


Office of Chief Counsel
Internal Revenue Service
memorandum

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date: June 11, 2013

to: Matt Weir
Deputy National Taxpayer Advocate

from: Judith M. Wall 
Special Counsel to the
National Taxpayer Advocate

subject: Offset Bypass Refunds - Significance of 23C Date, and Definition of Clerical Error

This memorandum responds to your request for assistance. This advice may not be used or cited as precedent.

Background

IRC § 6402 provides that the IRS “*may credit*. . . [an] overpayment, including any interest allowed thereon, against any liability in respect of an internal revenue tax on the part of the person who made the overpayment” and, “shall, subject to [certain limitations], refund any balance to such person.” IRC § 6402(a) (emphasis added). Thus, IRC § 6402(a) gives the IRS the authority to offset a taxpayer’s overpayment against any outstanding federal tax liability before issuing a refund. Because the statute is phrased as the IRS “*may credit*...,” the IRS can exercise its discretion to bypass the outstanding federal tax liability and issue a refund to a taxpayer experiencing economic hardship. This type of refund is known as an offset bypass refund (OBR).

There is no legal authority that requires the IRS to issue an OBR; rather, the IRS has made a policy decision not to offset an overpayment against an outstanding federal tax liability but instead issue a refund if the taxpayer can demonstrate hardship. Hardship for this purpose is economic hardship within the meaning of IRC § 6343 and the regulations thereunder (*i.e.*, unable to pay basic living expenses).

The IRM provides that an “OBR must be issued before the posting date (Assessment Document Date or the 23C Date) of the original return (TC 150) on which the overpayment was reported.” IRM 21.4.6.5.12.1(8). In addition, the IRM provides that the manual refund document has to be received by the Accounting function no later than the Friday cut-off-time before the 23C date (which is always a Monday). *Id.* If a taxpayer contacts the IRS to request an OBR and the 23C date has passed, IRS

employees are instructed to tell the taxpayer that the overpayment has been applied to the balance due account and the IRS cannot stop it. See IRM 21.4.6.5.12.1(5). See also IRM 3.17.79.3.21(5) ("OBR request must be received and processed before the actual posting date on which the offset of the overpayment is shown (the 23C Date))." Once the offset has been made, the IRS will not reverse the offset unless a clerical error has occurred that prevented processing of the request. See IRM 3.17.79.3.21(5) (Note). Additionally, if a taxpayer has an IRS debt and a Treasury Offset Program debt (i.e., federal agency nontax debt, state income tax obligations, unemployment compensation debt, or child support), IRM 3.17.79.3.21(2)(Note) prohibits the IRS from bypassing either debt.

ISSUES

1. What is the significance of the 23C date? Is it possible to initiate an OBR after the 23C date?
2. If the IRS's policy is to reverse an offset only if a clerical error occurred that prevented the processing of the request for an OBR, what constitutes a "clerical error"?
3. If a taxpayer owes an outstanding Treasury Offset Program debt as well as a federal tax debt, is there a legal prohibition on the IRS issuing an OBR after satisfying the Treasury Offset Program debt?

CONCLUSIONS

1. The date of the offset, not the 23C date, is the significant date for OBR purposes. Once the offset has occurred, there is no longer any overpayment to refund. Consequently, an OBR cannot be initiated after the offset has occurred. The IRM does not clearly reflect this rule. [REDACTED]

2. The concept of "clerical error" is not defined in the Internal Revenue Code or Treasury Regulations; rather, it stems from case law developed by the courts over the years as a way to permit the IRS to reverse certain errors. A clerical error is not an error based on substance or judgment, but rather, a mere inadvertent act on the part of a TAS or IRS employee.

3. Under IRC § 6402(a), the IRS has discretion to offset an overpayment against a liability, but only when it is with respect to an internal revenue tax. In contrast, the IRS is obligated to apply a taxpayer's overpayment to a Treasury Offset Program debt (outstanding child support debt, Federal agency nontax debt, state income tax obligation, or unemployment compensation) prior to crediting the overpayment to a future tax or making a refund. Thus, the IRS has no discretion to bypass Treasury Offset Program debts. In addition, IRC § 6402 provides rules for the priority of offsets,

depending on the type of Treasury Offset Program debt. For some (but not all) types of Treasury Offset Program debts, the priority rules contemplate that the IRS must be paid first before an offset can be made to a Treasury Offset Program debt. Consequently, for consistency and administration purposes, the IRS has adopted a policy of not issuing an OBR when the taxpayer has a federal tax debt and any type of Treasury Offset Program debt.

