

**Office of Chief Counsel
Internal Revenue Service
Memorandum**

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date: January 8, 2010

to:

Associate Area Counsel ()
(Small Business/Self-Employed)

from:

Chief, Branch 4
(Procedure & Administration)

subject:

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

ISSUES

1. Whether the Service can make a refund check payable directly to taxpayer's counsel instead of to the taxpayer.
2. Whether there is protocol for identifying the payee on the refund check when the subject tax year involves a jointly filed return, and the husband and wife are now divorced.
3. Whether there is protocol for identifying the payee on the refund check when the subject tax year involves a jointly filed return, and one of the spouses is now deceased.
4. Whether there is protocol for identifying the payee on the refund check when the subject tax year involves a jointly filed return, and both spouses are now deceased.
5. Whether there is protocol for identifying the payee on the refund check when the subject tax year involves an individually filed return, and the taxpayer is now deceased.

CONCLUSIONS

1. The Service may not make a refund check payable directly to taxpayer's counsel instead of to the taxpayer.
2. The Service should make the refund payable to the spouses whose names appear on the return.
3. The Service should make the refund payable to the spouses whose names appear on the return, since the surviving spouse and/or the duly appointed executor or administrator may negotiate the refund check.
4. The Service should make the refund payable to the spouses whose names appear on the return, since the duly appointed executor or administrator may negotiate a decedent's check. Where there is not a duly appointed executor or administrator, the Service should obtain a Form 1310 from the taxpayer's counsel of record.
5. The Service should make the refund payable to the taxpayer who filed the return, since the duly appointed executor or administrator may negotiate the decedent's check. Where there is not a duly appointed executor or administrator, the Service should obtain a Form 1310 from the taxpayer's counsel of record.

FACTS

Pursuant to the litigation, the Service will be required to recompute tax liabilities for over . This recomputation will result in reduced tax liabilities for these taxpayers. To the extent the taxpayers paid the tax liabilities previously determined and filed protective refund claims, the recomputations will generate significant refunds, including interest.

LAW AND ANALYSIS

I.R.C. § 6402(a) 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."

The regulations under section 6402 provide, in part, that checks in payment of claims allowed will be drawn in the names of the persons entitled to the money. Treas. Reg. § 301.6402-2(f)(1). The regulations implement the clear statutory rule that a tax refund should be issued to the person or persons who overpaid the tax.

Spouses filing a joint return under section 6013(a) have separate interests in any overpayment, the interest attributable to each depending on the amount he or she contributed to the overpaid tax. Rosen v. United States, 397 F.Supp. 342, 343 (E.D. Pa. 1975); Gens v. United States, 230 Ct. Cl. 42 (1982). The Service has set out, in a series of revenue rulings, the "separate tax formula" for making this apportionment. See

Rev. Rul. 80-7, 1980-1 C.B. 296; Rev. Rul. 85-70, 1985-1 C.B. 361; and Rev. Rul. 87-52, 1987-1 C.B. 347. Under the separate tax formula, a spouse's separate interest in an overpayment is determined by subtracting that spouse's contribution toward the payment of the joint tax liability.

Although spouses filing a joint return have separate interests in any overpayment, the Service does not determine the separate interests of the spouses in an overpayment before crediting or refunding the overpayment, due to the volume of joint returns received by the Service and the complexity in determining a spouse's separate interest in the overpayment. See IRM 21.4.1.4.9.2(1). As a practical matter, the Service cannot determine the separate interests of the spouses based solely on the information provided on the return. Thus, when the Service refunds an overpayment shown on a joint return, it typically issues the refund in the names of both spouses, leaving them to divide the proceeds. By requiring the joint payees to endorse the refund check, both parties are put on notice that a refund check was issued. However, a refund check may be issued in only one name if requested by a spouse filing an injured spouse claim, or the taxpayer submits a copy of the divorce decree allocating the refund. See Id. Therefore, the Service should issue refunds in the names of both spouses.

There is no different treatment for a refund when one or both spouses are deceased compared to a refund issued to a deceased single taxpayer. IRM 21.4.1.4.9.4 directs that refund checks are typically issued without taking the death of a taxpayer into account because a duly appointed executor or administrator has the power to endorse a check issued to a decedent and then ensure the proper distribution of the refund to the person or persons entitled to it. Normally, the executor may endorse the check via his or her legal capacity, and present it to a bank with a copy of the court certification of appointment. If the return was filed as married filing jointly, if only one of the spouses is deceased, the surviving spouse must also endorse the check as co-payee. Id.

If the surviving spouse is unable to negotiate the refund check payable to both spouses because the bank refuses to accept the joint refund check where the other spouse is deceased, the surviving spouse can mark "VOID" on the back of the check and return it with a written request for reissuance of the refund check. IRM 21.4.1.4.9.4(2). The reissuance of the check in the surviving spouse's name does not mean that the Service is determining the ownership interest of the deceased spouse and the surviving spouse in the refund. The surviving spouse is instead treated as acting as a fiduciary to the person or persons entitled to the decedent's share of the refund.

IRM 4.10.8.20.4(1) states that when a refund is to be issued to someone other than the now deceased taxpayer in whose name the tax was paid, documentary evidence must be provided to permit refunds to be made. IRM 4.4.3.6 provides procedures to follow when a refund is to be issued to someone other than the taxpayer in whose name the tax was paid. Where the Service is aware that the deceased single taxpayer or the deceased married filing jointly taxpayers estates do not have a duly appointed executor or administrator, the Service should obtain a Form 1310, Statement of Person Claiming

Refund Due a Deceased Taxpayer, from counsel of record for the taxpayer(s) rather than issue a check that is not negotiable.

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Please call (202) 622-3630 if you have any further questions.