



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

OFFICE OF
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INTERNAL REVENUE SERVICE NATIONAL OFFICE FIELD SERVICE ADVICE

MEMORANDUM FOR

FROM: DEBORAH A. BUTLER
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CC:DOM:FS

SUBJECT: Accuracy-Related Penalty -- Corporate Application for
Tentative Refund

This Field Service Advice responds to your memorandum dated March 18, 1999. Field Service Advice is not binding on Examination or Appeals and is not a final case determination. This document is not to be cited as precedent.

LEGEND:

Taxpayer	=
Date 1	=
Year 3	=
Year 2	=
Year 1	=
\$	=
\$\$	=
\$\$\$	=
\$\$\$\$	=

ISSUE(S):

Whether a Corporate Application for Tentative Refund (Form 1139) is a return for purposes of determining an underpayment under Treas. Reg. § 1.6664-2(a) in applying the I.R.C. § 6662 accuracy-related penalty.

CONCLUSION:

A Corporate Application for Tentative Refund (Form 1139) is not a return for purposes of determining the amount of tax shown by the taxpayer on his return under Treas. Reg. § 1.6664-2(a)(1)(i) and, thus, is not a “return” for determining an underpayment under Treas. Reg. § 1.6664-2(a) in applying the accuracy-related penalty. Any amount refunded as a result of the filing of this form would constitute a “rebate” to be included under Treas. Reg. § 1.6664-2(a)(2) in the calculation of an underpayment for purposes of the accuracy-related penalty.

FACTS:

On Date 1, Taxpayer filed a Corporation Application for Tentative Refund (Form 1139), as a result of a net operating loss (NOL) incurred for Year 3. The Form 1139 was adjusted for a previously filed Form 1139 and previously filed but unprocessed claims for refund. As a result of the Year 3 NOL, general business tax credits were released to be carried back to earlier years.

The examining officer claims that at the time the Form 1139 was filed on Date 1, Taxpayer was aware of the correct general business tax credit available to be carried forward from prior years that were settled subsequent to the filing of the previously filed Form 1139 but prior to the filing of the Date 1, Form 1139. Thus, the examining officer contends that Taxpayer is liable for the accuracy-related penalty attributable to negligence under I.R.C. § 6662(b)(1) because Taxpayer should have taken the prior year settlements into account in computing the tentative refund and was negligent to the extent that it did not correct the Form 1139 for the correct general business tax credit carryforwards to Year 1 and Year 2.

The examining officer computed the negligence penalty under § 6662(b)(1) on the excess general business credits claimed on the Form 1139. In so doing, the examining officer determined the negligence penalty as if the Date 1, Form 1139 was the original return. Because the examining officer computed the penalty as if the negligence was attributable to the preparation of the original returns and did not allow Taxpayer an offset to the negligence penalty computation for any carryforwards not adjusted for on the Form 1139 that are in Taxpayer’s favor, the examiner determined a penalty of \$\$ for Year 1 and \$\$\$\$ for Year 2, although taxpayer only received a refund of \$ for Year 1 and \$\$\$ for Year 2.

LAW AND ANALYSIS

For returns due after December 31, 1989 (determined without regard to extensions), section 6662 imposes an accuracy-related penalty on any portion of an underpayment of tax required to be shown on a return if such portion is attributable to one or more types of proscribed conduct (e.g., negligence or substantial

understatement of income tax). Treas. Reg. § 1.6662-2(a). In the case of income taxes imposed under subtitle A, an underpayment for purposes of section 6662 means the amount by which any income tax imposed under subtitle A exceeds (1) the sum of the amount shown as tax by the taxpayer on his return plus amounts not so shown previously assessed (or collected without assessment), over (2) the amount of rebates made. The term “rebate” means so much of an abatement credit, refund or other repayment, as was made on the ground that the tax imposed was less than the excess of (1) the sum of the amount shown as the tax by the taxpayer on his return plus amounts not so shown previously assessed (or collected without assessment), over (2) rebates previously made.

Section 6012(a)(2) requires every corporation subject to taxation under subtitle A to make a return with respect to income taxes. Treas. Reg. § 1.6012-2(a)(1) requires, with certain exceptions not applicable here, that every corporation “subject to taxation under subtitle A of the Code shall make a return of income regardless of whether it has taxable income or regardless of the amount of its gross income.” Treas. Reg. § 1.6012-2(a)(3) provides that “[t]he return required of a corporation under this section shall be made on Form 1120... .”

Treas. Reg. § 1.6011-1(a) provides that every person who is subject to income tax must file a return on the form prescribed by the IRS. The return must be fully and accurately prepared in accordance with the forms, instructions or regulations which pertain to the return or it will not be accepted. Treas. Reg. § 1.6011-1(b)

In lieu of filing an amended return to obtain a credit or refund of an overpayment of tax resulting from the carryback of a net operating loss, a business credit, or a capital loss, a taxpayer may file an application under § 6411 for a tentative carryback adjustment of the taxes for taxable years prior to the taxable year of the net operating or capital loss or the unused credit, which are affected by the carryback. Treas. Reg. § 1.6411-1(a). Treas. Reg. § 1.6411-1(b) provides that the application for a tentative carryback shall be filed, in the case of a corporation, on Form 1139, and in the case of taxpayers other than corporations, on Form 1045. The application (Form 1045 or Form 1139) must be filed on or after the date on which the return is filed for the year of the net operating loss, net capital loss, or unused business credit resulting in the carryback and within 12 months after the close of that year. Treas. Reg. § 1.6411-1(c).

