

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

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date: September 23, 2013

to: Barbara A. Boutin
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Wage & Investment: Customer Account Services: Accounts Management: Processing
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from: Bridget E. Tombul 
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subject: Limitations Period for Injured Spouse Claims

This document should not be used or cited as precedent.

This program manager technical assistance memorandum responds to your request of November 2012 in relation to the above topic. Specifically, you asked whether there is a limitation period applicable to a non-debtor spouse who submits an Injured Spouse Allocation (Form 8379) to recover a tax overpayment which the IRS offset against the debtor spouse's past due child support in 1982 and 1983.¹

ISSUE

What is the applicable limitation period for a non-debtor spouse to submit to the IRS an Injured Spouse Allocation (Form 8379) in order to recover her allocable share of a joint tax overpayment which the IRS offset against a debtor-spouse's past-due child support?

CONCLUSION

The non-debtor spouse has no more than six years from when the non-debtor's claim first arose to submit an injured spouse allocation for a non-tax offset. 28 U.S.C. §§ 2501(a) and 2401(a).

¹ Throughout this memorandum, we use "non-debtor spouse" and "injured spouse" interchangeably.

FACTS

Taxpayers W and H filed joint returns for tax years 1981 and 1982, on which both claimed joint refunds. In processing each return, the IRS offset the entire claimed refund to pay Taxpayer H's past-due child support. When the IRS offsets overpayments, the IRS's system making the offsets sends offset notices to the taxpayers. Taxpayer W filed Forms 8379 for tax years 1981 and 1982 with the IRS in 2011.

DISCUSSION:

Section 6402 requires the IRS to apply federal tax overpayments to past due child support obligations, certain non-tax federal debts, state tax debts and unemployment compensation debts owed to states. I.R.C. § 6402(c) – (f). The Social Security Act also addresses the collection of past-due child support from claimed federal tax refunds. 42 U.S.C. § 664. Section 664(a)(1) requires Treasury to send notice to an individual of an offset made to satisfy a past-due child support obligation. This includes notice to any non-debtor spouse who may have filed a joint return with the debtor-spouse, and the steps the non-debtor spouse may take to secure his or her share of the refund. This section also provides that if the non-debtor spouse takes the appropriate action to secure his or her share of the amount offset against child support, the Service must pay to the non-debtor spouse his or her share. 42 U.S.C. § 664(a)(3)(C).

In the case of any of the mandatory non-tax offsets under Code section 6402(c) – (f), the injured spouse's claim for his or her share of the offset is not a refund claim of a tax under Title 26; it is a general money claim against the government. I.R.C. § 6402(g) ("No action brought against the United States to recover the amount of any such reduction shall be considered to be a suit for refund of tax."). Although section 6402(g) also provides that no court has jurisdiction to review the IRS's reduction of a federal tax overpayment, at least one court has held that this provision must be read in conjunction with the provisions of the Social Security Act referenced above, which reflect that Congress did not intend to preclude the IRS's consideration of an injured spouse claim after the offset takes place. On the issue of jurisdiction, see Oatman v. Dept. of Treasury-Internal Revenue Service, 34 F.3d 787, 789 (9th Cir. 1994). If a court could have jurisdiction over the return of a non-debtor spouse's share of an overpayment under section 664 of the Social Security Act, the "claim" would arise when the IRS sends notice to the taxpayers that their claimed tax refund was offset to pay a child support obligation.


The Court of Federal Claims has jurisdiction over claims for money that arise from the U.S. Constitution, federal statutes, executive regulations, or express or implied contracts with the Government. 28 U.S.C. § 1491. Such claims are barred unless a petition is filed in the Court of Federal Claims not later than six years after the claim first arises. 28 U.S.C. § 2501(a). A similar provision governs claims brought before the district courts. 28 U.S.C. § 2401(a) ("every civil action commenced against the United

States shall be barred unless the complaint is filed within six years after the right of action first accrues.”). As discussed above, at the time of the offset, the non-debtor spouse is notified of his or her claim and that he or she needs to take appropriate action to secure the offset funds.

In light of the six-year limitation period applicable to general claims for money against the Government under 28 U.S.C. § 2501, the IRS cannot consider an injured spouse's allocation more than six years after the IRS sends the injured spouse a notice of the offset. Accordingly, Taxpayer W's requests for injured spouse allocations filed in 2011 for overpayments offset in 1982 and 1983 are not timely and should be denied.

In a memorandum issued in June 2005, our office advised the IRS that there are instances when a non-debtor spouse will have an unlimited time period to submit an injured spouse allocation (Form 8379) to recover his or her share of a tax overpayment previously offset under section 6402. Upon further consideration, we conclude that the prior analysis, which is also reflected in IRM 21.4.6.5.9.8 (Statute of Limitations for Processing Form 8379 and Reversing DMF, TOP or TAX Offsets), is incorrect. The analysis was based on the mistaken premise that the IRS should issue a notice of claim disallowance to the taxpayer when a federal tax refund is reduced under authority of section 6402.

A refund claim included with a timely filed joint return or amended joint return reporting an overpayment that is offset under the provisions of section 6402 is not a disallowed claim. Rather, when an overpayment is offset to pay a prior liability under section 6402, the overpayment is *allowed*, but the IRS does not pay the claimed refund to the taxpayers because such overpayment is applied under authority of section 6402 against other liabilities. There is no reason for the Service to issue a notice of claim disallowance when the claimed overpayment is allowed in full.


Please call Gerald Semasek at (202) 622-4910 if you have any further questions.