

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

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to:

Senior Counsel  
(Large Business & International)

from:

Senior Technical Reviewer  
(Procedure & Administration)

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subject: CCA Request, POSTF-124417-12

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

LEGEND

Taxpayer =  
Year 1 =  
Year 3 =  
Year 8 =  
Year 17 =  
Date 1, Year 17 =  
Amount 1 =  
Amount 2 =

ISSUE

Whether Taxpayer's claim for refund of a Year 1 overpayment is timely under IRC section 6511(d)(3)(A) where Taxpayer elected in Year 17 to deduct rather than credit foreign taxes paid or accrued in Year 8, thereby generating an increased net operating loss in Year 8 which Taxpayer carried back to Year 3. The net operating loss carryback

to Year 3 resulted in an increase in excess foreign taxes paid or accrued in Year 3, which Taxpayer sought to carry back and credit against its U.S. tax for Year 1.

## CONCLUSION

Taxpayer's refund claim for Year 1 is not timely under IRC section 6511(d)(3)(A). Because Taxpayer elected to deduct foreign taxes paid or accrued in Year 8, no credit is allowed for such taxes, and thus the special ten-year period of limitations does not apply with respect to foreign taxes paid or accrued in Year 8. Moreover, Taxpayer's refund claim for Year 1 is attributable to a carryback of excess foreign taxes paid or accrued in Year 3, not Year 8. Because the Year 1 refund claim was filed in Year 17, more than 10 years after the due date of the return for Year 3, it was not timely filed under IRC section 6511(d)(3)(A).

## FACTS

On Date 1, Year 17, Taxpayer filed an amended federal income tax return for Year 8, reflecting its election to change previously-claimed foreign tax credits under I.R.C. section 901 to I.R.C. section 164(a)(3) deductions for foreign income taxes totaling Amount 1 that accrued in Year 8. On Date 1, Year 17, Taxpayer also filed an amended federal income tax return for Year 3 to reflect its claimed carryback of the increased net operating loss (NOL) created by its election to deduct rather than to credit foreign taxes that accrued in Year 8. According to Taxpayer, this claimed increase to the NOL carryback from Year 8 to Year 3 released Year 3 foreign tax credits, which Taxpayer then claimed it was entitled to carry back to Year 1. Taxpayer filed a refund claim for Year 1 on Date 1, Year 17, in the amount of Amount 2.

## LAW AND ANALYSIS

### Law

IRC section 901(a) provides that if a taxpayer chooses the benefits of the foreign tax credit, the taxpayer's income tax shall, subject to the limitation of IRC section 904, be credited with the amounts allowed under IRC section 901(b) plus, in the case of a corporation, the taxes deemed to have been paid under IRC sections 902 and 960. Such choice for any taxable year may be made or changed at any time before the expiration of the period prescribed for making a claim for credit or refund of the income tax for such taxable year.

Treasury Regulation section 1.901-1(d) provides that, for a particular year, a taxpayer may claim the benefits of IRC section 901 (or claim a deduction in lieu of a foreign tax credit) at any time before the expiration of the period prescribed by IRC section 6511(d)(3)(A) (or section 6511(c) if the period is extended by agreement).

IRC section 6511(a) provides that a claim for credit or refund of an overpayment of any income tax in respect of which tax the taxpayer is required to file a return shall be filed by the taxpayer within three years from the time the return was filed or two years from the time the tax was paid, whichever of such periods expires the later.

Prior to its amendment in 1997, IRC section 6511(d)(3)(A) provided that if a claim for credit or refund relates to an overpayment attributable to any taxes paid or accrued to any foreign country for which credit is allowed against U.S. income tax in accordance with the provisions of section 901, in lieu of the three-year period of limitations prescribed in IRC section 6511(a), the period of limitations shall be ten years from the date prescribed by law for filing the return for the year “with respect to which the claim is made”. The pre-amendment version of section 6511(d)(3)(A) is applicable to refund claims based on foreign taxes paid or accrued in Year 1 or Year 3 for which credit is allowed against U.S. tax. The post-amendment version of the statute, which would apply to determine the period of limitations for refund claims attributable to foreign taxes paid or accrued in Year 8 for which credit is allowed against U.S. tax, sets the period at “10 years from the date prescribed by law for filing the return for the year in which such taxes were actually paid or accrued.”

