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CHIEF COUNSEL

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

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CC:DOM:IT&A:BR3JDryden
WTA-N-109604-99

MEMORANDUM FOR NANCY RYMER
OP:C:A:A CHIEF, ACCOUNTS RESOLUTION BRANCH
ATTN.: Dick Kisiel

FROM: Michael D. Finley *Michael D. Finley*
Chief, CC:DOM:IT&A:Br3

SUBJECT: Limitation on Credit or Refund

You requested our assistance in determining the Refund Statute Expiration Date (RSED) when a refund claim is received more than three years after the original return was filed and more than two years after the last date for payment of tax, but within two years of a payment of penalty and/or interest.

You provided us with the following example: On June 15, 1995, a taxpayer filed a Form 1040 for Tax Period December 31, 1994 reporting a tax liability of \$1,000.00. The taxpayer was assessed a late filing penalty and interest in the amounts of \$100.00 and \$50.00, respectively. The taxpayer made two payments of \$500.00 on September 15, 1995 and April 15, 1996 to pay the tax liability. On June 15, 1998, the taxpayer made a final payment of \$150.00 to pay the penalty and interest. On April 15, 1999, the taxpayer filed an amended return claiming a refund for the full tax liability of \$1,000.00 plus any penalty and interest paid.

ISSUE

Are the interest and penalty in your example properly treated as "tax" for the purposes of section 6511?

CONCLUSION

Interest and penalties generally are treated as tax by the Internal Revenue Code and by the courts, including for the purpose of determining the timeliness of refund requests under section 6511. The taxpayer, in your example, filed a timely refund claim for the amount paid on June 15, 1998 and, thus, is not barred by section

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6511 from receiving a refund for that portion of the tax (i.e., interest and penalty) paid within two years of the taxpayer's refund claim.

ANALYSIS

Section 6511 has two requirements that are applicable to this example. First, section 6511(a) requires that a claim for a refund of an overpayment of "any tax imposed by this title" must be filed within the later of three years from the time the return was filed or two years from the time the tax was paid. Second, section 6511(b)(2)(B) limits the amount of refund, in cases where the claim for refund was not filed within the three year period, to the amount of the tax paid in the two years immediately preceding the filing of the refund claim.

In this case, the taxpayer failed to file for a refund within three years of the time the return was filed and also failed to file for a refund within two years of the time the initial two tax liability payments were made. However, the taxpayer did file for a refund within two years of the taxpayer's payment of the \$150 of interest and penalty. If the interest and penalty are properly treated as tax paid, then the taxpayer's refund claim meets the timeliness requirements of section 6511(a).

The taxpayer paid \$150 to the Service in the two years immediately preceding the taxpayer's filing a refund claim. If this payment is considered tax, the taxpayer's refund is limited to \$150 by section 6511(b)(2)(B).

Your question, whether or not the payment of the interest and penalty are to be considered a tax payment under section 6511, is key to correctly applying the law to this case.

Because the taxpayer was late in remitting his or her tax liability for Tax Period December 31, 1994, it appears that the taxpayer was assessed interest under section 6601. Section 6601(e)(1) states explicitly that interest is treated as tax:

Interest prescribed under this section on any tax . . . shall be assessed, collected, and paid in the same manner as taxes. Any reference in this title . . . to any tax imposed by this title shall be deemed also to refer to interest imposed by this section on such tax.

In addition to interest, the taxpayer seems to have been assessed a penalty under section 6651(a)(1) which requires that a penalty of five percent of the amount of the tax liability be added to the tax for each month or fraction of a month in which the taxpayer fails to file his or her tax return past the date prescribe by the Code. The taxpayer filed his or her tax return for Tax Period December 31, 1994 on June 15, 1995, two months past the filing deadline of April 15, 1995 and, therefore, was

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assessed a penalty of \$100. This penalty is treated as tax under section 6665(a)(2):

any reference in this title to "tax" imposed by this title shall be deemed also to refer to the additions to the tax, additional amounts, and penalties provided by this chapter.

Section 6651 is in chapter 68 along with section 6665; the penalty assessed by 6651, therefore, is tax.

The courts similarly have interpreted the Code as meaning that interest and penalties, related to tax liability, are to be treated as tax. In Alexander Proudfoot Co. v. United States, 454 F.2d 1379 (Ct. Cl. 1972), the United States Court of Claims stated that interest is assimilated into the tax and that the taxpayer who pays both should seek to recover both in one proceeding. The court further states, "[T]he interest demand would be as much governed by §6511 as the claim for the tax itself" Id. at 1382.

Other courts have sustained this view. See, Fisher v. United States, 80 F.3d 1576 (Fed. Cir. 1996) (holding that the Code treats interest on a tax liability as an integral part of the liability itself); Greenhouse v. United States, 738 F.Supp. 709 (S.D.N.Y. 1990) (agreeing with the government's claim that interest and penalties are included in the term "tax"); Gannet v. United States, 877 F.2d 965 (Fed. Cir. 1989) (stating that §6601(e)(1) treats accrued interest as part of the unpaid tax). *Cf.*, Ertle v. United States, 93 F.Supp. 619 (Ct. Cl. 1950) (indicating that penalty should be treated as tax in its holding that claims for return of penalty must follow the same procedures as a claim for a refund of overpayment of tax).

Given that the taxpayer filed a refund claim within two years of the taxpayer's final payment of the "tax", the taxpayer's refund claim was timely under section 6511(a), but the amount of refund is limited to the amount of the final payment under section 6511(b)(2)(B).

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