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From: [REDACTED]

Sent: Tuesday, January 12, 2016 11:03:45 AM

To: [REDACTED]

Cc: [REDACTED]

Bcc:

Subject: RE: Statute of Limitations re: Section 6676 Civil Penalty Imposed for Filing a Claim for Refund in an Excessive Amount without Reasonable Basis

Hi ,

You submitted a question concerning the appropriate form for use in extending the statute of limitations on assessment of the section 6676 penalty in situations where the penalty is subject to deficiency procedures. We intended to respond to the question by reviewing and revising the memo drafted by subject matter expert

. However, an intervening statutory change has made the question moot.

In Rand v. Commissioner, 141 T.C. 376 (2013), the Tax Court considered whether the disallowance of refundable credits listed in section 6211(b)(4) could give rise to an underpayment, as defined in section 6664(a). The Tax Court held in that case that disallowed refundable credits must be taken in to account when determining the amount shown as tax on a return, but that the amount shown as tax cannot be reduced below zero as a result of disallowed refundable credits. The Rand holding created a situation in which the disallowance of a refundable credit gave rise to a deficiency, as defined in section 6211, but not an underpayment, as defined in section 6664. Furthermore, because no underpayment would arise from the disallowance of refundable credits, the penalties under section 6662, 6662A, and 6663 were inapplicable to disallowed refundable credits and the section 6676 penalty on erroneous claims for refund or credit was applicable instead.

In determining whether a given penalty is subject to deficiency procedures, the Tax Court has applied a rule that when a penalty is dependent on the determination of a deficiency, then that penalty is subject to deficiency procedures; when a penalty is not dependent on the determination of a deficiency, then the penalty is not subject to deficiency procedures. See Smith v. Commissioner, 133 T.C. 424, 429 (2009). Prior to the recent statutory change, the section 6676 penalty was dependent on the determination of a deficiency in only one circumstance: when asserted with respect to the disallowance of a refundable credit. The disallowance of a refundable credit on an original tax return would give rise to a deficiency, but not an underpayment, such that the section 6676 penalty could apply. Any section 6676 penalty asserted with respect

to the disallowed refundable credit was dependent on the existence of a deficiency. If the taxpayer correctly claimed the refundable credit, there would be no deficiency and, accordingly, there would be no excessive claim to which the section 6676 penalty could apply. If, on the other hand, the taxpayer *did* erroneously claim the refundable credit, a deficiency would arise and the section 6676 penalty could apply. Because the section 6676 penalty was, under these circumstances, dependent on the determination of a deficiency, deficiency procedures were applicable.

Section 209(a) of the PATH Act (Pub. L. 114-113) in effect overrules Rand and amends section 6664(a) of the Code to provide that “a rule similar to the rule of section 6211(b)(4) shall apply for the purposes of this subsection.” Under section 6664, as amended, disallowed refundable credits must be taken into account when determining the amount shown as tax on the return and *can* reduce below zero the amount of tax shown on the return. This change eliminates the discrepancy created by Rand between how refundable credits are taken into account in calculating a deficiency under section 6211 and how they are taken into account in calculating an underpayment under section 6664. As a result of this change in calculating the amount of an underpayment, disallowed refundable credits claimed on an original return will no longer be subject to penalty under section 6676, but will instead be subject to penalty under sections 6662, 6662A, and 6663. This change also eliminates situations where determination of the section 6676 penalty is dependent on the determination of a deficiency.

Section 6664(a), as revised, is effective with respect to all returns filed after December 18, 2015 and with respect to returns filed on or before December 18, 2015 for which the section 6501 statute of limitations on assessment had not yet expired as of that date.

Because there are no longer any situations where the section 6676 penalty is subject to deficiency procedures, the question posed by _____ memo is moot. Moving forward, the Form 872-EC can continue to be used to extend the statute of limitations on assessment of the section 6676 penalty. If you have any questions or would like to discuss these issues further, just let me know.

Best,