

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

Number: **201540010**

Release Date: 10/2/2015

CC:PA:01:JRBlack

POSTU-121966-14

UILC: 6511.00-00, 6511.03-00, 6511.03-02, 6511.03-03

date: June 19, 2015

to: Shirley Mao
Attorney
(Large Business & International)

from: Blaise Dusenberry
Senior Technician Reviewer
(Procedure & Administration)

subject: FTC and NOL Attribution

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

LEGEND

Year 1 =
Year 2 =
Year 4 =
Year 8 =
Year 9 =
Year 11 =
Day X =
Day Y =
Day Z =

ISSUES

Taxpayer originally carried all its net operating losses ("NOL") from Year 4 back to Year 1 and elected to take a foreign tax credit ("FTC") for foreign tax paid for Year 1. In December of Year 9, Taxpayer filed an amended return to elect to deduct foreign tax paid for Year 1 in lieu of taking the FTC. The deduction reduced the income tax liability

for Year 1. Taxpayer contends that the reduced Year 1 regular tax liability freed up part of the NOL from year 4 that was originally carried back to Year 1. In December of Year 8, Taxpayer filed an amended return for Year 2 claiming, in part, a refund due to carryback of the Year 4 NOL to Year 2. The Year 1 assessment statute expiration date (“ASED”) is in September of Year 8, the Year 4 ASED is Day Y, Year 9, and the Year 2 ASED is Day X, Year 11. Is Taxpayer’s claim for refund for Year 2 timely?

CONCLUSIONS

Taxpayer’s claim for refund for Year 2 is timely because (1) Taxpayer made the election under I.R.C section 901 to deduct foreign taxes paid for Year 1 within the ten-year period prescribed by section 6511(d)(3)(A), and (2) Taxpayer filed its claim for refund based on NOL carried from Year 4 within the period extended by agreement as prescribed by section 6511(d)(2)(A) and (c).

FACTS

Taxpayer incurred a NOL in Year 4. Taxpayer originally carried all of this NOL from Year 4 back to Year 1, and elected to take a FTC for foreign tax paid for Year 1. In December of Year 9, Taxpayer filed an amended return to elect to deduct foreign tax paid for Year 1 in lieu of taking the FTC.

The deduction reduced the regular tax liability for Year 1, but created an AMT liability for that year because AMT FTC was no longer credited against it. Taxpayer contends that the reduced Year 1 regular tax liability freed up part of the NOL from year 4 that was originally carried back to Year 1, and that AMT FTC in the amount of the Year 1 increased AMT liability became available to offset regular tax in Year 2. Taxpayer will enter into a closing agreement with the Service to pay the Year 1 AMT.

Taxpayer and the IRS executed Forms 872, Consent to Extend the Time to Assess Tax, extending the Year 1 ASED to September of Year 8, the Year 4 ASED to Day Y, Year 9, and the Year 2 ASED to Day X, Year 11.

LAW AND ANALYSIS

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 section 901(b) plus, in the case of a corporation, the taxes deemed to have been paid under 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 Regulations section 1.901-1(d) provides that, for a particular year, a taxpayer may elect to claim the benefits of 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).

Section 6511(a) provides that, in general, 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.

Section 6511(d)(2)(A) provides that when a claim for refund relates to an overpayment attributable to an NOL carryback, in lieu of the three-year period prescribed by section 6511(a), the period ends three years after the time prescribed by law for the filing of the return (including extensions) for the taxable year of the NOL which results in the carryback, or the period prescribed in section 6511(c) in respect of such year, if later.

Section 6511(c) provides that when the period for assessment is held open by agreement, the period within which a taxpayer may file a request for refund shall generally not expire until at least six months after the expiration of the period for assessment.

Section 6511(d)(3)(A) provides that if a claim for credit or refund relates to an overpayment attributable to a tax paid or accrued to a foreign country for which credit is allowed under section 901, in lieu of the three-year period prescribed in section 6511(a), the period is ten years from the date prescribed for the filing of the return for the taxable year in which the foreign tax was actually paid or accrued.

The ten-year period of limitations under section 6511(d)(3)(A) applies only to claims based on foreign tax credits *allowed* under section 901, not deductions of foreign tax for which a credit is *allowable*. A foreign tax credit or a deduction for foreign taxes paid or accrued may each be allowable, but they are also mutually exclusive; the taxpayer is required to choose only one option for a given tax year. This is explicitly outlined in section 275(a)(4) and the regulations under sections 164 and 901. A credit is allowable unless a deduction is taken, and a deduction is allowable unless a credit is taken. However, only one or the other can be allowed in a given year. A credit is only allowed when chosen; conversely, it is not allowed when a deduction is taken in lieu of that credit. See Treas. Reg. § 1.901-1(h). Consequently, because section 6511(d)(3)(A) only provides a ten-year period to file a request for refund of overpayments attributable to foreign taxes for which credit is allowed, it does not provide the ten-year period for overpayments attributable to foreign taxes claimed as a deduction.

Where an overpayment can be traced to multiple causes in the context of a claim for refund, it is "attributable to" the most immediate cause for purposes of determining which period of limitations under section 6511 applies. See Electrolux Holdings, Inc. v. United States, 491 F.3d 1327, 1331-33 (Fed. Cir. 2007) (rejecting a taxpayer's argument that an overpayment was attributable to a capital loss carryback rather than a

carryforward where a capital loss was carried back to a year before the overpayment and then carried forward to the year of the overpayment).

In this case, Taxpayer's election in Year 9 to take the deduction for foreign tax paid rather than the FTC in Year 1 was timely, because it was within the ten-year period provided by section 901(a), Treasury Regulation 1.901-1(d), and section 6511(d)(3).

Taxpayer's claim for refund for Year 2 was timely because it was filed prior to six months after the ASED for Year 4. To be timely under section 6511(d)(2)(A), Taxpayer's claim for refund based on carryback of an NOL to Year 2 must have been filed by the later of three years after the time prescribed by law for filing the return for the loss year, or six months after the ASED for the loss year under 6511(c). Because the loss year was Year 4 and the ASED for Year 4 was Date Y, Year 9, Taxpayer's claim for refund for Year 2 must have been filed by Date Z, Year 9, to be timely. Taxpayer timely filed its claim for refund in December of Year 8.¹

CASE DEVELOPMENT, HAZARDS AND OTHER CONSIDERATIONS

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) 317-6845 if you have any further questions.

¹ This analysis presumes, but does not determine, that the Year 2 claim for refund filed in Year 8 was a valid protective claim although the Taxpayer did not make its election under section 901 until December of Year 9. This analysis does not address whether the section 901 election could be deemed to have been made informally in Year 8 at the time of the request for refund. Please contact Procedure & Administration for assistance if these matters are in question.