



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 DOUG H. ROGERS
NATIONAL DIRECTOR
OFFICE OF INTEREST AND PENALTY ADMINISTRATION
S:C:CP:RC:P C9-156

FROM: ASSISTANT CHIEF COUNSEL
ADMINISTRATIVE PROVISIONS AND JUDICIAL PRACTICE
CC:PA:APJP

SUBJECT: Interest on Replacement Refund Check

This Chief Counsel Advice responds to your memorandum dated June 8, 2001. In accordance with I.R.C. § 6110(k)(3), this Chief Counsel Advice should not be cited as precedent.

LEGEND

Taxpayer
Year 1
Year 2
Year 3
\$X
Refund Check Y

ISSUE

Whether Taxpayer is entitled to overpayment interest to the date of the replacement refund, when the Service properly issued Taxpayer an original refund check within the 45 days required by Internal Revenue Code section 6611, but Taxpayer never received the original refund check?

CONCLUSION

Taxpayer is not entitled to overpayment interest because the delay in the delivery of the refund check was not due to any fault of the government and because under the

presumption of delivery, the Service tendered the refund check to Taxpayer within 45 days after the return was filed.

FACTS

Taxpayer timely filed his Year 1 return on October 18, Year 2 pursuant to an approved extension. Taxpayer's return indicated an overpayment of \$X. Taxpayer requested that the overpayment be refunded by direct deposit to Taxpayer's financial institution. The Service did not refund the overpayment by direct deposit, but instead issued a refund check on November 4, Year 2. In December Year 2, Taxpayer's representative contacted the Service and stated that Taxpayer had not received the refund. The Service confirmed with Taxpayer's representative that the refund was issued to the correct taxpayer and mailed to the correct address. The Service researched the claim and discovered that the refund check was never negotiated and was never returned to the Service as undeliverable. The Service issued a second refund to Taxpayer on February 7, Year 3.

LAW AND ANALYSIS

The government may only pay interest if specifically allowed by a statutory provision. See, U.S. ex. Rel. Angarica v. Bayard, 127 U.S. 251 (1888). Section 6611(a) of the Internal Revenue Code provides, in general, that interest shall be allowed and paid on any overpayment of any internal revenue tax at the overpayment rate established under § 6621.

Section 6611(b)(2) adds that in the case of a refund, interest is paid from the date of the overpayment to a date (to be determined by the Secretary) preceding the date of the refund check by not more than 30 days, whether or not such refund check is accepted by the taxpayer after tender of such check to the taxpayer. The acceptance of such check shall be without prejudice to any right of the taxpayer to claim any additional overpayment and interest thereon.

In addition, Section 6611(e)(1), provides that no overpayment interest will be paid if the overpayment is refunded within 45 days after the last day prescribed for filing the return (determined without regard to any extension of time for filing the return) or, if the return is filed after such last date, the refund is made within 45 days after the date the return is filed.

Section 6611(e)(2) provides that if the taxpayer files a claim for a credit or refund for any overpayment of tax, and such overpayment is refunded within 45 days after the filing date of the claim, no overpayment interest is paid from the filing date of the claim until the refund date.

The Delay in the Delivery of the Refund Check was not due to any Fault of the

Government.

Taxpayer claims interest to the date of the replacement check, because Taxpayer never received the original refund check, and, thus, according to Taxpayer the overpayment was not refunded within the 45 days prescribed in section 6611(e)(1).

Interest is not allowed when the delay in effecting the delivery of the refund check is not due to any fault of the Government. Rev. Rul. 76-74, 1976-1 C.B. 388; IRM 121.1.8.

In Rev. Rul. 76-74, the Service endorsed two situations in which the government paid additional interest because the government improperly delayed the delivery of refunds. In the first situation, the Service erroneously issued a refund check in the name of a person other than the taxpayer and, thus, prevented negotiation of the check by the taxpayer. In the second, the Service held the taxpayer's refund to offset a debt erroneously reported by another agency. In both situations, the Service determined that the periods of interest ran to the dates of the subsequently issued replacement checks, not the dates of the original checks. The Service recommended the payment of additional interest because the refunds' deliveries were delayed due to the fault of the government.

In this case, the Service established that the refund was issued to the correct taxpayer and mailed to the correct location; therefore, unlike the situations in Rev. Rul. 76-74, the delay in the delivery of the refund was not due to any fault of the Service and interest should not be allowed.

The Government tendered the Refund Check to Taxpayer on November 4, Year 2.

