

Office of Chief Counsel
Internal Revenue Service
Memorandum

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from: Elizabeth Girafalco Chirich
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subject: Request for Advice Regarding Section 6601 Underpayment Interest and Sections 6651(a)(2) and 6655 Additions to Tax, in Case of Section 7507(a) Receivership of Bank

This Chief Counsel Advice responds to your request for assistance. Specifically, you have requested legal advice on how sections 6601, 6651(a)(2), and 6655 apply in the context of the section 7507(a) receivership of a specific bank. You require this advice in order to properly calculate the amount of interest and additions to tax to be assessed. This advice may not be used or cited as precedent.

Legend

Taxpayer Bank =

Date 1 =

Date 2 =

Issues

In a situation in which (a) section 7507(a) barred the assessment, collection, and payment into the U.S. Treasury of Taxpayer Bank's federal income tax beginning on Date 1 and continuing through Date 2; (b) Taxpayer Bank timely paid all federal income tax due before Date 1 but paid no federal income tax from Date 1 until Date 2; and (c) on Date 2, the immunity afforded by section 7507(a) ceased to apply, and Taxpayer

Bank paid the base amount of federal income tax that had become due during the period of section 7507(a) immunity:

1. When did section 6601 interest accrue?
2. When did the section 6651(a)(2) addition to tax for failure to pay tax accrue?
3. When did the section 6655 addition to tax for failure to pay estimated tax accrue?

Conclusions

1. Section 6601 interest accrued from the date fixed for filing the return reporting the tax, until the date the tax was paid. Section 6601 interest on unpaid section 6601 interest continues to accrue until the amount of section 6601 interest owed is paid. The accrual of section 6601 interest is unaffected by section 7507(a).
2. The section 6651(a)(2) addition to tax did not accrue. Taxpayer Bank's failure to pay was due to reasonable cause that existed as of the due date for payment of the tax.
3. The section 6655 addition to tax accrued from the applicable date specified in section 6655(c)(2), until the date specified in section 6655(b)(2). The accrual of the section 6655 addition to tax is unaffected by section 7507(a).

Facts

Taxpayer Bank, a calendar-year taxpayer, is and always has been a corporation for federal tax purposes. On Date 1, Taxpayer Bank was insolvent, and on this date, the Federal Deposit Insurance Corporation (FDIC) took receivership of Taxpayer Bank. As of the date of this advice, FDIC continues to act as receiver. Although Taxpayer Bank did not file for title 11 bankruptcy protection, its parent holding company did.

The Internal Revenue Service Exam team assigned to this case has determined that, between Date 1 and Date 2, inclusive of Date 1, Taxpayer Bank's income taxes qualified for immunity under section 7507(a). The Exam team has also determined that, on Date 2, section 7507(a) immunity ceased to apply to the taxes of Taxpayer Bank.

All income tax returns required to be filed relating to Taxpayer Bank's income have been timely filed. In addition, all income tax returns required to be filed relating to any consolidated group of which Taxpayer Bank was a member have been timely filed. Taxpayer Bank timely paid all income taxes due before Date 1. The income tax returns filed since Date 1 and before Date 2 included proper claims of immunity from assessment and collection of taxes under section 7507(a) for Taxpayer Bank only, with immunity under section 7507(a) commencing on Date 1. During the period of section 7507(a) immunity, Taxpayer Bank made no payment or deposit for the taxes claimed to be immune.

Immediately before Date 2, Taxpayer Bank's depositors had not been paid in full, but all depositors were paid in full on Date 2. After Taxpayer Bank's depositors were paid, Taxpayer Bank had enough funds to pay all its unpaid federal income tax liabilities, which it paid in full on Date 2. It also had enough funds to pay all, or a significant portion of, any unpaid section 6601 interest and additions to tax that had accrued on its federal income tax liabilities. Taxpayer Bank did not, however, pay any section 6601 interest or additions to tax.

Law and Analysis

Whenever any bank "has ceased to do business by reason of insolvency or bankruptcy, no tax shall be assessed or collected, or paid into the Treasury of the United States, on account of such bank . . . which shall diminish the assets thereof necessary for the full payment of all its depositors . . ." I.R.C. § 7507(a).¹ Any tax collected will be deemed to be erroneously collected and generally will be refunded. I.R.C. § 7507(c)(1).

The tax barred from assessment, collection, and payment under section 7507(a) "shall be assessed or reassessed whenever it shall appear that payment of the tax will not diminish the assets" necessary for the full payment of all the bank's depositors. I.R.C. § 7507(c)(2). "In the case of a bank within section 7507(a), immunity will end whenever, and to the extent that, taxes may be assessed and collected . . . without diminishing the assets available and necessary for payment of depositors." Treas. Reg. § 301.7507-9(a)(1).²

Once immunity under section 7507(a) terminates, the bank must pay the taxes that would have been due absent section 7507(a) immunity. See Treas. Reg. § 301.7507-9(f) ("As immunity terminates with respect to any assets, it will be the duty of the bank, without notice from the district director, to make payment of taxes collectible from such assets.").

