

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

Number: **201252015**

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CC:PA:01:

POSTF-122192-12

Third Party Communication: None

Date of Communication: Not Applicable

UICL: 6501.04-11, 6401.00-00

date: September 18, 2012

to:

(Small Business/Self-Employed)

from:

(Procedure & Administration)

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subject: Payment of tax liability prior to expiration of the assessment period of limitations under I.R.C. § 6501.

LEGEND

Year 1 =

Year 2 =

Date 1 =

Date 2 =

Date 3 =

Date 4 =

Date 5 =

Date 6 =

Date 7 =

Date 8 =

Date 9 =

Date 10 =

Date 11 =

Date 12 =

Date 13 =

Amount 1 =

Amount 2 =

Amount 3 =  
 Amount 4 =  
 Amount 5 =  
 Amount 6 =

This Chief Counsel Advice responds to your request for assistance. You provided us with a draft memo in which you addressed four issues related to the taxpayers' claims for refund for tax years 1 and 2. We agree with your conclusions on issues 1, 2, and 3 of that memo. We disagree with your conclusion on issue 4, and provide this advice instead. This advice may not be used or cited as precedent.

ISSUES

1. Whether the Service timely assessed the additional tax shown on taxpayers' amended returns for tax years 1 and 2?
2. If the Service did not timely assess the additional taxes, whether the Service must refund those taxes to the taxpayers?

CONCLUSIONS

1. The Service did not timely assess the additional tax shown on the taxpayers' Year 1 and Year 2 amended returns. Although the taxpayers filed these returns while the applicable I.R.C. § 6501 periods of limitations were open, the actual assessments were not made until after those periods had expired.
2. The Service should not refund the tax and interest paid by the taxpayers prior to the expiration of the assessment periods of limitations for tax years 1 and 2. However, the Service must refund any interest paid by the taxpayers after the assessment period of limitations expired.

FACTS

The taxpayers filed their Year 1 and Year 2 federal income tax returns on Date 1 and Date 2, respectively. The Service later selected these returns for examination. On Date 3, the taxpayers executed a Consent to Extend the Time to Assess Income Tax (Form 872) for the Year 1 taxable year, extending the period for which the Service could assess additional income taxes against the taxpayers for the Year 1 taxable year until Date 4. The taxpayers did not execute a Form 872 for the Year 2 taxable year. In Date 5, the taxpayers sent amended returns to the service center for the Year 1 and Year 2 taxable years. These balance due amended returns reflected additional income and tax as follows:

<u>Taxable Year</u>	<u>Additional Income</u>	<u>Additional Tax</u>
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Year 1	\$Amount 1	\$Amount 3
Year 2	\$Amount 2	\$Amount 4

The Service has not retained copies of these amended returns. The taxpayers have stated that they filed them on Date 6. When they filed their amended returns, the taxpayers paid the additional taxes shown on the returns and some of the interest due for those two years.

The taxpayers' transcripts for Year 1 and Year 2 indicate that the payments were credited to the taxpayers' accounts on Date 7. Although the Service posted these payments, the Service did not process the returns and did not make any assessments with respect to them until Date 8. This delay was partially attributable to the fact that the assigned revenue agent referred the taxpayers to the Service's Criminal Investigation Division ("CI") in Date 5. The CI Division ultimately declined to pursue a case against the taxpayers for the Year 1 and Year 2 taxable years and returned the case to the revenue agent in Date 9. The Service assessed the above amounts (including interest) against the taxpayers on Date 8. Also on Date 8, the Service transferred credits from the taxpayers' Year 3 tax year to satisfy additional interest liabilities in the amounts of \$Amount 5 for tax year 1 and \$Amount 6 for tax year 2.

On Date 10, the taxpayers filed a second set of amended returns for tax years 1 and 2. These amended returns requested refunds for both tax years, in the amounts of the additional taxes paid on Date 6 as well as the offsets made on Date 10. The taxpayers also filed Forms 843 requesting that interest be abated for tax years 1 and 2.

## LAW AND ANALYSIS

### Timeliness of the Assessment

Section 6501(a) provides generally that an assessment must be made within three years after a return was filed. Section 6501(c)(7) provides that if, within the 60 day period ending on the last day for assessing the tax, the Secretary receives an amended return or other written document signed by the taxpayer showing the taxpayer owes an additional amount of tax, the period for the assessment of that additional amount shall not expire before the day 60 days after the day on which the Secretary receives the amended return or other document.

