



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

OFFICE OF
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August 27, 1999

INTERNAL REVENUE SERVICE NATIONAL OFFICE SERVICE CENTER ADVICE

MEMORANDUM FOR DISTRICT COUNSEL, ROCKY MOUNTAIN DISTRICT

M. K. Mortensen
Associate District Counsel, Salt Lake City
CC:WR:RMD:SLC
Attention: Mark H. Howard

FROM: Assistant Chief Counsel (Income Tax & Accounting)
CC:DOM:IT&A

SUBJECT: Limitations on Refund of § 6721 Penalties

This responds to your Request for Significant Advice dated April 15, 1999, in connection with a question posed by the Statutes Unit for Taxpayer Relations of the Ogden Service Center.

ISSUE:

What is the period of limitations for a claim for refund of a civil penalty imposed under § 6721 of the Internal Revenue Code for failure to file an information return?

CONCLUSION:

The period of limitations for a claim for refund of a § 6721 penalty is, under § 6511(a) of the Internal Revenue Code, 2 years from the date the penalty was paid.

FACTS:

The Internal Revenue Code imposes a civil penalty under § 6721 for failure to file certain information returns described in § 6724. At the Ogden Service Center, assessment of a § 6721 penalty is made by the Examination Branch, the Collection Branch, and the IAP Unit.

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The party obligated to file an information return may challenge the assessment of a § 6721 penalty and file a claim for refund of a § 6721 penalty it has paid.

Generally, if the party provides the required information, the Service will abate the penalty. Moreover, under § 6724, if the party has reasonable cause for the failure to file, the penalty is waived. Abatement or waiver of an assessed and paid § 6721 penalty results in an overpayment of tax.

The Service Center has asked us to determine what period of limitations applies to a claim for refund of a § 6721 penalty. In addition, the Service Center posed four specific questions.

DISCUSSION

Section 6721(a) provides for a penalty for: (1) any failure to file an information return on or before the required filing date; and (2) any failure to include all of the information required to be shown on the return or the inclusion of incorrect information. The term "information return" is defined in § 6724(d)(1) and encompasses 28 types of information returns.

Under § 6671 of the Code, the penalty set forth in § 6721 shall be assessed and collected in the same manner as a tax and, except as otherwise provided, any reference to "tax" shall be deemed also to refer to this penalty. Under § 6724(b), a § 6721 penalty is payable as a tax on notice and demand.

Inasmuch as payment of a penalty arising under § 6721 constitutes payment of a tax, when a § 6721 penalty has been paid and is subsequently abated or statutorily waived, an overpayment of tax is created and the taxpayer is entitled to a credit or refund.

Under § 6402, 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 refund any balance to such person.

Section 6511 of the Code sets forth the limitations on credit or refund for an overpayment of any tax.

Under § 6511(a) of the Internal Revenue Code, a taxpayer generally must file a claim for a credit or refund of an overpayment of tax within 3 years from the date the original tax return was filed or 2 years from the date the tax was paid, whichever of such periods expires later.

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Section 301.6511(a)-1(a)(2) of the Income Tax Regulations provides that, in the case of any tax (other than a tax payable by stamp), if no return is filed, the claim for credit or refund of an overpayment must be filed by the taxpayer within 2 years from the time the tax was paid.

A taxpayer does not file a return to report a § 6721 penalty. Nor does a § 6721 penalty directly relate to a tax reported on a tax return. Compare, for example, the addition to tax under § 6651, for failure to file a tax return or pay a tax, that does relate directly to a tax return. Rather, a § 6721 penalty relates to an information return, which reports information relating to a possible tax liability but is not a tax return reporting tax liability. See § 6011. Thus, a taxpayer seeking refund of an overpayment of tax due to an abated or waived § 6721 penalty must file a claim within 2 years from the date the tax (i.e., the penalty) was paid. § 301.6511-1(a)(2).

Under § 6511(b) of the Code, there are limits on the amount that may be credited or refunded. Under § 6511(b)(2)(A), if a claim was filed within 3 years from the date the original tax return was filed, the amount of the credit or refund shall not exceed the portion of the tax paid within the period, immediately preceding the filing of the claim, equal to 3 years plus the period of any extension of time for filing the return. Under § 6511(b)(2)(B), if a claim was not filed within such 3-year period, the amount of the credit or refund shall not exceed the portion of the tax paid during the 2 years immediately preceding the filing of the claim.

Section 301.6511(b)-1(b)(iii) provides that if no return was filed, but a claim is filed, the amount of the credit or refund shall not exceed the portion of the tax paid within the 2 years immediately preceding the filing of the claim. Thus, because no return is filed for a § 6721 penalty, the amount of the refund of an overpayment of tax due to an abated or waived § 6721 penalty shall not exceed the portion of the tax paid within the 2 years immediately preceding the filing of the claim.

Thus, the specific questions raised by the Service Center and our answers are as follows:

(1) Should the Service Center consider a claim timely if it is filed within 2 years of the date the party paid the penalty?

(1) Yes, under § 301.6511-1(a)(2) of the Income Tax Regulations, because no return is filed, a taxpayer seeking refund of an overpayment of tax due to an abated or waived § 6721 penalty must file a claim within 2 years from the date the tax (i.e., the penalty) was paid.

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(2) Should the Service Center consider a claim timely if it is filed within 3 years (but not within 2 years) of the date the party paid the penalty?

(2) No. As discussed in the answer to (1), under § 301.6511-1(a)(2), a taxpayer seeking refund of an overpayment of tax due to an abated or waived § 6721 penalty must file a claim within 2 years from the date the tax (i.e., the penalty) was paid.

(3) Should the Service Center consider a claim timely if it is filed within 3 years of the date the Service Center assesses the penalty?

(4) Should the Service Center consider a claim timely if it is filed within 2 years of the date the Service Center assesses the penalty?

(3 & 4) As discussed in (1), under § 301.6511-1(a)(2), a taxpayer seeking refund of an overpayment of tax due to an abated or waived § 6721 penalty must file a claim within 2 years from the date the tax (i.e., the penalty) was paid. Thus, for example, if the taxpayer were to pay a § 6721 penalty 4 years after the date the Service Center assessed the penalty, the taxpayer would still have 2 years from the date of payment to file a timely claim. Further, there is no statute of limitations prohibiting the Service from considering a request for abatement or waiver of an assessed but unpaid § 6721 penalty until the period for collection expires under § 6502.

If you have any further questions, please call Paul Tellier of this office at (202) 622-4930.

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