



DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

OFFICE OF
CHIEF COUNSEL

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MEMORANDUM FOR DISTRICT COUNSEL,

ATTN:

FROM: Heather C. Maloy
Acting Assistant Chief Counsel (Income Tax & Accounting)
CC:DOM:IT&A

SUBJECT: Significant Service Center Advice

This responds to your request for Significant Advice dated January 29, 1999, in connection with a question posed by the Service Center.

ISSUE

Is the Internal Revenue Service (Service) liable to a spouse for his or her share of a joint refund where the Service erroneously issued the refund check to the other spouse?

CONCLUSION

Section 6402 of the Internal Revenue Code (Code) provides that the Service shall refund an overpayment of tax to the person who made the overpayment. When married taxpayers file a joint return, each spouse has a separate interest in the overpayment shown on the return. In cases where the Service issues a refund check in the name of only one spouse, and the other spouse demonstrates a separate interest in the overpayment, the Service is liable to this other spouse for the amount of his or her separate interest in the overpayment.

Accordingly, the Service is required to pay the other spouse his or her separate interest in the refund. Also, the Service should pursue the spouse who received the original refund check and attempt to recover the share of the overpayment which was due to the other spouse.

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FACTS

The taxpayers, husband and wife, were married at all times during the taxable year. The husband filed a return claiming "head of household" filing status. The wife did not file a return. Service Center conducted an examination of the husband's return and proposed several adjustments. One of the adjustments was to allow the husband "married filing joint" filing status with his wife. The husband and wife executed Form 4549-CG, Statement of Income Tax Examination Changes, agreeing to the proposed adjustments (i.e., an additional personal exemption for the wife and computation of the tax using joint rates rather than single rates). The agreed adjustments resulted in an overpayment of tax.

Because the Service failed to include the wife's name on the account, the service center issued the refund check in the name of the husband (original filer) only. The husband cashed the refund check and refused to give the wife any portion of the proceeds. The wife contends that the Service erred by not issuing the refund check jointly to the taxpayers. To correct this alleged error, the wife requests that the Service issue a duplicate refund check for the full refund to her.

DISCUSSION

Section 6013(a) of the Code permits a husband and wife to make a joint return of individual income taxes.

Section 6402(a) of the Code provides, in part, that in the case of any overpayment, the Secretary may credit the amount of such overpayment against any tax liability of the person who made the overpayment and shall refund the balance to such person.

Section 301.6402-2(f)(1) of the Regulations on Procedure and Administration provides, in part, that checks in payment of claims allowed will be drawn in the names of the persons entitled to the money. The regulations implement the clear statutory rule that a tax refund should be issued to the person or persons who overpaid the tax.

Section 6402(a) of the Code authorizes the Service to credit or refund any overpayment of tax only to the "person who made the overpayment." Although spouses are permitted to file a joint return, they are considered separate taxpayers for purposes of determining the "person who made the overpayment." Gordon v. United States, 757 F.2d 1157 (11th Cir. 1985); Maragon v. United States, 153 F.Supp. 365 (Ct. Cl. 1957); St. John v. Bookwalter, 58-1 USTC ¶ 9216 (W.D. Mo. 1957). Disputes over entitlement to a joint refund often require an allocation of the spousal shares.

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In Rev. Rul. 74-611, 1974-1 C.B. 399, the Service held that a joint income tax return does not create new property interests for the husband or the wife in each other's income tax overpayment. Instead, each spouse has a separate interest in the overpayment shown on a joint return. Under the facts of the ruling, because the entire overpayment was attributable to the wife, no portion of the overpayment shown on the joint return could be credited against the husband's separate tax liability. The wife was the "person who made the overpayment" within the meaning of § 6402(a).

The amount of a joint return overpayment that is attributable to each spouse is determined by apportioning the overpayment between the spouses to the extent each spouse contributed to the overpaid tax. Gens v. United States, 230 Ct. Cl. 42 (1982); Rosen v. United States, 397 F.Supp. 342 (E.D. Pa. 1975). The Service has set out, in a series of revenue rulings, the "separate tax formula" for making this apportionment.¹ Under the separate tax formula, a spouse's separate interest in an overpayment is determined by subtracting that spouse's share of the joint tax liability from that spouse's contribution toward the payment of the joint tax liability.

The Service does not typically determine the separate interests of the spouses in an overpayment before crediting or refunding the overpayment. As a practical matter, the Service often cannot determine the separate interests of the spouses based solely on information provided in the return. Thus, when the Service refunds an overpayment shown on a joint return, it typically issues the refund in the names of both spouses, leaving them to divide the proceeds. This procedure satisfies the § 6402(a) requirement that the Service issue the refund to the person or persons who made the overpayment, and is administratively practical, considering the volume of joint returns received by the Service and the complexity involved in determining a spouse's separate interest in the overpayment.²

Assuming the Service were able to determine the separate interest of each spouse in an overpayment shown on a joint return, nothing in the law would prohibit the Service from issuing a separate refund check to each spouse in the amount of his or her interest in the overpayment. On the other hand, where the Service issues a refund in the name of only one spouse, and the other spouse has a separate interest in that overpayment, the Service has not issued the refund to the "person who made the overpayment" within the meaning of § 6402(a) of the Code.

¹ See Rev. Rul. 80-7, 1980-1 C.B. 296; Rev. Rul. 85-70, 1985-1 C.B. 361; and Rev. Rul. 87-52, 1987-1 C.B. 347.

² Similarly, the Service does not determine the separate interests of the spouses in an overpayment when it credits the overpayment against the separate tax debt of one of the spouses. Rather, the Service credits the entire amount of the joint overpayment against the separate tax debt of the liable spouse. If the nonliable spouse can demonstrate that he or she had a separate interest in the joint overpayment, the Service will refund that spouse's share of the overpayment.

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In such cases, the Service is liable to the other spouse for his or her share of the overpayment. To remedy this error, the Service should apply the separate tax formula of Rev. Rul. 80-7 and issue a refund to the spouse for his or her separate interest in the overpayment. The Service should then attempt to recover the excessive refund from the spouse who received the original refund check. If necessary, the Service could utilize the erroneous refund procedures of § 7405(b) of the Code.

Under the facts presented, you indicate that the Service mistakenly issued the refund to the husband only. We suggest that the service center apply the separate tax formula of Rev. Rul. 80-7, as modified by Rev. Rul. 87-52, to the facts. If the wife did, in fact, have a separate interest in the overpayment, the Service should refund this amount to the wife and take the necessary steps to recover the same amount from the husband.

However, the information you submitted indicates that the wife had no earned income and made no payments toward the joint tax liability. We note that, under the Rev. Rul. 80-7 formula, the wife may not have a separate interest in the overpayment.

If you have any further questions, please contact Andrew Keyso at 202-622-4910.

HEATHER C. MALOY

/s/ George J. Blaine

By: _____
GEORGE J. BLAINE
Chief, Branch 1

cc: