



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

OFFICE OF
CHIEF COUNSEL

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INTERNAL REVENUE SERVICE NATIONAL OFFICE SERVICE CENTER ADVICE

MEMORANDUM FOR JACQUELINE M. GLORE
PROGRAM ANALYST

FROM: John J. McGreevy
Assistant to the Branch Chief
CC:PA:APJP:1

SUBJECT: Injured Spouse Rules

In accordance with I.R.C. § 6110(k)(3), this Chief Counsel Advice should not be cited as precedent.

This responds to your request for Service Center Advice in connection with the injured spouse rules. We have restated the issues as follows:

ISSUES

1. Whether a surviving spouse ("liable spouse") is entitled to file a claim and receive a refund on behalf of a deceased injured spouse ("deceased injured spouse") where the liable spouse owes a federal or state tax debt that was incurred prior to marriage.
2. Whether the refund received by the liable spouse on behalf of the deceased injured spouse is subject to offset in order to satisfy an existing federal or state tax debt owed by such liable spouse.

CONCLUSIONS

1. A liable spouse is entitled to file a claim and receive a refund on behalf of a deceased injured spouse for the deceased injured spouse's share of the joint overpayment, where the liable spouse owes a federal or state tax debt which was incurred prior to marriage.

2. The offset rules do not apply to a refund which is received by a liable spouse on behalf of a deceased injured spouse.

FACTS

In your inquiry to our office dated May 20, 2002, you present a factual scenario wherein a liable spouse owes an outstanding federal or state tax debt that was incurred by such liable spouse prior to marriage. You further indicate that the liable spouse filed a joint return with the deceased injured spouse showing an overpayment of tax. The liable spouse wants to file a claim to recover that portion of the overpayment to which the deceased injured spouse would otherwise be entitled under the injured spouse rules. Finally, you question whether the Internal Revenue Service ("Service") may refund the allocable share of the deceased injured spouse's overpayment to the liable spouse; or, whether the Service may effect an offset of the deceased injured spouse's allocable share of the overpayment to the liable spouse's federal or state tax debt pursuant to § 6402 of the Internal Revenue Code ("Code").

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.

If the missing taxpayer filed a joint return with a spouse under § 6013(a) of the Code, 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 spousal shares.

In Rev. Rul. 74-611, 1974-1 C.B. 399, the Service states 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 § 6402(a) of the Code.

Internal Revenue Manual ("IRM") 21.4.6.4.9(1) defines an injured spouse as "[T]he spouse whose portion of a joint income tax overpayment was or will be offset to a tax or non-tax debt for which he or she is not liable." Similarly, IRM 21.4.6.4.9.1(2) states that "[A] surviving spouse is entitled to file a claim and receive a refund on behalf of the deceased injured spouse even though the surviving spouse owes the obligation." The liable spouse files a claim on behalf of the deceased injured spouse on Form 8379, Injured Spouse Claim and Allocation, and receives a check, in the liable spouse's name, for that portion of the allocable share of the deceased injured spouse's overpayment. Thus, it is the Service's articulated practice to permit a liable spouse to file a claim on behalf of his or her deceased injured spouse and receive a refund in the amount of the deceased injured spouse's allocable share of a joint overpayment of tax (presuming that neither an executor nor administrator of the estate of the deceased injured spouse is involved).

Issue 2

The § 6402 offset rules are inapplicable to the deceased injured spouse's allocable share of the joint overpayment. Because the amount paid to the liable spouse (or executor or administrator) on behalf of the deceased injured spouse is not the liable spouse's overpayment, such amount is not subject to offset under § 6402 of the Code. By receiving the allocable share on behalf of the deceased injured spouse, the liable spouse acts as a fiduciary to the person or persons entitled to the refund and must direct the distribution of the deceased injured spouse's share as determined by will or probate. As a result, the Service must explore other collection mechanisms in order to recover the existing legal federal or state tax debt incurred by the liable spouse prior to marriage.

CASE DEVELOPMENT, HAZARDS, AND OTHER CONSIDERATIONS

This writing shall not be construed as limiting any entitlement to recover, by refund, the allocable share of a deceased injured spouse's joint overpayment to the liable spouse only. Consideration should be given to requiring a representation of entitlement by the party claiming the check. Additionally, it does not address the possibility of any offset which may be effected by the Financial Management Service as a consequence of the refund being reissued in the name of the liable spouse.

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