

Office of Chief Counsel
Internal Revenue Service
memorandum
CC:PA:04:TWCurteman

date: August 2, 2018

to: Commissioner, Large Business and International (LB&I) Division

from: Associate Chief Counsel
(Procedure and Administration)

subject: Overpayments and I.R.C. § 965(h)

Background

In March, April, and June of 2018, the Service published and updated on IRS.gov a list of [questions and answers](#) (Q&As) relating to I.R.C. § 965 and pertaining to the 2017 tax year. Question 14 of the Q&As addresses whether taxpayers making an election under section 965(h) could receive refunds of any 2017 payments or estimated tax payments that exceeded the sum of their 2017 net income tax liability described under section 965(h)(6)(A)(ii), which is the taxpayer's net income tax liability determined without regard to section 965, plus the taxpayer's first annual installment pursuant to an election under section 965(h) due in 2018. Answer 14 states that taxpayers are not eligible for a refund of this amount unless and until the amount of payments exceeds the entire unpaid 2017 income tax liability, including all amounts to be paid in installments under section 965(h) in subsequent years. Answer 14 further provides that any excess amount paid would instead be applied to the "next successive annual installment (due in 2019), and to the extent such excess exceeds the amount of that installment due, then to the next such successive annual installment (due in 2020), etc." Taxpayers have expressed concerns with the legal basis for this answer, and some would like to obtain a refund of or apply as a credit to their next year's estimated tax liability any amount that exceeds the amount currently due. Questions have also been raised about whether the Service's offset refund bypass procedures apply. See IRM 21.4.6.5.11.1.

Analysis

The Service's legal authority to make a credit or refund, and the limited circumstances in which the Service may exercise that authority, is found in section 6402. Section 6402(a) authorizes the Service to apply overpayments as credits against tax liabilities and refund any balance. Additionally, section 6402(b) grants the Service the authority to allow certain taxpayers to elect to credit an overpayment from one tax year to the succeeding year's estimated income tax. By its terms, section 6402(a) does not grant the Service the legal authority to credit or refund any amount except to the extent that an overpayment exists with respect to a liability. *Minihan v. Commissioner*, 138 T.C. 1 (2012). Likewise, section 6402(b) does not authorize the Service to apply any amount as a credit to the succeeding year's

estimated income tax except to the extent that such amount constitutes an overpayment. I.R.C. § 6402(a) and (b).

Overpayments are payments that exceed the amount properly due. *Jones v. Liberty Glass Co.*, 332 U.S. 524, 531 (1947). An overpayment is not created just because a taxpayer remits more than a part of a liability immediately due when a taxpayer makes an election to pay an otherwise properly due liability in installments. *Estate of Bell v. Commissioner*, 928 F.2d 901, 903-04 (9th Cir. 1991) (a taxpayer is not entitled to a refund of amounts of an estate tax liability for which the taxpayer elected to defer payment under section 6166, despite the taxpayer having remitted an amount in excess of those tax liability installments then due). The amount of income tax properly due for the 2017 tax period is the entire income tax liability for that period, even though a taxpayer may have the ability to elect to pay that liability in installments. See *Lewis v. Reynolds*, 284 U.S. 281, 283 (1932) (for a tax year's liability, "[a]n overpayment must appear before refund is authorized"); *Estate of Bell*, 928 F.2d at 903-04.

Section 965 increases the subpart F income of deferred foreign income corporations, and through the operation of section 951 a pro rata share of that income is included in income by the corporations' United States shareholders in the tax period during which the corporations' inclusion year ends. This in turn increases a United States shareholder's income tax liability. Section 965(h)(1) provides that a "United States shareholder of a deferred foreign income corporation. . . may elect to pay the net tax liability under this section in 8 installments. . . ." Section 965(h) does not permit the United States shareholders to defer recognizing these amounts as income and therefore defer the tax liability; it only permits a deferral of the *payment* of that liability if the shareholder elects to do so. Accordingly, an overpayment under section 6402(a) does not exist with respect to a 2017 income tax liability unless and until the entire liability is fully paid, including any amount of that liability that is subject to an election to pay that income tax liability in installments under section 965(h). Absent an overpayment of the entire tax liability for the 2017 tax period, the Service cannot issue a credit or refund under section 6402(a) with respect to the 2017 tax period.

Taxpayers who made elections under section 965(h) to pay in installments, and who made estimated tax payments with respect to their 2017 income tax liability prior to Congress enacting the amendments to section 965, may have remitted more than the sum of the portion of their 2017 income tax liability not subject to payment in installments and their first installment payment of their section 965(h) net tax liability. A taxpayer's section 965(h) election to defer payment of the net tax liability under section 965(h)(6) makes that liability a tax payable in installments. Cf. *Estate of Bell*, 928 F.2d at 903 ("[s]ection 6166 deferred payments [of an estate tax liability] are clearly taxes payable in installments"). "In the case of a tax payable in installments," section 6403 provides that any amount paid in excess of the correct amount of the installment "shall be credited against the unpaid installments, if any." Section 6403 does not set out the order in which the excess payments are to be applied to the remaining installments due. The Service will apply any excess amount to the next successive annual installment due in 2019, and to the extent such excess exceeds the amount of that installment due, then

to the next such successive annual installment until the excess amount has been fully applied. Section 6403 does not permit the Service to refund any excess installment payment to the taxpayer prior to there being an overpayment of the entire liability as provided in section 6402. Because there is no overpayment under section 6402 until the entire 2017 tax liability is paid, including all of the installments of the deferred payment, the Service's offset refund bypass procedures will not apply.