Treasury Regulation section 301.6511(d)-3(a) provides that, in the case of an overpayment of income tax resulting from a credit allowed under the provisions of section 901 for taxes paid or accrued to a foreign country or possession of the United States, a claim for credit or refund must be filed by the taxpayer within ten years from the last date prescribed for filing the return (determined without regard to any extensions of time for filing such return) for the taxable year with respect to which the claim is made. Such ten-year period shall be applied in lieu of the three-year period prescribed in IRC section 6511(a).

### Analysis

You have asked if Taxpayer’s refund claim is timely under IRC section 6511(d)(3)(A), which provides a special ten-year period of limitations for refund claims in certain circumstances.

Section 6511(d)(3)(A) was amended in 1997, effective for foreign taxes paid or accrued in tax years beginning after August 5, 1997, to clarify that the limitations period for claims attributable to foreign tax credits begins with the year in which the foreign taxes are paid or accrued, and not the year to which excess foreign taxes are carried under section 904(c) and claimed as a credit. Because the refund claim at issue is attributable to a carryback of excess foreign taxes paid or accrued in Year 3, and such foreign taxes were paid or accrued before the effective date of the 1997 amendment, the pre-amendment version of section 6511(d)(3)(A) applies to this case.

The applicable version of that section provides:

(3) SPECIAL RULES RELATING TO FOREIGN TAX CREDIT.--

(A) SPECIAL PERIOD OF LIMITATION WITH RESPECT TO FOREIGN TAXES PAID OR ACCRUED.-- If the claim for credit or refund relates to an overpayment attributable to any taxes paid or accrued to any foreign country or to any possession of the United States for which credit is allowed against the tax imposed by subtitle A in accordance with the provisions of section 901 or the provisions of any treaty to which the United States is a party, in lieu of the 3-year period of limitation prescribed in subsection (a), the period shall be 10 years from the date prescribed by law for filing the return for the year with respect to which the claim is made.

IRC section 6511(d)(3)(A).

Taxpayer's refund claim for Year 1 was filed on Date 1, Year 17, which is more than 10 years after the due date of the returns for Year 1 and Year 3.<sup>1</sup> Accordingly, it was not timely filed under the pre-amendment version of IRC section 6511(d)(3)(A).<sup>2</sup> Taxpayer argues, however, that its Year 1 refund claim is timely under IRC section 6511(d)(3)(A) because it is "attributable to" creditable foreign taxes paid or accrued in Year 8. This argument fails for two reasons. First, section 6511(d)(3)(A) does not apply to refund claims based on *deductions* for creditable foreign taxes paid or accrued. Second, Taxpayer's Year 1 refund claim is "attributable to" foreign taxes paid or accrued in Year 3, not Year 8.

Pursuant to the plain language of IRC section 6511(d)(3)(A), the special ten-year period of limitations only applies if the claim for refund or credit relates to an overpayment attributable to any taxes paid or accrued for which credit is *allowed* against U.S. income tax under section 901. Because Taxpayer filed an amended return for Year 8 electing to claim a deduction for the foreign taxes paid or accrued in that year, a foreign tax credit for foreign taxes paid or accrued in Year 8 is no longer allowed.

The distinction between an "allowed" credit and an "allowable" credit is an important one. The term "allowable" is defined as "that which may be allowed, legitimate, permissible." Random House Dictionary, Random House, Inc. 2011. The term "allowed," on the other hand, is defined as that which is permitted. *Id.* IRC section

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<sup>1</sup> Because the claim was filed more than ten years after the due date of the returns for each of Year 1 (the carryback year) and Year 3 (the year in which the foreign taxes were paid or accrued), the claim is untimely under both the Court of Claims' interpretation of the pre-amendment version of section 6511(d)(3)(A) in *Ampex v. Commissioner*, 620 F.2d 853 (Ct.Cl. 1980) (holding that "the year with respect to which the claim is made" is the year to which excess credits are carried), and the Service's interpretation, which was adopted by the Tax Court and the Sixth Circuit Court of Appeals in *Chrysler v. Commissioner*, 436 F.3d 644 (6<sup>th</sup> Cir. 2006), *aff'g* T.C. Memo 2000-283 (holding that "the year with respect to which the claim is made" is the year in which the foreign taxes were paid or accrued).

<sup>2</sup> For refund claims attributable to foreign taxes paid or accrued in Year 3, the result would be the same under the current, post-amendment version of section 6511(d)(3)(A).

