

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

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subject: Refund Claim Relating to Foreign Tax Credits

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

LEGEND

Corporation A =  
Corporation B =  
Foreign Country =  
Y1 =  
Y2 =  
Y3 =  
Y4 =  
Y5 =  
Y6 =  
Y8 =  
Y9 =  
Y10 =  
Y12 =  
Y13 =  
Y14 =

Y15	=
\$a	=
\$b	=
\$c	=
\$d	=
\$e	=
Date 1	=
Date 2	=
Date 3	=
Date 4	=
Date 5	=
Date 6	=
Date 7	=
Date 8	=
Date 9	=
Date 10	=
Date 11	=
Date 12	=
Date 13	=

### ISSUES

1. Whether Corporation B's claim for Corporation A for a refund for tax year Y4 relating to foreign tax credits ("FTC") was timely, given that it was filed on Date 12/Y15, more than ten years after the original returns were due?
2. Whether Corporation B made an informal claim for refund for Corporation A when it communicated its intention to file a formal claim in the future?
3. Whether the Service waived the refund claims requirements by considering Corporation B's claim for Corporation A after the expiration of the period of limitation for filing claims?

### CONCLUSIONS

1. Corporation B's claim for Corporation A was not timely. Section 6511(d)(3)(A) provides that claims for refunds relating to FTC must be filed within 10 years from when the return was due (without regard to any extension) for the tax year for which the FTC were claimed. Corporation B's refund claim for Corporation A was filed on Date 12/Y15, approximately three weeks after this period expired.
2. No. An informal claim only exists if the taxpayer asserts a claim. Merely informing the Service of future plans to file a claim does not qualify.
3. No. The waiver doctrine only operates if the Service considers the claim within the period of limitation for filing a claim.

FACTS

Disregarding any extensions of the time to file, Corporation A's tax returns for tax years Y1, Y2, Y3 and Y4 were due on March 15 of the subsequent years. Corporation B purchased Corporation A in Y6.

Corporation A executed extensions of the time to assess tax with the Service for each of these tax years, as shown on the following table:

Tax Year	Extension Expired
Y1	12/31/Y8
Y2	12/31/Y8
Y3	12/31/Y8
Y4	Date 1/Y10

In tax year Y12, Corporation B settled a dispute Corporation A had with Foreign Country's taxing authorities regarding Corporation A's foreign subsidiary. Corporation B submitted Forms 1120X for Corporation A for tax years Y1, Y2 and Y3 to claim additional FTC resulting from the settlement.<sup>1</sup> Corporation A was in an "excess limitation" position and could not claim refunds relating to the additional FTC and instead carried the FTC forward. Corporation A attached an "Explanation of Changes" statement to each of these amended returns stating,

Corporation A is submitting this Form 1120X to claim, under IRC §6511(d)(3)(A), additional foreign tax credits for its tax year ended 12/31/Y1.<sup>2</sup> As shown on Attachment #1, the result of this claim is an increase to Corporation A's foreign tax credit carryforward for the tax year ended 12/31/Y1.<sup>3</sup>

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<sup>1</sup> Corporation B submitted a Form 1120X for Corporation A for tax year Y1 to claim an additional \$a in foreign tax credits on Date 4/Y12. Corporation B submitted a Form 1120X for Corporation A for tax year Y2 to claim an additional \$b in FTC on Date 5/Y13. Corporation B submitted a Form 1120X for Corporation A for tax year Y3 to claim an additional \$c in FTC on Date 6/Y14. The taxable income reported on the Form 1120X for tax year Y3 differed from the records that the Service had. After receiving notice of the discrepancy from the Service, Corporation B revised Corporation A's Form 1120X for tax year Y3 and submitted the revised form to the Service on Date 7/Y14.

<sup>2</sup> The Forms 1120X for tax year Y2 and tax year Y3 adjusted the year appropriately.

<sup>3</sup> The form 1120X for tax year Y3 had an additional aborted sentence beginning, "The amended foreign tax credit carry-forward is". The sentence was not complete.

At least as early as Date 8/Y14, Corporation B discussed its intention to file a claim for Corporation A for tax year Y4 with the IRS team coordinator assigned to audit Corporation B. These discussions included the amount of refund and the grounds for the claim that Corporation B would file for Corporation A. The team coordinator noted discussing Corporation A's "FTC claims that will be coming in later" in the case activity record under Date 8/Y14.

On Date 9/Y15, Corporation B sent an email to the team coordinator. The email stated, "Will you please let me know when you have a few minutes to talk about the Corporation A 1120Xs? We are almost finished with one, and I wanted to get your thoughts on what we plan to include."

On Date 10/Y15, Corporation B showed the team coordinator a preliminary draft Form 1120X for Corporation A claiming a refund for tax year Y4. Corporation B did not give a copy of the draft 1120X to the team coordinator or anyone else with the Service. The understanding was that Corporation B would continue to revise the draft before submitting a final version to the Service. The team coordinator noted in the activity log under Date 10/Y15 that Corporation B was continuing working on the draft Form 1120X and that he was assisting Corporation B in getting transcripts for tax year Y4 and tax year Y5.

