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Memorandum

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date: July 26, 2021

to: Anthony J. Kim
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from: Elizabeth Girafalco Chirich, Branch Chief (Branch 1)
(Procedure & Administration)

subject: Statute of Limitations on Assessment under Section 6501(e) and Claims for Credit or Refund under Section 6511

This Chief Counsel Advice responds to your request for assistance asking whether failure to report subpart F income on several income tax returns, which failure extends the statute of limitations under section 6501(e)(1)(C), extends the statute for all items on the returns. You also asked whether the refund period of limitations was extended by virtue of the parties' agreement to extend the assessment period under section 6501(c)(4). This advice may not be used or cited as precedent.

ISSUES

1. Where the extended six-year assessment period under section 6501(e)(1)(C) applies as a result of omitted subpart F income, does the extended assessment period apply to the *entire return* or just to items related to omitted subpart F income?
2. Does an agreement to extend the period of limitations for assessment under section 6501(c)(4) also extend the limitations period for filing a claim for credit or refund when the agreement was entered into before the 6-year assessment period had expired but after the credit or refund limitations period under section 6511(a) had passed?

CONCLUSIONS

1. Yes, based on the prefatory language in section 6501(e)(1), the six-year period for assessment under section 6501(e)(1)(C) applies to the entire return and is not limited to the omitted subpart F income item.
2. No. Under section 6511(c)(1) and relevant case law, for the statutory period for filing a claim for credit or refund under section 6511(a) to also be extended, the agreement to extend the assessment period under section 6501(c)(4) must be made before the statutory period for filing a claim for credit or refund under section 6511(a) has expired.

FACTS

(“Taxpayer”)

For all relevant periods addressed in this memorandum, Taxpayer operated on a calendar year ending December 31.

- For the _____ tax year, Taxpayer made a \$ _____ estimated tax payment on _____ and timely filed its Form 1120 on _____, reporting tax due. Taxpayer filed an amended return on _____ that included adjustments to previously claimed credits, resulting in a refund, which Taxpayer received. On _____, Taxpayer filed a second amended return, reporting an omission of dividend income (subpart F income) and claiming additional credit and credit adjustments. This second amended return was filed after the three-year period of limitations on assessment under section 6501(a) had expired, but before the six-year period of limitations had expired under section 6501(e)(1)(C). Because of the omitted subpart F income, Taxpayer’s amended returns resulted in a net underpayment for the _____ tax year, which Taxpayer has not yet paid.
- For the _____ tax year, Taxpayer made a \$ _____ estimated tax payment on _____ and timely filed its Form 1120 on _____, reporting tax due. Taxpayer filed an amended return on _____ that included adjustments to previously claimed credits, resulting in a refund, which Taxpayer received. On _____, Taxpayer filed a second amended return, reporting an omission of dividend income (subpart F income) and claiming additional credit and credit adjustments. This second amended return was filed after the three-year period of limitations on assessment under section 6501(a) had expired, but before the six-year period of limitations had expired under section 6501(e)(1)(C). Because of the omitted subpart F income, Taxpayer’s amended returns resulted in a net underpayment for the _____ tax year, which Taxpayer has not yet paid.

- For the _____ tax year, Taxpayer timely filed its Form 1120 on _____, reporting a fully-paid tax liability. On _____, Taxpayer made an \$ _____ deposit in the nature of a tax bond for the _____ tax year. Taxpayer filed an amended return on _____, reporting an omission of dividend income (subpart F income) and claiming additional credit and credit adjustments. Because of the omitted subpart F income, the amended return reported an underpayment for the _____ tax year. This amended return was filed after the three-year period of limitations on assessment under section 6501(a) had expired, but before the six-year period of limitations had expired under section 6501(e)(1)(C).

In _____, the IRS began an examination of Taxpayer's _____ tax years. Because of the omitted subpart F income shown on Taxpayer's amended returns, the IRS determined, and Taxpayer agreed, that the six-year assessment period under section 6501(e)(1)(C) applied for each year _____.¹ Before the six-year period of assessment expired, Taxpayer and the IRS consented to extend the assessment period of limitations, signing in _____ a Form 872 (Consent to Extend Time to Assess Tax) for the _____ tax year. They signed additional Forms 872 for the _____ tax years in _____, so that the period of limitations on assessments for tax years _____ is extended to _____.

