



OFFICE OF
CHIEF COUNSEL

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
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MEMORANDUM FOR GEORGE W. BEZOLD, ATTORNEY
ASSOCIATE AREA COUNSEL/MILWAUKEE (CC:SB:4:MIL)

FROM: Joseph W. Clark
Senior Technician Reviewer, Branch 2 (CBS)

SUBJECT: Payment of Interest on Overpayments of Offers in
Compromise

This Chief Counsel Advice responds to your memorandum dated April 13, 2001. In accordance with I.R.C. § 6110(k)(3), this Chief Counsel Advice should not be cited as precedent.

ISSUE:

Whether interest is payable to a taxpayer who, following acceptance of an offer in compromise, remits more than the amount reflected in the offer but less than the actual tax liability?

CONCLUSION:

Under the circumstances described, we agree that the taxpayer is not entitled to interest.

FACTS:

Your memorandum posits three scenarios in which a taxpayer submits an offer in compromise (OIC) for \$4,000.00. You ask, under each scenario, whether the taxpayer is entitled to be paid interest.

Scenario #1: The taxpayer pays \$500.00 in cash and \$4,000.00 obtained through a loan.

Scenario #2: The taxpayer pays \$4,000.00. The Service also offsets the taxpayer's income tax refund in both the year of acceptance and (erroneously) the following year.

Scenario #3. The taxpayer pays \$4,000.00 in December, then mistakenly pays an additional \$4,000.00 the following July.

It is assumed for the purpose of each scenario that the taxpayer's liability has not been fully satisfied because the taxpayer has not fulfilled all of the terms and conditions of the OIC at the time the extra payment was made.¹ It also is assumed that the Service fails to timely repay the taxpayer within 45 days of the claim.² You conclude under each scenario that the taxpayer is not entitled to interest. Under the first scenario, you conclude that the additional \$500.00 submitted by the taxpayer is a deposit. Under all scenarios, you conclude that the taxpayer's payment of more than the amount provided in the OIC is not an overpayment because the amount submitted is less than the amount of the taxpayer's liability. Therefore, there is no requirement under I.R.C. § 6611 that interest be paid to the taxpayer.

LAW AND ANALYSIS:

I.R.C. § 6611 provides that the Service will pay interest on any overpayment of a tax. "Overpayment" is not defined in the Code,³ but is treated by the courts as any payment of a tax in excess of what is rightfully due. United States v. Dalm, 494 U.S. 596, 609 n.6 ("The common sense interpretation is that a tax is overpaid when a taxpayer pays more than is owed for whatever reason or no reason at all."); Jones v. Liberty Glass Co., 332 U.S. 524, 531 (1947). "There can be no overpayment of tax until the entire tax liability has been satisfied." Treas. Reg. § 301.6611-1(b). Since compromise of a tax liability pursuant to an OIC under I.R.C. § 7122 will always be for less than the total tax liability, the Service has no authority to pay interest on monies paid relative to an OIC.

In the absence of express Congressional consent to an award of interest, the United States is immune from an interest award. United States v. Louisiana, 446 U.S. 253, 264-265 (1980) (in the absence of specific provision by contract or statute, or express consent by Congress, interest does not run on a claim against

¹ Item #8(d) of Form 656, "Offer in Compromise," provides: "I/We will comply with all provisions of the Internal Revenue Code relating to filing my/our returns and paying my/our required taxes for 5 years or until the offered amount is paid in full, whichever is longer." In the situations described, the taxpayer has not fulfilled this condition.

² I.R.C. § 6611(e)(2) provides that if the Service refunds an overpayment within 45 days of the taxpayer's filing a claim for credit or refund, no interest will be paid.

