



DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

OFFICE OF
CHIEF COUNSEL

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MEMORANDUM FOR H S. KESSELMAN
DISTRICT COUNSEL CC:NER:PEN:PHI

FROM: Richard G. Goldman
Special Counsel (Tax Practice and Procedure)
CC:DOM:FS:PROC

SUBJECT: Significant Service Center Advice Concerning Internal
Revenue Code Section 7502- Applicability to Delinquently
Filed Refund Returns, TL-N-6936-98

This responds to your request for Significant Service Center Advice dated
November 13, 1998, which arose from joint advice sought from the Philadelphia
Service Center and Philadelphia Appeals.

Disclosure Statement

Unless specifically marked "Acknowledged Significant Advice, May Be Disseminated" above, this memorandum is not to be circulated or disseminated except as provided in Chief Counsel Directives Manual (35)2(13)3:4(d) and (35)2(13)4:(1)(e). This document may contain confidential information subject to the attorney-client and deliberative process privileges. Therefore, this document shall not be disclosed beyond the office or individual(s) who originated the question discussed herein and are working the matter with the requisite "need to know." In no event shall it be disclosed to taxpayers or their representatives.

Issues

1. Can a taxpayer rely on the timely mailing, timely filing rule of I.R.C. § 7502 so that a claim for refund is considered timely filed where the taxpayer mails a delinquent 1993 return on either April 10, 1997, or April 12, 1997, claiming an overpayment and that return is date stamped "received" by the Service Center on April 17, 1997?

2. Do you concur with the Appeals' analysis that there are sufficient litigating hazards (both legal and factual) to warrant allowing these refund claims as part of an overall case settlement?
3. If we agree with Appeals then how do we answer the Service Center's concern that we are treating similarly situated taxpayers differently since the Service Center is denying such claims pursuant to our previous advice?
4. If we disagree with Appeals, does the Service Center have the authority to refuse to implement Appeals settlements which allow such refunds in order to ensure consistent treatment of similarly situated taxpayers?

Conclusions

1. A taxpayer cannot rely on the timely mailing, timely filing rule of section 7502 when mailing an original income tax return after its due date.
2. Appeals' analysis is incorrect as a matter of law so we disagree that there are sufficient litigating hazards (both legal and factual) to warrant allowing these refund claims as part of an overall settlement.
3. Since we disagree with Appeals' analysis, no response is required to this question.
4. The extent to which the Service Center would have the authority to refuse to implement these settlements depends on whether Appeals has entered into a binding settlement agreement, which should be determined based on the particular facts and circumstances of the individual agreement.

Discussion

A delinquent return for the 1993 tax year bears a United States postmark of April 10, 1997, or April 12, 1997, but is not date stamped "received" by the Service Center until April 17, 1997.¹ Appeals believes that a finder of fact would likely conclude that Service Center date stamping at the height of the filing season is not 100% certain to occur on the actual date of receipt. Therefore, a court could conclude that the return mailed on April 10, 1997, was actually received on or

¹ With your agreement we have changed the initial hypothetical you proposed to the 1993 tax year since your initial hypothetical involved the 1994 tax year and April 15 of the next year fell on a Saturday. The fact that April 15, 1995, fell on a Saturday may have section 7503 and section 6511(b)(2)(A) implications. You have advised that you are not seeking advice concerning section 7503.

before April 15, 1997, notwithstanding the date stamp. Although you have not specifically stated, we assume that the payments creating refunds are withholding credits. Thus, according to Appeals, the question is no longer the applicability of section 7502, but is instead simply a factual question regarding the reliability of Service Center date stamping which like any other factual question is within the purview of Appeals to settle based upon hazards. Appeals further opines that the Service Center is overstepping its role to question whether it should implement an Appeals settlement.

It is our understanding that you contacted the Philadelphia Service Center to inquire whether they could testify that 100% of the mail is accurately date stamped even during the height of the filing season. We understand that you are satisfied that if put to our proof the Internal Revenue Service (Service) could satisfy a court that there is a sufficient system in place to ensure that 100% of the mail is accurately date stamped.

You state that according to Appeals the question is no longer the applicability of section 7502 but the factual question concerning the reliability of the date stamping. Because you are satisfied that 100% of the mail is accurately date stamped, there is no factual dispute. Furthermore, we think that Appeals' use of the "timely mailing treated as timely filing" rule of section 7502 is incorrect as a matter of law.

Section 6511(a) provides that in order for a claim for refund to be filed timely, the claim must be filed within three years of the filing of the return or within two years of the date on which the tax was paid, whichever occurs later. However, section 6511(b)(2)(A) limits the amount of a refund to the amount of tax paid during the three years immediately preceding the filing of the claim plus the period of any extension of time for filing the return.

