

**Office of Chief Counsel
Internal Revenue Service
memorandum**

CC:PA:01:CAMcGreevy
POSTN-145484-10

UILC: 6611.00-00

date: February 01, 2011

to: Thomas S. Ryan
(Service Wide Interest)

from: Blaise G. Dusenberry
Senior Technical Reviewer
(Procedure & Administration)

subject: Application of Coca-Cola v. U.S., 87 Fed. Cl. 253 (2009)

This Chief Counsel Advice responds to your request for assistance concerning how statutory interest under section 6611 of the Internal Revenue Code is to be computed in situations involving a tentative carryback allowance that is later reduced (referred herein as a recapture of the tentative allowance) following an audit in which a general adjustment overpayment is also determined. Specifically, you have asked whether the Court of Federal Claims' decision in Coca-Cola v. United States, 87 Fed. Cl. 253 (2009) requires the Service to make adjustments to its current procedures. Your inquiry is not case specific but is intended to be used in interest tutorials, interest computation routines, training materials, and the Internal Revenue Manual, as appropriate.

Your initial inquiry included two factual scenarios, which you supplemented with additional scenarios.¹ We have evaluated the various fact patterns you have presented and conclude that there is no blanket rule for the computation of overpayment interest to be derived from the Coca-Cola case. The mere existence of a recapture of a tentative allowance is not enough to implicate the treatment afforded in Coca-Cola.²

¹ We understand that the fact patterns presented were synthesized from actual taxpayer claims submitted to the Service requesting the "benefit of Coca-Cola." Computations can change precipitously with subsequent events, which may or may not be indicated in the scenarios presented for our consideration. Thus, this advice should not be construed to dispose of any particular taxpayer's request. If you need assistance with a live case, please contact our office for further guidance in the form of Technical Advice or Taxpayer Specific Chief Counsel Advice, as appropriate.

² The existence of a "tentative carryback allowance" and a "subsequent recapture" is a generic concept equivalent to the "determination of a subsequent deficiency" or "general adjustment" and of itself dictates no particular computational treatment. The Service must evaluate each case on its own specific fact pattern. Therefore, we caution against translating this general advice to an intended resolution of any particular example presented.

Consequently, interest computation specialists must continue to apply the general rules of section 6601 and section 6611, as appropriate, and should resist the urge to draw parallels between what are unrelated issues just because the general concept of a recapture of a tentative carryback allowance is present.

Proper application of the principles that govern overpayment interest suggests that each particular case must be evaluated based on the facts presented. After considering the variations presented, we determined that most of the scenarios were not analogous to the facts of Coca-Cola. Consequently, we confine our discussion to the appropriate fact patterns.³

ISSUE

Whether the Service is required to pay additional overpayment interest in the described scenarios based on the Court of Federal Claims decision in Coca-Cola.

FACTS

Example 1:

For calendar year 2003, B Corp files Form 1139, Corporate Application for Tentative Refund, on September 15, 2004, carrying back a net operating loss deduction to 2001. The resulting overpayment of \$50,000 is issued to B Corp as a refund on October 12, 2004, within 45 days of the date of the application. Pursuant to section 6611(e) and (f)(4)(B), no interest is allowed on the refund.

On August 5, 2005, the Service completes an examination of the Form 1120 for B Corp for the tax years ending 2001 – 2003, which results in a general adjustment overpayment of \$5,000 for 2001 and a complete recapture of the tentative carryback refunded without interest on October 12, 2004, for a net tax increase of \$45,000.

Specific issue – Is taxpayer entitled to overpayment interest from March 15, 2003, (the due date of the 2002 return) to October 12, 2004, (the date of the tentative carryback allowance) on \$5,000 (the general adjustment after audit before taking into account the recapture.)

Example 2:

The facts are the same as example 1, except that the carryback recapture is a partial recovery of \$30,000.

Specific issue – Is taxpayer entitled to overpayment interest from March 15, 2003, (the due date of the 2002 return) to October 12, 2004, (the date of the tentative

³ The incoming also uses phrases without legal significance, such as “interest suspension period” and “liability date of the carryback recapture.” These characterizations confuse the issue and fail to recognize that various factual scenarios require different computational treatment.

carryback allowance) on \$5,000 (the general adjustment after audit before taking into account the recapture.)

Example 3:

C Corp timely filed its 1993 Form 1120, U.S. Corporation Income Tax Return (Form 1120), pursuant to an extension on September 15, 1994. On December 15, 1999, C Corp files a Form 1139 seeking to carry its 1998 loss to its 1993 year, requesting a refund of \$10 million. The Service refunded \$10 million, without interest, on January 10, 2000 (within 45 days of the filing of the tentative application).

