



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

OFFICE OF
CHIEF COUNSEL

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INTERNAL REVENUE SERVICE NATIONAL OFFICE FIELD SERVICE ADVICE

MEMORANDUM FOR ASSOCIATE AREA COUNSEL

FROM: Pamela W. Fuller
Senior Technician Reviewer
CC:PA:APJP:1

SUBJECT:

This Chief Counsel Advice responds to your request for advice dated September 12, 2001. In accordance with I.R.C. § 6110(k)(3), this Chief Counsel Advice should not be cited as precedent.

LEGEND

Taxpayer A =
Taxpayer B =
State =
Year 1 =
Year 2 =
Year 6 =
Year 7 =
Year 8 =
Year 9 =
Year 10 =

ISSUES

May the Internal Revenue Service ("Service") reverse an offset by transferring the offset amount from the taxpayer's Year 2 account back to the Year 6 joint account?

CONCLUSION

FSA-N-151971-01

The Service does not have the authority to reverse the offset of an overpayment that has been properly credited to an outstanding liability of a taxpayer.

FACTS

Taxpayers A and B filed a joint return for Year 6 showing an overpayment. The Service received the return on March 3, Year 8. The return showed (and the Service allowed) an overpayment, all of which came from withholding (deemed paid April 15, Year 7). The Service then offset part of the Year 6 overpayment against Taxpayer B's Year 1 and Year 2 tax liabilities. The transcript for Year 2 shows the amount from Year 6 was credited in the 12th week of Year 8, which runs from March 21, Year 8 to March 27, Year 8. On April 12, Year 8, the Service refunded the balance of the overpayment to the taxpayers.

State had determined, for state income tax purposes, that Taxpayer B was not entitled to head of household filing status for the Year 2 tax year. Based on information received from State, the Service issued a notice of deficiency to Taxpayer B for the Year 2 tax year, disallowing her head of household filing status, adjusting her standard deduction, and disallowing her claimed child care credit. Taxpayer B did not respond to the notice. The Service then assessed a deficiency for Year 2 on June 23, Year 6.

On October 23, Year 6, State advised Taxpayer B that it reversed its prior determination and that her head of household filing status for Year 2 had been allowed.

Taxpayer B went to the Service's office on April 11, Year 10. A representative of the Taxpayer Advocates Office filled out a Form 911, Application for Taxpayer Assistance Order, which was intended to be Taxpayers A's and B's informal claim for refund.

In July Year 10, the Taxpayer Advocate's Office abated the deficiency assessment on Taxpayer B's Year 2 account creating an overpayment for that year.

On July 18, Year 10, the Service issued a "105C Letter" to Taxpayer B stating that the period of limitations for Year 2 had expired, and that no refund would be issued. The Service then transferred the Year 2 overpayment to "excess collections" on the grounds that the "payment" date was April 15, Year 7, and the Year 2 period of limitations expired two years after the date of payment, April 15, Year 9¹.

¹The Service considers the payment on an outstanding tax liability to have been made on the date the credit was allowed. See United States v. Swift, 282 U.S. 468, 476 (1931). In this case, the payment date has no impact on the outcome since the

LAW AND ANALYSIS

Section 6402(a) of the Code provides that in the case of an overpayment of tax, the Secretary may credit the overpayment against any outstanding federal tax liability ("offset"), or refund the overpayment, or any balance thereof, to the taxpayer. Although § 6402 and the regulations thereunder address the Service's authority to offset against a taxpayer's outstanding federal tax liability, the authority as to whether the Service may reverse an offset once the transaction has been completed is more fully discussed under § 7811 and its regulations.

Section 7811 authorizes the Service to exercise its discretion in issuing a refund of an overpayment in cases when the taxpayer is in a condition of significant hardship. This offset bypass refund is authorized even though the taxpayer owes unpaid taxes against which the refund may be offset. However, § 301.7811-1(c)(3) of the Regulations on Procedure and Administration ("regulations") permits offset bypass refunds only where an overpayment exists. Once the overpayment is credited and the liability is paid, the overpayment ceases to exist and no amount is available for refund.

Section 301.7811-1(c)(3) of the regulations provides that in the absence of an overpayment, there is no authority under which the Service may release sums which have been credited against the taxpayer's liability and deposited into the Treasury of the United States.

An exception to the general prohibition on reversing an offset is the judicially created doctrine known as clerical error. Succinctly stated, whenever an action occurs because of mistake of fact or bookkeeping error, that mistake can be corrected so long as this does not prejudice the taxpayer. See Crompton-Richmond Co. v. United States, 311 F.Supp. 1184 (S.D.N.Y. 1970). At least one other court has come to the same result by deeming the mistaken action as not being what it purported to be, ("Clerical errors are by their nature not errors in judgment but merely inadvertencies"), which essentially permitted the correction to occur. Matter of Bugge, 99 F.3d 740, 745 (5th Cir. 1996)(citing NTN Bearing Corp. v. United States, 74 F.3d 1204 (Fed. Cir. 1995)). Thus, absent statutory authorization or a clerical error, the Service may not reverse an offset once the transaction has been completed.

Taxpayers filed the claim more than 2 years after the Service allowed the credit.

FSA-N-151971-01

Based on the facts provided, Taxpayer B had tax liabilities for Year 1 and Year 2. Taxpayers A and B filed a joint return for Year 6 claiming a refund of an overpayment. The Service offset the Year 6 overpayment against the Year 1 and Year 2 tax liabilities. As stated above, § 6402 provides that in the case of an overpayment of tax, the Secretary may credit the overpayment against any outstanding federal tax liability, or refund the overpayment, or any balance thereof, to the taxpayer. At the time of the overpayment, the Service properly credited the overpayment against Taxpayer B's prior tax liabilities. The offset was not due to a mistake of fact or bookkeeping error. Thus, the clerical error doctrine does not apply. As a result, the Service does not have the authority to reverse the offset in this case.

CASE DEVELOPMENT, HAZARDS AND OTHER CONSIDERATIONS

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.

Please call (202) 622-4910 if you have any further questions.