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From: [REDACTED]

Sent: Tuesday, November 12, 2013 11:09:46 AM

To: [REDACTED]

Cc: [REDACTED]

Bcc:

Subject:

This responds to your OVDI-related inquiry of September 25, 2013.

As we understand the facts, the taxpayer entered into the OVDI for tax years [REDACTED] through [REDACTED]. As part of the OVDI process, taxpayer filed an amended [REDACTED] return reporting previously unreported income. The amended [REDACTED] return was received by the Service on [REDACTED], and the additional tax was assessed on [REDACTED]. When the taxpayer filed the amended [REDACTED] return, the taxpayer also made a payment of the additional tax reported as owed on the amended return. The payment was made on [REDACTED]. The ASED expired on the [REDACTED] tax year on [REDACTED]. The return was not sent to Exam until September [REDACTED]. At no time has taxpayer made a claim for refund of the [REDACTED] overpayment. Upon exam, it has been determined that the taxpayer over-reported the additional income and, as a result, overpaid the additional tax due for [REDACTED].

Exam wants to know whether the amount of the overpaid [REDACTED] taxes may be credited to the taxpayer's penalty balance in a different tax year.

Quite simply, the answer is no. The assessment on [REDACTED] was an invalid assessment and could have been abated pursuant to § 6404(a)(2) (stating that the Service may abate any portion of an assessment that "is assessed after the expiration of the period of limitations"). The assessment is invalid because the original return had an assessment date of [REDACTED], and an amended return does not revive the period of limitation on assessment or refund, Rev. Rul. 72-311; therefore, the assessment in question was made after the ASED expired on [REDACTED]. Moreover, the Service took no steps to extend the statutory assessment period by consent or waiver for tax year [REDACTED] when it permitted the taxpayer to participate in the OVDI. Additionally, we have no information that leads us to believe the statute of limitations on assessment would otherwise be open under other exceptions to the general three-year period, e.g., section 6501(e)(1). According to Rev. Rul. 74-580, the Service may refund any payment made pursuant to an assessment that was made after the ASED expired. However, the taxpayer must also make a timely claim for refund in accordance with § 6511 to receive a refund. In this case, the ASED had expired both when the payment was remitted and at the time of the invalid assessment so, the assessment could have been abated

and the taxpayer had two years from the date of payment to claim a refund pursuant to § 6402. Neither of those happened.

The general assessment statute of limitations of I.R.C. § 6501(a) is three years from the date of the filing of the return. The purpose of an assessment, however, is only to place the taxes owed on the books of the Government. Hibbs v. Winn, 542 U.S. 88, 100 (2004). See also Lewis v. Reynolds, 284 U.S. 281, 283 (1932) (“Although the statute of limitations may have barred the assessment and collection of any additional sum, it does not obliterate the right of the United States to retain payments already received when they do not exceed the amount which might have been properly assessed and demanded.”).

Even to the extent that the payment could be a statutory overpayment, it cannot be automatically refunded to the taxpayer if the ASED has expired, because it is subject to the period of limitations on refund claims found in I.R.C. § 6511(a). See Rev. Rul. 74-580 (stating that an overpayment under section 6401(a) “should be refunded under section 6402(a) if the taxpayer has filed a timely claim for refund in accordance with section 6511(a)”); see also Williams-Russell & Johnson v. United States, 371 F.3d 1350, 1353 & n.2 (11th Cir. 2004) (finding it unnecessary to address the taxpayer’s assertion that the I.R.C. § 6511(a) limitation period does not run from the date of payment when there is a § 6401(a) statutory overpayment, but also indicating that such an argument has “little merit.”). Section 6511(a) requires that a claim for refund be filed within three years from the time the return was filed, or two years from the time the tax was paid, whichever is later. In addition, the amount of a refund is limited by § 6511(b), which provides either: (1) a three-year look-back period in cases in which the claim was filed within three years of the return or (2) a two-year look-back period in cases in which the claim was filed within two years of payment.

Filing an amended return does not extend the three-year I.R.C. § 6511(a) period of limitations on a refund claim. Zellerbach Paper Co. v. United States, 293 U.S. 172 (1934); Rev. Rul. 72-311, 1972-1 C.B. 398. Therefore, even if the taxpayer had a statutory overpayment for tax year _____, any refund would have to have been claimed by the taxpayer within the two-year period following the payment made on _____. As the taxpayer did not file a claim on or before _____, any refund claim now filed would be untimely, and the refund cannot be made. As a refund may not be made due to the expiration of the period of limitations under section 6511, the Service may not credit the _____ overpayment to a different year’s penalty balance.

Regards,