus Mining Co. v. Commissioner, 325 U.S. 293, 297–99 (1945). 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.

- Examples of qualifying informal claims:

  - A letter to the Service. Kales, 314 U.S. 186.
  - 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. United States, 18 F. Supp. 938 (Ct. Cl. 1937).
  - A protest letter, along with request for suspension pending the outcome of litigation. Furst v. United States, 678 F.2d 147 (Ct. Cl. 1982).
  - A taxpayer's oral statements made before assessment and recorded by a revenue agent; New England Elec. Sys. v. United States, 32 Fed. Cl. 636 (Fed. Cl. 1995).

E. Protective Claims

- Protective claims are filed to preserve the taxpayer's right to claim a refund when the 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 informal claim for credit or refund. Protective claims are often based on current litigation or expected changes in the law, other legislation, or regulations.

- 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 United States v. Memphis Cotton Oil, 288 U.S. 62 (1933); see also Kales, 314 U.S. 186.

- A valid protective claim need not state a particular dollar amount or demand an immediate refund, but it must meet the Kales criteria.

F. Amending a Claim

- 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.

- If a filed claim is found inadequate or incomplete, it may be amended at any time as long as:

  - the Service has not taken final action with respect to the claim, and
  - no new matters are raised by the taxpayer.

- 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. United States, 105 F.2d 183 (2d Cir. 1939). Such a supplemental claim is a new claim rather than an amendment to the original timely claim.

- 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.

- 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. Under Memphis Cotton Oil, when a late-filed amended claim relies upon the same facts as a timely claim, the amendment may constitute an acceptable clarification of the original.

- 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.

G. Waiver Doctrine

- 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.

- 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

- 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.

- 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; see also 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.

IV. LIMITATIONS ON CREDIT OR REFUND

A. In General

- Section 6511 establishes the timeliness rules for claims for refund or credit of an overpaid tax.

- Section 6511(a) provides the general period of limitations for filing refund claims.

- Section 6511(b) provides limits on the allowance of credits and refunds .

- The remainder of section 6511 provides special rules for certain cases.

B. Period of Limitations for Filing a Refund Claim

- If a return was filed, a claim must be filed within three years from the date the return was filed, or two years from the date the tax was paid, whichever is later. I.R.C. § 6511(a)

- 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).

- If a tax is required to be paid by stamp, a claim must be filed within three years from the time the tax was paid. I.R.C. § 6511(a).

C. Limitation on Allowance of Credits and Refunds

- Necessity of filing claim within the prescribed period

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

- Limit on amount of credit or refund

    - Limit if Claim Filed Within Three-Year Period: If the taxpayer has filed a tax return and files a claim for credit or refund within three years of the filing of the return, the credit or refund amount is limited to the tax paid within three years before the taxpayer filed the claim, plus any extension of time the taxpayer had for filing the tax return. I.R.C. § 6511(b)(2)(A). See also Baral v. United States, 528 U.S. 431 (2000); Tiernan v. United States, 113 Fed. Cl. 528 (2013).
    - Limit if Claim Not Filed Within Three-Year Period: If the taxpayer has filed a return but files a claim for credit or refund more than three years after the return was filed (plus any extension of time to file), the credit or refund amount is limited to the tax paid within two years before the taxpayer filed the claim. I.R.C. § 6511(b)(2)(B).
    - Limit Where no Return Filed: If the taxpayer has not filed a return but has filed a claim for credit or refund, the refund amount is limited to the tax paid within two years before the taxpayer filed the claim. I.R.C. § 6511(b)(2)(B).
    - Limit Where no Claim Filed: If the taxpayer has not filed a claim for credit or refund, 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).
    - Part Payment Before Claim and Part Payment After Claim: Where a taxpayer pays part of the tax before, and part after, filing a refund claim, the amount of any refund potentially allowable is limited to the amount paid before the claim (and within the applicable two- or three-year look-back period). See Carroll v. United States, 198 F. Supp. 2d 328, 348 (E.D.N.Y. 2001), rev'd on other grounds, 339 F.3d 61 (2d Cir. 2003); Keeter v. United States, 957 F. Supp. 1160, 1163-64 (E.D. Cal. 1997) (holding that a refund may include additional taxes paid after the filing of a refund claim, so long as the total does not exceed the portion of tax paid prior to the administrative claim).

