



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 LMSB AREA COUNSEL (Financial Services and Healthcare)
Attn: Roland Barral CC:LM:F

FROM: John McGreevy
Assistant to the Branch Chief
Administrative Provisions and Judicial Practice
CC:PA:APJP:1

SUBJECT: Issuing refund checks to missing persons

This Chief Counsel Advice responds to your memorandum dated September 25, 2001. In accordance with I.R.C. § 6110(k)(3), this Chief Counsel Advice should not be cited as precedent.

ISSUES

- 1) If a taxpayer is missing but not legally declared deceased and no estate has been created, to whom should the taxpayer's refund check be issued based on each type of possible filing status in the year to which the refund relates?
- 2) If a taxpayer is missing, but not legally declared deceased, and filed a joint return with a spouse from whom the taxpayer is divorced, and the taxpayer is remarried, to whom should the refund check be issued?

CONCLUSIONS

- 1) The refund check should be issued in the name of the missing taxpayer and the taxpayer's spouse if the parties filed a joint return in the year to which the refund relates. However, if the missing taxpayer's filing status for the year to which the refund relates was anything other than "married filing joint return," the refund check should be issued in the name of the missing taxpayer.
- 2) If a taxpayer who is missing but not legally declared deceased filed a joint return with a spouse from whom the taxpayer is divorced and the missing taxpayer now has a new spouse, the refund check should be issued in the names of the missing

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taxpayer and the spouse whose name appears on the joint return (i.e., the former spouse).

FACTS

The Service has completed the examination of tax returns that include distant tax years. You request advice regarding how refund checks should be issued for those years when a taxpayer is missing but not legally declared deceased.

LAW AND ANALYSIS

Issue 1

Section 6402(a) of the Code provides, in part, that in the case of any overpayment, the Secretary may credit the amount of such overpayment against any tax liability of the person who made the overpayment and shall refund the balance to such person. This section authorizes the Service to credit or refund any overpayment of tax only to the “person who made the overpayment.”

Section 301.6402-2(f)(1) of the Regulations on Procedure and Administration provides, in part, that checks in payment of claims allowed will be drawn in the names of the persons entitled to the money. The regulations implement the clear statutory rule that a tax refund should be issued to the person or persons who overpaid the tax.

Individual taxpayers can file a tax return under a status of “single,” “married filing separate return,” “head of household,” “qualifying widow(er) with dependent child,” and “married filing joint return.” For each of these different statuses, except for the “married filing joint return” status, a refund check of an overpayment should be issued in the name of the only person filing the return. Therefore, missing taxpayers who filed under any status other than the “married filing joint return” status for the tax year to which the refund relates should be issued the refund check in their name alone. This result flows from section 6402(a) and the Treasury Regulations thereunder which allow the refund to be issued only to the person who made the overpayment. If the missing taxpayer filed as anything other than married filing jointly, the missing taxpayer is the only one to whom the overpayment can be attributed.

If the missing taxpayer filed a joint return with a spouse under section 6013(a), they are considered separate taxpayers for purposes of determining the “person who made the overpayment.” Gordon v. United States, 757 F.2d 1157 (11th Cir. 1985); Maragon v. United States, 153 F.Supp. 365 (Ct. Cl. 1957); St. John v. Bookwalter, 58-1 USTC ¶ 9216 (W.D. Mo. 1957). Disputes over entitlement to a joint refund often require an allocation of the spousal shares.

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In Rev. Rul. 74-611, 1974-1 C.B. 399, the Service stated that a joint income tax return does not create new property interests for the husband or the wife in each other's income tax overpayment. Instead, each spouse has a separate interest in the overpayment shown on a joint return. Under the facts of the ruling, because the entire overpayment was attributable to the wife, no portion of the overpayment shown on the joint return could be credited against the husband's separate tax liability. The wife was the "person who made the overpayment" within the meaning of section 6402(a).

