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From:

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To:

Cc:

Subject: TAO as an informal claim for refund

I agree with 12/22/10 advice to you, but have now studied the case and wanted to give you some additional analysis and authorities.

1) Whether a document filed by the Taxpayer Advocate Service (TAS) can constitute a taxpayer's claim for refund?

No. Section 6511(b) mandates that no credit or refund shall be made unless a timely claim for credit or refund is filed by the taxpayer. While a claim can be filed by a taxpayer's representative or an agent of the taxpayer, a power of attorney must accompany the claim. See Treas. Reg. § 301.6402-2(e). Even though a TAS employee is often thought of as the voice of the taxpayer when dealing with the IRS, a TAS employee does not have a power of attorney from the taxpayer and does not represent the taxpayer. Therefore, a taxpayer's claim for refund filed by a TAS employee is not a claim filed by the taxpayer within the meaning of section 6511.

2) Even if a document filed by TAS could somehow constitute a taxpayer's claim for refund, would a Taxpayer Assistance Order (TAO) qualify as an informal claim for refund?

No. First, as you know, section 6511(a) mandates that a claim for credit or refund must be filed within 3 years from the date the return was filed or 2 years from the date the tax was paid, whichever is later. The penalties at issue here were paid September 4, 2009. Under the two-year rule of section 6511, a claim for refund must be filed by September 6, 2011 (the 4th is a Sunday and the 5th is Labor Day). The informal claim for refund theory is a theory of last resort developed by the courts; it is used when a taxpayer has failed to file a formal claim and the RSED has expired, and the taxpayer is not always successful arguing that a particular document constitutes a timely informal claim. There is still plenty of time for the taxpayer to file a formal claim for refund; thus, it seems risky to rely solely on an informal claim for refund to protect the taxpayer. That being said, however, we disagree with the notion that the TAO issued by _____ qualifies as an informal claim.

As a general rule, a claim for refund of an overpayment of penalties shall be made on Form 843. Treas. Reg. § 301.6402-2(c). It has long been recognized, however, that a formal claim for refund is not needed; all that is required is a timely informal claim. United

States v. Kales, 314 U.S. 186 (1941). “The touchstone of the informal claim theory is not only whether the I.R.S. was aware of the facts underlying the claim, but also, whether it understood that there was a claim for refund based upon those facts.” Simmons v. United States, 29 Fed. Cl. 136, 141 (1993) (citation omitted). “The basic underlying principle is the necessity that the Commissioner be put on notice by some means that a refund is requested.” Szpunar-Lojasiewicz v. Internal Revenue Service, 876 F.Supp. 465, 469 (W.D. N.Y. 1994). Moreover, a valid claim for refund “must set forth in detail each ground upon which a refund is claimed and facts sufficient to apprise the IRS of the exact basis thereof.” Treas. Reg. § 301.6402-2(b)(1). At the time the TAO was issued in this case, the penalties had not been paid; thus, the TAO does not request a refund, but instead, requests abatement of the penalties. Thus, the IRS did not know that the taxpayer was seeking a refund when it received the TAO.

In addition, a claim “must be verified by a written declaration that it is made under the penalties of perjury.” Treas. Reg. § 301.6402-2(b)(1). The TAO does not contain a penalties of perjury statement, and therefore it cannot be said that the taxpayer intended for the TAO to be a true and accurate claim for refund.

Lastly, in order for an informal claim for refund to succeed, the claim must be amended by a formal claim. The defects of an informal claim for refund can be cured by amendment, and if the IRS never takes any action on the informal claim, the two claims become merged into a single and indivisible claim, “the new indissolubly welded into the structure of the old.” United States v. Memphis Cotton Oil Co., 288 U.S. 62, 71 (1933). Thus, even if one were to view the TAO as an informal claim, the taxpayer would still need to file a formal claim on Form 843 to cure the defects.

Let me know if you have any questions.