



OFFICE OF
CHIEF COUNSEL

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
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INTERNAL REVENUE SERVICE SIGNIFICANT SERVICE CENTER ADVICE

MEMORANDUM FOR ASSOCIATE DISTRICT COUNSEL,
KENTUCKY-TENNESSEE DISTRICT

FROM: Assistant Chief Counsel
(Field Service)

SUBJECT: Returns and Refunds of Levy Payments

This Significant Service Center Advice responds to your memorandum dated December 11, 1999. This document is not to be cited as precedent.

ISSUE

When a levy payment creates an overpayment to a taxpayer's account (and no balance is due for any other period listed in the levy), may the overpayment be manually refunded, even though more than nine months have elapsed since the date of the levy?

CONCLUSION

Under I.R.C. § 6343(d), levied property may be returned only in limited situations. Money may be returned at any time before the expiration of nine months from the date of the levy. In addition, if a timely request for the return of money is filed, or if a determination by the Service to return an amount of money is made before the expiration of the nine-month period, the money may be returned within a reasonable period of time after the nine-month period, if additional time is necessary for investigation or processing.

In the event an overpayment results from a levy, a refund may be made, but only within the periods of limitation described in I.R.C. § 6511.

FACTS

The service center has raised a question regarding the disposition of levy payments. Some at the service center think all levy payments applied to a fully paid account (where no balance is due on any other period listed on the levy) must be manually refunded, even if more than nine months have passed since the levy payment was received by the Internal Revenue Service. Others think that if the statute for refunding an overpayment resulting from a levy has expired, the excess payment cannot be refunded and should be transferred to an excess collections account.

The following hypothetical has been offered to flesh out the problem. Assume the Service makes a substitute for return, and an assessment in the amount of \$10,000 is fully paid by levy. Subsequently, the taxpayer files a return showing a tax liability of \$8,000, and the return does not state a timely refund claim.¹

LAW AND ANALYSIS

The issue posed focuses on the interplay of I.R.C. §§ 6343 and 6511. I.R.C. § 6343 authorizes the release of levies and return of property. If the Service determines that property has been wrongfully levied upon, an amount equal to the amount of money levied upon (or received from the sale of the property levied upon) may be returned at anytime before the expiration of nine months from the date of the levy. I.R.C. § 6511 spells out the limitation on the credit or refund of an overpayment of tax. I.R.C. § 6511 requires that a claim for refund of an overpayment "shall be filed by the taxpayer within 3 years from the time the return was filed or 2 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 2 years from the time the tax was paid."

Most levies are made on third parties, but it is possible that a levy may be made on property in the possession of a taxpayer. If property has been wrongfully levied upon, I.R.C. § 6343(b) authorizes the Service to return an amount of money equal to the amount of money levied upon or received from a sale of seized property, at any time before the expiration of nine months from the date of the levy. A wrongful levy action may be brought by a third party, and not by a taxpayer whose property is seized. See I.R.C. § 7426(a)(1), concerning civil actions brought by persons

¹ A refund claim on a late original return (even if a substitute for return was made by the Service) would be timely for tax payments made up to three years (plus any extension of time for filing a return) before the later return was filed. See Rev. Rul. 76-511, 1976-2 C.B. 428; I.R.C. § 6511(b)(2)(A).

other than the taxpayer. Unless a claim is filed, a wrongful levy action must be begun within nine months of the levy (or agreement) giving rise to such wrongful levy action. I.R.C. § 6532(c).

In 1996, as part of the Taxpayer's Bill of Rights II (TBOR II), P.L. 104-168 (July 30, 1996), the Service was authorized to return property (including money deposited in the Treasury) that has been levied upon if it determines: (1) the levy was premature or otherwise not in accordance with the administrative procedures of the Service; (2) the taxpayer has entered into an installment agreement to satisfy the tax liability; (3) the return of the property will facilitate collection of the tax liability; or (4) the return of the property would be in the best interests of the taxpayer (as determined by the Taxpayer Advocate) and the government. These four provisions, now codified in I.R.C. § 6343(d), cover situations where prior to TBOR II the Service could not return levied property even within the nine-month period of I.R.C. § 6343(b). I.R.C. § 6343(d) also expressly provides that the provisions of I.R.C. § 6343(b), including the nine-month time period, apply to subsection (d) "in the same manner as if such property had been wrongfully levied upon," except no interest is allowed. Thus, the nine-month period to return levied property applies even where the Service determines "the return of the property would be in the best interests of the taxpayer (as determined by the National Taxpayer Advocate) and the United States." I.R.C. § 6343(d). As the result of the TBOR II additions to I.R.C. § 6343, the Service may return levied property to a taxpayer without a formal claim being filed by the taxpayer and, in such cases, by allowing the return payment to be made more than nine months after the levy, where the Service decides to return the payment within nine months of the levy.

