

*26 CFR 601.105: Examination of returns and claims for refund, credit, or abatement; determination of correct tax liability.*

*(Also, Part I, Sections 692, 7508A; 1.692-1, 1.7508A-1.)*

## **Rev. Proc. 2004-26**

### **SECTION 1. PURPOSE**

This revenue procedure provides guidance for representatives of certain military or civilian employees of the United States who die as a result of injuries incurred in a terrorist or military action. It provides guidance for having tax forgiven or for claiming refunds of tax under section 692(c) of the Internal Revenue Code, as amended by the Victims of Terrorism Tax Relief Act of 2001, Pub. L. No. 107-134. It also provides procedures by which the Secretary will determine whether a terrorist or military action has occurred.

### **SECTION 2. BACKGROUND**

.01 Prior to amendment by the Victims of Terrorism Tax Relief Act of 2001, Pub. L. No. 107-134 (the Act), section 692(c)(1) provided that, in the case of any

individual military or civilian employee of the United States who died as a result of wounds or injury incurred in a terrorist or military action outside the United States while the individual was a military or civilian employee of the United States, any tax imposed by subtitle A of the Code (income tax) did not apply with respect to the taxable year in which fell the date of death and with respect to any prior taxable year in the period beginning with the last taxable year ending before the taxable year in which the wounds or injury were incurred.

.02 Section 113(b) of the Act amended section 692(c) to remove the requirement that the employee must have incurred the wounds or injuries outside the United States. This amendment applies to tax years ending on or after September 11, 2001. Section 692(c)(1), as amended, provides that, in the case of any individual military or civilian employee of the United States who dies as a result of wounds or injury incurred in a terrorist or military action while the individual was a military or civilian employee of the United States, any tax imposed by subtitle A of the Code (income tax) shall not apply with respect to the taxable year in which falls the date of death and with respect to any prior taxable year in the period beginning with the last taxable year ending before the taxable year in which the wounds or injury were incurred.

.03 Section 692(c)(2) defines “terroristic or military action” as any terrorist activity which a preponderance of the evidence indicates was directed against the United States or any of its allies and any military action involving the Armed Forces of the United States and resulting from violence or aggression against the United States or any of its allies (or threat thereof). Terrorist activity includes criminal offenses intended to coerce, intimidate, or retaliate against the government or civilian population. See, e.g., Homeland Security Act of 2002, Pub. L. No. 107–296, sec. 2(15), 116 Stat. 2135, 2141, 6 U.S.C. § 101(15).

.04 Section 111 of the Act added section 139 to the Code. Section 139 provides that gross income shall not include any amount received by an individual as a qualified disaster relief payment. A qualified disaster includes a disaster which results from a terrorist or military action, as defined in section 692(c)(2). I.R.C. § 139(c)(1).

.05 Section 112(a) of the Act grants the Secretary authority under section 7508A to disregard a period of time (up to one year) for determining: (a) the timeliness of acts under section 7508(a)(1), (b) the amount of any addition to tax, and (c) the amount of any credit or refund, in the event of a terrorist or military action, as defined in section 692(c)(2). Section 112(c) of the Act amends the Employee Retirement Income Security Act, 29 U.S.C. § 1148 and 29 U.S.C. § 1302(i) (ERISA), to authorize the Secretary of Labor to disregard a period of up to one year for determining the timeliness of actions required under ERISA, in the event of a terrorist or military action, as defined by section 692(c)(2).

.06 Section 113 of the Act amends section 104(a)(5) of the Code to include compensation received for injuries or sickness as a result of a terrorist or military action, as defined by section 692(c)(2).

### SECTION 3. SCOPE

.01 A determination under this revenue procedure that an act qualifies as a terrorist or military action within the meaning of section 692(c)(2) will apply with respect to the following provisions of the Code:

(1) section 104(a)(5) — which excludes from gross income amounts received by an individual as disability income attributable to injuries incurred as a direct result of a terrorist or military action;

(2) section 139(c) — which defines qualified disasters to include disasters which result from a terrorist or military action;

(3) section 692(c)(1) — which provides tax relief for certain military or civilian employees of the United States dying as a result of injuries incurred in a terrorist or military action; and

(4) section 7508A — which authorizes the Secretary to postpone certain deadlines by reason of Presidentially declared disasters or terrorist or military actions.

