



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

OFFICE OF
CHIEF COUNSEL

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MEMORANDUM FOR ASSISTANT DISTRICT COUNSEL, DELAWARE-
MARYLAND

FROM: Kathryn A. Zuba
Chief, Branch 2 (General Litigation)

SUBJECT: Offsetting Refunds to Offers in Compromise

This is in response to the memorandum from your office dated March 3, 1999, requesting an advisory opinion. This document is not to be cited as precedent.

ISSUE:

May the Internal Revenue Service retain a refund for the taxable year 1999 where an offer in compromise is accepted during 1999 and the Form 656 states that refunds for tax periods extending through the calendar year that the offer is accepted will be retained but the acceptance letter states that refunds made in 1999 for the prior tax year will be retained.

CONCLUSION:

The Service may retain the refund for 1999 because the Form 656, not the acceptance letter, contains the terms governing the offer agreement.

FACTS:

The Form 656 provides in item 8(g), in relevant part, as follows:

IRS will keep any refund, including interest, due to me/us because of overpayment of any tax or other liability, for tax periods extending through the calendar year that IRS accepts the offer. I/we may not designate a refund, to which the IRS is entitled, to be applied to estimated tax payments for the following year....

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The acceptance letter reads, in relevant part, as follows:

Additionally, please remember that the conditions of the offer include the provision that as additional consideration for the offer, we will retain any refunds or credits that you may be entitled to receive for XX or for earlier tax years. This includes refunds you receive in XX+1 for any overpayments you made in XX or in earlier years.

When the offer in compromise package is prepared for approval by appropriate Service personnel, the "XX" in the acceptance letter is filled in with the current year. Thus, where a revenue officer forwards an offer package for approval towards the end of a calendar year, but the offer is not finally accepted by the Service until the beginning of the next year, the Form 656 and the acceptance letter provide conflicting information about the refunds that the Service will retain. For example, when the Service sends the acceptance letter and offer package to district counsel's office for review and approval at the end of 1998, but the offer is not formally accepted until the beginning of 1999, the language in Form 656 states that the refund for the year 1999 be retained by the Service, but the acceptance letter provides that the Service will retain refunds for the year 1998 and prior years.

LAW AND ANALYSIS:

The offer in compromise agreement is a contractual agreement between the Internal Revenue Service and the taxpayer. See Cooper Agency v. United States, 301 F. Supp. 871 (D.S.C. 1969), aff'd 422 F. 2d 1331 (4th Cir. 1970). As a contract, the offer in compromise is subject to the rules governing general contract law. United States v. Lane, 303 F.2d 1 (C.C.A. Fla. 1962), appeal after remand, 328 F.2d 602 (5th Cir. 1964); United States v. McCue, 178 F. Supp. 426 (D. Conn. 1959). The terms of the offer agreement are contained in the Form 656. The acceptance letter serves to convey to the taxpayer that the Service has accepted the offer. As a document intended to convey the Service's acceptance of the offer, it may not modify or alter those terms. See generally 1 Corbin on Contracts 456 (rev. ed. 1993) (an expression of assent that changes the terms of the offer in any material respect is not an acceptance of a contract). The language in the letter should, therefore, reflect the terms contained in the Form 656 and should not modify or alter those terms.

The situation you have requested our advice on arises because the acceptance letter is completed prior to approval of the offer and the year(s) for which the Service may retain the refunds is specified in the body of the letter at the time the letter is prepared. In situations where the offer is accepted in a year after the compromise package is prepared, the date included in the acceptance letter should

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be revised to reflect the year in which the letter is dated prior to being sent to the taxpayer.

To the extent that the acceptance letter contains language that appears to be inconsistent with the terms contained in the Form 656, it is our position that the parties are bound by the provisions contained in the Form 656. Since the offer provides specifically that the Service will retain any refund, including interest, for "tax periods extending through the calendar year that IRS accepts the offer," the Service may retain any refund for the calendar year in which the offer is accepted and any prior years. Thus, in the hypothetical case you described to us where the offer was accepted in the year 1999, the Service is entitled, under the terms of the agreement, to retain the 1999 refund.

If you have any further questions, please call the branch telephone number (202) 622-3620.

cc: Assistant Regional Counsel (GL), Southeast Region