An application for a tentative carryback adjustment does not constitute a claim for credit or refund. Treas. Reg. § 1.6411-1(b)(2). If such application is disallowed by the district director or director of a service center in whole or in part, no suit may be maintained in any court for the recovery of any tax based on such application. Further, the filing of an application for a tentative carryback adjustment does not constitute the filing of a claim for credit or refund within the meaning of

§ 6511 for purposes of determining whether a claim for credit or refund was filed prior to the expiration of the applicable period of limitation. Id. If the IRS disallows the tentative refund claim in whole or in part, the taxpayer may file a standard claim for credit or refund. If that claim is disallowed, the taxpayer may file a suit for refund. Treas. Reg. § 1.6411-3(c).

Turning to the instant case, we do not believe an application for tentative carryback, such as Form 1139 or Form 1045, is a return for purposes of determining the amount of the accuracy-related penalty for several reasons. First, with regard to income taxes, the accuracy-related penalty applies to an underpayment of income tax imposed under subtitle A that is required to be shown on the return. In this regard, the regulations provide that a corporation subject to taxation under subtitle A shall report its income tax liability imposed under subtitle A on Form 1120. The application for tentative carryback (Form 1139) is not the form prescribed in the regulations for a corporation to report income tax imposed under subtitle A. Second, the application for tentative carryback (Form 1139) does not purport to be a return of income tax imposed under subtitle A. Thus, it does not satisfy one of the requirements necessary to constitute an income tax return for purposes of § 6011. In this regard, we note that to determine whether a return had been filed for purposes of § 6011, the Tax Court in Beard v. Commissioner, 82 T.C. 766, applied the following Supreme Court test, which is used to determine whether a document is a return for purposes of beginning the period of limitations on assessment and collection: (1) there must be sufficient data to calculate tax liability, (2) the document must purport to be a return, (3) there must be an honest and reasonable attempt to satisfy the requirements of tax law, and (4) the taxpayer must execute the return under penalties of perjury. Third, the language of Treas. Reg. § 1.6411-1(c), which concerns applications for tentative carryback, indicates that the application for tentative carryback is not the return on which is reported the income tax imposed under subtitle A. In this regard, we note that Treas. Reg. § 1.6411-(c) states that the tentative carryback must be filed on or after the date on which the “return” is filed for the year of the net operating loss, net capital loss, or unused business credit resulting in the carryback. Thus, the language of Treas. Reg. § 1.6411-(c) suggests that an application for tentative carryback is a document that is separate from a return. Fourth, under Treas. Reg. § 301.6402-3(a)(5), a properly executed corporation or individual original return does constitute a claim for refund or credit within the meaning of § 6402 and § 6511 for the amount of the overpayment disclosed by such return if it contains a statement setting forth the amount determined as an overpayment and advises whether such amount shall be refunded to the taxpayer or shall be applied as a credit against the taxpayer’s estimated income tax for the immediately succeeding tax year. However, an application for tentative carryback does not constitute a claim for credit or refund within the meaning of § 6511. Thus, the application for tentative carryback is a document that is different from the return (Form 1120) on which income tax imposed under subtitle A is required to be reported by a corporation. Fifth, Form

1139 is merely an application for tentative refund. As noted, its purpose is not to report the tax liability imposed under subtitle A. Rather, the primary purpose of Form 1139 is to allow the corporate taxpayer to quickly obtain the money that it would otherwise be entitled.

We believe that if Taxpayer received a credit, refund, or other payment as a result of a tentative carryback adjustment to Year 1 and Year 2, such amount should be treated as a "rebate" for purposes of determining the underpayment of tax for the those tax years. See Pesch v. Commissioner, 78 T.C. 100 (1982) (tax refund resulting from carryback adjustment is a rebate under § 6211(b)(2)) and Baldwin v. Commissioner, 97 T.C. 704 (1991) (a credit against unpaid taxes that is allowed as a result of a tentative carryback adjustment for a net operating loss under § 6411 constitutes a "rebate" within the meaning of § 6211(b)(2)). Further, if an underpayment results after consideration of the rebate stemming from the tentative carryback adjustment and any other applicable adjustment(s), the accuracy-related penalty would apply to any portion of the underpayment attributable to conduct proscribed by § 6662, e.g., negligence, substantial understatement, etc. See Rev. Rul. 84-106, 1984-2 C.B. 312, amplifying Rev. Rul. 173, 1953-2 C.B. 227 and Rev. Rul. 60-215, 1960-1 C.B. 642.

If you have any further questions, please call (202) 622-7900.

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