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INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

OFFICE OF
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INTERNAL REVENUE SERVICE NATIONAL OFFICE FIELD SERVICE ADVICE

MEMORANDUM FOR ASSOCIATE AREA COUNSEL, AREA 3 (LARGE AND MID-SIZE BUSINESSES) CC:LM:RFP:MIA
ATTN: JAMES P. DAWSON, SENIOR ATTORNEY

FROM: CURTIS G. WILSON
ASSISTANT CHIEF COUNSEL (ADMINISTRATIVE
PROVISIONS AND JUDICIAL PRACTICE) CC:PA:APJP

SUBJECT: Assessments After the Expiration of the Statute of
Limitations and Refunds of Prior Payments

This Field Service Advice responds to your memorandum dated November 27, 2000. Field Service Advice is not binding on Examination or Appeals and is not a final case determination. This document is not to be used or cited as precedent.

DISCLOSURE STATEMENT

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official tax administration duties with respect to the case and the issues discussed in the document require inspection or disclosure of the Field Service Advice.

LEGEND

Taxpayer =

ISSUES

- (1) Whether the Service can make an assessment of a deficiency and restricted interest after the statute of limitations has expired.
- (2) Whether amounts paid to the Service by Taxpayer constitute advance payments or deposits.
- (3) Whether the Service is required to refund the payments received from Taxpayer both prior to and after the running of the statute of limitations.

CONCLUSIONS

- (1) The Service cannot make an assessment of the deficiency and restricted interest after the statute of limitations has expired. An abatement made due to a clerical mistake or bookkeeping error and lacking the proper authorization may be treated as if it did not occur or may allow for a reinstatement of the assessment after the expiration of the statute of limitations. However, when the assessment was not made within the statute of limitations, there is no valid assessment to reinstate. Thus, even though an improper abatement occurred, no assessment can be made at this time, due to the fact that the statute of limitations regarding Taxpayer's deficiency has expired.
- (2) The amounts paid to the Service by the Taxpayer constitute payments. An assessment is not required in order to classify a remittance as a payment. This determination must be made by taking into account all of the facts and circumstances, to include the intent of the taxpayer, the intent of the Service, the Service's treatment of the remittance, and whether the Service made a timely assessment. Considering all of the facts and circumstances, taxpayer's remittances were payments of Taxpayer's estate tax liability.
- (3) The Service is not required to refund the payments received from Taxpayer prior to the expiration of the statute of limitations. However, the Service must refund payments received after the expiration of the statute of limitations, as these are overpayments within the meaning of section 6401(a).

FACTS

After petitioning the Tax Court, but prior to trial, Taxpayer's counsel and the Service reached a settlement on the substantive issues in this case. The Taxpayer's counsel and the Service entered into a stipulated decision that was filed in Tax Court on April 13, 1999. The decision document states that there is a deficiency in estate tax due from the Taxpayer in the amount of \$798,286.71 and that advance payments of \$700,000 (\$121,336.86 was applied to estate tax deficiency and interest, the remainder to gift tax deficiency and interest) were made on September 8, 1998, and \$300,000 on December 3, 1998. Petitioner made an additional advance payment of \$75,000 on November 12, 1999.

On March 23, 1999, Service personnel prepared Form 5403, Appeals Closing Record. This form requests a deficiency assessment of \$798,286.71. The form was reviewed and initialed by a clerk on March 23, 1999, and by a group manager in Appeals on April 26, 1999.

On May 10, 1999, a clerk posted the \$798,286.71 as an abatement rather than an assessment. This abatement posted to the account on May 31, 1999. On September 10, 1999, the statutory period within which an assessment could be made expired. The error was discovered after that date, when Taxpayer's representative wrote a letter to Examination requesting his refund.

LAW AND ANALYSIS

(1) Taxpayer has requested a refund of amounts paid toward the agreed upon deficiency, because the Service did not assess the tax liability prior to the expiration of the statute of limitations. Section 6501(a) provides that tax must be assessed against the taxpayer within three years after his return is filed. Section 6503(a) further provides that the mailing of a statutory notice of deficiency or the filing of any court action will suspend the running of the statute of limitations, and the statute of limitations will not begin to run again until sixty days from the entry of final judgment of that court.