D. Special Rules for When There's Been an Extension of Time by Agreement

- Section 6511(c) modifies the general rules in section 6511(a) and (b) for cases in which the taxpayer and the Service agree, within the period prescribed for filing a claim for credit or refund, to extend the period for assessment.

- Section 6511(c)(1) modifies the period for when claims must be filed. Under that section, the period for filing a claim for credit or refund shall not expire before 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).

- Section 6511(c)(2) modifies the limitations on the allowed amount of credits and refunds. Under that section, 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 claim for credit or refund, 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.

- Under section 6511(c)(3), the special rules in section 6511(c) do not apply to the case of a claim filed (or credit or refund allowed if no claim filed), either:

    - before the execution of the extension agreement, or
    - 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.

E. Running of Periods of Limitation Suspended while Taxpayer is Unable to Manage Financial Affairs Due to Disability

- In United States v. Brockamp, 519 U.S. 347 (1997), the Supreme Court held that courts may not use non-statutory equitable reasons to toll the time limitations set forth in section 6511.

- In response to Brockamp, Congress enacted section 6511(h).

- Section 6511(h)(1) provides that in the case of an individual, the running of the periods specified in sections 6511(a), 6511(b), and 6511(c) are suspended during any period in which the individual is financially disabled.

- Section 6511(h)(2) provides that unless the individual's spouse or another person is authorized to act on the individual's behalf, the individual is generally considered financially disabled if he or she is unable to manage his or her financial affairs by reason of a medically determinable physical or mental impairment that can be expected to result in death or which has lasted, or can be expected to last, for a continuous period of at least 12 months.

F. Some Exceptions to the General Rules for Certain Income Tax Cases

- Bad Debts or Worthless Securities. A taxpayer can file a claim for refund within seven years from the date prescribed for filing the return. Section 6511(d)(1).

- 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. Section 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.

- Certain Credit Carrybacks

    - 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. Section 6511(d)(4)(A).

    - 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. Section 6511(d)(4)(A).

    - If a taxpayer has signed a consent to extend the time to assess tax (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. Section 6511(d)(4)(A). Waivers only apply to the three-year limitation period and do not change the two-years-from-payment rule. Section 6511(d)(4)(A).

- Section 6511(d) also modifies the period of limitations for other deductions and credits, such as foreign tax credits, self-employment tax, income recapture under qualified plan termination, and the reduction of uniformed services retirement pay as a result of an award of disability compensation.

G. Time Return is Deemed Filed

- 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. Section 6513(a).

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

- 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. United States, 221 F. Supp. 291 (S.D.N.Y. 1963).

- 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.

H. When Tax is Considered Paid

- General Rules
    - 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.
    - 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. An extension of time to file a return does not extend the time to pay the tax liability owed. This rule applies to taxpayers who have elected to pay the tax installments, as well. I.R.C. § 6513(a).
    - 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).
    - 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).
    - 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 due date of the return, and no portion of the $10,000 estimated tax payments could be refunded. 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.
- Credit of an Overpayment
    - A taxpayer may indicate on its return whether to credit an overpayment reported

thereon against its estimated tax for the next year. I.R.C. § 6402(b); Treas. Reg. § 301.6402-3(a)(5). These credits are referred to as "credit elects."

- Under section 6513(b)(2), the amount of the credit elect is considered paid as of the due date of the return for the year to which the credit was applied.

I. Effect on Claim of a Prior Petition Filed in Tax Court

- In general, 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.

- The Service may, however, refund any of the following six amounts:

  - Overpayment determined by a final decision of the Tax Court. (The taxpayer does not have to file a claim for refund as to the amount of overpayment in the decision. See United States 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 other five exceptions to the general rule applies.)
  - Amount collected in excess of an amount computed in accordance with a final decision of the Tax Court.
  - Amount collected after the period of limitation for collection had expired for making a levy or beginning a proceeding in court.
  - Overpayment attributable to partnership items.
  - Amount collected by the Service within the period during which collection is barred under section 6213(a).
  - 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). See Commissioner v. Lundy, 516 U.S. 235 (1996).

- 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. United States, 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.

V. OFFSETS

A. In General

- Section 6402 provides the authority for offsetting overpayments against other liabilities.

