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DEPARTMENT OF THE TREASURY
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INTERNAL REVENUE SERVICE NATIONAL OFFICE SERVICE CENTER ADVICE

MEMORANDUM FOR LEWIS ABRAHAMS, ASSOCIATE AREA COUNSEL, SMALL BUSINESS & SELF EMPLOYED DIVISION (BROOKLYN)
Attn: Patricia Riegger

FROM: Kelly E. Alton
Acting Senior Technician Reviewer, Branch 3 (Administrative Provisions & Judicial Practice)

SUBJECT: Claims for Refund and Math Error Assessments

This memorandum responds to your request for Significant Advice dated July 20, 2000, in connection with a question raised by the Submission Processing function of the Brookhaven Service Center.

ISSUE

Whether the Service is authorized to refund an overpayment of tax after the period for filing a claim for refund has expired if:

1) The Service previously sent the taxpayer a math error notice adjusting the taxpayer's liability for tax and reducing or eliminating the overpayment of tax claimed on the taxpayer's original return, which was filed before the period for filing a refund claim expired, but the taxpayer later substantiates that his or her tax liability was reported correctly on the original return.

2) The Service previously sent the taxpayer a notice of claim disallowance with respect to the overpayment of tax claimed on the taxpayer's original return, which was filed before the period for filing a refund claim expired, but the taxpayer later substantiates that his or her tax liability was reported correctly on the original return.

CONCLUSIONS

1) The Service is authorized to refund an overpayment of tax after the period for filing a claim for refund has expired if the taxpayer substantiates that the math error notice previously sent the taxpayer was not correct and that his or her liability, including the overpayment of tax, was reported correctly on the original return that was filed before the period for filing a refund claim expired.

2) The Service is not authorized to refund an overpayment of tax after the period for filing a claim for refund has expired where the taxpayer was sent a notice of claim disallowance with respect to a claim filed on an original return if the taxpayer did not file a suit for refund within two years after the notice of claim disallowance was mailed to taxpayer unless the Service and the taxpayer agreed in writing to extend the period for filing a refund suit and such period has not expired.

DISCUSSION

Section 6511(b)(1) of the Internal Revenue Code provides that no refund may be allowed or made after the expiration of the period of limitations for filing a claim for refund unless a claim for refund is filed by the taxpayer within such period. In general, the period of limitations for filing a claim for refund is 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever is later. Sec. 6511(a). A claim for credit or refund of income tax filed after June 30, 1976, generally is made on an original or amended return. Treas. Reg. § 301.6402-3(a).

A timely filed claim for refund may be amended after the period of limitations for filing a claim for refund has expired, but before final disallowance or allowance, when the amendment is based on the same facts stated in the original claim and requires no additional investigation. United States v. Ideal Basic Industries Inc., 404 F.2d 122, 124 (10th Cir. 1968); Addressograph-Multigraph Corp. v. United States, 78 F. Supp. 111 (Ct. Cl. 1948); Pink v. United States, 105 F.2d 183 (2d Cir. 1939). Cf. Bemis Brothers Bag Co. v. United States, 289 U.S. 28 (1933). No amendment of a claim for refund is allowed, however, after the claim has been disallowed by the Service. United States v. Memphis Cotton Oil Co., 288 U.S. 62, 72 (1932); see also Tobin v. Tomlinson, 310 F.2d 648 (5th Cir. 1962), cert. denied, 375 U.S. 929 (1962); Young v. United States, 203 F.2d 686 (8th Cir. 1953); Solomon v. United States, 57 F.2d 150 (2d Cir. 1932); Newport Industries, Inc. v. United States, 60 F. Supp. 229 (Ct. Cl. 1945).

Here, the taxpayers filed their original claims for refund on their original tax returns, which were filed before the expiration of the period of limitations for filing a claim for refund. The Service, however, needed additional information from the taxpayers to substantiate the claims, and the taxpayers did not send this information until the period of limitations for filing a claim for refund expired. Accordingly, the claims for refund, as amended by the additional information, cannot be allowed unless the

Service did not disallow the original claims for refund before the additional information was received.