In this case, Taxpayer filed an estate tax return on September 15, 1994. The three-year statute of limitations began to run as of this date, and would have expired on September 15, 1994. However, the statutory notice of deficiency was mailed on September 12, 1997, which tolled the statute of limitations under section 6503(a)(1). Taxpayer then petitioned the Tax Court, which entered a stipulated decision on April 13, 1999. The decision of the Court became final in 90 days, on July 12, 1999 and the statute remained open an additional 60 days, until September 10, 1999, pursuant to section 6503(a)(1). The three days remaining

from the original three year statute are “tacked” onto this date. Accordingly, the statute of limitations expired on September 13, 1999. In order to be within the statute of limitations, the assessment must have been made prior to this date.

Section 6201 authorizes and requires the Secretary to make assessments of taxes (including interest, additional amounts, additions to the tax, and assessable penalties). Section 6203 provides that an assessment shall be made by recording the liability of the taxpayer in accordance with rules and regulations prescribed by the Secretary. Treas. Reg. § 301.6203-1 states that an assessment is made when an assessment officer signs the summary record of assessment. The signature of the assessment officer on the summary record of assessment validates the form and is critical to making a valid assessment of tax liability. Brafman v. United States, 384 F.2d 863 (5th Cir. 1967); Gentry v. United States, 962 F.2d 555 (6th Cir. 1992).

The appeals office requested an assessment using Form 5403, Appeals Closing Record, on March 23, 1999. This is a standard closing form designed to contain all of the information required to make a prompt assessment, but does not in and of itself constitute an assessment. It is merely a request for assessment. Instead of assessing the tax due of \$798,286.71 and restricted interest of \$168,949.15, the clerk inputting the transaction abated the tax and restricted interest in error on May 10, 1999. This abatement was posted to Taxpayer’s account on May 31, 1999. The tax was not assessed prior to the running of the statute of limitations on September 13, 1999.

Courts have recognized certain limited circumstances in which an abated assessment may be reinstated, even when the statute of limitations precludes a new assessment. In re Bugge, 99 F.3d 740 (5th Cir. 1996); Crompton-Richmond Co. v. United States, 311 F. Supp. 1184 (S.D.N.Y. 1970). This case is similar in that the abatement was the result of a clerical error or mistake in fact. It is distinguishable from these, and other similar cases, however, in that the tax liability was never assessed. Thus, even though a court may find that the abatement lacked the proper authorization, the Service did not make the required assessment prior to the running of the statute of limitations. Thus, the Service may no longer assess the tax liability and restricted interest, as the statute of limitations has expired. Rev. Rul. 74-580, 1974-2 C.B. 400, distinguished by Rev. Rul. 85-67, 1985-1 C.B. 364.

(2) We expect that Taxpayer may argue that the amounts paid to the Service were deposits and not payments, and are therefore refundable. The Supreme Court held that under certain limited circumstances, amounts paid on estate tax liabilities are considered deposits, not payments, for purposes of claiming a refund under the predecessor statute to section 6511. Rosenman v. United States,

323 U.S. 658 (1945). In Rosenman, there was a dispute as to the amount of estate tax due, the taxpayer specified that amounts paid were paid under protest, and the Service treated the amounts paid as deposits. The Court found that when the Service transferred the amounts paid from the “suspense account” and applied it toward the taxpayer’s assessed deficiency, payment was made. Additional amounts paid toward the deficiency and interest were also considered payments. Rosenman, 323 U.S. at 661-62. While these payments occurred after the Service’s assessment, the court did not specifically hold that there must be an assessment prior to payment.

Prior to the Supreme Court opinion in Baral v. United States, 528 U.S. 43 (2000), the federal appellate courts were split as to whether an assessment is required in order for a valid payment to be made in cases where the liability is disputed or in which there is a deficiency. The majority of the circuits held that a remittance prior to a formal assessment may be a tax payment. Whether amounts paid constitute a deposit or a payment depends upon the facts and circumstances of each case. Moran v. United States, 63 F.2d 663, at 668 (7th Cir., 1995). Some factors specifically cited by the courts are: (1) whether the Service has made a formal assessment; (2) the taxpayer’s intent in remitting the money; and (3) the Service’s treatment of the remittance once received. Ewing v. United States, 914 F.2d 499 at 503 (4th Cir. 1990); Moran, 63 F.2d at 668. In Ewing, the Court held that the amounts that the taxpayers paid in accordance with their Closing Agreements and related documents, but which were received by the Service prior to the expiration of the assessment period were payments of tax which the government was entitled to retain.