In examining the tax returns in issue, the IRS has proposed to adjust other items unrelated to the omitted subpart F income and questions whether section 6501(e)(1)(C) extends the assessment period with respect to Taxpayer's entire tax liability for the tax returns in issue. In other words, does the IRS have until _____ to issue a deficiency notice determining a deficiency attributable to items unrelated to the unreported subpart F income?

LAW AND ANALYSIS

1. Application of the six-year period of limitations under section 6501(e)(1)(C) to the entire return

Section 6501 generally requires the IRS to assess a tax within three years after the filing of a return. There are several exceptions to this general rule. For example, section 6501(c)(1) provides that there are no time limitations on the assessment of tax arising from a false or fraudulent return; and section 6501(h) provides a limited exception to the general three-year rule for a deficiency attributable to a net operating loss.

Section 6501(e) also provides an exception to the general three-year limitations period: section 6501(e)(1)(A) provides a six-year limitations period where there is a substantial omission of gross income on a taxpayer's return; and section 6501(e)(1)(C)—at issue

¹ Under section 6501(a), the assessment periods for the _____ tax years would have expired on _____, _____, and _____, respectively.

here—applies a six-year limitations period if a taxpayer omits amounts that must be included in income under the subpart F rules (I.R.C. §§ 951 et. seq.).

Courts have found that, based on the statutory language, some of the extended limitation periods described above apply to the entire return, while others only apply to a specific item of omitted income. For example, section 6501(c)(1) states that, in the cases of fraud, “*the tax may be assessed . . . at any time.*” (emphasis added). Courts have interpreted that provision to mean that, when section 6501(c)(1) applies to a particular year, the IRS can determine a deficiency with respect to all items on the return. See *Rhone-Poulenc Surfactants and Specialties, L.P. v. Comm’r*, 114 T.C. 533, 548 (2000), citing *Lowy v. Comm’r*, 288 F.2d 517, 520 (2d Cir. 1961) (“[I]f section 6501(c)(1) applies to a particular tax year, it clearly permits an open-ended period for any assessment of tax even if part of the assessment was based on nonfraudulent . . . items.”).

In contrast, section 6501(h) states that, where a deficiency is attributable to a net operating loss, “*such deficiency may be assessed at any time before the expiration of the period within which a deficiency for the taxable year of the net operating loss which results in the carryback may be assessed.*” (emphasis added). Thus, this exception has been interpreted “as a limited exception to the general 3-year period of limitations and is applicable only with respect to a deficiency attributable to the extraordinary items listed therein.” *Colestock v. Commissioner*, 102 T.C. 380, 385-86 (1994), citing *Deakman-Wells Co. v. Comm’r*, 213 F.2d 894, 898 (3d Cir. 1954), rev’g and remanding 20 T.C. 610 (1953); see also, *Thomas H. Jones v. Comm’r*, 71 T.C. 391, 396-97 (1978) (“This Court has interpreted [section 6501(h)] to prevent the Commissioner from assessing a deficiency in a year to which a carryback applies where the deficiency is attributable to errors having no relationship to the circumstances giving rise to the carryback . . .”).

In *Colestock*, the Tax Court determined that the exception under section 6501(e)(1)(A) opens all items on a taxpayer’s return for the determination of a deficiency, not just those items that created the deficiency. *Colestock*, 102 T.C. at 385-86. The court focused on the prefatory language of section 6501(e)(1) that applies the substantial omission exception to “any tax imposed by subtitle A.” Based on this language, the court explained, “[W]e interpret the phrase ‘the tax may be assessed * * * at any time within 6 years after the return was filed’ as referring to *any tax* imposed by subtitle A for the particular taxable year.” *Id.* at 388. The court distinguished this language from the language used under section 6501(h), which specifically limits the extended limitations period to items related to a net operating loss. *Id.*

The court found support for its conclusion in the legislative history related to section 6501(e)(1)(A). *Id.* at 388-90. The legislative history does not include any explanation related to section 6501(e)(1)(C), see H.R. Rep. 108-548 (June 16, 2004); H.R. Conf. Rep. 108-755 (Oct. 7, 2004). But section 6501(e)(1)(C) shares the same prefatory language referring to “any tax imposed by subtitle A,” which makes the analysis under *Colestock* regarding the scope of the limitations period under section

6501(e)(1)(A) equally applicable to section 6501(e)(1)(C). See *U.S. v. American Truck Associations*, 310 U.S. 534, 543-44 (1940) (statutes are to be construed so as to give effect to their plain and ordinary meaning).