- Before a refund is issued, the Service may offset the amount of an overpayment (including interest) against any outstanding liability for any tax (or for any interest, additional amount, addition to the tax, or assessable penalty) and must offset the amount of four specified types of non-tax liabilities.

B. Reduction of Overpayment before Refund

- Under section 6402(a), the Service may credit the amount of an overpayment against any other internal revenue tax owed by the taxpayer.

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

- Under section 6402(g), no court has jurisdiction to review an offset action taken by the Service under sections 6402(c), (d), (e) or (f).

C. Processing Offsets

- Treasury's Bureau of Fiscal Services (BFS) issues tax refunds. The reduction in overpayments pursuant to sections 6402(c) through (f) is accomplished through BFS's Treasury Offset Program (TOP).

- If an agency submits a taxpayer's legally enforceable, past-due debt to TOP for offset, BFS will take as much of the taxpayer's refund as is needed to pay off the debt and will send it to the agency. BFS will issue the remaining portion of the taxpayer's refund to the taxpayer. BFS 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. BFS will also notify the Service of the amount taken from the taxpayer's refund.

D. 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 (including a federal tax debt when the injured spouse is not responsible for that amount), 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.

E. 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 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. Indeed, under section 6513(d), once a credit elect has been claimed, it shall be considered as payment of the income tax for the succeeding taxable year, and no claim for credit or refund of the overpayment will be allowed for the year in which the overpayment arises.

- Under section 7422(d), the credit of an overpayment of any tax in satisfaction of any tax liability shall, for the purpose of any suit for refund of the satisfied tax liability, be deemed to be a payment in respect of the satisfied tax liability at the time the credit was allowed.

VI. EFFECT OF CLAIM ON FURTHER ADJUSTMENTS AND ESTOPPEL

A. Adjustments Beyond Claim

- A claim for refund permits the Service to examine the return that is the subject of the refund claim.

- A claim for refund could thus result in the following things happening:

- Adjustments made by the Service that could effectively reduce or eliminate the claimed overpayment;

- The creation of a deficiency in the year covered by the claim (if the period of limitations for assessment of a deficiency for that year has not expired); or

- An increase in tax in years other than the year for which the claim is filed because the Service can make an adjustment to a carryover or continuing item that affects other returns.

B. Consents to Assessment and Estoppel

- Form 870, Waiver of Restrictions on Assessment and 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 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.
    - The waiver permits the Service to make an assessment against the taxpayer without having to comply with the deficiency procedures.

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

    - 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, e.g., Whitney v. United States, 826 F.2d 896, 898 (9th Cir. 1987) ("standing alone [the Form 870-AD] should not estop the executing taxpayer from seeking a refund").

- Equitable Estoppel

    - Equitable estoppel prevents any party from profiting from an action that induced reliance by another party.
    - The elements of estoppel are as follows:
        - there must be false representation or wrongful misleading silence;
        - the error must originate in a statement of fact, not in an opinion or a statement of law;
        - the one claiming the benefits of estoppel must not know the true facts;
        - that same person must be adversely affected by the acts or statements of the

one against whom an estoppel is claimed.

See Whitney, 826 F.2d at 898 n.5 (citing Lignos v. United States, 439 F.2d 1365, 1368 (2d Cir. 1971)); Uinta Livestock v. United States, 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).

- 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. Ihnen v. United States, 272 F.3d 577, 579 (8th Cir. 2001); Aronsohn v. Commissioner, 988 F.2d 454, 456-57 (3d Cir. 1993); Union Pac. R.R. v. United States, 847 F.2d 1567, 1570 (Fed. Cir. 1988); Elbo Coals, Inc. v. United States, 763 F.2d 818, 820 (6th Cir. 1985); Stair v. United States, 516 F.2d 560, 564-65 (2d Cir. 1975); General Split Corp. v. United States, 500 F.2d 998, 1003-04 (7th Cir. 1974); 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.
- A minority of courts, however, find that taxpayers are not prevented under a theory of equitable estoppel from claiming a refund after executing a Form 870-AD. Whitney, 826 F.2d at 898, Uinta Livestock Corp, 355 F.2d at 767.
- Where a taxpayer takes action contrary to the agreed terms of a previously executed Form 870-AD, the Service argues that, due to additional factors, the taxpayer should be estopped from doing so.

