

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

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to: Carolyn Schenck  
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(Small Business/Self-Employed)

from: Adrienne Griffin  
Senior Technician Reviewer  
(Procedure & Administration)

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subject: Crediting of Overpayments in the Offshore Voluntary Disclosure Program

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

ISSUE

In the context of the Offshore Voluntary Disclosure Program (OVDP), whether an overpayment attributable to one tax year may offset the miscellaneous offshore penalty or tax due in a different year in the OVDP disclosure period.

CONCLUSION

Unless the taxpayer files a claim for refund that is timely pursuant to I.R.C. § 6511, the Service is prohibited by I.R.C. § 6514 from crediting or refunding the taxpayer's overpayment.

FACTS

The OVDP is a program that was made available beginning in 2009 to certain taxpayers with previously undisclosed foreign bank accounts. The requirements of the program, which have been modified several times since 2009, are explained in a series of "Frequently Asked Questions" (FAQs) available on the Service's website. The current iteration of the OVDP applies to OVDP submissions made after July 1, 2014.

As a condition of entering the program, taxpayers must disclose the existence of their previously undisclosed foreign accounts.<sup>1</sup> They are required to file either original or amended tax returns which include the income earned by their foreign accounts for the most recent eight tax years for which the due date has passed (disclosure period).<sup>2</sup> Taxpayers are also required to submit properly executed agreements to extend the period of limitations on assessment under I.R.C. § 6501 for each of the eight tax years included in the disclosure period.<sup>3</sup> In addition, taxpayers agree to be responsible for the tax due, interest, and penalties, including the accuracy-related penalty of I.R.C. § 6662 and the failure to file and failure to pay penalties of I.R.C. § 6651(a)(1) and (2), as applicable.<sup>4</sup> Finally, taxpayers entering the OVDP also agree to be subject to an additional title 26 miscellaneous offshore penalty, which is imposed under the authority of I.R.C. § 7121 and in lieu of other penalties, such as ones for fraud, failure to file information returns, and the FBAR civil penalty, among others.<sup>5</sup> The standard practice is to assess the offshore penalty in the last year of the disclosure period.

A taxpayer who enters the OVDP may voluntarily withdraw from the program, at which point his case would be referred for an examination and all applicable taxes and penalties would be imposed. In addition, if a taxpayer who enters the OVDP stops cooperating with the agent assigned to his case, the Service can involuntarily remove the taxpayer from the program and refer the case for examination.

Your office has received a number of questions from OVDP examining agents about taxpayers who report additional income and tax on their amended returns for most of the years in the disclosure period, but report an overpayment on their amended return for at least one of the years at issue. A typical fact pattern might involve a taxpayer for whom the disclosure period is tax years 2003 through 2010. For tax years 2003 through 2007 and 2009 and 2010, the taxpayer reports additional income and tax. But the amended return submitted for tax year 2008 includes a large loss, resulting in an overpayment for that tax year. After reviewing the amended return, the examining agent confirms the claimed loss and the resulting tax computations show an overpayment for tax year 2008. The taxpayer then requests that the overpayment for tax year 2008 be credited against increases in tax for the other tax years in the disclosure period or the miscellaneous offshore penalty. You have asked for advice regarding how I.R.C. §§ 6511 and 6514 affect the Service's ability to credit the overpayment as requested by the taxpayer.

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<sup>1</sup> See 2014 OVDP Frequently Asked Questions (FAQ), number 23, available at: <https://www.irs.gov/individuals/international-taxpayers/offshore-voluntary-disclosure-program-frequently-asked-questions-and-answers-2012-revised>

<sup>2</sup> See 2014 OVDP FAQ, numbers 9 and 25.

<sup>3</sup> See OVDP FAQ, number 25.

<sup>4</sup> See OVDP FAQ, number 7

<sup>5</sup> See OVDP FAQ, numbers 5 and 7.

## LAW AND ANALYSIS

I.R.C. § 6514(a)(1) prohibits the Service from crediting or refunding any overpayment unless the taxpayer timely filed a claim for refund or credit of such amount. I.R.C. § 6511(a) requires that a claim for refund or credit be filed within three years from the time the original return was filed or two years from the time the tax was paid, whichever is later. In addition, the amount of any refund or credit is limited by I.R.C. § 6511(b), which provides either: (1) a three year look-back period in cases in which the claim was filed within three years of the return or (2) a two year look-back period in cases in which the claim was filed within two years of payment.