The amount of a joint return overpayment that is attributable to each spouse is determined by apportioning the overpayment between the spouses to the extent each spouse contributed to the overpaid tax. Gens v. United States, 230 Ct. Cl. 42 (1982); Rosen v. United States, 397 F.Supp. 342 (E.D. Pa. 1975). The Service has set out, in a series of revenue rulings, the "separate tax formula" for making this apportionment. See Rev. Rul. 80-7, 1980-1 C.B. 296; Rev. Rul. 85-70, 1985-1 C.B. 361; and Rev. Rul. 87-52, 1987-1 C.B. 347. Under the separate tax formula, a spouse's separate interest in an overpayment is determined by subtracting that spouse's contribution toward the payment of the joint tax liability.

In the case of taxpayers filing a joint return, the Service does not typically determine the separate interests of the spouses in an overpayment before crediting or refunding the overpayment. See IRM 21.4.1.4.9.2(1). As a practical matter, the Service cannot determine the separate interests of the spouses based solely on the information provided on the return. Thus, when the Service refunds an overpayment shown on a joint return, it typically issues the refund in the names of both spouses, leaving them to divide the proceeds. However, in the present situation, one spouse is missing and cannot choose how to divide the refund.

In this situation, the spouse of the missing taxpayer may be able to endorse the refund check on behalf of the missing taxpayer payee which could be an acceptable endorsement depending on state law conveying such authority from the other payee. An example would be: "John Jones by Mary Jones." Checks endorsed "for collection" or "for deposit only to the credit of the within named payee or payees," are acceptable without any signature. See 31 CFR § 240.11 (1999). Once the missing taxpayer is legally declared deceased, the executor of the decedent could sign "John Jones by Mary Jones, executor of the estate of John Jones." See 31 CFR § 240.13 (1999). Alternatively, the surviving spouse may send the check back requesting that a separate check be issued in the name of the surviving spouse or the decedent's estate.

Form 1310 allows a surviving spouse to receive a reissued check solely in the surviving spouse's name. Issuing the check in the surviving spouse's name does not mean that the Service is determining the ownership interests of the deceased spouse and the surviving spouse in the refund. The surviving spouse acts as a fiduciary to the person or persons entitled to the refund. For example, the

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deceased spouse's will or, if the spouse died intestate, the probate code of the state may identify who is entitled to that portion of the refund.

Issue 2

As already discussed, the Service typically issues the refund check to the spouses whose names appear on the tax return for the tax period to which the refund relates.

By issuing the refund check in the name of the missing taxpayer and the spouse for the year to which the return relates, the determination of the amount of the refund to which each spouse is entitled is left to the parties whose names appear on the tax return. This procedure satisfies the section 6402(a) requirement that the Service issue the refund to the person or persons who made the overpayment, and is administratively practical, considering the volume of joint returns received by the Service and the complexity in determining a spouse's separate interest in the overpayment. If the missing taxpayer is later determined to be deceased, the former spouse, who is no longer considered to be a surviving spouse for purposes of Form 1310, and the executor of the decedent's estate are to determine the amount to which each is entitled. The current spouse does not determine the amount to which each is entitled in the capacity of decedent's surviving spouse because the current spouse is not considered a surviving spouse for purposes of Form 1310 because he or she was not married to the decedent in the year to which the refund relates.

By requiring the joint payees to endorse the refund check, both parties are put on notice that a refund check was issued. This notice informs each payee that he or she may be entitled to part or all of the refund amount. As discussed above, there is no legal impediment to issuing (or reissuing) separate checks in the name of each payee for the amount to which each is entitled. Although it is the policy of the Service to issue the check jointly, the Service stated in Rev. Rul. 67-431, 1967-2 C.B. 411, amplified by Rev. Rul. 80-7, Rev. Rul. 85-70, and Rev. Rul. 87-52, that it has the authority to make credits or refunds to only one spouse if warranted by the circumstances and if the Service has no knowledge of circumstances indicating that the applicable taxes were paid by anyone other than the spouse to which the refund or credit will be issued.

DISCLOSURE STATEMENT

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 call our office at (202) 622-4910.