LAW AND ANALYSIS

1. Significance of the 23C Date.

Although the IRS's policy on OBRs in IRM 3 and IRM 21 appears to be tied to the 23C date, the 23C date isn't actually the significant date. How and when the IRS processes the overpayment claimed on the return and the offset determines whether an OBR can be issued. The TC 150 is the transaction code posted to the account, reflecting that a return has been filed and any tax assessed. See IRS Document 6209. The 23C date is the date the summary record is signed, where the summary record reflects all the TC 150s that are recorded on that date.¹ When a taxpayer files a return, the computer systems reflect that a return has been received, but it sometimes takes up to a week or ten days for the TC 150 to post to the account. Until the tax shown on the return has been assessed and the overpayment is reflected on the account, there is nothing to offset. And the overpayment credit does not exist until the IRS authorizes the scheduling of the refund or credit. See IRC § 6407.

After the return has been processed, the offset and the 23C date are generally the same. The exception, however, is if there is a freeze condition or a refund hold on the account when the taxpayer files his or her return; in those situations, the offset will not occur until the freeze or hold is lifted, which then may be long after the 23C date. Thus, unless there is a freeze condition/refund hold in place, the date of the offset and the 23C date are the same. The date of the offset is the significant date.

Once an overpayment has been

¹ The IRS has historically used Form 23C as the summary record of assessments, which is a compilation of the total amount of tax, penalties, and interest that are assessed for a particular day, without reference to any taxpayer. March v. IRS, 335 F.3d 1186 (10th Cir. 2003); IRM 3.17.63.2.4.9. Accordingly, the assessment date is referred to as the "23C" date. Note that the IRS now uses Revenue Accounting Controls System (RACS) Report 006, a computerized version of the Form 23C. See IRM 3.17.63.2.3. The IRS does, however, still use Form 23C when RACS is unavailable. See IRM 3.17.63.2.4.9(11).

offset to another liability, the overpayment no longer exists. And unless there has been a clerical error associated with the offset, it is not possible to initiate an OBR after the offset has occurred.

2. Definition of "Clerical Error"

Once the offset has occurred, there is no longer any overpayment to refund. There is nothing in the Code or the regulations that gives the IRS the authority to reverse the offset when there is no longer any overpayment.² There is a "clerical error" doctrine, however, which courts have developed over the years, primarily as a way to allow the IRS to reverse certain errors. See, e.g., Crompton-Richmond Co. v. United States, 311 F. Supp. 1184 (S.D.N.Y. 1970); Bugge v. United States, 99 F.3d 740 (5th Cir. 1996).³ In creating the OBR process administratively in the IRM, the IRS is relying on the clerical error doctrine to correct errors that prevented the processing of the OBR.

Some employees may automatically equate "clerical error" with an error committed by someone in a clerical job position or an error based on data entry. Applying the legal definition, however, a "clerical error" is

[a]n error resulting from a minor mistake or inadvertence, esp. in writing, or copying something on the record, and not from judicial reasoning or determination. Among the boundless examples of clerical errors are omitting an appendix from a document; typing an incorrect number; mistranscribing a word; and failing to log a call.