Therefore, like section 6501(e)(1)(A), the phrase “the tax may be assessed . . . at any time within 6 years after the return was filed” refers to all income taxes reflected on a return. Thus, the six-year limitations period under section 6501(e)(1)(C) applies to the entire tax liability for a particular tax year and is not limited to the specific subpart F items constituting the omission from gross income.

2. Availability of claims for credit or refund under section 6511 when statute of limitations on assessment is extended under sections 6501(e)(1) and 6501(c)(4)

The Secretary of the Treasury is authorized to make credits or refunds when a taxpayer overpays taxes. I.R.C. § 6402(a). But refunds of overpayments “may not be allowed or made after the expiration of the statutory period of limitations properly applicable, unless, before the expiration of such period, a claim therefor has been filed by the taxpayer.” Treas. Reg. §301.6402-2(a)(1).

A taxpayer seeking a claim for credit or refund of overpaid taxes ordinarily must file a timely claim for a refund with the IRS under section 6511. Specifically, a taxpayer must file a claim for credit or refund

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 later, or if no return was filed by the taxpayer, within 2 years from the time the tax was paid.

I.R.C. §§ 6511(a) and (b)(1).

Taxpayer’s _____ claims for credit, filed on _____, are untimely because they were filed more than three years after the tax returns for those years were filed. Taxpayer’s claims for _____ were also filed more than two years after the tax was paid on _____ and on _____. Although Taxpayer remitted \$ _____ for the _____ tax year on _____, this was a deposit in the nature of a cash bond, not a payment of tax for purposes of a claim for credit or refund. Thus, this is not considered a payment for purposes of section 6511(a).²

² See *Baral v. United States*, 528 U.S. 431, 436 (2000); Rev. Proc. 2005-18, §4.01 provides that a taxpayer may make a deposit under section 6603 by remitting to the IRS Center a check accompanied by a written statement designating the remittance as a deposit. The written statement must include a statement described in §7.02 identifying the amount of and basis for the disputable tax. A remittance that is not designated as a deposit (aka, “undesignated remittance”) will be treated as a payment. Rev. Proc. 2005-18, §4.01(2). Any undesignated remittance that is made while the taxpayer is under examination, but before a liability is proposed to the taxpayer in writing (e.g., before the issuance of a revenue agent’s or examiner’s report), will be treated by the Service as a deposit if the taxpayer has no outstanding liabilities. Rev. Proc. 2005-18, §4.01(1).

Although Congress generally intended for the assessment period under section 6501 and the refund period under section 6511 to run concurrently,³ section 6511 does not contain an extended refund period of limitations when the 6-year assessment period of limitations under section 6501(e)(1) is extended by agreement under section 6501(c)(4).

Section 6511(c) provides special rules related to the credit or refund limitations period where the parties agree to extend the assessment period under section 6501(c)(4). Specifically, section 6511(c)(1) provides:

The period for filing claim for credit or refund or for making credit or refund if no claim is filed, provided in subsections (a) and (b)(1), *shall not expire prior to 6 months after the expiration of the period within which an assessment may be made pursuant to the agreement or any extension thereof under section 6501(c)(4).*

I.R.C. §6511(c)(1) (emphasis added).

But section 6511(c) also requires that the agreement under section 6501(c)(4) be executed “within the period prescribed in subsection (a) for the filing of a claim for credit or refund”—i.e., within three years from filing the return or two years from paying tax—in order for the credit or refund period to be extended by agreement. I.R.C. § 6511(c); Treas. Reg. §301.6511(c)-1(a).

An agreement to extend the assessment period must be made before the relevant assessment period has expired. I.R.C. § 6501(c)(4). Thus, an agreement to extend the assessment period under section 6501(e)(1) is valid so long as it is made before the six-year period expires. Under section 6511(c), however, unless a Form 872 was signed within the credit or refund limitations period under section 6511(a), the extension of the assessment period does not automatically extend a taxpayer’s time to claim a credit or refund.

The Ninth Circuit addressed this intersection of the assessment and refund periods in *Estate of Chism et al. v. Comm’r*, 322 F.2d 956 (9th Cir. 1963). In this case, the estate and the IRS entered into a consent agreement, Form 872, with respect to Mr. and Mrs. Chism’s 1952 tax year, in November 1957. This November date was more than three years but less than five years after the filing and due date of the Chism’s 1952 return. Under the consent agreement, the time for making an assessment was extended to June 30, 1959. In March 1959, the IRS timely issued a notice of deficiency for tax years 1952 through 1956.