On Date 11/Y15, Corporation B sent an email to the team coordinator, subject line "Corporation A account support", and included information regarding the amount of Corporation A's taxable income for an unspecified tax year. Attached to the email were two documents: (1) a Form 4549, Income Tax Examination Changes, for tax years Y4, Y5 and Y6 that was signed by Corporation in Y9; (2) a Form 1120X for tax year Y4 for Corporation A with a cover letter from Y5.

Corporation B submitted a Form 1120X for Corporation A for tax year Y4 on Date 12/Y15. Corporation A claimed a refund of \$. This consisted of \$d of foreign tax credit for tax year Y4, and the balance from credit carry-forwards from tax years Y1, Y2 and Y3. Corporation A remitted its last payment for tax year Y4 on Date 2/Y10, five years before Date 12/Y15.

The Service issued a letter denying the refund claim as untimely on Date 13/Y15.

### LAW AND ANALYSIS

- I. Corporation A's refund claim was not timely under I.R.C. § 6511(d)(3)(A)

Section 6511 of the Internal Revenue Code establishes a two-part limitation regime on refund claims. Boeri v. United States, 724 F.3d 1367, 1369 (Fed. Cir. 2013). First, to

receive a “refund of an overpayment of any tax imposed by this title in respect of which tax the taxpayer is required to file a return,” a refund claim must be filed no later than “3 years from the time the return was filed or 2 years from the time the tax was paid, whichever of such periods expires the later.” I.R.C. § 6511(a). Second, section 6511(b)(2) limits the allowable amount of a credit or refund to the amount of taxes that were paid in the preceding two or three years, depending on if the claim was filed within three years of filing a return or not. This second limitation is known as the section 6511(b)(2) “lookback” period.

There are several exceptions to this general framework, two of which are relevant here.

Section 6511(c) provides that if a taxpayer agrees to extend the time to assess tax within the time for filing a claim for credit or refund, the period for claiming a credit or refund shall not expire prior to 6 months after the expiration of the agreement.

Corporation A executed a number of agreements with the Service extending the time to assess tax. However, the last of these agreements expired on Date 1/Y10. Thus, the six month period under section 6511(c) expired on Date 3/Y10. Corporation B did not claim a refund for Corporation A relating to FTC until Date 12/Y15, four years after the section 6511(c) period expired. Thus, Corporation A’s agreements under section 6511(c) do not make Corporation B’s refund request for Corporation B timely.

Section 6511(d)(3) provides a special rule for refunds relating to FTC. In lieu of the 3 year period for filing a claim provided in section 6511(a), the period for filing a claim relating to FTC is “10 years from the date prescribed by law for filing the return for the year in which such taxes were actually paid or accrued.” I.R.C. § 6511(d)(3)(A). The regulations under section 6511(d)(3) clarify that the 10 year period to file claims is without regard to any extension of time for filing the returns. Treas. Reg. § 301.6511(d)-3(a). Under this rule, the section 6511(b)(2) lookback period does not apply. I.R.C. § 6511(d)(3)(B). The 10 year period for filing claims is counted from the date that the return was due for the tax year for which the FTC is claimed. Albemarle Corp. & Subsidiaries v. United States, 118 Fed.Cl. 549, 579 (2014).

In this case, Corporation B filed claims for refund for Corporation A relating to FTC that it claimed for tax years Y1, Y2, Y3 and Y4. The return due dates for each of these years (without regard to any extensions) were March 15<sup>4</sup> of the subsequent years. Corporation A did not remit any payments for tax year Y4 within 2 years of the claim

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<sup>4</sup> Where March 15 falls on a Saturday, Sunday or legal holiday, the time for performance of the act will be considered timely if it is performed on the next succeeding day which is not a Saturday, Sunday or legal holiday. I.R.C. § 7503.

filing date, thus the 2-year rule in section 6511(a) is not applicable. The respective I.R.C. § 6511(d)(3) deadlines and claim filing dates are as follows:

Tax Year	Original Return Due Date	§ 6511(d)(3) Deadline for Filing Refund Claim	Refund Claim Filed
Y1	3/15/Y2	3/15/Y12	Date 12/Y15
Y2	3/15/Y3	3/15/Y13	Date 12/Y15
Y3	3/15/Y4	3/15/Y14	Date 12/Y15
Y4	3/15/Y5	3/15/Y15	Date 12/Y15

Because Corporation B did not claim a refund for Corporation A until after the respective 10 year periods had all expired, its refund claim for tax year Y4 is untimely.