³ Under I.R.C. § 6401, the word "overpayment" includes certain payments and credits, but that section does not provide an exclusive list.

the United States). Unlike the return of the funds actually collected from a person, the payment of interest will result in the net depletion of Treasury funds. Congress has only authorized the use of appropriated funds for the payment of interest in specific situations, such as where there is an overpayment entitling a taxpayer to a refund under the Internal Revenue Code. See, e.g., I.R.C. § 6611. These specific grants of authority indicate that the Service does not have any general authority to pay interest in cases not covered by the specific grants. See, e.g., Dresser v. United States, 180 F.2d 410 (1950) (no additional interest on replacement refund check, because right to recover interest from Government must come from contract or Congressional enactment). In the absence of specific Congressional authorization, interest cannot be provided to a party when funds are returned to such party.

In Moskowitz v. United States, 285 F.2d 451 (Ct. Cl. 1961), the taxpayer submitted funds along with an offer in compromise to the Service. These funds were deposited in a special account for amounts received other than by collection, such as by compromise. After several months, the Service rejected the offer and returned the taxpayer's money, without interest. The Service later assessed the taxpayer, and the taxpayer sued to recover the purported difference between the amount submitted with his offer, plus accrued interest, and the amount of the assessment. Discussing the taxpayer's demand for interest, the court found no provision of law that would authorize the Service to pay. The court held that the taxpayer's remittance did not constitute an overpayment, relying on several cases⁴ in which payments made prior to tax assessments were treated as deposits not subject to interest upon their return. The court concluded that because the amount held by the Government did not exceed the taxpayer's liability, and because the taxpayer could have requested a return of the amounts held at any time, there was no overpayment and no authority to award interest. See also, e.g., I.R.C. § 1311(a) (correction of certain errors by adjustment treated as an overpayment, but specifically excluding compromises under section 7122).

Similarly, under the scenarios described above, the amounts received in excess of what the taxpayer proposed as the compromise amount do not constitute overpayments. Under Treas. Reg. § 301.7122-1T(g), any sum submitted with a proposed OIC or during the pendency of an OIC is considered a deposit.⁵ If the

⁴ Rosenman v. United States, 323 U.S. 658 (1944); Manee v. United States, 97 F. Supp. 993 (1951); Busser v. United States, 130 F.2d 537 (3^d Cir. 1942).

⁵ As a general rule, the gross amount of all taxes and revenues received under the provisions of the Internal Revenue Code, and collections of whatever nature received or collected pursuant to the authority of any internal revenue law, are paid daily into the Treasury of the United States as internal revenue collections. I.R.C. § 7809(a). As one exception to the general rule, sums offered in compromise are

OIC is withdrawn, unprocessable or rejected, the Regulation provides that any amounts submitted will be returned to the taxpayer, without interest.⁶

Absent statutory authority, sovereign immunity prevents an award of interest. Library of Congress v. Shaw, 478 U.S. 310 (1986). The Service has no statutory authority to award interest unless there is an overpayment. I.R.C. § 6611. To the extent that the amount received by the Service does not exceed the taxpayer's liability, there is no overpayment. Under the three scenarios described above, the taxpayer is not entitled to interest on the amounts received by the Service in excess of the compromised tax liability.

CASE DEVELOPMENT, HAZARDS AND OTHER CONSIDERATIONS:

The foregoing analysis assumes that the taxpayer has not fully satisfied his tax liability at the time the Service receives and holds the excess funds. If, however, the Service has adjusted the taxpayer's account balance so that the monies received on account of the OIC fully satisfied the taxpayer's liability, any funds held by the Service would be considered an overpayment under section 6611 and subject to the 45-day repayment rule under section 6611(e).

This writing may contain privileged information. Any unauthorized disclosure of this writing may have an adverse effect on privileges such as the attorney-client privilege. If disclosure becomes necessary, please contact this office for our views.

If you have any questions, please contact Richard Charles Grosenick at 202/622-3620.

deposited in a deposit fund account. Once the offer is accepted, the amount is withdrawn from the deposit account and deposited in the Treasury as internal revenue collections. I.R.C. § 7809(b).

⁶ As part of the contractual conditions signed by the taxpayer on Form 656, "Offer in Compromise," item # 8 provides in relevant part, "I/we understand that the IRS will not pay interest on any amount I/we submit with the offer."