



OFFICE OF
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DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
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INTERNAL REVENUE SERVICE NATIONAL OFFICE FIELD SERVICE ADVICE

MEMORANDUM FOR

FROM: Assistant Chief Counsel (Field Service) CC:DOM:FS

SUBJECT: Internal Revenue Service National Office Field Service
Advice

This Field Service Advice responds to your memorandum dated September 15, 1998. Field Service Advice is not binding on Examination or Appeals and is not a final case determination. This document is not to be cited as precedent.

LEGEND:

X

Y

Z

Date 1

Date 2

Date 3

Date 4

Year 1

Year 2

Year 3

Year 4

Year 5

ISSUE(S):

Whether a Form 1139, which is based on an attached unfiled, revised Form 1120, which has been altered from the actual filed return, is an acceptable processible form.

CONCLUSION:

A Form 1139, which is based only on an unfiled, revised return, is not an acceptable form for processing an application for tentative refund. Therefore, the Service may disallow X's application for tentative refund.

FACTS:

On Date 1, X filed a Chapter 11 bankruptcy. X's liquidating plan for reorganization was confirmed on Date 2. The liquidating plan provided that all of X's assets, including any claims or causes of action, would be transferred to Y. X's trustee, Z, was empowered with the rights, powers and standing of a debtor in possession under 11 U.S.C. § 1107.

On Date 3, Z filed a Form 1139, Corporation Application for Tentative Refund, on behalf of X, seeking to carryback a "specified liability loss" from Year 1 to Year 2. The specified liability loss was comprised of professional fees incurred in Year 4 and Year 5 during X's bankruptcy, and had been capitalized. (The issue of whether the claimed fees constitute a specified liability loss will be the subject of a separate Request for Technical Advice.)

Z attached to the submitted Form 1139 a Form 1120, United States Corporation Income Tax Return, for Year 1. This attached Form 1120 had been altered from the Form 1120 that was filed with the Service for Year 1. The Form 1120 that was attached to the Form 1139 had revised figures for its loss and included a deduction for the capitalized bankruptcy fees. The actual Form 1120 of X for Year 1 that was filed with the Service was signed by X's former CEO, and was dated Date 4. The revised Form 1120 that was attached to the Form 1139 contains a copy of the signature of X's former CEO and is dated Date 4, as if the revised Form 1120 was an actual copy of the filed Form 1120. However, the filed Form 1120 for Year 1 did not include deductions for the capitalized fees that are now included in the altered Form 1120.

A note on a schedule that was submitted with the revised Form 1120 stated that the identical capitalized fees deduction was included as a deduction on X's Form 1120 that was filed with the Service for Year 3. X states that the deductions were mistakenly included on the Form 1120 for Year 3. However, X has not filed an amended Form 1120 for Year 3 to eliminate the erroneously claimed deductions. X

has also not filed Forms 1120X, Amended U. S. Corporation Income Tax Return, for Year 1 or Year 2.

LAW AND ANALYSIS

Pursuant to I.R.C. § 6411(a), a taxpayer may file an application for a tentative carryback adjustment of the tax for a prior year. Section 6411(a) states that:

The [application for tentative carryback adjustment] shall set forth in such detail and with such supporting data and explanation as such regulations shall require

(1) The amount of the net operating loss, net capital loss, or unused business credit;

(2) The amount of the tax previously determined for the prior taxable year affected by such carryback, the tax previously determined being ascertained in accordance with the method prescribed in section 1314 (c);

(3) The amount of decrease in such tax, attributable to such carryback, such decrease being determined by applying the carryback in the manner provided by law to the items on the basis of which such tax was determined;

(4) The unpaid amount of such tax, not including any amount required to be shown under paragraph (5);

(5) The amount, with respect to the tax for the taxable year immediately preceding the taxable year from which the carryback is made, as to which an extension of time for payment under section 6164 is in effect; and

(6) Such other information for purposes of carrying out the provisions of this section as may be required by such regulations.

Section 6411(a) further requires that the application must be verified in accordance with section 6065 in the case of a return and shall be filed in a manner and form required by regulations prescribed by the Secretary. The regulations prescribed by the Secretary require the taxpayer to include a copy of the return from the tax year with the carryback loss. The application shall be filed on or after

the date for filing the return for the tax year with the loss and within 12 months after such taxable year. Reg. § 1.6411-1.