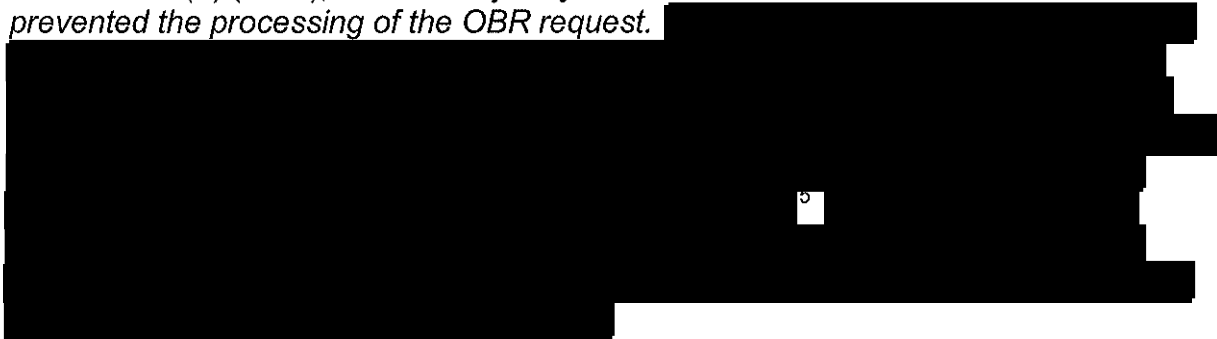
BLACK'S LAW DICTIONARY 563 (7th ed. 1990). Similarly, the common, everyday meaning is "a minor error, as in the keeping of records, the transcribing of documents, or the handling of correspondence." Dictionary.com (May 30, 2013), <http://dictionary.reference.com/browse/clerical?s=ts>. Perhaps a better way to describe the principle is an inadvertent error or a ministerial error. Both of those phrases are somewhat broader, and cover the notion that the IRS (including TAS) made some type of error in the overall processing of the case, not just an error in the inputting of data.⁴

² In contrast, one spouse (the injured spouse) on a jointly filed tax return can get back his or her share of the overpayment which was offset to a past-due obligation belonging solely to the other spouse. In the injured spouse context, there is still an overpayment that can be refunded because the injured spouse's portion of the overpayment was applied to a debt that the injured spouse had no responsibility to pay. See Treas. Reg. § 301.6402-6(i). See also Form 8379, *Injured Spouse Allocation*.

³ Both Crompton-Richmond and Bugge dealt with situations in which the IRS abated assessments in error. The courts in those cases concluded that the abatements were accidental mistakes, not mistakes involving errors in judgment. As a result, the IRS was allowed to reinstate the assessments even though the assessment statute expiration date had passed.

⁴ For example, IRC § 6404(e)(1) provides, in relevant part, that the IRS may, within its discretion, abate interest on any deficiency where the interest is attributable to an error.

The IRM is not clear on the meaning of "clerical error." The plain meaning would suggest that TAS employees could advocate for the reversal of an offset in a number of appropriate circumstances. To be consistent with the existing guidance in IRM 3.17.79.3.21(5) (Note), an error to justify a reversal of the offset must be one which *prevented the processing of the OBR request.*



The following examples are intended to help TAS employees advocate for clarity between (1) clerical errors, and (2) errors in judgment or substantive errors. This is by no means an all-inclusive list of examples; the examples are intended to give some parameters and promote uniformity in OBR cases.

Examples of Clerical Errors

- (1) A case advocate receives documentation of the taxpayer's economic hardship (\$989) and timely submits the OBR request to the IRS before the offset has occurred, but requests an OBR for \$889. The Local Taxpayer Advocate approves the manual refund paperwork, but doesn't notice the typo. The case advocate realizes the error after the offset has occurred. The

or delay by an officer or employee of the IRS in performing a ministerial act. The regulations promulgated under section 6404 define a "ministerial" act as one that does not involve the exercise of judgment or discretion. See Treas. Reg. § 301.6404-2(b)(2). In the interest abatement context, Congress described the concept of a ministerial act as "a procedural action, not a decision in a substantive area of tax law." S. Rep. No. 99-313, at 209 (1986).

⁵ Local Taxpayer Advocates have the delegated authority to determine that a manual refund is appropriate. See IRM 1.2.42.2, Delegation Order 3-1 (Rev. 1) (Feb. 4, 2011). The Local Taxpayer Advocate must sign Form 3753, *Manual Refund Posting Voucher*, to indicate his or her approval to issue the manual refund.

incorrect amount requested is an inadvertent mistake, not a substantive one. A clerical error has occurred that prevented the processing of the OBR request in the correct amount.