The Supreme Court recently clarified its position in Baral as to whether an assessment is required in order to classify remittances as payments. The Court stated, “...the Code directly contradicts the notion that payment may not occur before assessment.” The Court looked to the language in sections 6151(a) and 6213(b)(4) in making this point. Baral, 528 U.S. at 437. Section 6151(a) provides, in part “...when a return of tax is required...the person required to make such return shall, *without assessment* or notice and demand from the Secretary, pay such tax...at the time and place fixed for filing the return” (emphasis added). Section 6213(b)(4) provides, in part, “[a]ny amount paid as a tax or in respect of a tax may be assessed upon the receipt of such payment....”

The payments at issue in Baral were withholding and estimated tax payments. The Court determined, by analyzing the applicable Code sections, that the withholding amounts and estimated tax payments were payments, not deposits. However, the Court also discussed other remittances paid in order to stop the running of interest and penalties. The Court stated that these may be either deposits or payments and noted that the Service has promulgated procedures to govern the classification of a

remittance as a deposit or payment in this context. Baral, 528 U.S. at 439; see Rev. Proc. 84-58, 1984-2 C.B. 501.

Taxpayer in this case settled the issue of the amount of deficiency owed when Taxpayer signed the stipulated decision agreeing to the deficiency. The decision, signed by both Taxpayer and the Service, specifically stated that previous amounts made on September 8, 1998, and December 3, 1998, were advance payments that were to be applied to the estate tax deficiency and interest. Both the Taxpayer and the Service intended for these amounts to be payments and not deposits. Furthermore, the Service treated these amounts as payments. Under the Court's analysis in Ewing and Moran, taking into account the parties' intentions and the Service's treatment of the amounts paid, the amounts paid by Taxpayer are payments of tax and not deposits, despite the fact that the Service failed to make a timely assessment.

(3) Taxpayer made some payments prior to the expiration of the statute of limitations, and one payment after the expiration of the statute. These payments are treated differently under the Internal Revenue Code. Section 6401(a) provides that "[t]he term 'overpayment' includes that part of the amount of the payment of any internal revenue tax which is assessed or collected *after the expiration of the period of limitation properly applicable thereto*" (emphasis added). Additionally, in Ewing, the Court stated that the Service may collect and retain taxes voluntarily paid without assessment and which do not constitute an overpayment. Ewing, 914 F.2d at 504. Taxpayer made payments both before and after the statute of limitations on assessment expired on September 13, 1999. No assessment was made prior to or on this date. Thus, Taxpayer's payments on September 8, 1998, and December 3, 1998, (prior to the expiration of the assessment statute) are not overpayments within the meaning of section 6401(a) and the Service is not required to refund these payments to Taxpayer. See also Rev. Rul. 85-67.

However, the Service must refund payments received after the expiration of the statute of limitations, as these are overpayments within the meaning of section 6401(a). Ewing, 914 F.2d 499; Guerard v. United States, 212 Ct. Cl. 591, 39 A.F.T.R.2d 814 (1997). See also, Rev. Rul. 74-580.

Section 6402(a) provides that "[i]n the case of any overpayment, the Secretary, within the applicable period of limitations, may credit the amount of such overpayment...against any liability in respect of an internal revenue tax on the part of the person who made the overpayment and shall...refund any balance to such person." The Service must refund Taxpayer's payments made after the expiration of the statute of limitations, i.e., Taxpayer's payment of \$75,000 on November 12, 1999, under section 6402(a) upon timely filing of a claim for refund.

OTHER CONSIDERATIONS



Please call Robin M. Tuczak at (202) 622-7132 if you have any further questions.

By: _____
JUDITH M. WALL
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