³ For example, the legislative history of section 6501(h) establishes that Congress intended the limitations period for the assessment of deficiencies attributable to NOL carrybacks and the limitations period for credit or refund of overpayments attributable to NOL carrybacks to be “coextensive.” See H. Rep. 79-849, 79th Cong. 1st Sess. 1945 C.B. 588.

The estate petitioned, challenging that the deficiency for 1952 was barred by the statute of limitations. The estate also raised a new issue that, if allowed by the Tax Court, would have resulted in a refund for all years.

The Tax Court held that the assessment was not barred, because there was an omission in excess of 25 percent of the gross income reported on the 1952 return. Thus section 275(c) [under the Internal Revenue Code of 1939 (the predecessor to section 6501(e)(1)(A))] applied; and before the expiration of the 5-year period under section 275(c), the parties entered into a consent agreement, extending the assessment period to June 30, 1959; and before June 30, 1959, the Commissioner issued his notice of deficiency. The Tax Court also disallowed the claim for overpayment of taxes. The estate appealed, arguing that the extension agreement for 1952 was void for lack of mutuality because it did not also operate to extend the time during which a claim for refund could be filed. *Estate of Chism*, 322 F.2d at 962.

The Ninth Circuit rejected the taxpayers' argument. The court explained that the Code did not require mutuality under these circumstances and that, for the refund period to be extended, section 322(b)(3), the predecessor to section 6511(c), clearly required the extension agreement to be entered into within the period of limitation for refund claims "prescribed in paragraph 1 ... three years from the time the return was filed by the taxpayer * * *." *Id.* at 963. The court noted that, in contrast, an agreement to extend the assessment period is valid so long as it is made within an applicable assessment period under section 275 (i.e. either the general three-year period or an extended period). Because that agreement to extend the assessment period was executed before the five-year assessment period under section 275(c) had expired, it was valid. *Id.* Although this result lacks mutuality, the court explained that:

Thus, in situations in which the five-year statute is applicable, agreements to extend the assessment period can be made at any time before the five-year statute has run.....But *refunds are authorized only if the claim has been filed within the three years after the return was filed, or within a period as extended by an agreement made within that three-year period.* A congressional intent to require mutuality in every case would be incompatible with this statutory framework. It would effectively preclude any agreement extending the five-year period for assessing deficiencies from being made more than three years after the return had been filed. We will not impute such an intent to Congress in the face of its contrary statutory language. The agreement extending the assessment period in this case was an effective one and assessment of the deficiency for 1952 is not barred.

Estate of Chism, 322 F.2d 956 at 963 (emphasis added).

Here, the facts mirror those in *Estate of Chism*. Although the instant case involves the six-year limitations period under section 6501(e)(1)(C), whereas *Estate of Chism* involved the predecessor to section 6501(e)(1)(A), the Ninth Circuit's reasoning applies

because both provisions operate in the same way under the statute. Applying both the plain language of section 6511(c) and *Estate of Chism*, Taxpayer's claims for credit for tax years are untimely.⁴

Conclusion

Case law and statutory interpretation suggest that the six-year assessment period under section 6501(e)(1)(C) applies to Taxpayer's entire return for each of the tax years. Both sections 6501(e)(1)(A) and (C) share the same prefatory language and the Tax Court's reasoning in *Colestock* logically applies to both provisions.

Taxpayer's claims for credit filed on were untimely under section 6511(a) and these claims could not be extended by the parties' consent agreements. Section 6511(c) clearly provides that an agreement to extend the limitations period for assessment will only extend a taxpayer's time to file a claim for credit or refund when it is executed within the limitations period under section 6511(a). The assessment statute for the tax years, however, was extended because the parties' Forms 872 were executed before the six-year assessment period under section 6501(e)(1)(C) had expired. Further, *Estate of Chism* applied these principles to a nearly identical set of facts.

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Please call Christopher Whitcomb at (202) 317-4210 if you have any further questions.

⁴ The IRS is not required to substantiate Taxpayer's potential offsets because the amended returns filed on do not involve overpayments and the IRS is proposing adjustments within the assessment period of limitations. See *Lewis v. Reynolds*, 284 U.S. 281 (1932) (holding the IRS can offset a taxpayer's refund claim even when the assessment period of limitations has expired).