On April 11, 2005, the Service recaptured the tentative allowance by transferring overpayment credits, in the amounts of \$8 million and \$2 million, from C Corp's 1994 and 1995 years, respectively, into the 1993 account. C Corp claims that "by applying the \$10 million in 1993, a new and subsequent overpayment balance was established as of March 15, 1999, that is separate from the original tentative allowance of \$10 million and also, separate from the interest free period that was applied to that tentative allowance." C Corp requests overpayment interest on the \$10 million from March 15, 1999, the due date of the 1998 return, to January 10, 2000, the date on which the Service issued the refund claimed on the Form 1139.

LAW AND ANALYSIS

Section 6611(a) sets forth the general rule that interest will be allowed and paid on overpayments of tax. Section 6611(e)(1) and (2) provide an exception to the general rule if the overpayment is refunded within 45 days after the return (or claim for credit or refund) is filed.

When an overpayment of tax is refunded, the taxpayer is allowed interest from the date of the overpayment to a date determined by the Secretary that precedes the date of the refund check by not more than 30 days. I.R.C. § 6611(b)(2). But, when an overpayment is credited against an outstanding tax liability, interest is allowable on the overpayment from the date of the overpayment to the payment due date of the amount against which the credit is applied. I.R.C. § 6611(b)(1); Treas. Reg. § 301.6611-1(h). Thus, if a taxpayer's overpayment is credited to a liability that was due prior to the date the overpayment arose, the overpayment is credited without interest. See AT&T Corp. & Subs. v. United States, 62 Fed. Cl. 490 (2004) (holding that the taxpayer was not entitled to any overpayment interest when the interest end date preceded the interest start date). Further, in the case of a credit carryback, the overpayment is deemed not to have been made before the filing date for the taxable year in which the carryback arises. I.R.C. § 6611(f)(3).

In Coca-Cola, the taxpayer filed its 1981 corporate income tax return on September 13, 1982. The taxpayer also timely filed its 1984 tax return on March 15, 1985, claiming, in part, a business credit carryback. On September 15, 1985, the taxpayer filed an

application for a tentative carryback adjustment and refund on Form 1139, carrying the business credit back to the taxpayer's 1981 tax year⁴ and requesting a refund of \$18,682,973 of the taxes paid for that year. The Service issued the refund in full on September 27, 1985, without interest.

From October 27, 1987, through January 23, 1991, the Service made several adjustments to Coca-Cola's 1981 tax liability. These adjustments included a determination that Coca-Cola was not entitled to \$12,448,079 of the \$18,682,973 tentatively refunded on September 27, 1985. On January 23, 1991, the Service assessed the \$12,448,079, which was paid when the Service credited overpayments from the taxpayer's 1980 and 1984 accounts to the 1981 account. These credits were made as of October 1987 and March 1990, respectively.

Coca-Cola disputed the carryback adjustment and the Service's recapture of the tentative refund. On April 8, 1991, it filed a Form 1120X for the 1981 tax year, claiming a refund of \$13,086,842. On May 30, 1991, the Service sent Coca-Cola a Notice of Deficiency proposing additional adjustments for 1981, 1983, and 1984. The adjustments to the 1981 tax year were based on other reductions to 1984 items that had been carried back to 1981. The determined deficiency for 1981 was \$6.2 million.

The taxpayer timely filed a petition for redetermination with the Tax Court. On January 2, 1997, the Tax Court entered a stipulated decision that, after taking into account business credit carrybacks from 1984, determined an overpayment of \$12,352,648 for the taxpayer's 1981 tax year.

The Service abated the \$12,352,648 in tax and \$5,531,965.47 in associated deficiency interest, putting the 1981 account into overpaid status. The Service exercised its statutory authority under section 6402(a) and, rather than refunding the overpayment, credited the full amount of the overpayment (without interest) to Coca-Cola's outstanding tax liability for its 1982 tax year.

Coca-Cola then filed suit in the United States Court of Federal Claims to recover interest on the overpayment of its taxes for the period from March 15, 1985, through September 27, 1985. The Court of Federal Claims awarded Coca-Cola \$2,587,589.36 in overpayment interest, plus interest on the interest to June 30, 2003.⁵ The Court of

⁴ Under section 6411(a), taxpayers seeking a refund from a carryback may apply for a tentative carryback adjustment and refund for the carryback year utilizing an expedited application process, rather than filing for a refund under section 6402. Under the expedited process, within 90 days of the date a taxpayer filed an application for a tentative carryback adjustment and refund the Service must: (1) perform a limited examination of the taxpayer's application for omissions and computational errors, (2) determine the tax decrease attributable to the carryback, and (3) credit the tax decrease against unpaid tax and refund any remaining amount to the taxpayer. I.R.C. § 6411(b); Treas. Reg. § 1.6411-3(a), (b), (d). Corporate taxpayers must apply for a tentative refund by filing Form 1139, Corporation Application for Tentative Refund. Treas. Reg. § 1.6411-1(b). If the Service subsequently determines a tentative refund was erroneously issued, the Service may summarily assess the refund as if it were caused by a mathematical or clerical error on the return. I.R.C. § 6213(b)(3); Treas. Reg. § 301.6213-1(b)(2).