The Service then has 90 days to decide whether to allow the carryback. During this 90-day period, the Service will make a very limited review of the application for tentative refund. The Service may only deny the application if it finds omissions in the application or errors in computation. Reg. § 1.6411-3. Essentially, section 6411 requires the Service to review the application for tentative refund, determine the amount of the overpayment, and apply a credit or refund an overpayment. Reg. § 1.6411-1. Reg. § 1.6411-2(b) further provides that in determining the decrease attributable to the carryback amount, items should be taken into account only to the extent that they were reported on the return.

The application for a tentative carryback adjustment shall be filed, in the case of a corporation, on a Form 1139. Reg. § 1.6411-1(b)(1). The application shall be filled out in accordance with the instructions accompanying the form, and all information required by the form and instructions must be furnished by the taxpayer. Id. The application form requires the taxpayer to submit a copy of the previously filed federal income tax return for the year of the carryback. See Instructions to Form 1139.

Rev. Rul. 75-327, 1975-2 C.B. 481, states that a Form 1139 that is filed with a Form 1120 marked "Tentative," will not be acceptable for the purposes of processing the Form 1139. Rev. Rul. 75-327 further states:

The Service must rely on the information provided by the taxpayer on Form 1139 and much of this information, such as the amount of the net operating loss, is based on the return for the loss year. Thus, section 6411(a) of the Code requires that the return for the loss year be filed before the application for tentative refund can be made, so that there is some reasonable basis for relying on the application.

Under § 6611(g), a return, including an application for tentative refund, is processible if it was (1) filed on a permitted form, (2) filed in proper form with the taxpayer's name, address, identifying number, and required signature, and (3) filed with sufficient information (whether on the return or required attachments) to permit the mathematical verification of the tax liability on the return. Columbia Gas Systems Inc. v. United States, 70 F.3d 1244, 1246 (Fed. Cir. 1995). Mathematical verification requires sufficient information to permit the Service to recalculate and corroborate the mathematics and information reported by the taxpayer. Id.

In the case at issue, X included with the Form 1139 a copy of an altered Form 1120 for Year 1 that was never filed with the Service. The original filed Form 1120 for Year 1 did not indicate a deficiency carryback amount. X did not file a

Form 1120X with the alterations on it. Instead X took a copy of the originally filed Form 1120, with the original signature and date, and made the alterations right on the form. In order for a document to constitute a valid return, the document must be verified under penalty of perjury. Hettig v. United States, 845 F.2d 794, 795 (8th Cir. 1988). The signature and date on the altered Form 1120 are the signature and date of the originally filed Form 1120. Therefore the signature is not verifying under perjury the alterations that were made to the return after it was signed, and the altered Form 1120 is not a valid return.

Thus, the altered Form 1120 is equivalent to the Form 1120 in the Rev. Rul. 75-327 example that was marked "Tentative." Rev. Rul. 75-327 ruled that the Form 1139 with the return marked "Tentative" was not acceptable for processing because it was not based on a valid return. Therefore, under this reasoning, the Form 1139 in the case at issue is also not acceptable for processing because it too is based upon an invalid Form 1120. The Service is not able to rely on X's submissions if they are conflicting and based on an altered Form 1120 that has not been filed. The conflicting Forms 1120 make it difficult for the Service to verify the application. This is especially true because X made the same deductions on both the altered Form 1120 for Year 1 and the filed return for Year 3. The Service has to depend on the submissions made by X to determine if X's application for a tentative refund should be granted. X's failure to file a valid tax return that states the carryback amount also amounts to an omission for which the Service may deny the application.

CASE DEVELOPMENT, HAZARDS AND OTHER CONSIDERATIONS:

An application for tentative carryback adjustment does not constitute a claim for refund. Reg. § 1.6411-1. In other words, if the application is denied by the Service, the taxpayer may not file a suit for a refund under section 6611. If the Service fails to disallow the application for a tentative refund within the 90-day period, the Service is not barred from later assessing a deficiency or challenging the taxpayer's entitlement to refund in a later suit. In re Southwestern States Marketing Corp., 179 B.R. 813 (N.D. Tex. 1994). Under section 6611, the Service must pay interest on any tax overpayment refunded to a taxpayer more than 45 days after the later of either the tax return due date or the return filing date. Columbia Gas Systems v. United States, 70 F.3d 1244 (Fed. Cir. 1995).

If you have any further questions, please call the branch telephone number.