In this case, the taxpayers filed their Year 1 return on Date 1. The three year period of limitations would have expired on Date 2; however, the taxpayers signed a Form 872, which extended the period of limitations to Date 4. The taxpayers then filed an amended return showing additional tax due, which would hold the statute open for an additional 60 days under section 6501(c)(7). Although the Service has not retained a copy of this amended return, the taxpayers have stated it was filed on Date 6. Therefore, the extended period of limitations on assessment would expire no later than Date 12. Because the Service made assessments of tax and interest on Date 8, these assessments were untimely.

For Year 2, the taxpayers filed their return on Date 2. The section 6501(a) period of limitations would have expired on Date 13. Because the taxpayers filed an amended Year 2 return showing additional tax due, this held the statute open for an additional 60 days. Again, the taxpayers state that they filed this amended return on 6. As a result the extended period of limitations expired no later than Date 12. Because the Service made assessments of tax and interest on Date 8, these assessments were untimely.

### Refunds for Tax Years 1 and 2

No refund or credit may be made unless it has first been determined that a taxpayer has made an “overpayment” of tax for the taxable period. See Lewis v. Reynolds, 284 U.S. 281, 283 (1932) (“An overpayment must appear before refund is authorized.”). The term “overpayment” is interpreted to mean any payment in excess of that which is properly due. See Jones v. Liberty Glass, 332 U.S. 524, 531 (1947). Moreover, payments made before the expiration of the period of limitations on assessment are not “statutory overpayments” under section 6401(a). Section 6401(a) provides that “the term “overpayment” includes that part of the amount of the payment of any internal revenue tax which is assessed or collected after the expiration of the period of limitation properly applicable thereto.” Rev. Rul. 85-67, 1985-1 C.B. 364, states that an advance payment which cannot now be assessed of an agreed deficiency plus interest is not an overpayment under section 6401(a), such that the taxpayer is entitled to a refund under 6402(a). This ruling distinguishes Rev. Rul. 74-580, 1974-2 C.B. 400, which states that payments that are made after the expiration of the assessment statute are refundable.

The Service’s position expressed in Rev. Rul. 85-67 is based on the Supreme Court’s decision in Lewis v. Reynolds, which held that the expiration of the period of limitations does not bar the Government from retaining payments already received when they do not exceed the amount which might have been properly assessed and demanded. Further, in Bull v. United States, 295 U.S. 247, 259 (1935) the Supreme Court held that the assessment does not create the liability but merely acts as a judgment for taxes found due.

The Service’s position has been accepted by the Eleventh Circuit Court of Appeals, which is the Circuit where the taxpayers reside. In Williams-Russell & Johnson Inc. v. United States, 371 F.3d 1350 (11th Cir. 2004), the court held that that the Service’s untimely assessment does not create an overpayment when payment was made prior to the expiration of the assessment statute. See also Principal Life Ins. Co. & Subsidiaries v. United States, 95 Fed. Cl. 786 (Fed.Cl. 2010) (holding that a payment attributable to tax liabilities made within the assessment deadline had not been retroactively transformed into overpayment that had to be refunded simply because the Internal Revenue Service did not make a timely assessment); Williams-Russell & Johnson Inc. v. United States, 371 F.3d 1350 (11th Cir. 2004) (holding that the Service’s untimely assessment does not create an overpayment); Ewing v. United States, 914 F.2d 499 (4th Cir. 1990) (holding that the statute requiring assessment to be made within three

years and prohibiting court proceeding without assessment to collect tax after expiration of three years does not forbid the government from collecting and retaining taxes that were voluntarily paid without assessment and that did not constitute overpayment).

In this case, there is no overpayment because the taxpayers did not pay more than what they owed, as shown on their amended returns. Further, the payments they made with their amended returns for Year 1 and Year 2 were not section 6401 statutory overpayments. These payments were credited to the taxpayers' accounts on Date 7. For Year 1, the assessment period of limitations was open on that date under section 6501(c)(7). For Year 2, the assessment period of limitations was open on that date under section 6501(a), because the original return was filed on Date 2, fewer than three years prior to the payment. On the other hand, the amounts of interest paid by credit transfer on Date 8 were in fact collected after the expiration of the assessment statute of limitations, and must be abated and refunded to the taxpayers.

#### CASE DEVELOPMENT, HAZARDS AND OTHER CONSIDERATIONS



The original memorandum drafted also addressed the question whether to issue a notice of deficiency for tax year 2, on the basis that the taxpayers omitted more than 25 percent of their gross income from the return they originally filed on Date 2. The Service would have until Date 14 to issue this notice of deficiency. In our view, this is unnecessary because the taxpayers did not make a statutory overpayment for Year 2, and no refund should be made except for the \$Amount 6 that was credited to the account on date 8.

This writing may contain privileged information. Any unauthorized disclosure of this writing may undermine our ability to protect the privileged information. If disclosure is determined to be necessary, please contact this office for our views.

Please call (202) 622-4910 if you have any further questions.