Taxpayer relies on Doolin v. United States, 918 F.2d 15, 18 (2d Cir. 1990) and Godfrey v. United States, 997 F.2d 335, 337 (7th Cir. 1993) in asserting that a refund check cannot be tendered unless the taxpayer has some knowledge of it and an opportunity to accept, or decline to accept, the check. However, in Doolin and Godfrey, the courts also acknowledged the presumption of delivery. Doolin, 918 F.2d at 18; Godfrey, 997 F.2d at 338. Under the presumption of delivery, proof that a letter properly directed was placed in a post office, creates a presumption that it reached its destination in usual time and was actually received by the person to whom it was addressed. Rosenthal v. Walker, 111 U.S. 185, 193 (1884); Hagner v. United States, 285 U.S. 427 (1932). Therefore, under the presumption of delivery a refund is tendered when placed with the postal service.

In Godfrey, the Seventh Circuit held that to invoke the presumption of delivery, the government could either present evidence of actual mailing such as an affidavit from the employee who mailed the check, or present proof of procedures followed in the

regular course of operation which give rise to a strong inference that the check was properly addressed and mailed. Godfrey, 997 F.2d at 338.

The Financial Management Service of the Treasury Department (FMS) in Austin, Texas, was responsible for issuing and mailing Taxpayer's refund. FMS creates a Progress Sheet for each set of payments that are delivered to the Post Office for mailing. The Progress Sheet indicates the check number and amount for each payment included in the set. According to Taxpayer's payment record, Refund Check Y for \$X was issued on November 4, Year 2. The Progress Sheet for November 5, Year 2, indicates that Refund Check Y for \$X was included among the checks delivered to the post office that day. The Service placed the refund with the postal service on November 5, Year 2; therefore, under the presumption of delivery, the refund was tendered to Taxpayer on November 5, Year 2. November 5, Year 2 is within 45 days after the date the return is filed; therefore, no interest should be allowed under section 6611(e).

In Godfrey, the court noted that even if the IRS presents sufficient evidence of mailing, the presumption of delivery may be rebutted by other evidence of non-delivery. Godfrey, 997 F.2d at 338 n.3.

Taxpayer claims that the Service is not entitled to the presumption of delivery, because the Service failed to issue Taxpayer a CP 53 notice, and, therefore, did not follow regular procedures. Whether the Service followed regular procedures in issuing or not issuing Taxpayer a CP 53 notice is irrelevant to whether the Service followed regular procedures in issuing and mailing Taxpayer's refund check, thus, whether the Service issued Taxpayer a CP 53 notice does not effect the Service's ability to invoke the presumption of delivery for Taxpayer's refund check. FMS followed regular procedures for mailing Taxpayer's refund check, and, therefore, the Service is entitled to the presumption of delivery for Taxpayer's refund check.

In addition, Taxpayer claims that the Service did not follow proper procedures because the Service did not direct deposit Taxpayer's refund. Although the Service has offered the option for the wire transfer of refunds, the Service is not required to accede to every wire transfer request. Onan Corp. v. United States, 19 Cl. Ct. 678, 680 (1990). Furthermore, Announcement 85-14, 1985-4 I.R.B. 43, provides that taxpayers must file a Form 8302, Application for Electronic Funds Transfer (EFT) of Tax Refund of \$1 Million or More, with their tax returns in order to receive a wire transfer. Taxpayer did not file a Form 8302 with his tax return, thus the Service followed proper procedures when it did not direct deposit Taxpayer's refund and the Service is entitled to the presumption of delivery.

CASE DEVELOPMENT, HAZARDS AND OTHER CONSIDERATIONS

Taxpayer's letter of April 5, Year 3 states, "A review of IRS procedures in Internal Revenue Manual 21.8, Refund Transactions, does not support the IRS position regarding the absolute necessity of issuing a paper check if the refund is in excess of \$1 million." It appears that the Service has relied on IRM 21.10.2.4.10 to assert that the Service could not direct deposit Taxpayer's refund because overpayments in excess of \$1,000,000 require issuance of a check through manual refund procedures. According to IRM 21.10.2.4.10, an account with an overpayment of \$1,000,000 requires that a manual refund be issued since a TC 846 will not generate. We believe that the language "a manual refund be issued" may be misinterpreted to mean that a refund check should be issued. We believe that this language should be interpreted to mean that the refund should be processed manually. Refunds for over \$1,000,000 are eligible for direct deposit. See Form 8302, Application for Electronic Funds Transfer (EFT) of Tax Refund of \$1 Million or More. [REDACTED]

[REDACTED]

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If you have any questions, please call Michelle B. Baxter at (202) 622-7947.

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