

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

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date: July 11, 2016

to: Shelley Turner Van Doran  
Special Counsel  
(Tax Exempt & Government Entities Division Counsel)

from: Elizabeth Chirich  
Branch Chief  
(Procedure & Administration)

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subject: Tribal General Welfare Exclusion Act refund questions

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

LEGEND

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On March 19, 2015, we furnished your office with a memorandum under the above subject's heading, which stated that certain refund claims, although timely filed due to a special provision under the Tribal General Welfare Exclusion Act of 2014 ("Act"),<sup>1</sup> were nonetheless barred by I.R.C. § 6511(b)(2), which limits refund claims to taxes paid within the applicable look-back period. Specifically, we concluded that the provision's one-year period applied as an extension to the time to file a refund claim, but the one-year period did not also extend the look-back period.

Currently the Indian Tribal Governments Office has over X claims with respect to the 2011 tax year that fall into the category of timely filed claim with no amounts available to refund under our initial analysis. You have asked us to reconsider our advice on whether these claims, discussed more fully below, may be paid or whether the look-

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<sup>1</sup> P.L.113-168, 128 Stat.1884 (Sept. 26, 2014).

back period overrides the Act with respect to these claims.

We have reanalyzed this issue and now believe that the waiver provision enacted by Congress applies not as an extension, but instead as an exception, or waiver, when all requirements are met. Examples where refunds may be paid are shown below.

## LAW

I.R.C. § 6511 contains two types of requirements regarding the timeliness of a refund claim: a filing deadline and a look-back period. Section 6511(a) states the filing deadline as:

### **(a) Period of limitation on filing claim**

Claim for credit or refund of an overpayment of any tax imposed by this title in respect of which tax the taxpayer is required to file a return shall be filed by the taxpayer within 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, or if no return was filed by the taxpayer, within 2 years from the time the tax was paid. Claim for credit or refund of an overpayment of any tax imposed by this title which is required to be paid by means of a stamp shall be filed by the taxpayer within 3 years from the time the tax was paid.

Section 6511(b) establishes that no refund may be allowed or made unless a timely claim is filed within the period of limitations, then further establishes two look-back periods used to determine the amount of paid tax available for refund. The first look-back period applies when a claim is filed within the 3-year period referenced in section 6511(a); the second applies to claims filed outside the 3-year period but otherwise within the alternate, 2-year period allowed in section 6511(a). Section 6511(b) reads as follows:

### **(b) Limitation on allowance of credits and refunds**

#### **(1) Filing of claim within prescribed period**

No credit or refund shall be allowed or made after the expiration of the period of limitation prescribed in subsection (a) for the filing of a claim for credit or refund, unless a claim for credit or refund is filed by the taxpayer within such period.

#### **(2) Limit on amount of credit or refund**

##### **(A) Limit where claim filed within 3-year period**

If the claim was filed by the taxpayer during the 3-year period prescribed in subsection (a), the amount of the credit or refund shall not exceed the portion of the tax paid within the period, immediately preceding the filing of the claim, equal to 3 years plus the period of any extension of time for filing the return. If the tax was required to be paid by means

of a stamp, the amount of the credit or refund shall not exceed the portion of the tax paid within the 3 years immediately preceding the filing of the claim.

**(B) Limit where claim not filed within 3-year period**

If the claim was not filed within such 3-year period, the amount of the credit or refund shall not exceed the portion of the tax paid during the 2 years immediately preceding the filing of the claim.

**(C) Limit if no claim filed**

If no claim was filed, the credit or refund shall not exceed the amount which would be allowable under subparagraph (A) or (B), as the case may be, if claim was filed on the date the credit or refund is allowed.

Congress enacted the Tribal General Welfare Exclusion Act of 2014 on September 26, 2014. Section 2(a) of the Act amended the Internal Revenue Code to insert I.R.C. section 139E, which essentially omits from gross income certain benefits provided by Indian tribes to their members. Section 2(d) of the Act provides the Act's effective date and extends the statute of limitations on refunds or credits, as follows:

(d) EFFECTIVE DATE.—

(1) IN GENERAL.—The amendments made by this section shall apply to taxable years for which the period of limitation on refund or credit under section 6511 of the Internal Revenue Code of 1986 has not expired.

(2) ONE-YEAR WAIVER OF STATUTE OF LIMITATIONS.—If the period of limitation on a credit or refund resulting from the amendments made by subsection (a) expires before the end of the 1-year period beginning on the date of the enactment of this Act, refund or credit of such overpayment (to the extent attributable to such amendments) may, nevertheless, be made or allowed if claim therefor is filed before the close of such 1-year period.

## ANALYSIS

The effective date provisions of the Act are two-fold. First, paragraph (d)(1) provides that the amendments only apply if the period of limitation on refund or credit under section 6511 had not expired as of the Act's enactment date (September 26, 2014). Paragraph (d)(2) then provides that a refund may be made or allowed if it would have been timely if filed as of the enactment date, would not normally be allowable before the end of 1 year from the date of enactment ("1 year period"), and is filed before the close of the 1-year period beginning on the enactment date of the Act. While the result is

similar to an extension of the statute of limitations, the Act provision is more correctly called an exception, not an extension.

The Act's exception ("exception") applies only if the requirements are met, and only to the extent the refund is attributable to the Act's amendments. The first requirement is that the period of limitation on refund or credit under section 6511 of the Internal Revenue Code of 1986 had not expired as of September 26, 2014, the date of enactment. The period of limitations within section 6511 is found specifically in section 6511(a), and includes multiple periods. A claim is timely filed under section 6511(a) if it is filed 1) within the later of three years from the date the return was filed or two years from the time the tax was paid; or 2) if no return was filed, within two years of when the tax was paid.

