

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

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date: January 07, 2014

to: Associate Area Counsel (Salt Lake City)
(Small Business/Self-Employed)
Attn: Mark Howard

from: Bridget Tombul
Senior Technician Reviewer
(Procedure & Administration)

subject: Your request for advice dated November 15, 2013

Issue

You asked us whether the Service Center should process an amended Form 1120S after the period of limitation on assessment against the S corporation or the period of limitation for filing a claim for refund by the S corporation had expired if the amended return reported no change to the tax reported.

Conclusion

Procedure & Administration is not opining, as this is a business decision to be made by the Service on a case-by-case basis.

Facts

The taxpayer is an S corporation that filed its return (Form 1120S) with the Service Campus. After the ASED and RSEDs had expired under sections 6501 and 6511, respectively, the S Corporation filed an amended return reporting no change in tax. The only apparent reason that the amended return was filed was to adjust certain flow-through items that would affect the individual shareholder's return. The amended Form 1120S was submitted by an individual shareholder to support a timely filed claim for refund by the individual as a result of the reduction in flow-through income or increase in flow-through tax credits.

You informed us that the Service disallowed the Form 1040X filed by the shareholder due to the fact that the amended Form 1120S was not filed within the ASED or RSED. We do not know whether the Service has sent the shareholder a formal notice of claim disallowance, but the 6-month period since the shareholder filed the Form 1040X has passed. Accordingly, the shareholder could now file a refund suit in district court or the Court of Claims. See I.R.C. § 6532(a)(1).

Discussion

Your November 15, 2013 memo correctly identifies that the periods of limitation for filing an individual and S corporation return are separate under Bufferd v. Commissioner, 506 U.S. 523 (1993). Under Bufferd, the period for limitation under section 6501 (and by implication, section 6511) on the individual shareholder of an S corporation is not controlled by when the S corporation files its Form 1120S, but rather, by when the shareholder files his/her Form 1040.

The sole issue, as we see it, is whether the Service should allow or deny the shareholder's claim for refund. It is the taxpayer's burden to prove that he is entitled to an item of credit or deduction. See generally, Welch v. Helvering, 290 U.S. 111 (1933); New Colonial Ice Co. v. Helvering, 292 U.S. 435 (1934). The Service, upon examination of the individual's claim for refund is free to examine whether the underlying flow-through items are correctly reported/claimed by the taxpayer. If the entity has not filed a return that matches up with the amounts claimed by the taxpayer, the Service clearly may disallow the claim based on a lack of substantiation. But note, that should the individual shareholder file a refund suit, the fact that the Service does or does not process the late-filed amended Form 1120S may prove to be wholly irrelevant to the taxpayer/plaintiff being able to substantiate that he is entitled to a refund and prove his claim in court.

We are aware of no authority which requires the Service to process, or prohibits the Service from processing, an amended return of an S Corporation after the expiration of the corporation's ASED or RSED if that amended return makes no change to the taxpayer's tax liability. The Service simply must make the business decision on a case-by-case basis as to whether to process the amended Form 1120S. In this case, the IRS should consider the fact that the late-filed amended Form 1120S will impact the shareholder's claim for refund on a timely filed Form 1040X, which may provide some justification for processing the late 1120S, but again, the IRS is not legally required to process the late 1120S.

If you have any questions regarding this advice, please contact Jamie Hartford at