

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

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date: May 07, 2008

to: Russ J. Thieleman
Program Manager, Servicewide Interest Program

from: Blaise Dusenberry
Senior Technician Reviewer
(P&A Branch 1)

subject:

This memorandum responds to your request for assistance with regard to the above-referenced case. We have reviewed the case report for issues within the jurisdiction of Procedure & Administration, Branch 1.

ISSUES

1. Which entity is entitled to a refund of an overpayment?
2. Is overpayment interest under section 6611 allowed on the refund?

FACTS

ending _____, which resulted in an overpayment that was elected to be applied to the estimated tax account of the succeeding taxable year. The taxpayer had an extension of time for filing the _____ tax return to _____. The Service applied the overpayment on or about _____, to the first installment of estimated tax on the _____ tax account of _____, due _____.

Subsequently, _____ filed an amended tax return (Form 1120X) for the _____ tax year that was received by the Service on _____. On that form, the taxpayer requested the aforementioned overpayment that was applied to the _____ tax account be issued as a refund.

PMTA : 01813

For the period ending _____, included its subsidiary, _____, in its consolidated return. Thus, a separate return for _____ was not filed for the _____ tax year. The consolidated return for _____ was received by the Service on _____, had an extension for filing the consolidated return to _____.

LAW AND ANALYSIS

1. Which entity is entitled to the refund of the overpayment.

Section 1501 gives to an affiliated group of corporations the privilege of filing a consolidated income tax return. By filing the return, all of the members of the group consent to be bound by the consolidated return regulations prescribed under section 1502. The regulations state that the tax liability of a group for a consolidated return year includes the tax on the group's consolidated taxable income for the year. Sec. 1.1502-2(a), 1.502-11(1).

Section 1.1502-77(a) provides "the common parent" for a consolidated return year is the sole agent (agent for the group) that is authorized to act in its own name with respect to all matters relating to the tax liability *for that consolidated return year* (emphasis added)."

As to a refund of a consolidated group's overpayment, under the regulations, only the common parent, as sole agent for the group (unless a substitute agent is designated), may file a claim for a refund of the overpayment. Sec. 1.1502-77(a)(2)(v).

Sections 1501 and 1502, and the regulations thereunder, apply to consolidated return years. The overpayment at issue (i.e., _____ overpayment) is not the overpayment of a consolidated group return year. As the return for the _____ tax year is that of _____, the overpayment for that year, along with any interest that may be applicable to such overpayment, is that of _____. Section 1.1502-77 has no impact on the entity entitled to a refund with respect to _____ overpayment.

Accordingly, _____ is the entity entitled to the refund of any overpayment with respect to its _____ tax year allowed by the Service.

2. Is there any overpayment interest on the refund?

Section 6611(a) provides that "interest shall be allowed and paid upon any overpayment in respect of any internal revenue tax at the overpayment rate established under section 6621." In the case of a refund, interest shall be allowed and paid from the date of the overpayment (if the return was timely) to a date (determined by the Service) preceding the date of the refund check by not more than thirty days.

Section 6402(a) of the Code provides that in the case of any overpayment, the Secretary may credit the amount of such overpayment against any federal tax liability of the person who made the overpayment.

Section 6402(b) authorizes the Service to prescribe regulations providing for the crediting against the estimated income tax for any taxable year of the amount determined by the taxpayer or the Secretary to be an overpayment of the income tax for the preceding taxable year.

Section 6513(d) provides "if any overpayment of income tax, in accordance with section 6402(b), is claimed as a credit against estimated tax for the succeeding taxable year, such amount shall be considered as a payment of the income tax for the succeeding taxable year (whether or not claimed as a credit in the return of estimated tax for such succeeding taxable year), and no claim for credit or refund of such overpayment shall be allowed for the taxable year in which the overpayment arises."

Section 301.6513-1(d) of the regulations provides that "an election...to credit an overpayment of income tax precludes the allowance of a claim for credit or refund of such overpayment for the taxable year in which the overpayment arises."

Section 301.6402-3(a)(5) of the regulations provides that a taxpayer may elect to apply all of the overpayment shown by its return to its estimated tax for the succeeding tax year by so indicating on its return. It also provides that no interest is allowed on the portion of the overpayment credited and the amount of the credit is applied as a payment on account of the estimated income tax for the year or the installments thereof. See also Sec. 301.6611-1(h)(2)(vii) (if a taxpayer "elects to have all or part of the overpayment shown by his return applied to his estimated tax for his succeeding taxable year, no interest shall be allowed on such portion of the overpayment credited and such amount shall be applied as a payment on account of the estimated tax for such year or the installments thereof").

As noted above, a corporation can elect to apply all or any portion of its overpayment of tax shown on its return as a payment of estimated tax for its next taxable year. Section 6513(d) and the accompanying regulations limit a taxpayer's ability to reverse an election to apply an overpayment of income tax in one taxable year to estimated income tax for the following taxable year. Such election, once made, generally cannot be revoked. See Martin Marietta Corp. v. U.S., 572 F.2d 839, 842 (Ct. Cl. 1978).

In certain cases, however, the Service has reserved discretion to allow taxpayers to change their election and receive a refund of their overpayment. In IRM 1.2.12.1.14, Policy Statement P-2-88 ("Elections to apply income tax overpayments to estimated tax may be reversed upon showing of undue financial hardship") provides:

When an income tax overpayment is elected for credit to estimated tax for the following year, it must be so applied. If the taxpayer wishes to change his/her election (after the filing of the overpayment return) in order to have the

overpayment refunded, the refund may be made only upon a showing that the taxpayer would suffer undue financial hardship. Refunds in such cases will be limited to individual taxpayers whose requests are submitted far enough in advance to permit refund to be made prior to the end of the taxable year to which the credit was applied. Interest will not be allowed on the overpayment for the reason that the Service was precluded from making the refund within the usual 45-day interest-free period.

In addition, IRM 20.2.4.8.4 provides that if "the taxpayer requests permission to change a credit elect to a refund, interest is not allowed on the refund".

Therefore, to the extent that the Service allows _____ to reverse the election it made under section 6402(b) to apply the overpayment for its _____ tax year to the estimated taxes of its succeeding tax year, interest under section 6611 is not allowed on the subsequent refund of such overpayment.

CONCLUSION

Provided the Service allows _____ to reverse its election to credit its overpayment for the _____ tax year to its estimated taxes for the succeeding tax year, _____ is the entity entitled to the subsequent refund of the _____ overpayment. In addition, _____ is not entitled to interest under section 6611 on the subsequent refund of the overpayment for its _____ tax year.

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 myself at (202) 622-3400 or Tim Sheppard (202) 622-4910 if you have any further questions.