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From:

Sent: Thursday, July 17, 2008 11:12 AM

To:

Cc:

Subject: General Info on Claims

It was nice speaking with you all this morning, and I am glad we are all on the same page. secretary is going e-mail him and request a telephone conference Monday afternoon (his morning schedule conflicts with mine). I will e-mail you the exact time once I hear back from the . In the meantime, below is a general overview of protective claims. , per your request citations to the regulatory are included at the end.

Protective claims are filed to preserve the taxpayer's right to claim a refund when the taxpayer's right to the refund is contingent on future events and may not be determinable until after the statute of limitations expires. The Internal Revenue Manual (IRM) indicates that a protective claim is based on an expected change in the tax law, other legislation, regulations, or case law. See IRM 21.5.9.3.7.4, Protective Claims. The concept of a "protective claim" is well established by the case law even though this term is not used in the statute or regulations. A claim should not be viewed as a valid protective claim for IRS processing purposes merely because the taxpayer labels it as such. Pursuant to Treas. Reg. 301.6402-2, a valid protective claim need not state a particular dollar amount or demand an immediate refund; however, the claim must identify and describe the contingencies affecting the claim, must be sufficiently clear and definite to alert the Service as to the essential nature of the claim, and must identify a specific year or years for which a refund is sought. The requirement that the claim state grounds and provide supporting facts is interpreted liberally by the Service. So long as the claim is sufficiently clear and definite apprise us of the essential nature of the claim, it will be accepted as having met the requirement.

The Service has discretion in deciding how to process protective claims. In general, it is in the interests of the Service and taxpayers to delay action on protective claims until the pending litigation or other contingency is resolved. Once the contingency is resolved, the Service may obtain additional information necessary in processing the claim and then allow or disallow the claim.

There is no shortage of cases in this area, both those invalidating and those sustaining the claims. Case law distinguishes between "general" and "specific" refund claims. General claims assert that an overpayment has occurred, but lack supporting facts or

reasons. See United States v. Andrews, 302 U.S. 517, 524 (1938), United States v. Memphis Cotton Oil Co., 288 U.S. 62, 64-65, 70 (1933). “Specific” claims, by contrast, identify the particular transactions or factual circumstances underlying the refund request. See United States v. Andrews, 302 U.S. at 524-25.

A “general” claim may be amended following the running of the statute of limitations to supply the missing information that caused the claim to be classified as general. See, e.g., United States v. Memphis Cotton Oil Co., 288 U.S. at 71. Assume a taxpayer files a timely general refund claim but the Service takes no action on that filing. If the taxpayer files a second claim correcting the defects in the first, the two claims are treated as one. The Supreme Court phrased this rule as follows in Memphis Cotton Oil:

[The Commissioner] may disallow the [original] claim promptly [for its excessive generality]. If, however, he holds it without action until the form has been corrected, and still more clearly if he hears it, and hears it on the merits, what is before him is not a double claim, but a claim single and indivisible, the new indissolubly welded into the structure of the old.
Id.

Two considerations are relevant in determining whether the supplemental claim is considered an amendment to the original claim, rather than an untimely new claim. First, the supplemental claim will not be considered an amendment to the original claim if it would require the investigation of new matters that would not have been disclosed by the investigation of the original claim. Such a supplemental claim is a new claim, rather than an amendment to the existing timely claim. Second, the supplemental claim will not generally be considered an amendment if the Service took final action on the original claim by rejecting the original claim or allowing it in whole or in part. If these two requirements are satisfied, there is no specific time period within which the supplemental claim must be filed.

Information that either clarifies matters already within the Service's knowledge or provides information that the Service would have naturally ascertained in the course of its investigation does not constitute new matters and a taxpayer may amend the original claim after the statute of limitations on refund claims has expired by providing such information. Where a late-filed amended claim relies upon the same facts as a timely claim, the amendment may constitute an acceptable clarification of the original. True Bros., Inc. v. United States, 93 F. Supp. 107, 110-11 (D.Mass. 1950) (held, untimely claim seeking carry-over adjustments based on same facts asserted in timely claim was permissible amendment). Similarly, if the Service already knew of the matters asserted in an amended claim because it had actually investigated the original timely claim, the amendment could be a permissible clarification of the original. Addressograph-Multigraph Corp. v. United States, 112 Ct.Cl. 201, 78 F.Supp. 111, 122-23 (1948)

However, the claim cannot be amended after the statute of limitations expires if the amendment would require the investigation of new matters that would not have been disclosed by the investigation of the original claim. United States v. Andrews, 302 U.S.

