

Office of Chief Counsel
Internal Revenue Service
Memorandum

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date: May 27, 2005

to: James C. Lanning, Jr.
Area Counsel
(Large & Mid-Size Business)

Attn: Rogelio A. Villageliu

from: Carol P. Nachman
Special Counsel, Administrative Provisions & Judicial Practice
(Procedure & Administration)

subject:

This Chief Counsel Advice responds to your request for assistance. This advice may not be used or cited as precedent.

LEGEND

T	=	████████████████████
Year 1	=	██
Date 1	=	████████████████████
Date 2	=	████████████████
Date 3	=	████████████████████

ISSUES

1. Whether the Service may assess a payment of tax made on an agreed deficiency (plus interest) that the Service received but did not assess before the running of the period of limitations.
2. If the Service cannot assess the payment, whether the payment of the unassessed deficiency and interest constitutes an overpayment of tax that may be refunded to the taxpayer.
3. Whether the docket attorney has an ethical obligation to notify the taxpayer's representative of the expiration of the statute of limitations.

CONCLUSIONS

1. Because the I.R.C. § 6501(a) period of limitations has expired, the Service may not assess the payment of tax and interest.
2. The payment is an advance payment. An advance payment made within the period prescribed for assessment but not timely assessed, does not create an overpayment; thus there is no overpayment to be refunded.
3. Because the Office of Chief Counsel no longer has jurisdiction over this case, the docket attorney has no obligation to notify the taxpayer's representative of the expiration of the statute of limitations. Appeals has no legal obligation to notify the taxpayer's representative, but we believe the better practice would be for them to do so. Appeals, of course, should make its decision based on its own practices and policies.

FACTS

T had a case pending in the United States Tax Court for Year 1. On Date 1, within the statutory period for assessment, T paid the Service an amount relating to its Year 1 deficiency and the accrued underpayment interest. T requested that the payment be treated as an advance payment under Rev. Proc. 84-58, 1984-2 C.B. 501. The parties later settled the case. On Date 2, the Tax Court entered the decision and stipulation documents, which reflected an amount of tax and interest due from T, as well as the amount that T paid on Date 1. The Office of Chief Counsel subsequently closed its case and transferred the case to Appeals. The statutory period for assessment expired before the Service assessed the deficiency and interest.

LAW AND ANALYSIS

1. Period of Limitations on Assessment

Section 6501(a) provides that "any tax imposed by this title shall be assessed within 3 years after the return was filed." The running of the period of limitations is suspended when the Service issues the taxpayer a notice of deficiency. If the taxpayer files a

petition in the Tax Court, the period of limitations on assessment is suspended until 60 days after the court's decision becomes final. I.R.C. § 6503(a)(1).

There is no other provision in the Internal Revenue Code that would have suspended the running of the 3-year period of limitations in this case. The period of limitations for T's Year 1 expired on Date 3.

2. Treatment of the Advance Remittance

Section 6401(a) defines an "overpayment" as that part of the amount of the payment of any internal revenue tax which is assessed or collected after the expiration of the period of limitation. Section 6402(a) provides that the Secretary, within the applicable period of limitations, may credit or refund an overpayment, subject to certain offsets provided in subsections (c), (d), and (e). The Code and regulations are silent on whether an advance payment for unassessed tax deficiency and interest made within the statutory period for assessment is an overpayment; however, Rev. Rul. 85-67, 1985-1 C.B. 364, is directly on point. It provides that an advance payment of tax and interest made before the statutory period for assessment expires does not constitute an overpayment just because the liability was not timely assessed. If the taxpayer's remittance is a payment and not a deposit, Rev. Rul. 85-67 would apply in this case.

The procedures for designation of remittances to the Internal Revenue Service are set out in Rev. Proc. 84-58, 1984-2 C.B. 501.¹ Essentially, it provides that unless a taxpayer expressly designates a remittance as a deposit, the remittance shall be treated as a payment. In this case, the taxpayer expressly labeled the advance remittance as a payment under Rev. Proc. 84-58.