- II. Corporation B did not make an informal claim for refund for Corporation A and the “Waiver Doctrine” does not apply in this case

A. The Informal Claim Doctrine

There are four elements to an informal claim. Pala, Inc. Employees Profit Sharing Plan & Trust Agreement v. United States, 234 F.3d 873, 877 (5th Cir. 2000). An informal claim must (1) be timely, (2) assert a right to a refund, (3) describe the tax, tax year and basis for the claim, and (4) have a written component. Id.; see Mobil Corp. v. United States, 67 Fed. Cl. 708, 716 (2005). An informal claim must put the Service on actual or constructive notice that the taxpayer is currently asserting a right to a refund. Mobil, 67 Fed. Cl. at 716. It is not enough to inform the Service of an intention to file a claim in the future. Id. at 717. As the Court of Federal Claims explained in Mobil,

if the IRS is left with the understanding that a taxpayer intends to file a claim in the future, this necessarily negates the inference that a claim is then being asserted. The purpose of an informal claim is to allow the IRS “to commence, if it wishes, an examination into the claim.” Donahue, 33 Fed.Cl. at 609 (quoting 3, 162 Ct.Cl. at 113–114). A statement to the

effect that a claim is forthcoming does not serve the vital purpose of inducing the IRS to commence an examination. Instead, we believe the contrary is true: a taxpayer's assertion that a claim will be filed in the future tends to dissuade the IRS from commencing an examination, even if it is aware of some of the facts and circumstances on which the taxpayer may ultimately base its claim.

This is true even if the taxpayer communicated the tax year, amount and basis for a future refund claim. BCS Financial Corp. v. United States, 118 F.3d 522, 526 (7th Cir. 1997).<sup>5</sup>

In this case, Corporation B informed the Service of its intention to make a claim for refund for Corporation A for tax year Y4, the amount of the refund and the basis for the future claim, all within the period of limitations for filing a claim for refund for tax year Y4.

However, Corporation B failed to actually assert a claim for a refund for Corporation A; instead it merely communicated its intention to file a claim in the future. Showing the team coordinator its draft Form 1120X does not constitute asserting a claim, as the implication of this was simply that Corporation B was working on making a formal claim that it would file in the future for Corporation A. Further, Corporation B cannot rely on the circumstances surrounding the draft Form 1120X to indicate that it was making an informal claim for Corporation A, as Corporation B still had over three weeks to finalize and file the formal claim before the period of limitations expired. Putting the Service on notice of its intention to file a claim in the future does not equate to Corporation B making an informal claim for Corporation A.

Additionally, there is no written component in this case. While there is case law holding that the element of a written component can be satisfied by writing that was produced by the Service<sup>6</sup>, New England Elec. Sys. v. United States, 32 Fed. Cl. 636, 643–44

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<sup>5</sup> In BCS Financial Corp., Judge Posner offered this instructive hypothetical:

Suppose B carelessly knocks over A's precious Ming vase, shattering it into a thousand pieces. A scowls but says nothing. B knows the value of the vase, knows that he was negligent in knocking it over, and knows that A has a reputation for being litigious. So B has, within moments of the accident, a belief approaching certainty that A will sue him, and for how much. Does this mean that the statute of limitations for negligently damaging personal property, which let us say is three years, stops running five minutes after the accident, so that A can if he wishes wait ten years to file his suit?

118 F.3d at 526.

<sup>6</sup> Other courts disagree and maintain that the written component must come from the taxpayer as a means of ensuring the integrity of the period of limitations. See Burlington Fortey-Niners, Inc. v. United States, 111 A.F.T.R.2d 2013-393 (D. Mass. December 28, 2012) ("an informal claim must have a written component and . . . such written component must have been prepared by the taxpayer. The rule. . . also properly puts the onus on the

(1995), at a minimum, the written component must be sufficient to be regarded as an assertion by the taxpayer that she believes the tax has been overpaid. Id. The various communications from Corporation B to the team coordinator imply, at most, Corporation B's intent to file a formal claim for Corporation A in the future, not that it asserted a claim. Similarly, the team coordinator's notes only indicate that Corporation B will file a formal claim for Corporation A in the future, not that Corporation B had actually asserted a claim.

B. The Waiver Doctrine

The waiver doctrine operates such that when “the taxpayer files a timely formal claim but fails to include the specific claim for relief, the claim may nonetheless be considered timely if the IRS considers that specific claim within the limitations period.” Computervision Corp., 445 F.3d at 1366. However, there can only be a waiver if the Service waives the requirements of the regulation during the limitations period; consideration outside of the limitations period does not constitute waiver. Id. at 1367; see United States v. Brockamp, 519 U.S. 347, 352 (1997) (holding that equitable tolling does not apply to toll the period of limitation on claiming a refund)

The Service did not consider Corporation B's specific claim for Corporation A prior to the expiration of the period of limitation. Any consideration that the Service gave to Corporation B's claim for Corporation A occurred after the formal claim for refund was filed, and after the period of limitations for filing a claim for a refund expired. As such, the waiver doctrine does not apply here.

CASE DEVELOPMENT, HAZARDS AND OTHER CONSIDERATIONS

[REDACTED]

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taxpayer seeking a refund to document his claim which he can accomplish by simply sending a letter with the pertinent information to the IRS.”)



[Redacted]

[Redacted]

[Redacted]

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Please call (202) 317-6844 if you have any further questions.