

INTERNAL REVENUE SERVICE  
NATIONAL OFFICE TECHNICAL ADVICE MEMORANDUM

August 10, 2015

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Third Party Communication: None  
Date of Communication: Not Applicable

Index (UIL) No.: 6611.00-00  
CASE-MIS No.: TAM-137658-14

Director

Taxpayer's Name:  
Taxpayer's Address:

Taxpayer's Identification No  
Year(s) Involved:

LEGEND:

X =  
TY 1 =  
TY 2 =  
Date 1 =  
Date 2 =  
Date 3 =  
Date 4 =  
Amount 1 =  
Amount 2 =  
Amount 3 =  
Amount 4 =

ISSUES:

I. Under section 6611, does interest accrue on a general adjustment overassessment when the Service has simultaneously determined that there is an increase in tax due to

adjustments to carrybacks from subsequent years, where the net effect of these increases and decreases is an overassessment?

II. If interest is allowed pursuant to section 6611 on the general adjustment overassessment, to what date does such interest accrual run?

CONCLUSIONS:

I & II. Yes. Overpayment interest is allowable on the portion of the overpayment used to satisfy the underpayment (Amount 2) from the date of said overpayment to the due date of the loss year return.

FACTS:

X timely filed a federal income tax return for TY1 and paid the liability prior to the due date of the return, which was Date 1. On or before Date 4, X filed a tentative refund claim for TY1 based on the carryback of a net operating loss (NOL) from TY2. On Date 4, the Service issued a tentative refund of Amount 1 to X for TY1. As the amount requested was paid within 45 days of X's request for a tentative refund, no overpayment interest was paid in accordance with section 6611(e)(2).

In subsequent examinations, the Service disallowed most of the NOL carryback and assessed, on Date 3, an underpayment of Amount 2. On the same day the Service made a general adjustment to X's TY1 return that decreased the tax due on X's original TY1 return and resulted in an overpayment of Amount 3. The amount of the overpayment resulting from the general adjustment decrease was Amount 4 more than the underpayment resulting from the disallowed NOL carryback.

The Service allowed interest on Amount 2 of the full Amount 3 overpayment from Date 1 (the filing and payment due date for TY1) to Date 2 (the due date for the loss year return). The Service allowed overpayment interest on the remaining amount, Amount 4, from Date 1 to Date 4 (the date of the tentative refund).<sup>1</sup>

X's position is that overpayment interest on Amount 2 is allowable to Date 4, the date on which the Service issued the tentative refund. The issue of the correct ending date for computation of overpayment interest is currently before Appeals. Appeals requested Technical Advice on the issue.

LAW AND ANALYSIS:

An overpayment is any payment in excess of that which is properly due. See Jones v. Liberty Glass Co., 332 U.S. 524, 531 (1947). Section 6611(a) provides that "[i]nterest

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<sup>1</sup> It is unclear why interest on Amount 4 stopped on Date 4.

shall be allowed and paid upon any overpayment in respect of any internal revenue tax at the overpayment rate established under section 6621.”

Section 6611(b) provides the period for interest on overpayments. In the case of a credit, section 6611(b)(1) provides that interest runs, “from the date of the overpayment to the due date of the amount against which the credit is taken.” The due date of the amount against which the credit is taken is defined as the last day fixed by law or regulations for the payment of tax, without regard to any extensions. Treas. Reg. §§ 301.6611-1(h)(1) & (2). The Service has the authority to credit any overpayment against any liability and refund the remainder, if any. I.R.C. § 6402(a).

In the case of refunds, section 6611(b)(2) provides that interest runs, “from the date of the overpayment to a date (to be determined by the Secretary) preceding the date of the refund check by not more than 30 days, whether or not such refund check is accepted by the taxpayer after tender of such check to the taxpayer. The acceptance of such check shall be without prejudice to any right of the taxpayer to claim any additional overpayment and interest thereon.” The Service has administratively established an end date of less than 30 days. See, e.g., I.R.M. 20.2.4.7.1.1 (09-03-2010).

Section 6611(b) does not specifically define the terms “credit” or “refund.” It does not contain a cross-reference to any other code section that defines those terms. However, by using the term “check” four times in section 6611(b)(2), Congress viewed a “refund” as meaning an amount tendered by check. Under Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843-844 (1984), we look to Treasury regulations to resolve any silence or ambiguity. But the regulations under section 6611(b) do not define the terms “credit” or “refund.” Because the terms are not clearly defined, a subjective analysis is required. See id.

The statute’s legislative history does not provide clear guidance on the issue. Section 6611 as it reads today was enacted in the Technical Amendments Act of 1958, P.L. 85-866, and is similar in relevant part to section 1019 of the Internal Revenue Act of 1924, 43 Stat. 253, 346 (1924) (providing that interest shall be paid on an overpayment “to the date of the allowance of the refund, or in the case of a credit, to the due date of the amount against which the credit is taken...”). The legislative history does not address the definitions of the terms “credit” or “refund,” and does not address the specific situation at issue. While the legislative history does explain that section 6611(b)(1) was amended in 1958 to remove certain distinctions among different types of credits, it does not address the definition of a “credit” or “refund.” See S. Rep. No. 1983, 85th Cong., 2d Sess. 234-35 (1958), reprinted in 1958-3 C.B. 922, 1156.

Case law is similarly unavailing as to clear definitions of the terms as no court has specifically defined the term for section 6611 purposes.