Section 6513(b)(1) provides that tax withheld from wages paid in 1993 is treated as being paid on April 15, 1994, the due date for the 1993 return. Treas. Reg. § 301.6402-3(a) provides that an original income tax return may constitute a claim for refund and that "such claim shall be considered as filed on the date on which such return . . . is considered as filed." Thus, it is necessary to determine when a taxpayer files a return in order to determine whether the taxpayer is entitled to a refund.

Section 7502 provides that if certain conditions are met, a document required to be filed under the internal revenue laws is deemed filed when it is mailed. Section 7502(a)(1) provides the general rule that any return, claim or other document required to be filed within a prescribed period or on a prescribed date, is deemed filed as of the date of the United States postmark stamped on the cover if it is delivered by the United States mail after the prescribed date. Section 7502(a)(2)(A)

limits the application of section 7502 to those documents that are postmarked on or before the due date for filing such documents.

Section 7502(a)(2)(A) provides:

(2) MAILING REQUIREMENTS. - - This subsection shall apply only if

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(A) the postmark date falls within the prescribed period or on or before the prescribed date --

(i) for the filing (including any extension granted for such filing) of the return, claim, statement, or other document

Under the clear language of section 7502(a)(2)(A), the "timely mailing treated as timely filing" rule of section 7502 only applies when the return, claim or other document is mailed on or before the due date for filing such documents. The courts have consistently interpreted section 7502 according to its express language and have concluded that the section does not apply to documents mailed after their due date. Mills v. United States, 805 F. Supp. 448, 450 (E.D. Tex. 1992); Chasar v. Internal Revenue Service, 733 F. Supp. 48, 49-50 (N.D. Tex. 1990); King v. United States, 495 F. Supp. 334, 337 (D. Neb. 1980); Orrock v. Commissioner, T.C. Memo. 1982-293. The Service's position is that a claim for refund cannot be separated from the return on which it was made. See Treas. Reg. § 301.6402-3(a). Thus, in order for section 7502 to be applicable to the claims for refunds in this case, it must apply to the returns on which the claims were made.

In the examples suggested, the original returns for 1993 were postmarked on either April 10, 1997, or April 12, 1997, which is a time period a little less than three years from the due date for filing the original 1993 income tax return. It follows that the "timely mailing treated as timely filing" rule of section 7502 is not applicable to these returns and the claims for refund made thereon. Accordingly, the original returns/claims for refund in this case were filed when received by the Service. See generally section 6091. Inasmuch as the returns were received on April 17, 1997, the claims were filed more than three years after April 15, 1994, the date on which the amounts withheld from the taxpayers' wages for 1993 were deemed paid. Pitre v. Internal Revenue Service, 938 F. Supp. 95, 97-98 (D. N.H. 1996); Becker v. Department of Treasury, 823 F. Supp. 231, 233 (S.D. N.Y. 1993). Therefore, the amount of any refund paid with respect to these claims for refund would be limited to those payments made within three years of April 17, 1997, and would not include withholding credits.

Any argument that the claim should be regarded as separate and apart from the original tax return so that section 7502 would apply to the claim for refund but not to

the return in which the claim for refund was made is also misplaced. Since the claim for refund was part of the original income tax return, logic dictates that the claim could not be filed any earlier than the actual return itself. Becker v. Department of Treasury, 823 F. Supp. 231, 233 (S.D. N.Y. 1993). Moreover, even assuming the claim could be deemed filed as of the postmark date of April 10, 1997, or April 12, 1997, the return could not be deemed filed earlier than the date of receipt on April 17, 1997. Since on the postmark date on which the claim might be deemed filed there was no tax return filed (which would not have occurred until April 17, 1998), the 2-year limitation in section 6511(a) would operate to bar the refund. See Christie v. United States, No. 3-90-285 (D. Minn. 1990), aff'd, No. 91-2375 MN (8th Cir. 1992).

It should be noted that in a memorandum dated September 2, 1998, from the Deputy Chief Counsel to the Acting Executive Officer for Service Center Operations, subject titled Application of Section 7502 to Refunds Claimed on Original Delinquent Returns, the Deputy Chief Counsel strongly recommended that instructions be issued to advise all Service Centers that refunds issued under the scenarios described above are barred by the statute of limitations.

Treas. Reg. § 601.106(f)(2) provides that Appeals can give serious consideration to a settlement offer on a basis which fairly reflects the relative merits of the case and the litigation hazards if the case was litigated and that Appeals cannot settle a case based on nuisance value. Appeals' settlements allowing the barred refunds are incorrect as a matter of law and therefore do not fairly reflect the relative merits of the case or the litigation hazards. Accordingly, Appeals appears to be overstepping their authority by settling these cases. Appeals should not settle future cases on this basis.

The extent to which the Service Center may refuse to implement an Appeals' settlement would depend on the nature of the settlement agreement. A closing agreement, for example, is final and may not be dishonored except as provided in section 7121. Less formal agreements may not be as binding. Questions concerning individual settlement agreements should be considered based on their particular facts and circumstances.