From:
Sent: Tuesday, July 08, 2008 6:24:33 PM
To:
Cc:
Subject: Interest netting for unresolved periods - informal

Your questions as I understand them are as follows.

1. What should the Service do when it receives a request for interest netting under IRC section 6621(d) and one or more of the identified periods is still under examination (unresolved periods)? More specifically, is there any such creature as a protective interest netting claim?

2. If the Service has accepted requests for netting under section 6621(d) that include unresolved periods, should the claims be denied?

Answers

1. In my opinion, it is not appropriate for taxpayers to claim the benefits of interest netting for unresolved periods. Interest netting is available under section 6621(d) only to the extent that, for any period, interest is payable under subchapter A and allowable under subchapter B on equivalent underpayments and overpayments by the same taxpayer. This presumes there exists both overpayment and underpayment interest for overlapping periods, which itself presumes that there is an overpayment and an underpayment upon which the interest could be computed. If a period is still under examination, there is no final "principal" upon which interest can be computed so the statutory requirements cannot be met. [fn 1]

Even if it is "clear" that an overpayment or underpayment will ultimately occur, and that it is only the "final" amount of underpayment or overpayment as of yet unresolved, I think the request for netting is premature and should be disallowed to the extent unresolved. The request for netting may be partially allowed to the extent of the resolved available periods of overlap.

Requests for netting (just like claims for refund) are subject to periods of limitation for a reason. The purpose of a period of limitation is to avoid stale claims and to ensure that the necessary information is available to be considered. It is well established that for interest netting to apply the periods of limitation for both overlapping periods must be open. See, Rev. Proc. 2000-26, 2000-1 C.B. 1257 and Computervision Corp. v. United States, 467 F.3d 1322 (Fed Cir. 2006), cert. denied, 127 S.Ct. 2033 (Apr.16, 2007).

A protective claim is a creature of administrative convenience and is not statutorily provided. In the absence of published guidance authorizing and specifying how a taxpayer may make a protective netting claim, they should not be accepted.

2. Of primary concern is that all similarly situated taxpayers all be treated the same. Thus, it is important to establish a Service wide initiative to ensure that any pending protective netting claims are consistently resolved. Since in my opinion, there is no legal authority for accepting a protective netting request, it is appropriate to deny the request to the extent that it involves unresolved periods.

Feel free to call if you have any questions.

_____
[fn 1] There are reasons, too numerous to mention, why overpayment interest and underpayment interest may not be appropriate even after a particular tax year is finally resolved. Also, at what point in an exam is "close enough" to resolution to be able to "file" a request for netting? From an historical perspective, while the Service tries to accommodate taxpayers as much as legally permissible, we cannot do so to the extent that the accommodation adversely affects administering the tax laws. Two examples where the Service has limited its accommodations to taxpayers for the benefit of efficient tax administration include the Service's application of section 6601(f), which permits the Service in its discretion to apply an overpayment to satisfy an underpayment, thereby affecting the computation of interest on these amounts; and by not allowing taxpayers to "dump" money on the government to suspend the accruing of interest on potential deficiencies unless the relevant revenue procedures are followed. On balance, these restrictions are appropriate under the circumstances.