The dictionary defines “credit,” in part, as “a deduction from an amount otherwise due.” See Webster’s New Collegiate Dictionary 294 (11th ed. 2006). Here, X had an overpayment of Amount 3 and an underpayment of Amount 2. The Service deducted Amount 2 from X’s overpayment of Amount 3 to satisfy X’s underpayment of Amount 2, and refunded the remaining Amount 4 with interest to X. Thus, with respect to Amount 2, the transaction fits within Webster’s definition of credit.

The dictionary defines “refund,” in part, as “to return (money) in restitution, repayment, or balancing of accounts.” See Id at 1047. In this case the Amount 2 overpayment on which X is seeking additional overpayment interest was not returned to X. When the Amount 3 overpayment was determined on Date 3, the Service did not tender a refund check to X for that amount, nor did it tender a check in the amount of Amount 2. Instead, Amount 2 of the Amount 3 overpayment was used to satisfy an outstanding liability of X, specifically, the Amount 2 underpayment that arose as a result of the recaptured NOL carryback. Thus with respect to Amount 2, the transaction does not fit within Webster’s definition of refund. Further, as a practical matter it would be strange to conclude that the Amount 2 overpayment was refunded and that interest should run to the check date of the Amount 2 overpayment, as interest cannot run to the date of a non-existent check. Because the overpayment was not refunded, section 6611(b)(2) does not apply.

Section 6611(b) provides only two situations in which interest is allowable on an overpayment, and it is clear that the Amount 2 overpayment was not refunded. Thus, in order for X to receive any overpayment interest at all on Amount 2, Amount 2 would have to have been credited. X argues that the Service cannot make a credit where both the adjustments that decrease taxable income and increase taxable income occur within the same tax year. To support this point, X relies on cases that present different facts, and are thus distinguishable from the present case. In particular, none of the cases involved carrybacks.

X argues that Kingston Products Corp. v. United States, 368 F.2d 281 (Ct. Cl. 1966) stands for the proposition that the crediting principle only applies as between different kinds of tax for a single tax year or against taxes of different years. In Kingston, the court was attempting to determine if a taxpayer’s claim was timely. The taxpayer attempted to use a downward adjustment as a “payment,” thus evoking the two-year rule for a timely claim under then-section 322 (current section 6511(a) and (b)). The court determined that the downward adjustment could not be considered a “payment” for purposes of section 322. The court in no way determined that the downward adjustment had any meaning for interest purposes. Any mention of section 6402(a) in that case was dicta and was meant as an explanation of what type of “credit” could be considered a payment for purposes of a timely-filed claim. Republic Petroleum Corp. v. United States, 613 F.2d 518 (5th Cir. 1980), which cites Kingston Products, is similarly distinguishable. Further, the rationale of the cases appears to be that a taxpayer cannot have a credit if a taxpayer is not actually overpaid, that is, a taxpayer cannot have an

overpayment and an underpayment at the same time because tax cannot be determined until after all upward and downward adjustments are considered. This rationale makes sense, unless a taxpayer has carrybacks from another tax year. In that situation, as is here, a taxpayer *can* have an overpayment and an underpayment in the same tax year. If that were not the case, X could receive no interest at all on Amount 2, rather than interest from Date 1 to Date 2. If the Service treated the entire TY1 as a whole, X would have an overpayment of only Amount 4, and would receive interest on only that amount.

As stated above, section 6611(b)(1) provides that overpayment interest runs, “from the date of the overpayment to the due date of the amount against which the credit is taken.” To the extent the X argues that the “due date” is the date the tentative refund was issued because that is the date X’s liability became unpaid, the same argument was rejected for purposes of section 6611(b)(1) in Marsh & McLennan Companies, Inc. v. United States, 302 F.3d 1369 (Fed. Cir. 2002) and AT&T & Subsidiaries v. United States, 62 Fed. Cl. 490 (2004). The due date is the unextended due date of the return on which the tax is required to be reported. I.R.C. § 6151(a); Treas. Reg. § 1.6151-1(a). Not the date on which a taxpayer becomes unpaid. See also Treas. Reg. § 301.6611-1(h)(2)(i).

While X may argue that under section 6611(b)(2) the due date for the amount against which the credit is taken is the due date for the TY1 return, and thus interest should run only to the due date for that tax year rather than to the TY2 return, Rev. Proc. 60-17 section 4.03(3)(b) specifies that, “[a]ny part of a general adjustment overpayment which is extinguished by a deficiency due to an excessive tentative carryback allowance” shall be paid interest “from the date of the overpayment to the last day of the applicable loss year...”<sup>2</sup> Applying these rules to the overpayment at issue, where the overpayment was extinguished by an underpayment due to an excessive tentative carryback allowance, interest is allowable on the overpayment from the date the overpayment arose, Date 1, to the due date of the loss year return, Date 2.

Finally, X argues that TAM201123029 applies to its facts and that it should be followed. As a preliminary matter, the TAM has no precedential value. Section 6110(k)(3); see also Amergen Energy Co. LLC v. United States, 94 Fed. Cl. 413, 419 n.8 (2010). Further, we disagree with its analysis, namely that an overpayment that is not in fact refunded to a taxpayer can be considered to be refunded.

This Technical Advice addresses only the precise situation described herein.

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<sup>2</sup> Rev. Proc. 60-17 reflects the prior version of section 6611(f). Section 6611(f) was amended to allow interest to the filing date of the taxable year in which the NOL arose. I.R.C. § 6611(f)(1).

TAM-137658-14

CAVEAT(S):

A copy of this technical advice memorandum is to be given to the taxpayer(s). Section 6110(k)(3) of the Code provides that it may not be used or cited as precedent.