⁵ The court also awarded the taxpayer \$162,263.62 in over-assessed deficiency interest, which is not in

Federal Claims glossed over the Service's decision to credit the overpayment of tax against Coca-Cola's 1982 tax liability and focused on the application of the 45-day rule set forth in section 6611(e).

According to the court, the government's argument was that, "because the IRS originally returned the requested amount within § 6611(e)'s 45-day grace period, no interest is now due." The court concluded that the term "refunded" in the text of section 6611(e), which provides that no interest shall be allowed if any overpayment of tax is refunded within 45 days, "necessarily implies that the taxpayer was permitted to keep the amount returned". Thus, the court found that government reliance on the 45-day rule and the fact that Service had full paid the taxpayer's claim for tentative refund was misplaced. Accordingly, the court held that section 6611(e) does not provide an exception to the statutory requirement that the government pay interest on the overpayment of tax that resulted from the recapture of the tentative refund and Coca-Cola is entitled to interest as provided therein.

We do not believe that the Coca-Cola decision stands for a blanket rule that upon recapture of any tentative carryback, the Service automatically becomes liable for interest on the overpayment that may result if the taxpayer ultimately succeeds in disputing the recapture of the tentative carryback. Under the particular facts of that case, which do not appear to be present in any of the scenarios before us, the 1985 overpayment was credited against Coca-Cola's outstanding tax liabilities for the 1982 tax year. Because the 1982 tax liabilities arose prior to March 15, 1985⁶, the overpayment is credited without interest and no interest is paid. See AT&T Corp. & Subs. v. United States, 62 Fed. Cl. 490 (2004). Thus, Coca-Cola was not legally entitled to overpayment interest on the amount of the overpayment determined by the Tax Court.⁷

Conclusions

Example 1:

The specific issue in this example was presented as follows: Is taxpayer entitled to overpayment interest from March 15, 2003, (the due date of the 2002 return) to October 12, 2004, (the date of the tentative carryback allowance) on \$5,000 (the general adjustment after audit before taking into account the recapture.)

dispute.

⁶ This was the date on which payments first exceeded the liability. Treas. Reg. § 301.6611-1(b) ("the dates of overpayment of any tax are the date of payment of the first amount which (when added to previous payments) is in excess of the tax liability" and the dates of any payments after that); Jones v. Liberty Glass Co., 332 U.S. 524, 531 (1947) (defining "overpayment" as "meaning any payment in excess of that which is properly due"). The overpayment was increased on March 15, 1990, when another payment was made to the account.

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We do not believe the taxpayer is entitled to such interest and that Coca-Cola is factually distinguishable. Following the audit, the Service determined a net underpayment of \$45,000. Based on the facts presented, the recapture was not satisfied by the application of an overpayment from another tax period; when determining the correct tax liability for a given year, the Service must take into account all adjustments (including those otherwise barred, a fact not relevant here.) Deficiency interest under section 6601 on the \$45,000 net adjustment will accrue as appropriate but overpayment interest is not allowed.

Example 2:

Similar to Example 1, the net adjustment for the year is \$25,000. No interest is allowed on the interim overpayment.

Example 3:

C Corp argues it is entitled to overpayment interest from March 15, 1999, to January 10, 2000, on the transfers into tax year 1993 from tax years 1994 and 1995. The Service satisfied the recapture of the tentative allowance as of April 11, 2005. Under section 6402(a), the Service has the discretion of applying an overpayment, plus any interest thereon, against another liability on the part of the taxpayer. Interest on the amounts transferred to 1993 from the 1994 and 1995 accounts might accrue overpayment interest that could also be applied to the 1993 liability, but would do so based on the facts of 1994 and 1995, rather than 1993, as the taxpayer claims. Under the facts specified here, however, C Corp is not entitled to overpayment interest for 1993 on amounts transferred in from other tax periods to satisfy the underpayment for 1993, because the due date of the 1993 payment preceded the due date of the 1994 payment. AT&T bars interest on the 1993 overpayment in this instance.

This writing may contain privileged information. Any unauthorized disclosure of this writing may undermine our ability to protect the privileged information. If disclosure is determined to be necessary, please contact this office for our views.

Please call (202) 622-4910 if you have any further questions.

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