517, 524-526 (1938); Pink v. United States, 105 F.2d 183 (2d Cir.1939). For example, in Honeywell Inc. v. United States, 973 F.2d 638 (8th Cir. 1992), the court held that a taxpayer could not amend a refund claim that was based on a credit for hiring welfare recipients because the amendment involved a new factual basis, namely, the hiring of 622 employees not involved in the original claim. Other cases have held that the original claim cannot be amended if the amendment involves a substantial change in the legal grounds for the claim. In Mesta v. United States, 137 F.2d 426 (3d. Cir. 1943), the original claim was based on the taxpayer's position that certain income was nontaxable. The amendment asserted a different legal ground, namely, that the income, if taxable, was overstated.

As to the second requirement, numerous cases have held that a supplemental claim filed after the expiration of the statute of limitations is not timely if the Service had previously taken final action on the original claim. Such final action generally occurs when the Service denies or allows the claim. In either case, the supplemental claim is untimely because once the Service has taken final action on the original claim, there is no longer any claim left to amend. Edwards v. Malley, 109 F.2d 640 (1st Cir. 1940); Mondshein v. United States, 338 F.Supp. 786 (E.D.N.Y. 1971), aff'd. 469 F.2d 1394 (2d Cir. 1973); New York Trust Co. v. United States, 87 F.2d 889 (2d Cir. 1937); Tobin v. Tomlinson, 310 F.2d 648 (5th Cir. 1962); and Young v. United States, 203 F.2d 686 (8th Cir. 1953).

Once the Service disallows a claim, the taxpayer generally has no right to amend the claim. However, the taxpayer may file a lawsuit to recover the overpayment and at trial the taxpayer may, depending on the circumstances, be allowed to introduce evidence to show a larger overpayment than that stated in the original claim. Pink v. United States, supra; Red River Lumber Co. v. United States, 139 F. Supp. 148 (Ct. Cl. 1956).

Section 6402 provides that the Secretary (within the applicable period of limitations), may credit the amount of an overpayment of tax, including interest, against any internal revenue tax liability of the person who made the overpayment and shall refund the balance to the person.

Section 6511(b)(1) provides that no refund may be allowed or made after the expiration of the period of limitation for filing a claim for refund unless a claim for refund is filed by the taxpayer within such period. In general, the period of limitation under Section 6511(a) for filing a refund claim is three years from the time the return was filed or two years from the time the tax was paid, whichever is later.

Section 7422(a) prohibits any suit or proceeding in any court for a refund of taxes unless a claim for refund has been filed with the Secretary in the manner prescribed in regulations established by the Secretary.

Section 301.6402-2 of the Procedure and Administration Regulations identifies the following general requirements that must be satisfied for the filing of a proper refund claim: (1) with minor exceptions, the claim must be filed with the service center where

the tax was paid (Reg. § 301.6402-2(a)(2)); (2) the claim must set forth in detail each ground upon which a credit or refund is claimed and facts sufficient to apprise the Commissioner of the exact basis thereof (Reg. § 301.6402-2(b)(1)); (3) the statement of the grounds and the facts must be verified by a written declaration made under the penalties of perjury ([Treas. Reg. § 301.6402-2\(b\)\(1\)](#)); (4) except as provided with respect to income tax and certain other taxes, the claim is to be made on a Form 843 (Reg. § 301.6402-2(c)); and (5) in the case of income, gift and Federal unemployment taxes, a separate claim is to be made for each type of tax for each taxable year or period (Reg. [*9] § 301.6402-2(d)).

Section 301.6402-2(b)(1) of the Procedure and Administration Regulations further provides that no refund or credit will be allowed after the expiration of the statutory period of limitations applicable to the filing of a claim therefore except upon one or more of the grounds set forth in a claim filed before the expiration of such period.

Section 301.6402-3(a)(1) of the Procedure and Administration Regulations provides, in general, in the case of an overpayment of income taxes, a claim for credit or refund of such overpayment shall be made on the appropriate form (here Form 1120X).