VII. INTEREST ON OVERPAYMENTS – SECTION 6611

A. In General

- Section 6611(a) provides that interest shall be allowed and paid upon any overpayment of tax.

- Section 6611(a) also provides that interest is paid at the rate established under section 6621.

B. Incorrect Amount of Interest Paid on Overpayment

- 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.

- A suit against the government for a payment of additional overpayment interest exceeding $10,000 must be brought in the Court of Federal Claims. 28 U.S.C. § 1491(a)(1). Claims not exceeding $10,000 may be brought in a federal district court. 28 U.S.C. § 1346(a)(2). But see Ford Motor Co. v. United States, 768 F.3d 580 (6th Cir. 2014) (affirming district court jurisdiction to decide these cases based on previous decision in Scripps); E.W. Scripps Co. and Subsidiaries v. United States, 420 F.3d 589 (6th Cir. 2005) (holding that 28 U.S.C. § 1346(a)(1) confers jurisdiction on the federal district courts to adjudicate claims for overpayment interest because the term "recovery of any sum" in that statute includes suits to obtain overpayment interest). The Tax Court has held, however, that it has subject matter jurisdiction over a taxpayer's claim for overpayment interest. But see Sunoco Inc. v. Commissioner, 663 F.3d 181 (3d Cir. 2011) (overturning the Tax Court's assertion of jurisdiction).

- 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 General Instrument Corp. v. United States, 33 Fed. Cl. 4 (1995) (applying section 6407 and holding that the six-year limitation period begins when the Service schedules an overassessment).

- A suit for overpayment interest commenced in federal district court pursuant to 28 U.S.C. § 1346(a)(1), rather than in the Court of Federal Claims, must be commenced within the two-year limitations period derived from sections 7422 and 6532. Pfizer, Inc. v. United States, 2017 WL 1969678 (S.D.N.Y. 2017)), appeal docketed No. 17-2307 (2d Cir. 2017).

- 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. 57-242, 1957-1 C.B. 452.

VIII. TENTATIVE CARRYBACK ADJUSTMENTS – SEC. 6411

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

- 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 an overpayment. After issuing a tentative refund, the Service may make a full

examination of the return under its regular examination procedures.

- 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:

  - Immediately assess the amount of the excessive refund as if it were a math error (section 6213(b)(3)). But the amount assessed under section 6213(b)(3) may not exceed the amount of the tentative refund erroneously refunded or credited.
  - Send a statutory notice of deficiency (SNOD) within the three-year period during which a deficiency may be assessed (section 6501(h)); and/or
  - Commence an action for the recovery of an erroneous refund within the two-year period under section 6532(b) (section 7405).

- Section 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.

IX. REPORTS OF REFUNDS AND CREDITS

A. Occasions When Reports are Necessary

- Under section 6405(a), no refund or credit of income, estate, gift, or certain other taxes in excess of $2,000,000 ($5,000,000 in the case of corporations) can be authorized until a report has been made to the Joint Committee on Taxation.
- For more information regarding refunds subject to section 6405, see IRM 4.36.

B. Occasions When Reports are Not Necessary

- Tentative Adjustments

  - In general, no report is required for refunds made pursuant to section 6411 (regarding tentative carryback and refund adjustments). Section 6405(b).
  - But if the credit or refund, reduced by any deficiency in the tax thereafter assessed as well as by deficiencies in any other tax, exceeds $2,000,000 ($5,000,000 in the case of corporations) after the Service determines the correct amount of tax, then a report must be submitted.

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

X. REFUND LITIGATION

A. In General

- 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.

B. Exhaustion of Administrative Remedies

- Section 7422(a) provides that no suit for refund shall be maintained in any court until a claim for refund has been duly filed with the Service. See sections III and IV of this lesson for claim-filing rules.
- The Service will review a claim for refund and inform the taxpayer, by letter, if it will accept the claim or disallow the claim in full or in part. A taxpayer can request a conference with the Office of Appeals if the the claim is disallowed in whole or in part.

- 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 Mfg., 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. United States, 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").

C. Full Payment Rule

- 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. United States, 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.").

- The Flora rule is a jurisdictional provision in litigation. It does not apply at the administrative level. Accordingly, the Service may (and does) process claims for refund even if a reported or assessed liability still has a balance due. Indeed, this is frequently the case with respect to filed Forms 1040X and 1120X.

- 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. United States, 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.").

