

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

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date: April 20, 2012

to: Kimberly Mattonen  
Attorney, Division Counsel  
(Small Business/Self-Employed)

from: Pamela Wilson Fuller  
Senior Technician Reviewer  
(Procedure & Administration)

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subject: Credit Interest Order of Allocation

This Chief Counsel Advice responds to your office's request for assistance dated January 30, 2012. This advice may not be used or cited as precedent.

ISSUE

When credits/payments are made to a tax module as of the same date and an overpayment is created by those credits/payments, must the Internal Revenue Service apply the credits/payments in a certain order for purposes of determining overpayment interest?

CONCLUSION

When credits/payments are made on the same date, the Service has the discretion in determining the order in which to apply the payments.

FACTS

Your inquiry is not case specific. Accordingly, we present the following factual scenario to highlight your question:

On May 2, 2011, the Service issued a 30-day letter to the taxpayer, claiming a liability of \$100,000 is due from the taxpayer for the 2010 taxable year. On May 12, 2011, the taxpayer provided a deposit under section 6603 in the amount of \$60,000. On February 9, 2012, the Service determined that the taxpayer was liable for \$40,000 for the 2010 taxable year. On April 9, 2012, the taxpayer signed a waiver of restrictions on

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assessment and collection and agreed to pay the full deficiency. On April 17, the Service assessed the \$40,000. On the date of the assessment, the Service also applied an overpayment of \$60,000 from the taxpayer's 2011 taxable year account to the taxpayer's 2010 taxable year account. The application of both the deposit and the offset, created an \$80,000 overpayment in the taxpayer's 2010 account. The taxpayer asked, in writing, for a return of the bond, and requested a refund of the remaining amount. To determine the appropriate amount of overpayment interest to be paid the taxpayer the Service needs to know whether there is a requirement to apply payments/credits in a certain order.

### LAW AND ANALYSIS

Section 6603(a) provides that a taxpayer may make a deposit with the Service which may be used by the Service to pay a disputable income, gift, estate, generation-skipping transfer or certain excise tax which has not been assessed at the time of the deposit. A disputable tax is the amount of tax that, at the time the deposit is made, is the taxpayer's reasonable estimate of the maximum amount of tax attributable to the disputed items. I.R.C. § 6603(d)(2). Revenue Procedure 2005-18 states that, upon completion of an examination, the deposit is applied against the liability as of the date the assessment, regardless of whether the taxpayer has executed a waiver of restriction on assessment and collection, or the 90 or 150-day period during which assessment is stayed has expired. See Rev. Proc. 2005-18, secs. 4.02(1) & (2). To the extent that the deposit is used by the Service to pay a disputable tax, the tax shall be treated as paid on the date of the deposit, thereby stopping any underpayment interest under section 6601, if a deficiency is determined. I.R.C. § 6603(b)(2).

The Service will return any section 6603 deposit that the taxpayer requests in writing to be returned, unless the amount has previously been used to pay tax or the Service determines that the collection of tax is in jeopardy. I.R.C. § 6603(c). The Service will pay overpayment interest on the returned deposit at the federal short-term rate determined under section 6621(b), compounded daily.

In this scenario, at the time the taxpayer made the deposit, the disputable tax for taxable year 2010 was \$100,000. Due to the 30-day letter, it was reasonable for the taxpayer to conclude that the taxpayer could have been liable for \$100,000 at the time of the deposit. Additionally, the issuance of a 30-day letter provides a safe harbor for determining the amount of the disputable tax under section 6603(d)(3).

Upon the completion of the examination, if the \$40,000 liability is deemed to be satisfied by the \$60,000 offset, the refund would consist of \$20,000 from the offset and the entire \$60,000 deposit. The \$20,000 refund from the offset would accrue overpayment interest to a date not more than 30 days preceding the date of the refund at the federal short-term rate plus 3 percentage points for non-corporate taxpayer and 0.5 percentage points for corporate taxpayers, and the \$60,000 deposit would accrue overpayment interest to date not more than 30 days preceding the date of the refund at the federal

short-term rate, compounded daily. I.R.C. §§ 6611(b)(2) and 6621(a). If the \$40,000 liability is deemed to have been satisfied by the \$60,000 deposit, the refund would consist of \$60,000 from the offset (accruing overpayment interest at the federal short-term rate plus 3 or 0.5 percentage points) and the \$20,000 deposit (accruing overpayment interest at the federal short-term rate, compounded daily).

Nothing in the Code, treasury regulations or Rev. Proc. 2005-18 addresses this situation. In Ford Motor Company v. United States, 105 A.F.T.R. 2d 2010-2775 (E.D. Mich. 2010), the United States District Court for the Eastern District of Michigan held that there is no legal authority requiring the Service to apply deposits to disputed amounts before applying overpayments from other years, or vice versa. In that case, the Service applied an overpayment from a later year to satisfy an underpayment for a year on which Ford had already made a deposit. Ford complained, and the Court held that there is “no legal basis for its [Ford’s] claim that the Government was required to apply its deposits to collect these amounts ... [A]bsent any authority requiring the IRS to apply the deposit to satisfy a subsequently assessed liability, the Court finds no reason why the Service cannot choose which monies to use.” *Id.* at \*7 and \*8.

While Ford considered pre-section 6603 deposits, there is still no authority requiring the Service to apply a deposit or overpayment first to a liability. Accordingly, the Service has the discretion to determine which payments/credits will be used to satisfy a liability.

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) 622-4940 if you have any further questions.