### SECTION 4. PROCEDURE

.01 Making a determination that a terrorist or military action has occurred under section 692(c)(2) —

(1) Prior to publishing a determination that an event that occurred outside the United States constituted a terrorist action within the meaning of section 692(c)(2),

the Secretary will ascertain, allowing a reasonable time under the circumstances for response, from the Department of State and the Department of Justice whether those Departments believe that a preponderance of the evidence indicates that the event resulted from terrorist activity directed against the United States or its allies. The Secretary will follow the same procedures if an event that occurred within the United States has an international dimension, or if the perpetrators or cause of the event are unknown. An event within the United States has an “international dimension” if a preponderance of the evidence indicates that it involves: (a) an attack by a foreign perpetrator, or by a domestic perpetrator with links to a foreign principal (e.g., a foreign terrorist group, sponsor or financier); (b) an attack on a foreign national, family members in the United States of a foreign national, or a United States entity held by foreign owners; (c) an attack on a foreign diplomatic mission or on an international organization (including attacks on foreign diplomats and other internationally-protected persons in the United States); or (d) an attack on, or with its impact in, the United States, launched from across the border of the United States. See, generally, 22 U.S.C. § 2656f(d); 18 U.S.C. § 2331(1).

(2) Prior to publishing a determination that an event that occurred within the United States that does not have an international dimension constituted a terrorist action within the meaning of section 692(c)(2), the Secretary will ascertain, allowing a reasonable time under the circumstances for response, from the Department of Justice whether that Department believes that a preponderance of the evidence indicates that the event resulted from terrorist activity directed against the United States.

(3) Prior to publishing a determination that an event constituted a military action within the meaning of section 692(c)(2), the Secretary will consult the Department of Defense with respect to whether the event was a military action involving the Armed Forces of the United States resulting from violence or aggression against the United States or its allies.

(4) After determining that a terrorist or military action has occurred, the Secretary may exercise the authority under section 7508A to disregard a period of up to one

year for determining: (a) the timeliness of acts under section 7508(a)(1); (b) the amount of any addition to tax; and (c) the amount of any credit or refund.

(5) Taxpayers may rely on the published guidance to establish that particular events were terrorist or military actions for purposes of sections 104(a)(5), 139(c), and 692(c).

.02 Filing claims for credit or refund under section 692(c) —

(1) Representatives of employees who qualify for the benefits of section 692(c), and for whom no Form 1040, *U.S. Individual Income Tax Return*, has been filed, may claim those benefits, or claim a refund of withholding or estimated tax payments, by filing a Form 1040. The representatives should file those forms at the address provided in Publication 3920, *Tax Relief for Victims of Terrorist Attacks*. (Also see Publication 3920 for more detailed procedures for claiming a refund.) On joint returns reporting taxable income of the surviving spouse, taxpayers must make an allocation of the tax liability between spouses. See section 1.692-1(b) of the Income Tax Regulations. If the surviving spouse or other person filing the joint return cannot determine the proper allocation, he or she should attach a statement of all income and deductions allocable to each spouse and the IRS will make the proper allocation. The representative must attach the employee's Form W-2, *Wage and Tax Statement*.

(2) In the case of any employee for whom a Form 1040 already has been filed, claims for refund should be made by filing Form 1040X, *Amended U.S. Individual Income Tax Return*, with IRS at the address provided in Publication 3920. (Also see Publication 3920 for more detailed procedures for claiming a refund.) In cases where the previously filed return was a joint return that reported taxable income of the surviving spouse, the claim for refund must make an allocation of the tax liability between spouses. See section 1.692-1(b) of the Income Tax Regulations. If the surviving spouse or other person filing the claim for refund cannot determine the proper allocation, he or she should attach a statement of all income and deductions allocable to each spouse, and the IRS will make the proper allocation.

(3) All returns and claims for refund filed pursuant to this revenue procedure

should be identified by writing "KITA" (or other designation as set forth in Publication 3920 or other guidance the Service issues) in bold letters on the top of page 1 of the return or claim for refund.