As we have noted, some at the service center think that levied property must always be returned to a taxpayer when an account is overpaid. This view may be based on equitable concerns. Recently, the United States Supreme Court defined the role of equity in tolling statutes of limitations. In United States v. Brockamp, 519 U.S. 347 (1997), the Court considered late-filed claims for refund, where income taxes were overpaid and claims not timely filed because the taxpayers were senile and alcoholic, respectively. The Supreme Court held that the refund statute, I.R.C. § 6511, could not be tolled for equitable reasons. The Court explained the rationale for its holding in the following manner. Section 6511 sets forth its time limitations in a highly detailed technical manner, reiterates them several times in different ways, imposes substantive limitations, and sets forth explicit exceptions to its basic time limits that do not include "equitable tolling." The Court opined that reading "equitable tolling" into the refund limitations statute could create serious administrative problems by forcing the Service to respond to, and perhaps litigate, large numbers of late claims. Further, the Court was of the opinion that Congress would likely have wanted to decide explicitly whether, or just where and when, to expand the statute's limitations periods, rather than delegate to the courts a

generalized power to do so wherever it appears that equity so requires. Accordingly, the Supreme Court held in Brockamp that Congress did not intend the "equitable tolling" doctrine to apply to Section 6511's time (and related amount) limitations for filing tax refund claims.

We note that, after Brockamp was decided in 1997, Congress did provide limited and express tolling of the section 6511 refund statute in very limited circumstances, where an individual taxpayer is "financially disabled," that is, unable to manage his or her financial affairs by reason of a medically determinable physical or mental impairment expected to result in death or which has lasted or is expected to last for a continuous period of not less than 12 months. See I.R.C. § 6511(h). The facts provided to us in your request for advice do not indicate that taxpayers involved in these situations are physically or mentally impaired. Therefore, the recently enacted exception now contained in I.R.C. § 6511(h) would not apply to the return of property or a refund to taxpayers under the facts of this advisory. Of course, if a taxpayer is determined to be "financially disabled," the provisions of I.R.C. § 6511(h) should be applied if the requirements of the statute are satisfied.

The illustration provided with your request does not involve return of levied payments because, at the time the taxpayer becomes entitled to the refund, the nine-month statute for return of levied property has expired. Where a substitute for return assessment is made for \$10,000, the assessment is fully paid by levy, and then the taxpayer files his return showing a tax liability of \$8,000, but does not claim a refund until after the refund statute of limitations has expired, the levied payments are properly applied to the \$10,000 assessment. This illustration involves a refund of tax (not a return of levied property), since the nine-month statute for return of levied property had expired before the taxpayer filed his return. Clearly, in this illustration, the refund can only be made within the refund period provided by I.R.C. § 6511.²

To conclude, property other than money may be returned at any time under I.R.C. § 6343(d). Money may be returned any time within nine months after the date of levy. In addition, when a timely request for the return of money is filed, or a determination to return an amount of money is made before the expiration of the nine-month period, the money may be returned within a reasonable period of time after the nine-month period, provided additional time is necessary for investigation or processing. This will insure that if a timely request has been made, or the Service decides to return money on its own initiative, the Service will have sufficient time for necessary investigation or processing. We note that this conclusion is

² Any amounts that are surplus proceeds must also be refunded within the period of limitations set out in I.R.C. § 6511.

supported by Delegation Order No. 40 (Rev. 6), which delegates the authority to make refunds and credits "within the applicable period of limitations" to authorized certifying officers in computing and service centers. By implication, no authority is delegated to certifying officers in service centers to make refunds and credits (or return property) outside the applicable period of limitations.

Please call if you have further questions.

By: _____
SARA M. COE
Chief, Procedural Branch