- (2) A case advocate receives documentation of the taxpayer's economic hardship, and the Local Taxpayer Advocate approves the manual refund paperwork. The case advocate timely faxes the OBR request to the IRS at least one business day before the offset will occur. When the case advocate calls the IRS two days later to check the status of the request, the IRS employee discovers the fax machine was jammed or out of paper and the IRS never received the OBR request and the offset has already occurred. The case advocate resends the OBR request. The IRS's lack of receipt before the offset is an inadvertent mistake, not a substantive one. A clerical error has occurred that prevented the processing of the OBR request.
- (3) A case advocate receives documentation of the taxpayer's economic hardship, and the Local Taxpayer Advocate approves the manual refund paperwork. The case advocate timely faxes the OBR request to the IRS on Friday morning, before the offset will occur on Monday. The case advocate neglects to check a box in Section II of Form 3753, *Manual Refund Posting Voucher*, to indicate the reason for the manual refund request. The IRS informs the case advocate via voicemail Monday afternoon that the Form 3753 was not filled out completely, and asks the case advocate to resubmit the OBR request with a correct Form 3753 attached. The offset occurred on Monday, but the case advocate doesn't receive the message until Tuesday morning. The case advocate resubmits the OBR request. The IRS may reverse the offset and issue the OBR, as the incomplete Form 3753 submitted before the offset occurred was a clerical error that prevented the processing of the OBR request.

Examples of Errors in Judgment/Substantive Errors

- (1) A case advocate receives documentation of the taxpayer's economic hardship on May 1. Due to the case advocate's workload, the case advocate doesn't submit the OBR request to the IRS until May 6. The offset occurred on May 5. The case advocate should have asked her manager to reassign the case. This is an error in judgment.
- (2) A case advocate receives documentation of the taxpayer's economic hardship on May 1. The case advocate is leaving on a three-week vacation on May 2. The case advocate does not mention the case to his manager,

and the manager makes no effort to have the case advocate's cases reassigned. This is an error in judgment.

- (3) A case advocate receives documentation of the taxpayer's economic hardship on the morning of May 1. The case advocate is out of the office unexpectedly beginning that afternoon and does not return until May 3. The offset occurred on May 2. The case advocate should have brought this case immediately to his manager's attention before leaving that afternoon. This is an error in judgment.

3. Issuing OBRs when Taxpayer has TOP Debt and IRS Debt

As discussed above in the Background section, under IRC § 6402(a), the IRS is not obligated to apply a taxpayer's overpayment to an outstanding federal tax liability before issuing the taxpayer a refund; the subsection is phrased as the "Secretary . . . *may* credit..." (emphasis added). In contrast, IRC § 6402(c), (d), (e) and (f) require a taxpayer's overpayment to be applied to any outstanding child support debt, Federal agency nontax debt, state income tax obligation, or unemployment compensation prior to crediting the overpayment to a future tax or making a refund; each of those subsections is phrased as the "Secretary *shall*. . ." (emphasis added). Thus, the IRS has no discretion to bypass those types of debts.

Additionally, the Code provides certain rules for the priority of offsets. For example, IRC § 6402(e)(3) provides that when a taxpayer has an outstanding state income tax obligation, the overpayment shall be reduced first by any federal tax liability, then applied to past-due child support, then to any other federal agency debt, and then to the state income tax obligation. Similarly, IRC § 6402(f)(2) provides that when a taxpayer has an outstanding unemployment compensation debt, the overpayment shall be reduced first by any federal tax liability, then applied to past-due child support, then to any other federal agency debt. See *also* Treas. Reg. 301.6402-5(d)(1) ("Thus, if a taxpayer making an overpayment has both an outstanding tax liability and a liability for past-due support subject to this section, then the entire amount of the overpayment shall be credited first against the outstanding tax liability under section 6402(a) and § 301.6402-1 and only the remainder, if any, of the overpayment will be offset by the amount of past due support."). Some of the other rules in IRC §§ 6402(c) and (d) for the priority of offsets do not specify, however, that the federal tax liability must be paid first. Consequently, for consistency and ease of administering offsets, the IRS has adopted a policy of not issuing any OBR when the taxpayer has a federal tax debt and a Treasury Offset Program debt. See IRM 21.4.6.4(3) ("A tax overpayment must offset to an outstanding tax debt before it offsets to non-tax debts or is applied to a credit elect."). See *also* IRM 3.17.79.3.21(2)(Note) ("if both an IRS and TOP debt exist, you may NOT bypass either offset").

This memorandum was coordinated with the Associate Chief Counsel (Procedure and Administration) and the Office of Division Counsel (Wage and Investment). Please call Susan L. Hartford at [REDACTED] or me if you have any further questions. Note that the above advice is based on our understanding of the OBR process. If we have made any error in explaining the process or have used incorrect terminology, please let us know so that we can determine if the analysis or conclusions change.

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