Revenue rulings are authoritative and binding on the Service. See Bankers Life & Cas. Co. v. United States, 142 F.3d 973 (7th Cir. 1998), The Limited, Inc. v. Commissioner, 286 F.3d 324 (6th Cir. 2002), Babin v. Commissioner, 23 F.3d 1032 (6th Cir. 1994). A revenue ruling is an official interpretation by the Service of the Internal Revenue Code, related statutes, tax treaties, and regulations. See CCDM 32.2.2.3.1. It is the conclusion of the Service on how the law applies to a specific set of facts. Id. CCDM 31.1.1.2.1 mandates all components of the Service to follow published guidance, including revenue rulings and revenue procedures. Revenue rulings have the force of legal precedent unless unreasonable or inconsistent with the provisions of the Internal Revenue Code. Salomon, Inc. v. United States, 976 F.2d 837, 841 (2d Cir. 1992).

The Service's position in Rev. Rul. 85-67 is not unreasonable or inconsistent with the Internal Revenue Code. The taxpayer's advance payment, although not timely assessed, is not an overpayment because the taxpayer paid only what the taxpayer owed for that taxable year. "An overpayment must appear before refund is authorized.

¹ Although Rev. Proc. 84-58 was superseded by Rev. Proc. 2005-18, 2005-13 I.R.B. 798, Rev. Proc. 2005-18 is effective only for remittances made after March 28, 2005. The remittance in this case was not made after March 28, 2005.

Although the statute of limitations may have barred the assessment and collection of any additional sum, it does not obliterate the right of the United States to retain payments already received when they do not exceed the amount which might have been properly assessed and demanded.” Lewis v. Reynolds, 284 U.S. 281, 283 (1932).

Furthermore, Rev. Rul. 85-67 has never been overruled. Although the holdings in Becker Brothers, Inc., v. United States, 88-1 USTC ¶ 9262, (C.D. Ill. 1988) (unreported order), and Estate of Goetz v. United States, 286 F. Supp. 128 (W.D. Mo. 1968), are contrary to the Service’s position in Rev. Rul. 85-67, they have little precedential value. In Goetz, the district court held that an advance remittance is a deposit when, as of the date of the remittance, the liability had not been assessed. Goetz was decided well before the Service issued Rev. Proc. 84-58 giving taxpayers the option of making a payment in response to a proposed liability. In Becker Brothers the district court relied on Goetz. Moreover, Becker Brothers, though decided after Rev. Rul. 85-67 was issued, fails to discuss or even mention Rev. Rul. 85-67. Finally, in a more recent case, Service National Corporation v. United States, No. Civ.A.92-154, 1994 WL 912143, 1994 U.S. Dist. LEXIS 21026 (D. Del. 3/31/94), the court expressly rejected the taxpayer’s argument that under Becker Brothers and Goetz it was entitled to a refund of employment tax, interest, and penalties.

For the foregoing reasons, a remittance designated by the taxpayer as a payment and made in response to a proposed liability constitutes an advance payment. An advance payment made within the period prescribed for assessment but not timely assessed, does not create an overpayment; accordingly, there is no overpayment to be refunded.

3. Obligation to Notify Taxpayer’s Representative of the Expired Limitations Period

It is the policy of the Office of Chief Counsel that when the statutory notice of deficiency is issued late as to any year raised in a Tax Court petition, and the taxpayer has not raised the expiration of the period of limitations on assessment as an affirmative defense, the field attorney must notify the taxpayer of the expiration of the limitations period. CCDM 35.2.1.1.1: (8). The policy to notify the taxpayer’s representative of an expired period of limitations reflects the attorney’s professional ethics obligations under the Model Rules of Professional Conduct, the Mission of the Service to apply the tax law with integrity and fairness to all, and the Mission of the Office of Chief Counsel to serve the taxpayers fairly and with integrity.

Here, however, the Office of Chief Counsel has no jurisdiction over the case, because it was settled and then transferred to Appeals. The Chief Counsel attorney, therefore, has no obligation to notify the taxpayer’s representative about the expired limitations period. Nevertheless, we recommend that you notify Appeals that, although they have no legal obligation to notify the taxpayer’s representative, we recommend that they do so. Appeals, of course, will make their decision based on their own practices and policies.

CASE DEVELOPMENT, HAZARDS AND OTHER CONSIDERATIONS

This writing may contain privileged information. Any unauthorized disclosure of this writing may undermine our ability to protect the privileged information. If disclosure is determined to be necessary, please contact this office for our views.

Please call 202 622-4940 if you have any further questions.