

INTERNAL REVENUE SERVICE
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INTERNAL REVENUE SERVICE NATIONAL OFFICE SERVICE CENTER ADVICE

MEMORANDUM FOR: DISTRICT COUNSEL, GEORGIA
CC:SER:ATL

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

SUBJECT: Amending Refund Claims after Expiration of Statute of
Limitations

This responds to your request for Significant Service Center Advice. In general terms, the question presented is whether a refund claim may be amended after the expiration of the statute of limitations for filing the claim.

ISSUES

(1) Assume that a taxpayer has filed a timely refund claim for one dollar fully setting forth the legal grounds and factual basis for the claim and, after the expiration of the statute of limitations for filing refund claims, the taxpayer files a supplemental claim for a greater amount. Is the supplemental claim a timely amendment to the original claim or is it a new claim that is untimely? Is there a specific time period within which the taxpayer must file the supplemental claim in order for it to be considered a timely amendment?

(2) Should the Service Center treat the one dollar claim as a protective claim? If not, how should the claim be processed?

(3) If the taxpayer files a general claim for refund, and does not inform the Service of the specific grounds for the refund prior to the expiration of the statute of limitations, is a supplemental claim considered timely if it explains the grounds for the original claim, but is submitted after the expiration of the statute of limitations?

CONCLUSIONS

(1) The supplemental claim is considered a timely amendment to the original claim if the taxpayer files it before the Service takes final action on the original claim and if the supplemental claim does not require the investigation of new matters that would not have been disclosed by the investigation of the original claim. There is no

specific time period within which the supplemental claim must be filed if these requirements are met.

(2) Under the facts presented, the Service Center is not required to treat the original claim as a protective claim. The Service Center may ask the taxpayer to provide a realistic dollar amount for the claim. If this information is not provided within a reasonable time, the Service should take final action on the claim. The type of final action to be taken may vary depending on the circumstances.

(3) A definitive response cannot be provided on this issue because your memorandum does not set forth specific facts. However, we are providing a discussion of case law relevant to this issue.

FACTS FOR ISSUES 1 AND 2

A taxpayer files an amended return shortly before the expiration of the statute of limitations. Because the taxpayer has not yet compiled his records to determine the specific claim amount, the claim is filed for "one dollar or any amounts legally allowable." The taxpayer specifically states the legal grounds and factual basis for filing the claim for refund. However, the claim does not explain the circumstances causing the delay in the compilation of the records. There is no litigation or ongoing audit involving the taxpayer's claim. Subsequent to the expiration of the statute of limitations under section 6511(a), the taxpayer files a supplemental claim in an attempt to increase the refund amount.

FACTS FOR ISSUE 3

Specific facts have not been provided on this issue.

APPLICABLE LAW AND REGULATIONS

Section 7422(a) of the Internal Revenue Code provides that no suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof.

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

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

Section 6402(a) of the Code provides that 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, subject to subsections (c), (d), and (e), refund any balance to such person.

Section 301.6402-2(b)(1) of the Regulations on Procedure and Administration provides that no refund or credit will be allowed after the expiration of the statutory period of limitation applicable to the filing of a claim therefor except upon one or more of the grounds set forth in a claim before the expiration of such period. The claim must set forth in detail each ground upon which a credit or refund is claimed and facts sufficient to apprise the Commissioner of the exact basis thereof. The statement of the grounds and facts must be verified by a written declaration that it is made under penalties of perjury. A claim which does not comply with this paragraph will not be considered for any purposes as a claim for refund or credit.

