

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

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to: Associate Area Counsel (Richmond)
(Small Business/Self-Employed)

from: Pamela Wilson Fuller
Senior Technician Reviewer, Branch 2
(Procedure & Administration)

subject: Proper Method for Calculating the Amount Available for Refund under Section 6511(b)(2)

This Chief Counsel Advice responds to your request for assistance dated May 21, 2014. This advice may not be used or cited as precedent.

ISSUES

Whether the amount available for refund under section 6511(b)(2), “the portion of the tax paid within the period,” includes payments allocated to interest and penalties?

CONCLUSIONS

Yes. Sections 6665 and 6601(e)(1) provide that for purposes of the Internal Revenue Code (Title 26 of the U.S. Code), references to “tax” are also deemed to include additions to tax including penalty and interest charges. Therefore, the phrase “tax paid” as used in section 6511(b)(2) includes not only payments of the tax, but also payments of interest and penalty charges associated with that tax. Any payment made with respect to the tax for the period at issue will be an amount paid for purposes of the limitation on refunds under section 6511(b)(2) even if the payment was specifically allocated to a non-contested item of the liability (i.e. tax, penalty, or interest on the module which is not specifically at issue).

LAW AND ANALYSIS

Section 6511(b)(2) of the Code provides that any refund or credit of tax is limited to the amount of the tax which was paid in the preceding two or three years, depending on

whether the two or three year period in section 6511(a) applies. If the taxpayer files a claim within three years of the filing of an original return, the taxpayer may obtain a refund or credit of any overpayment up to the amount of the tax paid in the three years immediately preceding the date of the filing of the claim for refund. Similarly, if a taxpayer files a claim outside of the three-year period, but within two years of a payment, then the taxpayer can recover the amount of any overpayment of tax up to the amount of the tax paid in the two years immediately preceding the filing of the claim for refund. In order to determine the amount of an overpayment subject to refund, the IRS must first determine the amount of “the tax paid” within the applicable look-back period.

The word “tax” as used throughout the Code is typically deemed to include, to the extent relevant, interest and penalty charges relating to the tax. See I.R.C. §§ 6665 and 6601(e)(1). The distinction between payments for tax, additions to tax, penalties, and interest is irrelevant; this is true even if the claim for refund asserts an overpayment based only on one aspect of the liability, such as a specific item of tax or the calculation of interest, or the amount of penalties. See Carroll v. United States, 339 F.3d 61, 76 (2nd Cir. 2003) (holding in part that “[t]here is nothing in the language of section 6511(b)(2)(B) that limits ‘the tax paid’ to the particular penalties disputed in the claim” and that “[t]he ‘tax paid’ therefore refers to the sum of taxes, penalties, and interest paid for the tax year in question.”).

Similarly, the IRS is not generally permitted to use the ordering or application of specific payments and claims with respect to the specific tax and period in order to limit a refund. See Allstate v. United States, 550 F.2d 629 (Ct. Cl. 1977). In Allstate, the court treated all payments as payments of “tax” for purposes of section 6511(b)(2) lumping together payments made specifically for tax, interest, and penalties. The court effectively held that it did not matter if the payments falling within the look-back period were specifically paid for the disputed liability (i.e. the item of tax or penalty or interest at issue), as long as it was a payment made with respect to the taxable period at issue. The courts in Carroll and Allstate seem to treat overpayments as fungible and disregard any connection between specific payments and specific calculations, and instead look to see if the account for the taxable period is overpaid, and if so, how much of the overpayment came about as a result of payments made during the look-back period.

Therefore, in calculating the limitation on credit or refund established in section 6511(b)(2) the IRS must take into account all payments, of whatever kind, which are applied to the liability for the tax for the specific taxable period at issue, including payments applied to tax, interest, and penalties. This is true regardless of whether the specific overpayment claimed relates exclusively to a specific item of tax, interest, or penalty.

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