



OFFICE OF
CHIEF COUNSEL

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
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INTERNAL REVENUE SERVICE NATIONAL OFFICE SERVICE CENTER ADVICE

MEMORANDUM FOR ASSOCIATE AREA COUNSEL
SMALL BUSINESS/SELF-EMPLOYED: AREA 1

FROM: John J. McGreevy
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Administrative Provisions & Judicial Practice
CC:PA:APJP

SUBJECT: Additional levied funds

This Chief Counsel Advice responds to your memorandum dated May 24, 2001. In accordance with I.R.C. § 6110(k)(3), this Chief Counsel Advice should not be cited as precedent.

ISSUES

- (1) Whether the Service may retain additional levied funds under section 6342(b)?
- (2) If the Service refunds the additional levied funds, what "look back" period under section 6511(b) applies?
- (3) Whether the Service may apply the additional levied funds under section 6402(a) to tax years for which no returns have been filed?

CONCLUSIONS

- (1) The Service may retain the additional levied funds under section 6342(b).
- (2) If the Service refunds the additional levied funds, the refunds will be subject to a 2-year or 3-year lookback period under section 6511(b)(2)(A) or (B).
- (3) The Service may not apply the additional levied funds under section 6402(a) to tax years for which there is no asserted tax liability.

FACTS

The Service is confronted with situations in which tax liabilities were fully paid by levied funds. However, the levies were not released because the levies were systemically performed and there was no occasion for review by IRS employees. As a result, the Service continued to receive funds. The Service applied the excess funds to tax years that were not included in the levies and for which no returns were filed. No liabilities were assessed for the years for which the funds were applied. The Service released the levies, but has not informed the taxpayers of the overpayment and the taxpayers have not requested a refund.

LAW AND ANALYSIS

Issue 1.

The initial question is whether the Service may retain surplus proceeds from the levy when the taxpayer fails to apply and offer satisfactory proof that he is entitled to such funds. In this situation, we think the Service may retain the surplus proceeds.

The term “surplus proceeds” describes the levied funds remaining after the payment of (1) expenses of the levy, (2) the tax liability on seized property, and (3) the liability of the taxpayer in respect of which the levy was made. See section 6342(a).

Section 6343(b) provides that any surplus proceeds remaining after the application of § 6342(a) shall, upon application and satisfactory proof in support thereof, be credited or refunded by the Secretary to the person or persons legally entitled thereto.

Given that the plain wording of the statute requires that an application and satisfactory proof be given to the Service before the Service may remit the surplus proceeds, we conclude that the taxpayer’s failure in this case to meet these requirements allows the Service to retain the funds.

Issue 2.

After the liabilities were fully satisfied, the Service continued to receive additional funds. These additional funds created overpayments for the years included in the levies.

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

Section 6511(b)(2)(A) provides that if the claim was filed by the taxpayer during the three-year period under section 6511(a), the amount of the credit or refund shall not exceed the portion for the tax paid during the period, immediately preceding the filing of the claim, equal to three years plus the period of any extension of time for filing the return. Section 6511(b)(2)(B) provides that if the claim was not filed within the three year period, the amount of the credit or refund shall not exceed the portion of the tax paid during the two years immediately preceding the filing of the claim.

Section 6511(b)(2)(C) provides that if no claim is filed, the amount of the refund shall not exceed the amount which would be allowable under section 6511(b)(2)(A) or (B) if a claim was filed on the date the refund is allowed.

For purposes of section 6511(b)(2)(C), a refund is considered “allowed” on the date on which the Secretary first authorizes the scheduling of the overassessment. See section 6407.

In order to apply section 6511(a), it is first necessary to identify the taxable year for which an overpayment may exist.

The excess funds constitute amounts “erroneously collected” within the meaning of section 7422(a). A lawsuit to recover such amounts may be filed only if the taxpayer first files a timely refund claim. See United States v. Dalm, 494 U.S. 596, 602 (1990). However, the Service may refund an overpayment even if no refund claim is filed provided that a timely refund claim could be filed on the date of allowance of the refund. This is clear from a consideration of section 6511(b)(2)(C), which provides that if no claim is filed, the amount of the refund shall not exceed the amount which would be allowable under section 6511(b)(2)(A) or (B) if a claim was filed on the date the refund is allowed.

As discussed above, a refund is “allowed” on the date on which the Secretary first authorizes the scheduling of the overassessment. Thus, the 2-year or 3-year lookback period of section 6511(b)(2)(A) or (B) runs from this date.

We assume that the taxpayers filed tax returns for the years included in the levies. If the refunds will be “allowed” within 3 years of the dates on which the returns were filed, the 3-year lookback period in section 6511(b)(2)(A) applies. Thus, the excess funds received by the Service may be refunded if they were received within 3 years of the date of allowance of the refund. However, if the date of allowance of any refund, as determined under section 6407, will occur more than 3 years after the return was filed, or if no return was filed, then the 2-year lookback period of section 6511(b)(2)(B) would apply. In such a case, the excess funds may be refunded only

if received within 2 years of the date of allowance of the refund as determine under section 6407.

In this case, the Service erroneously collected taxes by levy after the liability was satisfied. The usual rules of section 6511 are applicable and the refunds will be subject to a 2-year or 3-year lookback period under section 6511(b)(2)(A) or (B) as explained above.

Issue 3.

Section 6402 grants the Service the authority to make credits or refunds. Section 6402(a) provides that, in the case of an overpayment, the Secretary, may credit the amount of such overpayment against any tax liability and shall, subject to certain subsections not relevant here, refund any balance.

Section 301.6402-1 of the Regulations on Procedure and Administration provides that the Commissioner, within the applicable period of limitations, may credit any overpayment of tax against any outstanding tax liability owed by the person making the overpayment and the balance, if any, shall be refunded to that person by the Commissioner.

The regulations under section 6402(a) provide that the Service may credit any overpayment of tax against any "outstanding liability." The regulations do not provide any further definition of what constitutes an "outstanding liability" for purposes of section 6402(a).

The levied funds were not retained to pay an asserted liability for the years not covered by the levy. The taxpayers did not file returns for the years to which the additional levied funds were applied and no liability was assessed for the taxpayers for those years. Thus, the levied funds were applied to taxpayers' accounts even though no outstanding tax liabilities had been asserted against the taxpayers. Because there were no outstanding tax liabilities against the taxpayer for the years in which the additional levy payments were applied, the levied funds could not be retained pursuant to section 6402(a).

If you have any questions, please call our office at (202) 622-4910.