Section 301.6402-3(a)(5) of the regulations provides that a properly executed individual, fiduciary, or corporation original income tax return or an amended return (on 1040X or 1120X if applicable) constitutes a claim for refund or credit within the meaning of section 6402 and section 6511 for the amount of the overpayment disclosed by such return (or amended return). A return or amended return shall constitute a claim for refund or credit if it contains a statement setting forth the amount determined as an overpayment and advising whether such amount shall be refunded to the taxpayer or shall be applied as a credit against the taxpayer's estimated tax for the taxable year immediately succeeding the taxable year for which such return (or amended return) is filed. (emphasis added)

DISCUSSION

Issue 1

As explained below, two considerations are relevant in determining whether the supplemental claim is considered an amendment to the original claim, rather than an untimely new claim. First, the supplemental claim will not be considered an amendment to the original claim if it would require the investigation of new matters that would not have been disclosed by the investigation of the original claim. Such a supplemental claim is a new claim, rather than an amendment to the existing timely claim. Second, the supplemental claim will not generally be considered an amendment if the Service took final action on the original claim by rejecting the original claim or allowing it in whole or in part. If these two requirements are satisfied, there is no specific time period within which the supplemental claim must be filed.

Some court cases have treated a supplemental claim as timely even though the Service previously took final action on the original claim. The exceptions to the “final action” rule are discussed in Part C below.

A. Does the supplemental claim require the investigation of new matters?

After the statute of limitations on refund claims has expired, a taxpayer may amend the original claim with 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. The claim cannot be amended after the statute of limitations expires if the amendment 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).¹

B. Did the Service take final action on the original claim?

Numerous court cases hold that a supplemental claim filed after the expiration of the statute of limitations is not timely if the Service had previously taken final action on the original claim. Such final action generally occurs when the Service denies or allows the claim. In either case, the supplemental claim is untimely because once the Service has taken final action on the original claim, there is no longer any claim left to amend. Edwards v. Malley, 109 F.2d 640 (1st Cir. 1940); Mondschein v. United States, 338 F. Supp. 786 (E.D.N.Y. 1971), aff’d, 469 F.2d 1394 (2d Cir. 1973); New York Trust Co. v. United States, 87 F.2d 889 (2d Cir. 1937); Tobin v. Tomlinson, 310 F.2d 648 (5th Cir. 1962); and Young v. United States, 203 F.2d 686 (8th Cir. 1953).

Once the Service disallows a claim, the taxpayer generally has no right to amend the claim. However, the taxpayer may file a lawsuit to recover the overpayment and at trial the taxpayer may, depending on the circumstances, be allowed to introduce evidence to show a larger overpayment than that stated in the original claim. Pink v. United States, supra; Red River Lumber Co. v. United States, 139 F.Supp. 148 (Ct. Cl. 1956); and Westchester Fire Insurance Co. v. United States, 138 F. Supp. 788 (S.D.N.Y. 1955).

¹ In Honeywell Inc. v. United States, 973 F.2d 638 (8th Cir. 1992), the court held that a taxpayer could not amend a refund claim that was based on a credit for hiring welfare recipients because the amendment involved a new factual basis, namely, the hiring of 622 employees not involved in the original claim. Other cases have held that the original claim cannot be amended if the amendment involves a substantial change in the legal grounds for the claim. In Mesta v. United States, 137 F.2d 426 (3d Cir. 1943), the original claim was based on the taxpayer’s position that certain income was nontaxable. The amendment asserted a different legal ground, namely, that the income, if taxable, was overstated.

C. Exceptions to the rule concerning final action by the Service

The Service's disallowance of a claim will not constitute final action by the Service if the Service did not fully consider all the grounds for the refund. In Bemis Brothers Bag Co. v. U.S., 289 U.S. 28 (1933), the Service denied a claim by rejecting one of the grounds, but overlooked two independent grounds for the claim. The taxpayer then reiterated its request for the alternative relief requested in the original claim. The Court held that the claim as amended was timely.

In Mutual Assurance, Inc. v. U.S., 56 F.3d 1353 (11th Cir. 1995), the Service allowed the refund claim in full. The Court of Appeals for the Eleventh Circuit held that a supplemental claim for an additional amount was a timely amendment, rather than a new claim barred by the statute of limitations. This holding is inconsistent with the decisions cited above holding that a claim cannot be amended after the Service takes final action on the original claim. The result in Mutual Assurance may be explained on the basis of the unusual facts presented. In particular, the original claim provided the Service with all the information it needed to accurately compute the correct amount of the refund (see footnote 2 of the opinion). The taxpayer made a computational error when filing the original claim, which could have been corrected by the Service. However, the Service failed to correct the taxpayer's mistake when processing the original claim. The taxpayer became aware of its mistake after the expiration of the statute of limitations when the Service conducted a field examination of the claim and discovered the mistake. In reaching its decision, the court primarily relied on the Supreme Court's decision in Bemis Brothers Bag Co., *supra*. However, Bemis Brothers Bag Co. is distinguishable because it involved a claim that was disallowed without a full consideration of all the grounds stated for the refund. Mutual Assurance, by contrast, involved a claim that was allowed based on a consideration of the one ground stated.