164(a)(3) provides that a deduction is allowed for the taxable year within which foreign income, war profits, and excess profits taxes are paid or accrued. However, IRC section 275(a)(4), Treasury Regulation section 1.164-2(d), and Treasury Regulation section 1.901-1(c) provide that no deduction is allowed for income, war profits, and excess profits taxes imposed by the authority of any foreign country or possession of the United States, if the taxpayer chooses to take to any extent the benefits of IRC section 901, relating to the credit for taxes of foreign countries and U.S. possessions. Conversely, Treasury Regulation section 1.901-1(h) denies the credit under IRC section 901 to any taxpayer who, for a particular taxable year, elects to deduct taxes paid or accrued to any foreign country or U.S. possession.

Under IRC section 275(a)(4) and the regulations under IRC sections 164 and 901, a deduction for foreign taxes paid or accrued is allowable unless and until the foreign tax credit has been claimed with respect to such taxes. Once a credit is taken, such deduction is not allowed. Similarly, a foreign tax credit is allowable for such taxes unless and until a deduction has been claimed with respect to such taxable year, at which point the credit is not allowed.

This interpretation is supported by Treasury Regulation section 301.6511(d)-3(a), which specifically states that the special ten-year limitations period applies only to an overpayment of income tax for which a claim for credit or refund is made, where the overpayment results “from a *credit, allowed under the provisions of section 901 ... for taxes paid or accrued to a foreign country or possession of the United States.*” (Emphasis added.) No provision is made under the regulations for an extended statute of limitations where the claim for credit or refund results from a deduction of foreign income taxes. The regulation has the force of law, see Mayo Found. For Med. Educ. & Research v. United States, 131 S. Ct. 704 (2011), and Taxpayer does not challenge its validity or applicability to this case. Therefore, under the plain language of the regulation as well as the statute, the special ten-year period of limitations under IRC section 6511(d)(3)(A) would not apply to Taxpayer’s claim for refund even if the statute were construed to treat the Year 1 refund claim as “attributable to” foreign taxes paid or accrued in Year 8.

In addition, Taxpayer’s Year 1 refund claim also is untimely because the claim is not “attributable to” foreign taxes paid or accrued in Year 8. In order for the claim to be timely under section 6511(d)(3)(A), all of the cascading carrybacks to Year 3 and to Year 1 would have to be deemed to be “attributable to” the Year 8 foreign taxes. But the Year 1 overpayment is in the most direct and logical sense “attributable to” credits for foreign taxes paid or accrued in Year 3, which were carried back and claimed as a credit in Year 1.

The Tax Court has defined “attributable to” to mean “traced directly to.” Herman Bennet Co. v. Comm’r, 65 T.C. 506, 510 (1975) (allowing an otherwise untimely refund for 1963 because a timely 1969 NOL carryback to 1966 released a previously allowed investment credit); see also Braunstein v. Comm’r, 374 U.S. 65, 70 (1963) (defining

“attributable to” as “caused or generated by”). To deem Taxpayer’s Year 1 refund claim “attributable” to Year 8 in this case would require looking through the attribute directly giving rise to the adjustment to an instigating event in another year, meaning that any refund claim would be timely if it could be traced, however remotely, to any attribute in another year that could directly give rise to a refund claim, even if the statute of limitations had expired with respect to the attribute directly claimed on the amended return.

Rather, the section 6511(d)(3)(A) limitations period applicable to Taxpayer’s Year 1 refund claim “attributable” to credits for foreign taxes paid or accrued in Year 3 is measured from the due date of the return for Year 3. Because the refund claim was not filed within ten years of the due date of the Year 3 return, the claim is not timely under section 6511(d)(3)(A).

Finally, we note that section 6511(d)(2)(A) provides the limitations period for a claim for credit or refund that relates to an overpayment attributable to a net operating loss carryback. Taxpayer acknowledges that this provision does not apply here because its Year 1 refund claim is not “attributable to” the NOL carryback from Year 8. We agree with Taxpayer on this point. See also Rev. Rul. 71-533, 1971-2 C.B. 413 (ruling that section 6511(d)(3), not section 6511(d)(2)(A), was the applicable refund statute where an NOL carryback freed up foreign taxes paid which the taxpayer carried back to another year and claimed a foreign tax credit).

Please call \_\_\_\_\_ if you have any further questions.