

Office of Chief Counsel
Internal Revenue Service
Memorandum

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date: January 16, 2007

to: David P. Alito
Director of Collections
(Small Business/Self-Employed)

from: Sara M. Coe
Deputy Division Counsel
(Small Business/Self-Employed)

subject:

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

ISSUES

(1) Whether _____ made an informal refund claim prior to the filing of the Form 843, Claim for Refund, dated _____, seeking a refund of the trust fund recovery penalties collected from him pursuant to I.R.C. § 6672 as a “responsible officer” of _____.

(2) Whether _____ is due any additional refund of sums paid by him as a “responsible officer” of _____ as a result of any informal refund claims.

CONCLUSIONS

(1) By letter dated _____, _____, through his representative _____, informed the Internal Revenue Service (“IRS”) that he was not liable for the trust fund recovery penalty assessed against him for which the IRS had previously

levied. This letter constitutes an informal refund claim and was received by the IRS on

(2) Any payments to the IRS made by _____ as a “responsible officer” of _____ after _____ should be refunded.

FACTS

On _____, the IRS assessed against _____ as a “responsible officer” of _____ a trust fund recovery penalty pursuant to I.R.C. § 6672 in the amount of \$ _____. This amount was based upon I.R.C. § 6020 returns prepared by the IRS for _____ for the taxable periods _____ and _____. Revenue Officer Frank Barbaro was assigned to _____ collection case. R. O. Barbaro informed this office that these are the only periods for which _____ was assessed an I.R.C. § 6672 civil penalty.

The following payments were collected by the IRS from _____ and applied towards his § 6672 civil penalty liability for the _____ and _____ periods¹:

<u>Date</u>	<u>Amount</u>	<u>Source</u>
\$ _____	overpayment applied from _____	year _____
\$ _____	overpayment applied from _____	year _____
\$ _____	overpayment applied from _____	year _____
\$ _____	levy ²	
\$ _____	levy from _____	
\$ _____	overpayment applied from _____	year _____
\$ _____	overpayment applied from _____	year _____

_____ appointed attorney _____ to represent him before the IRS. Our office has been provided with copies of letters sent by _____ to the IRS in this representative capacity. The letters are dated _____, _____, _____, and _____. The earlier of these letters each state that _____ and the board members were in disagreement with the amount of _____

¹ A current TAXMODA transcript of _____ year reflects multiple entries involving the sum of \$ _____. We have been informed that this involved a levy which the IRS did not actually receive but for which the IRS issued two separate refund checks. As this matter is being separately addressed by the IRS, it is not discussed herein.

² A current TAXMODA transcript reflects an _____ payment of \$ _____. This office believes this amount may be a combination of the \$ _____ levy from _____ and the \$ _____ levy from _____ referenced in _____ letter to R.O. Barbaro, but we lack sufficient evidence to make a conclusive determination.

employment tax determined to be due by the IRS in that the IRS used estimated amounts and since [redacted] was operating with a reduced staff during the relevant time periods the actual liability should be reduced. None of the earlier letters raise the issue of whether the IRS had improperly determined that [redacted] was a "responsible officer". The [redacted] letter to the IRS reiterates the concerns that the IRS's computation of [redacted] liability, upon which the civil penalties were based, is inaccurate. The [redacted] letter references levies against [redacted] and further notes an intent to make a refund request. The [redacted] letter to the IRS raises for the first time the argument that [redacted] (and the other board members) are not properly liable for the civil penalty as they were voluntary directors of a not-for-profit with no knowledge, or responsibility, for the day to day operations of [redacted]. This letter was received by the IRS on [redacted].

On [redacted], [redacted] contacted the Taxpayer Advocates office. On [redacted], the Taxpayer Advocate's office requested that [redacted] complete a Form 843 so that his claim for refund could be considered. By letter dated [redacted], the Taxpayer Advocate's office again requested that [redacted] complete a Form 843 so that his claim for refund could be considered. On [redacted], the Taxpayer Advocate's office again requested that [redacted] complete a Form 843. On [redacted], the IRS received a completed Form 843 from [redacted] for each of the years [redacted], [redacted], [redacted], and [redacted]. It is this office's understanding that the only I.R.C. § 6672 civil penalties assessed against [redacted] were for the [redacted] year. Based upon the Form 843 and affidavits supplied by [redacted], the IRS determined that [redacted] was not a "responsible officer" and abated the full amount of the I.R.C. § 6672 penalty of \$ [redacted]. Due to a determination that some of the payments made by [redacted] were barred by the period of limitations, [redacted] was not refunded all of the payments he made towards the penalty. On [redacted], the IRS issued to [redacted] a refund check in the amount of \$ [redacted]. On [redacted],

the IRS issued a refund check to [redacted] in the amount of \$ [redacted].

This office has been requested to opine on whether any of the letters received by the IRS on [redacted] behalf constitute an informal claim for refund which would affect the relevant period of limitations.

LAW AND ANALYSIS

I.R.C. § 6402 grants the IRS the authority to make refunds of overpayments, within the applicable period of limitations.

Under Treas. Reg. sec. 301.6402-2 and sec. 301.6402-3, a proper formal refund claim must satisfy specific requirements. The general elements necessary for a formal claim are: (1) it must be in writing submitted to the service center where tax was paid; (2) it must set forth in detail each ground upon which the credit or refund is claimed and facts sufficient to apprise the IRS of the basis of the claim; (3) the grounds and facts must be

verified by written declaration made under penalty of perjury; (4) except with respect to income tax and certain other taxes, it must be on a Form 843; and (5) a separate claim must be made for each type of tax and each taxable year. See summary discussion in FSA 200211006 and Jackson v. Commissioner, T.C. Memo. 2002-44.

Informal claims have long been held to toll the limitation period for a claim for refund. As summarized by the Tax Court, an informal written refund claim will toll the period if: (1) the writing is delivered to the IRS before the expiration of the applicable period of limitations; (2) the writing in conjunction with its surrounding circumstances adequately notifies the Service that the taxpayer is claiming a refund and the basis therefor; and (3) either the IRS waives the defect by considering the refund claim on its merits or the taxpayer subsequently perfects the informal refund claim by filing a formal refund claim before the IRS rejects the informal refund claim. Jackson v. Commissioner, T.C. Memo. 2002-44.

In a frequently cited case, the U.S. Supreme Court has stated, "This Court, applying the statute and regulations, has often held that a notice fairly advising the commissioner of the nature of the taxpayer's claim, which the Commissioner could reject because too general or because it does not comply with formal requirements of the statute and regulations, will nevertheless be treated as a claim, where formal defects and lack of specificity have been remedied by amendment filed after the lapse of the statutory period". U.S. v. Kale, 314 U.S. 186 (1941), at 194.

By letter dated _____, _____, through his representative _____,

informed the Internal Revenue Service ("IRS") that he was not liable for the trust fund recovery penalty assessed against him for which the IRS had previously levied. This letter, in conjunction with the surrounding circumstances, is sufficient to constitute an informal refund claim for the I.R.C. § 6672 civil penalties collected from _____. The _____ letter was received by the IRS on _____. _____ perfected his claim with the subsequent filing of the Form 843.

I.R.C. § 6511(a) requires that claims for a trust fund recovery penalty be filed within two years of payment. See Kuznitsky v. United States, 17 F.3d 1029, 1032 (7th Cir. 1994). Since the relevant period of limitations is two years and the informal refund claim was received by the IRS on _____, any payments received by the IRS from _____ after _____ should be refunded.

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