



OFFICE OF
CHIEF COUNSEL

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

FEB 19 1999

MEMORANDUM FOR ROBERT E. BARR
ASSISTANT COMMISSIONER
(ELECTRONIC TAX ADMINISTRATION)

FROM:

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Associate Chief Counsel (Domestic)

SUBJECT:

Electronically Transmitted EIC Returns

ISSUE: This memorandum addresses whether the Service may issue refunds to certain taxpayers who electronically filed Forms 1040 claiming the earned income credit (EIC). Pursuant to § 32(k) and the regulations thereunder, these returns should have been, but were not, accompanied by a Form 8862, Information to Claim Earned Income Credit After Disallowance.

BACKGROUND:



1. Rejection Code 600 indicates that the return is missing a Form 8862. Form 8862 is generally required to claim the EIC after previous disallowance of the credit.

PMTA: 00256

DISCUSSION: Section 6402(a) of the Code and § 301.6402-1(a) of the Income Tax Regulations provide that the Commissioner may refund any overpayment. Refunds of overpayments may not be allowed or made after the expiration of the period of limitations unless, before the expiration of the period of limitations prescribed by § 6511, a claim has been filed by the taxpayer. In the case of an overpayment of income taxes, a claim for refund of an overpayment is made on the appropriate income tax return or on Form 1040X if the income tax return has been filed. The Commissioner's authority to schedule a refund is predicated on a determination that the taxpayer has overpaid the tax liability. In the present case, and assuming that no other "refund freeze" conditions are present, the authority of the Commissioner to refund an overpayment turns on the EIC claimed by the taxpayer under § 32.

Section 32(k)(2) provides

In the case of a taxpayer who is denied credit under this section for any taxable year as a result of the deficiency procedures . . . , no credit shall be allowed under this section for any subsequent taxable year unless the taxpayer provides such information as the Secretary may require to demonstrate eligibility for such credit.

Section 1.32-3T of the temporary regulations provides that

In the case of a taxpayer [who has been denied an EIC as a result of the deficiency procedures], and except as otherwise provided by the Commissioner, no claim for the EIC filed subsequent to the denial is allowed unless the taxpayer properly completes Form 8862, *Information To Claim Earned Income Credit After Disallowance*, demonstrating eligibility for the EIC and otherwise is eligible for the EIC. [emphasis added.]

Thus, as provided by the regulation, the Commissioner may permit the EIC to be claimed after disallowance in situations where the Form 8862 has not been filed. However, the preamble to the regulation indicates that the delegation of authority was based on the understanding that there may be circumstances in which the Commissioner might want evidence in addition to Form 8862. Nevertheless, the language of § 1.32-3T(c) is not limited only to circumstances in which the Commissioner decides that additional evidence is necessary. Accordingly, § 1.32-3T(c) may be read to permit the Commissioner to reduce or waive evidentiary requirements in appropriate circumstances.

We are aware of no requirement in published procedures that would require the refunds to be paid prior to receiving the Form 8862.² With respect to the E-File program and direct deposit of refunds, section 9 of Rev. Proc. 98-50, 1998-38 I.R.B. 8, states that the Service does not guarantee a specific date by which a refund will be directly deposited in the taxpayer's financial institution account. Further, the IRS will ordinarily process a request for direct deposit, but reserves the right to issue a paper refund check.

CONCLUSION:

[REDACTED]

This memorandum has been coordinated with the Office of the Associate Chief Counsel (Employee Benefits and Exempt Organizations), which has jurisdiction over § 32.

cc: Mr. Rossotti, Commissioner
Mr. Wenzel, Deputy Commissioner of Operations
Mr. Dalrymple, Chief Operations Officer
Mr. Cosgrave, Chief Information Officer
Mr. Brown, Chief Counsel
Mr. Oveson, Taxpayer Advocate
Ms. Marks, Deputy Associate Chief Counsel (EBEO)
Mr. Fernandez, Deputy Assistant Chief Counsel (IT&A)

2. Delay in issuing a refund may result in the allowance of interest payable under the 45-day rule set forth in section 6611(e).