The Mutual Assurance case is legal precedent in cases that would be appealable to the Eleventh Circuit Court of Appeals. If you are considering such a case, we recommend that Mutual Assurance be narrowly interpreted. Thus, it would be followed only in the following unusual circumstances: (1) the overpayment amount stated in the original claim is improperly computed; (2) the Service has sufficient information to compute the correct amount of the overpayment but fails to do so; (3) the Service issues a refund for the full amount stated in the refund claim; and (4) after the statute of limitations expires, the taxpayer submits a supplemental claim to correct the computational error and obtain an additional refund.

Issue 2

A. Distinguishing "protective claims" from incomplete claims

Protective claims are filed to preserve the taxpayer's right to claim a refund when the taxpayer's right to the refund is contingent on future events and may not be

determinable until after the statute of limitations expires. The Internal Revenue Manual (IRM) indicates that a protective claim is based on an expected change in the tax law, other legislation, regulations, or case law. See IRM 21.5.9.3.7.4, Protective Claims. The concept of a “protective claim” is well established by the case law even though this term is not used in the statute or regulations. Cases on this issue may be found in the 1999 Federal Tax Coordinator 2d (RIA) at ¶ T-6742.

A claim should not be viewed as a valid protective claim for IRS processing purposes merely because the taxpayer labels it as such. For example, in Nucorp, Inc. v. United States, 23 Cl. Ct. 234 (1991), four taxpayers each filed a one dollar claim that included the following language:

Protective claim, taxpayer is claiming a refund of windfall profit tax withheld during the year ending December 31, 1984, due to the net income limitation and withholding error. Additional information will be sent shortly, this claim is not limited to the stated amount.

A valid protective claim need not state a particular dollar amount or demand an immediate refund. However, the claim must identify and describe the contingencies affecting the claim; must be sufficiently clear and definite to alert the Service as to the essential nature of the claim; and must identify a specific year or years for which a refund is sought. The Service has discretion in deciding how to process protective claims. In general, it is in the interests of the Service and taxpayers to delay action on protective claims until the pending litigation or other contingency is resolved. Once the contingency is resolved, the Service may obtain additional information necessary in processing the claim and then allow or disallow the claim.

The facts as stated in the Service Center Advice Request do not involve a protective claim because the taxpayer’s failure to state the actual amount of the claim arises from the taxpayer’s failure to compile records, rather than from a stated contingency affecting the amount of the claim. Thus, we conclude that the claim is an ordinary claim that is incomplete, rather than a protective claim.

B. Processing of incomplete claims

As stated above, the facts presented involved an incomplete claim because a realistic dollar amount is not stated. If the Service receives a claim in which the requested refund is one dollar or other amounts legally allowable, the Service should generally request additional information as to the actual amount of the claim, unless it is clear that the claim must be disallowed. The Service should provide the taxpayer with a reasonable amount of time to supply information as to the actual amount of the claim and other necessary information. The determination of what is a reasonable amount of time may vary depending on the circumstances. In particular, a longer time period will generally be appropriate if circumstances beyond the taxpayer’s control prevent the taxpayer from quickly providing the additional information to the Service.

If the requested information, including the actual amount of the claim, is not provided within a reasonable time, the Service should take final action on the original claim after fully considering all the grounds stated for the refund. This will prevent the taxpayer from amending the claim after the expiration of the statute of limitations as explained above. The type of final action to be taken may depend on the circumstances. Thus, in some cases the claim should be disallowed on the merits. In other cases, it may be appropriate to treat the claim as nonprocessable. A claim for a refund of income tax could be treated as nonprocessable and disallowed on the basis that the taxpayer has failed to respond to the Service's request for information as to the dollar amount of the claim. Section 301.6402-3(a)(5) (applicable to income tax refund claims) provides that the claim must state the amount of the overpayment. The Service may insist on full compliance with the regulations governing refund claims. See Angelus Milling Co. v. Commissioner, 325 U.S. 293 (1945).