(4) Returns and claims for refunds must be accompanied by the following documents:

(a) Form 1310, *Statement of Person Claiming Refund Due a Deceased Taxpayer*, unless: (i) the surviving spouse is filing an original or amended joint return, or (ii) the decedent's personal representative is filing an original Form 1040, in which case the personal representative must attach a copy of the court certificate showing his or her appointment, and;

(b)(i) For military and civilian employees of the Department of Defense — A certification made by the Department of Defense on DD Form 1300 that includes the name and social security number of the individual, the date of injury, the date of death, and a statement that the individual died as the result of a military or terrorist action and was an employee of the United States on the date of injury and on the date of death.

(ii) For United States government employees killed in the United States (who are not employees of the Department of Defense) —

(A) A death certificate stating the nature of the injury causing death or, if the cause of death is not apparent from the death certificate, a letter from the treating physician, medical examiner, or hospital stating the cause of death, and

(B) A certification from the federal employer that includes the name and social security number of the decedent, the date of injury, the date of death, a statement that the decedent was an employee of the United States on the date of injury and the date of death and, if the death was associated with an event that the Secretary has identified as a military action or terrorist activity in published guidance, a statement identifying the action or activity associated with the death. This certificate may be a form or letter from the employing agency's personnel department to the decedent's representative.

(iii) For United States government employees killed overseas (who are not employees of the Department of Defense) — A certification from the Department of State that the death was the result of ter-

rorist or military action outside the United States. The certification must be made in the form of a letter signed by the Director General of the Foreign Service, Department of State, or his or her delegate. The certification must include the name and social security number of the individual, the date of injury, the date of death, and a statement that the individual died as the result of a military or terrorist action outside the United States and was an employee of the United States on the date of injury and on the date of death.

(5) In a case in which a representative of a decedent who died as the result of terrorist or military action does not have enough tax information to file a timely claim for refund, the representative may stop the running of the period of limitations for making such a claim by filing Form 1040X with the IRS at the address provided in Publication 3920, attaching Form 1310, any other available documentation required by this revenue procedure, and a statement that an amended claim will be filed as soon as the additional requisite information is ascertained.

(6) If an event occurs in the United States that the representative of a decedent who was not an employee of the Department of Defense at the time of injury and death believes was a terrorist or military action, and the Secretary has not published a determination that the event was a terrorist or military action, the representative may submit a request for a determination with the return or claim for refund of the decedent's estate and any other documentation required by this revenue procedure. Taxpayers should submit the following information with their determination requests:

(a) Date and location of incident,

(b) Type of incident (terrorist or military),

(c) Number of taxpayers thought to be affected,

(d) A description of the facts on which the representative bases the claim that a terrorist or military action has occurred, including the facts relating to any alleged international dimension of a terrorist action as set forth in section 4.01(2) of this revenue procedure, and

(e) A completed Form 8821, *Tax Information Authorization*, that will permit the IRS to disclose to the Department of Justice (for terrorist attacks), the Department of State (for terrorist attacks with an alleged international dimension), or the Department of Defense (for military actions) return information relating to the return or claim for refund. Taxpayers should complete the form as instructed, listing the Department of Justice as the appointee if the request relates to an alleged terrorist attack, the Department of State if the request relates to an alleged terrorist attack with an international dimension, or the Department of Defense if the request relates to an alleged military action. The appointee's

address is not required in this instance. Taxpayers should check the box on the line of Form 8821 that indicates that the tax information authorization is for a specific use and not recorded on the Centralized Authorization File (CAF).

#### SECTION 5. EFFECT ON OTHER DOCUMENTS

This revenue procedure obsoletes Rev. Proc. 85-35, 1985-2 C.B. 433.

#### SECTION 6. EFFECTIVE DATE

This revenue procedure is effective as of the date of publication of this revenue

procedure in the Internal Revenue Bulletin, May 10, 2004.

#### SECTION 7. DRAFTING INFORMATION

The principal author of this revenue procedure is Emly B. Berndt of the Associate Chief Counsel (Procedure and Administration), Administrative Provisions and Judicial Practice. For further information regarding this revenue procedure, contact Emly Berndt at (202) 622-4940 (not a toll-free call).