- 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.

- 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. I.R.C. § 6331(i)(4)(A)(i).

- 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 ensure that section 6331(i) is not violated.

D. Standing

- In General

    - Under 28 U.S.C. § 1346(a)(1), there is no explicit limitation on who may file a refund suit.
    - Traditionally, only "taxpayers" had standing to bring a refund suit. See Busse v. United States, 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; see also Munaco v. United States, 522 F.3d 651 (6th Cir. 2008) (and cases cited therein).

- United States v. Williams

  - In United States 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 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.
  - 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.
  - The Court noted that it was not deciding when a volunteer who paid a tax assessed against someone else could sue for refund.

- Newly-Created Statutory Remedies for Third Parties

  - 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).
  - 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). (Lesson 7 has a more in depth discussion of section 6325.)
  - 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 section 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). A third party may also file a quiet title action under 28 U.S.C. 2410 to challenge the value or attachment of a tax lien to their property.]. However, the advantage of the section 6325(b)(4)/section 7426(a)(4) procedures is the third party is able to get the lien discharged from the property and then contest the value or attachment of the lien.

- 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, 522 F.3d 651; 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); Four Rivers Invs. v. United States, 77 Fed Cl. 592 (2007); City of Richmond, Kentucky v. United States, 348 F. Supp. 2d 807 (E.D. Ky. 2004). 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). A court has also permitted a third party to bring suit under section 1346(a)(1) who attempted to comply with the procedures of section 6325(b)(4) but the Service erroneously issued a certificate of release rather than a certificate of discharge, thus leaving the third party without a remedy. See Streeter v. United States, 150 F. Supp. 3d 82 (D. Mass. 2015).

E. Period of Limitations for Filing Suit

- Under section 6532(a)(1), no refund suit can be filed before the expiration of six months from the date the taxpayer filed its refund claim, unless the Service renders a decision on the claim within that time, or more than two years after the Service mails the taxpayer a notice of claim disallowance. See also Rev. Rul. 56-381.

- The two-year period for filing suit under section 6532 may be extended by agreement in writing between the taxpayer and the Service. I.R.C. § 6532(a)(2). A taxpayer request for Appeals consideration does *not* extend the two year period.

- 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.

- Under section 6514(a)(2), in the case of a taxpayer who filed a timely refund claim that the Service disallowed, an overpayment cannot be refunded or credited if the two-year period for filing a suit under section 6532 runs and the taxpayer has not filed suit within that time.

F. Role of Counsel in Refund Litigation

- Section 34.5.2 of the CCDM provides directions on the roles and responsibilities Chief Counsel attorneys have in refund litigation. The section provides instructions on gathering necessary returns and documents, drafting the defense letter, and coordinating refund cases with Tax Court cases. The following provides a summary of those tasks. For specific instructions, check the CCDM.

- Basic Responsibilities in Refund Litigation

    - The attorney should immediately examine the complaint to determine which tax returns and related documents (such as transcripts of account) will be needed.

    - The attorney should promptly request the administrative files and any other related document from the Service. 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. 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 period of limitation for assessment, including issuing a statutory notice of deficiency.

    - 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

o The defense letter is due with the Department of Justice Tax Division by the later of 50 days after the taxpayer files the complaint or 40 days after Field Counsel receives the complaint. If a defense letter requires national office review, it must be sent for review no later than 10 days before the DJ due date.

o If a defense letter and administrative file cannot be timely sent to the Tax Division, the attorney should contact the Tax Division attorney assigned to the case to provide an estimate of when either will be sent. In the meantime, assistance should be given to the Tax Division attorney in answering 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 the Tax Division attorney did not receive a complete duplicate file. If it is practical to do so, an attorney may give the Tax Division attorney access to the administrative files. An attorney should avoid sending the Tax Division the original files and suspending work on the case until the files are returned. If the Tax Division needs the original files, the attorney should retain an entire duplicate administrative file in order to complete the defense letter.

o 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 the Tax Division 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 the Tax Division a letter setting forth factors involved in the related Tax Court case.

o 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.

2018 GL-1 Instruction Assigned to Nancy Gilmore(CC:SB)

Previous Instruction: Micah A. Levy, Shannon K Castaneda, Lawrence (“Larry”) E. Mack, Kelley A Blaine, and Karen L Baker