Issue 3

Specific facts have not been provided on this issue and thus no definitive conclusions can be provided. However, the following discussion of the case law should be of some assistance in resolving this issue. It is assumed that the claim at issue is a general claim, and is not a protective claim.

In United States v. Felt & Tarrant Manufacturing Company, 283 U.S. 269, 272 (1931), the Supreme Court noted that the filing of a refund claim is prerequisite to a suit to recover taxes paid (see section 7422 of the Code) and held that "quite apart from the provisions of the Regulation, the statute is not satisfied by the filing of a paper which gives no notice of the amount or nature of the claim for which the suit is brought, and refers to no facts upon which it may be founded." (emphasis added)

In addition to the statutory requirements noted above, the regulations under section 6402 contain numerous requirements as to both the content and form of refund claims. In particular, the regulations provides that a refund claim must set forth in detail each ground upon which a credit or refund is claimed and facts sufficient to apprise the Service of the exact basis thereof. Angelus Milling Co. v. Commissioner, supra, held that the Service may insist upon full compliance with the regulations governing refund claims and may reject a refund claim that fails to satisfy the requirements of the regulations.

In Solomon v. United States, 57 F.2d 150 (2d Cir. 1932), the court rejected a claim for failing to meet the statutory requirements for a refund claim identified in United States v. Felt & Tarrant Manufacturing Company. The taxpayer was a salesman entitled to a fixed salary plus a commission equal to 10 per cent of the net profits of his employer. The contract of employment provided that if the employer's net profits were subsequently adjusted, the taxpayer's commission would correspondingly be adjusted. The taxpayer's refund claim did not mention his contract of employment or the agreement concerning the adjustment of his commission. The claim merely stated the

following: "Profits were credited to the claimant on the basis of erroneous profits ascribed to Hahlo Co. for the calendar year 1919. Brief will follow." The Service rejected the claim and the taxpayer subsequently filed a supplemental claim fully explaining the grounds for the refund claim. The subsequently filed claim was held to be untimely because it was submitted after rejection of the claim and after the expiration of the statute of limitations.

Similarly, in American National Insurance Company v. Bass, 68 F.2d 511 (5th Cir. 1934), the original claims filed by the taxpayer gave no notice either as to the factual basis or legal grounds for the claims. After the Service rejected the claims, the taxpayer filed new claims satisfying the requirements of the statute and regulations. The court held that the new claims were untimely. Also, the court indicated that if the original claims had been properly amended by the taxpayer prior to rejection by the Service, the amendment would have been considered timely notwithstanding the defects in the original claims.

By its conduct, the Service may be found to have waived the requirements of regulations as to the specificity of refund claims. Such a waiver typically arises when there is "unmistakable" evidence that the Service has considered the merits of a particular claim. Angelus Milling Co., *supra*. In United States v. Kales, 314 U.S. 186, 194 (1941), the Court stated the following concerning waiver:

This Court, applying statute and regulations, has often held that a notice fairly advising the Commissioner of the nature of the taxpayer's claim, which the Commissioner could reject because too general or because it does not comply with formal requirements of the statute and regulations, will nevertheless be treated as a claim where formal defects and lack of specificity have been remedied by amendment filed after the lapse of the statutory period. [Citations omitted]. This is especially the case where such a claim has not misled the Commissioner and he has accepted and treated it as such.

In summary, a general claim may be amended after the statute of limitations has expired provided that the original claim has not been rejected at the time the amendment is filed and the amendment merely makes clear the specific matters the Service has already considered by investigating the original defective claim. Although the Service might have rejected the original claim, the defect is considered waived if there is "unmistakable evidence" that the Service considered the original claim on the merits.

If you have any questions concerning this memorandum, please contact John Moran at (202) 622-4940.

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