I.R.C. § 6511(c) provides a special rule for situations where a taxpayer has executed a consent to extend the statute of limitations on assessment pursuant to I.R.C. § 6501(c)(4). I.R.C. § 6511(c)(1) provides that, when a taxpayer enters into an agreement to extend the period of limitations on assessment during the three-year refund or credit period prescribed in I.R.C. § 6511(a), the period for filing a timely claim for refund or credit shall not expire prior to six months after the expiration of the assessment period as extended by that agreement. Where a claim for refund or credit is filed within the period prescribed by I.R.C. § 6511(c)(1), I.R.C. § 6511(c)(2) limits the amount of the refund or credit to the portion of the tax paid after the execution of statute extension *plus* the portion of the tax paid within the look-back period which would be applicable under I.R.C. § 6511(b)(2) if the claim for refund or credit had been filed on the date that the statute extension was executed.

Whether a taxpayer with the facts described above is entitled to have his or her 2008 overpayment credited against increases in tax for other tax years in the disclosure period or against the miscellaneous offshore penalty will depend on whether the 2008 amended return (which serves as the claim for refund or credit) was filed within the period prescribed by I.R.C. § 6511. If, for example, the taxpayer entered the OVDP in March, 2012, there is a good chance that the taxpayer's 2008 amended return was filed within the three-year period described in I.R.C. § 6511(a). If, on the other hand, the taxpayer entered the OVDP in March, 2014, it is less likely that the amended return was filed within the three-year period described in I.R.C. § 6511(a). It is certainly *possible* that the amended return was filed within that three-year period, particularly if the original 2008 return was filed late, although there may not be any payments in the 3-year look back period prescribed by I.R.C. § 6511(b)(2)(A). It is also possible that the taxpayer made payments with respect to the 2008 tax year after the 2008 return was filed. If the amended return was filed within two years of any payment, it would also be timely filed. However, I.R.C. § 6511(b)(2)(B) would limit the amount of the refund or credit to amounts paid within the two-year period preceding the filing of the claim.

A claim for refund or credit for 2008 might also be timely by virtue of I.R.C. § 6511(c)(1). OVDP FAQ 25 requires taxpayers who are participating in OVDP to submit properly executed statute extensions for each of the eight tax years included in the disclosure

period. If a taxpayer and the Service entered into an agreement under I.R.C. § 6501(c)(4) extending the taxpayer's 2008 period of limitations on assessment during the three-year period described in I.R.C. § 6511(a), then the taxpayer's claim for refund or credit would be timely as long as it was filed within six months of the expiration of the period within which assessment may be made pursuant to the agreement or any extension thereof. However, as with claims filed within the standard three-year or two-year periods described in I.R.C. § 6511(a), claims considered timely under I.R.C. § 6511(c)(1) are also subject to amount limitations. Therefore, even if the hypothetical taxpayer executed a statute extension within the period provided for by I.R.C. § 6511(a), I.R.C. § 6511(c)(2) would limit the amount of the 2008 overpayment available for credit to the portion of the tax paid after the execution of statute extension, plus the portion of the tax paid within the look-back period which would be applicable under I.R.C. § 6511(b)(2) if the claim for refund or credit had been filed on the date that the statute extension was executed. If the statute extension was executed within three years of the original return, the look-back period would be three years. If the statute was executed within two years of a payment, the look-back period would be two years.

In addition to the special rule in I.R.C. § 6511(c), I.R.C. § 6511(d) also lists a variety of other special circumstances under which the period for filing a claim for refund or credit may be extended. For example, I.R.C. § 6511(d)(2) provides for an extended period where the claim for refund or credit relates to an NOL carryback, and I.R.C. § 6511(d)(3) provides for an extended period where the claim relates to a foreign tax credit. In determining whether a taxpayer's claim for refund or credit is timely filed, we therefore also advise considering whether the taxpayer's claim falls within any of the special circumstances described in any subsection of I.R.C. § 6511(d).

Ultimately, whether a taxpayer is entitled to have any overpayment credited against a liability for another tax year or against the miscellaneous offshore penalty depends on whether that taxpayer filed a timely claim for refund or credit. If the claim was filed within the period prescribed by I.R.C. § 6511, the claim is timely and the taxpayer is entitled to a credit for the overpayment of amounts paid within the relevant look-back period. If the claim for refund was not filed within the period prescribed by I.R.C. § 6511, the overpayment is barred and I.R.C. § 6514 prohibits the Service from crediting it against liabilities for other tax types or periods.

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) 317-6844 if you have any further questions.

cc: Daniel Price  
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