The due date for filing Taxpayer Bank's income tax return is unaffected by section 7507(a) and remains the normal filing due date determined under section 6072, Time for Filing Income Tax Returns. Section 6151(a) generally establishes a required date for paying income tax to the Internal Revenue Service, which date is the same as the unextended return filing due date.

¹ The language of section 7507(a) dates to 1879. See An Act To Amend the Law Relating to Internal Revenue, Section 22, 20 Stat. 327, 351 (Mar. 1, 1879). A review of the relevant legislative history has not revealed any particular answers to the central questions addressed in this memorandum.

² Section 7507(a) immunity from assessment and collection does not apply to employment taxes. I.R.C. § 7507(d); Treas. Reg. § 301.7507-11. In addition, Treas. Reg. § 1.597-6, as authorized by section 597(a) and the legislative history of section 597, supersedes the application of section 7507, and the regulations thereunder, for the assessment and collection of federal income tax attributable to Federal Financial Assistance (as defined in section 597(c) and Treas. Reg. § 1.597-1(b)). Treas. Reg. § 1.597-6(f). Taxpayer Bank's claims of section 7507(a) immunity at issue do not relate to any of its employment taxes or to any of its income taxes attributable to income that is Federal Financial Assistance.

Section 6601 Interest on Underpayment, Nonpayment, or Extensions of Time for Payment, of Tax

If a taxpayer does not pay the amount of tax imposed by title 26 “on or before the last date prescribed for payment,” interest on that amount must be paid for the period “from such last date to the date paid.” I.R.C. § 6601(a). Under the general rule of section 6601, the last date prescribed for payment of income tax is the date for payment as determined under section 6151(a). See I.R.C. § 6601(b).³

Section 7507 does not mention interest or section 6601.⁴ Section 6601(b) confirms the inapplicability of section 7507 to determining the last date prescribed for payment for purposes of starting the running of interest by affirmatively stating that that date “shall be determined under chapter 62” and making no mention of section 7507. Section 6151(a), which prescribes the original filing due date as the payment due date for tax, is in chapter 62, and section 7507 is not. Accordingly, the accrual of section 6601 interest is unaffected by the period of section 7507(a) immunity. With respect to an amount of unpaid tax, section 6601 interest accrues from the date fixed for filing the return reporting the tax, until the date on which the tax is paid, irrespective of section 7507(a) immunity.

Under section 6601(e)(1), interest prescribed under section 6601 is treated as tax to which section 6601 interest accrues. Section 6601 interest on unpaid section 6601 interest continues to accrue until the amount of section 6601 interest is paid.

FDIC has suggested that no interest can accrue during the period of section 7507(a) immunity, because FDIC believes that the tax will be abated under section 7507(a).⁵ Under FDIC’s view, the abatement would extinguish the tax liability so that there could be no tax liability upon which interest can accrue. Contrary to FDIC’s belief, however,

³ Underpayment interest generally accrues at the rates indicated in section 6621, and is compounded daily, I.R.C. § 6622(a). In FDIC-administered receiverships, a uniform interest rate generally applies to all creditor claims, and the interest is not compounded. 12 C.F.R. § 360.7. The FDIC’s general rule, however, “would not affect the calculation or accrual of interest on any federal income tax liability pursuant to sections 6601 and 6621 of the Internal Revenue Code.” Payment of Post-Insolvency Interest in Receiverships With Surplus Funds, 66 Fed. Reg. 65,144, 65,145 n.3 (Dec. 18, 2001) (Notice of Proposed Rulemaking for 12 C.F.R. § 360.7). See also Payment of Post-Insolvency Interest in Receiverships With Surplus Funds, 67 Fed. Reg. 34,385, 34,386 (May 14, 2002) (final regulation preamble indicating that 12 C.F.R. § 360.7’s “final rule is essentially identical to the proposed rule”). Accordingly, the Internal Revenue Code’s interest rates and compounding rule apply to any section 6601 interest that accrues in this receivership.

⁴ In the context of section 7507(b) immunity, Treas. Reg. § 301.7507-10 indicates that statutory interest should be collected if sufficient assets are available. However, section 7507(b) immunity is inapplicable in this case of section 7507(a) immunity, and Treas. Reg. § 301.7507-10 does not specify how interest should be calculated in this context.

⁵ “[S]uch tax shall be abated from such national banks as are found by the Comptroller of the Currency to be insolvent . . .” I.R.C. § 7507(a).