Applying the first requirement to section 6511(a), a claim would be allowable if September 26, 2014 was within three years of the date the return was filed or two years from the time the tax was paid.

The second requirement is that the period of limitations expires during the period between September 26, 2014 and September 26, 2015. Therefore, if a claim would have been timely as of September 26, 2015 or later, then the exception is unnecessary and does not apply. If a claim is timely filed during the 1-year period without need for a waiver, then application of the waiver is also not necessary. If, however, a claim that would have been timely on September 26, 2014 is filed during the 1-year period but after the normal period of limitations had expired, then it is to be deemed timely if it would have been timely on September 26, 2014, to the extent the refund is attributable to the amendment.

After determining whether a claim is timely under section 6511(a), the next step is to determine the applicable look-back period in section 6511(b). While section 6511(a) provides whether a claim is timely, section 6511(b) determines the amount available to be refunded. Section 6511(b) also has multiple provisions.

Section 6511(b)(1) first provides that no refund shall be made or allowed unless the claim is filed within the period provided by 6511(a). As discussed earlier, if the claim is only deemed timely under section 6511(a) due to the application of the exception, then the requirement of section 6511(b)(1) would also be deemed met. Section 6511(b)(2) then provides the look-back rules. Section 6511(b)(2)(A) applies if the claim is filed within the 3-year period in section 6511(a); section 6511(b)(2)(B) applies if the claim is filed within the 2-year period in section 6511(a).

Just as with the analysis for section 6511(a), the exception can apply to the look-back period if the requirements are met. If the applicable look-back period is found in section 6511(b)(2)(A), then the look-back period should first be determined as of the claim date and then determined as of September 26, 2014. If the second period (i.e., the period calculated from September 26, 2014) would provide an additional allowable amount,

then that additional amount would be deemed allowable through application of the provision. If the applicable look-back period is found in section 6511(b)(2)(B), the same type of analysis would be done. First, allowable amounts would be determined from the claim date (including amounts paid two years before the date of the claim). Then the allowable amounts would be determined as if the claim were filed on September 26, 2014. Any additional allowable amounts would be deemed allowable through application of the provision.

Tax year 2011 returns were due on April 15, 2012. Claims for refunds relating to returns filed on or before April 15, 2012 were due on April 15, 2015. Therefore, all claims for the 2011 tax year would have been timely if filed on September 26, 2014, and the time for filing a claim would have expired before September 26, 2015. Therefore, any claim filed between April 16, 2015 and September 26, 2015<sup>2</sup> would fall under the exception.

Taxpayers who requested and received a six-month extension to file a tax year 2011 return would have had until October 15, 2012 to file the original return. Because the rule to treat returns filed before the due date as if they were filed on the due date does not apply during an extension, any return filed on or before September 25, 2012 would have a period of limitation for claims expiring before September 26, 2015. Therefore, all taxpayers who filed tax year 2011 returns on or before September 25, 2012 could have filed a claim on or before September 26, 2015, and could potentially utilize the exception in the Act.

Taxpayers who filed their tax year 2011 return on or after September 26, 2012 would normally have a claim filing deadline of September 26, 2015. Therefore, the exception would not apply to those returns.

The following examples show how to apply the exception using this analysis:

Example 1:

Tax year 2011, no extension requested

Return filed March 14, 2012 reporting a tax liability of \$4000

Claim filed September 14, 2015 reporting a corrected tax liability of \$2500

Refund requested \$1500

Payments: withholding of \$3000; with the return (March 14, 2012) \$1000

Analysis:

Applying I.R.C. § 6513(a), the original return and all payments are deemed filed and paid on April 15, 2012. Under section 6511(a), the claim was filed more than three years from the date of the return and more than two years from the date of payment.

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<sup>2</sup> September 26, 2015 was a Saturday. Affected taxpayers had until Monday, September 28, 2015, to file a claim for refund utilizing the Act's exception. See I.R.C. § 7503.

However, utilizing the exception, the taxpayer could have filed a timely claim on September 26, 2014. Therefore, any claim filed on or before September 26, 2015 may be considered timely to the same extent as if it had been filed on September 26, 2014. If it had been filed on September 26, 2014, the claim would have been filed within three years of the return. Therefore, the claim is deemed timely filed under the 3-year period and the exception. The applicable look-back period is section 6511(b)(2)(A). Three years before the claim date was September 14, 2012, and no extensions were requested to extend that time period. No payments would be available under the rule without an exception. Utilizing the exception, the look-back is then determined as if the claim were filed on September 26, 2014. Three years before that date would be September 26, 2011. As all payments were deemed made on April 15, 2012, all payments are deemed available under section 6511(b) and the exception.

Example 2:

Tax year 2011; extension granted to October 15, 2012

Return filed October 15, 2012

Claim filed September 1, 2015

Analysis: The claim was filed within the three-year period in section 6511(a) without need to consider the exception. The look-back period is found in section 6511(b)(2)(A) and includes the extension period; therefore, there is no need to consider the exception to the allowable amount.

Example 3:

Tax year 2011; extension granted to October 15, 2012

Return filed June 1, 2012

Claim filed September 1, 2015

Analysis: Section 6513 does not deem a return filed on the extended due date. Therefore, the claim is not filed within three years of the return or two years of payment. However, a claim filed on September 26, 2014 would have been within the 3-year period of section 6511(a). Therefore, utilizing the exception, the claim is deemed to be filed within the 3-year period. The applicable look-back period is section 6511(b)(2)(A). The look-back period is three years plus any extensions; therefore, the look-back period reaches all payments without a need to utilize the exception.

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 contact Rachel Gregory at (202) 317-5456 if you have any further questions.