



OFFICE OF
CHIEF COUNSEL

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224
June 19, 2001

Number: **200130042**
Release Date: 7/27/2001
UILC: 6611.00-00

CC:PA:APJP:B01
GL-129744-00

INTERNAL REVENUE SERVICE NATIONAL OFFICE SERVICE CENTER ADVICE

MEMORANDUM FOR LINDA DETTERY
AREA COUNSEL SBSE:AREA 1

FROM: John McGreevy
Assistant to the Branch Chief
CC:PA:APJP:B01

SUBJECT: Significant Service Center Advice
Interest on Misdirected Refunds

This Chief Counsel Advice responds to your memorandum for significant service center advice dated March 21, 2001, in connection with a question posed by the Taxpayer Advocate of the Andover Service Center. In accordance with I.R.C. § 6110(k)(3), this Chief Counsel Advice should not be cited as precedent.

ISSUE

Whether Internal Revenue Service procedures should be changed so that a taxpayer will be allowed interest based on a replacement refund check when the original refund check is lost in the mail through no fault of the taxpayer.

CONCLUSION

We believe the Service's procedures are not inconsistent with current case law. Therefore, it is proper to allow interest based on a replacement refund check if the original check is delayed due to the fault of the Service.

DISCUSSION

It is well settled that the government may only pay interest if specifically allowed by a statutory provision. See, U.S. ex. Rel. Angarica v. Bayard, 127 U.S. 251 (1888). Section 6611(a) of the Internal Revenue Code provides, in general, that interest is paid on any overpayment of any internal revenue tax at the overpayment rate established under § 6621.

Section 6611(b)(2) adds that in the case of a refund, interest is paid from the date of the overpayment to a date (to be determined by the Secretary) preceding the

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date of the refund check by not more than 30 days, whether or not such refund check is accepted by the taxpayer after tender of such check to the taxpayer. The acceptance of such check shall be without prejudice to any right of the taxpayer to claim any additional overpayment and interest thereon.

In addition, § 6611(e)(1) provides that no overpayment interest will be paid if the overpayment is refunded within 45 days after the last date prescribed for filing the return (determined without regard to any extension of time for filing the return) or, if the return is filed after such last date, the refund is made within 45 days after the return is filed.

Section 6611(e)(2) continues that if the taxpayer files a claim for a credit or refund for any overpayment of tax, and such overpayment is refunded within 45 days after the filing date of the claim, no overpayment interest is paid from the filing date of the claim until the refund date.

Section 6611(e)(3) provides that if an adjustment initiated by the Service results in a refund or credit of an overpayment, the overpayment interest will be computed by subtracting 45 days from the number of days interest is otherwise allowed under § 6611.

In situations in which the Service sends a taxpayer a replacement check the question arises whether interest allowed under § 6611 is based on the original check or the replacement check. According to current Service procedure, interest is allowed based on the replacement check where the Service is at fault for delaying the refund. IRM 121.1.8. Service procedure also states that if a refund check is lost through no fault of the Service, the Service should not allow additional interest for the period of delay. IRM 121.1.8. The Service considers these situations on a case by case basis.

In Rev. Rul. 76-74, 1976-1 C.B. 388, the Service endorsed two situations in which the government paid additional interest because the government improperly delayed the delivery of refunds. In the first situation, the Service erroneously issued a refund check in the name of a person other than the taxpayer and, thus, prevented negotiation by the taxpayer. In the second, the Service held the taxpayer's refund to offset a debt erroneously reported by another agency. In both situations, the Service determined that the periods of interest ran to the dates of the subsequently issued replacement checks, not the dates of the original checks. The Service recommended the payment of additional interest because the refunds' deliveries were delayed due to government faults.

The Taxpayer Advocate of the Andover Service Center is concerned that the Service's procedures are contrary to current case law. As a result, the Taxpayer Advocate believes the Service should change its procedures to allow additional

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interest to all taxpayers where a refund check is misdirected through no fault of the taxpayer.

In Doolin v. United States, 918 F.2d 15, 18 (2nd Cir. 1990), the court held that documentary evidence proved the original refund check existed, but it was improperly tendered and had to be reissued because of government fault. Thus, the court determined that § 6611 entitled plaintiffs to interest from the date of the overpayment up to a date not more than 30 days preceding the date the check was reissued. The court found that the Service failed to “tender” the original refund check because plaintiffs lacked actual knowledge of the check, and the Service conceded it was not delivered. Id. The court recognized that when the Service puts a check into the postal system, a rebuttable presumption of delivery, and thus tender, is created. Id. at 19. Furthermore, the Doolin court’s finding that the initial check was improperly tendered was not conclusive in determining the plaintiff was entitled to additional interest. The court also found that the check had to be reissued because of government fault. Id.

In Godfrey v. United States, 997 F.2d 335, 337 (7th Cir. 1993), which is cited by the Taxpayer Advocate, the Seventh Circuit agreed with the reasoning of the Doolin court. The court stated that the use of the word “tender” in § 6611 implies that the taxpayer must have an opportunity to accept or reject a refund check, and that this only occurs upon delivery of the check to the taxpayer. The court continued, however, that “the government is entitled to a rebuttable presumption of delivery upon presentation of evidence of proper mailing.” Id. at 338. In addition, the court stated that the government may present evidence of actual mailing or present proof of procedures followed in the regular course of operations. Id.

Under the unique facts of Doolin and Godfrey, the government was required to pay interest based on the replacement check. However, both Doolin and Godfrey follow the well settled rule that the government establishes a rebuttable presumption of delivery, and thus tender, by submitting evidence of proper mailing. The taxpayer may rebut the presumption by providing evidence that proper mailing did not occur. We do not agree that these cases provide that a taxpayer automatically qualifies for additional interest where the taxpayer does not receive a properly mailed refund.

As a result, the above cases are not inconsistent with the Service’s current procedures. Where the facts show the Service is at fault, interest is allowed to the date of the replacement refund check. Where the facts indicate proper mailing, the taxpayer is only entitled to interest if the taxpayer provides evidence that rebuts proper mailing.

If you have any questions regarding this memorandum, please call Tiffany P. Smith at (202) 622-4910.