“[t]he fact that earnings of a given year may be wholly or partly unavailable under section 7507 for collection of taxes does not exempt the income for that year, or any part thereof, from tax liability. The section affects collectability only and is not concerned with taxability.” Treas. Reg. § 301.7507-5(b). As used in section 7507(a), abatement is only a removal of an assessment of tax made during a period of immunity and not an extinguishment of the underlying liability. See Treas. Reg. § 301.7507-6(a) (“assessment . . . is subject to abatement”). In other words, the tax liability itself is not abated, and only the assessment is abated. Assessment is not a prerequisite of the accrual of interest.

Section 6651(a)(2) Addition to Tax for Failure to Pay Tax

An addition to tax is imposed on a taxpayer for failing to pay the amount shown as tax on any return specified in section 6651(a)(1) (including income tax returns) on or before the date prescribed for paying that tax (determined with regard to any extension of time for payment), unless it is shown that the failure is due to reasonable cause and not due to willful neglect. I.R.C. § 6651(a)(2).

As to tax that becomes due during a period of immunity under section 7507(a), failing to pay tax during the period of immunity is due to reasonable cause under section 6651(a)(2) and not due to willful neglect, because section 7507(a) effectively precludes paying such tax on the payment due date. A proper claim of immunity filed as part of the taxpayer’s tax return is effectively a claim of reasonable cause under section 6651(a)(2). Thus, the section 6651(a)(2) addition to tax did not accrue, because Taxpayer Bank had reasonable cause as of the due date for paying the tax.

Section 6655 Addition to Tax for Failure by Corporation to Pay Estimated Income Tax

Section 6601 interest does not accrue on unpaid estimated tax. See I.R.C. § 6601(h). However, section 6655 imposes an addition to tax on a corporation that fails to pay estimated income tax. This addition to tax is in some ways an extension of section 6601 interest. While section 6601 interest accrues after the last date prescribed for payment of tax, the section 6655 addition to tax accrues before such date, at the same rate as section 6601 interest, although compounding under section 6622 applies only to section 6601 interest and not to the section 6655 addition to tax.

For a calendar year corporate taxpayer such as Taxpayer Bank, estimated income tax is generally due in four installments, on April 15, June 15, September 15, and December 15 of the tax year. See I.R.C. § 6655(c)(2). In general, each installment should be 25 percent of the required annual payment. I.R.C. § 6655(d)(1)(A). The required annual payment in the case of a large corporation is generally 100 percent of the tax shown on the return for the taxable year (or 100 percent of the tax for such year if no return is filed). I.R.C. § 6655(d)(1)(B) & (d)(2)(A). However, the required annual payment may be 100 percent of the tax shown on the return for the preceding taxable

year, if that amount is less and the taxpayer is not a large corporation. See I.R.C. § 6655(d)(1)(B).

The section 6655 addition to tax is determined by applying the underpayment rate, established under section 6621, to the amount of the underpayment, for the period of the underpayment. I.R.C. § 6655(a). For any given installment, the amount of the underpayment is the amount of the required installment minus any amount of the installment paid on or before the due date for the installment. I.R.C. § 6655(b)(1). The period of the underpayment begins on the due date for the installment, and it ends on the earlier of (1) the 15th day of the fourth month following the close of the taxable year (April 15 in the case of Taxpayer Bank), or (2) the date such underpayment is paid. I.R.C. § 6655(b)(2).⁶ The section 6655 addition to tax does not accrue if the tax shown on the return for the taxable year (or, if no return is filed, the tax) is less than \$500. I.R.C. § 6655(f).

Section 7507 does not mention section 6655 or the addition to tax for failure to pay estimated income tax; and section 6655 does not mention section 7507. Accordingly, the accrual of the section 6655 addition to tax is unaffected by a period of section 7507(a) immunity. With respect to an amount of unpaid estimated tax, the section 6655 addition to tax accrues from the applicable date specified in section 6655(c)(2), until the date specified in section 6655(b)(2),⁷ irrespective of section 7507(a) immunity.

⁶ Section 6655(b)(2) was amended in 2015 to change the 15th day of the third month to be the 15th day of the fourth month, effective for tax years beginning after December 31, 2015, conforming with a concurrent statutory change to the due date for corporate income tax returns.

⁷ Section 6658, Coordination with Title 11, cancels the additions to tax under sections 6651, 6654, or 6655, for income taxes in the case of title 11 bankruptcy and if certain other conditions are met. Although the parent holding company of Taxpayer Bank filed for title 11 bankruptcy protection, Taxpayer Bank did not do so. Thus, section 6658 is not applicable to the preceding analysis of the additions to tax in the case of Taxpayer Bank.