Section 6532(a) provides, in pertinent part, that no suit or proceeding for the recovery of any internal revenue tax, penalty, or other sum may be begun after the expiration of 2 years from the date of mailing by certified or registered mail[1] to the taxpayer a notice of the disallowance. Neither the statute nor the regulations thereunder require that the notice of disallowance be in any particular form. The Internal Revenue Manual does provide, however, that letters 905(DO) and 906(DO) generally are used as certified notices of claim disallowance. See IRM secs. 4.2.8.8.5 and 4.2.8.8.6. Additionally, computer generated certified notices of claim disallowance are prepared on letters 105C and 106C, see IRM 21.5.3.4.6.1.1, and Appeals uses letters 1363(RO), and 1364(RO) for their certified notices of claim disallowance. See IRM sec. 8.5.1.4.1. Each letter, whether manually prepared or computer generated, indicates that it is the taxpayer's legal notice that their claim has been disallowed, or partially disallowed. Each letter also provides that, if the taxpayer wishes to start legal action to recover any of the tax or other amounts disallowed, a suit for refund must be filed with the United States District Court or the United States Court of Federal Claims. Each letter further provides that, unless the taxpayer has signed Form 2297, Waiver of Statutory Notice of Claim Disallowance, the law permits the taxpayer to file such suit within 2 years from the mailing date of "this letter."

A few courts have held that the Service can provide notice of claim disallowance to the taxpayer through other forms or letters. See, e.g., Gervasio v. United States, 627 F. Supp. 428 (E.D. Ill. 1986)(notice of claim disallowance was provided when agent refused to refuse to accept taxpayer's claim and mailed such claim back to

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[1] In Finkelstein v. United States, 943 F. Supp. 425 (D. N.J. 1996), the court held that the period for filing suit begins to run when the Service mails a notice of claim disallowance to the taxpayer, whether or not such notice is sent by certified or registered mail, where the taxpayer admits to receiving the notice in a timely manner. The court concluded that the requirement that the notice be sent by certified or registered mail is a protective measure for the Service to use to prove that the notice of disallowance was indeed mailed. Id. While we agree with the Finkelstein court's conclusion that proof of mailing is a principal purpose for requiring that notices of claim disallowance be sent by certified or registered mail, this requirement also may serve other purposes. Using certified or registered mail, for example, may suggest that action by the recipient is necessary and the enclosed document, therefore, needs the recipient's immediate attention. Regardless, the statute unambiguously requires that notices of claim disallowance be sent by certified or registered mail. Thus, in the absence of a statutory change, notices of claim disallowance are to be sent to the taxpayer by certified or registered mail.

the taxpayer); Register Publishing Co. v. United States, 189 F. Supp. 626 (D. Conn. 1960)(mailing of 30-day letter and revenue agent's report sufficient to provide taxpayer notice of claim disallowance). In Register Publishing Co., the taxpayer filed a claim for refund on January 19, 1960, with respect to amounts it paid for its fiscal years ending October 1957 and 1958. On March 28, 1960, the Service sent the taxpayer a 30-day letter and a copy of the revenue agent's report proposing to disallow the taxpayer's claim. The taxpayer filed suit to recover the refund on May 24, 1960. The government filed a motion to dismiss the taxpayer's suit because the suit had been filed prematurely.[2] The court denied the government's motion because it determined that the 30-day letter was a decision within the meaning of section 6532(a)(1). The Register Publishing Co. court rejected the government's argument that the taxpayer's claim had not been disallowed because the revenue agent's report that accompanied the 30-day letter merely recommended disallowance of the taxpayer's claim. Id. at 631. The court also was not persuaded by the government's argument that the 30-day letter was not a decision because it advised the taxpayer that a protest could be filed which would be given careful consideration by the Service's Appellate division. Id. at 630. Rather, the court found that once the decision had been rendered the taxpayer had the option of either filing a protest with the Appellate division or commencing a suit for refund in district court. Id.

In Block-Southland Sportswear Co. v. United States, 73-1 USTC ¶ 9230 (E.D.N.C. 1972), aff'd per curiam, 480 F.2d 921 (4th Cir. 1973), the court held, however, that a 30-day letter and the revenue agent's report attached thereto were not a decision within the meaning of section 6532(a)(1). The court rejected the taxpayer's argument that a 30-day letter showing a deficiency in tax was by its very nature a denial of the taxpayer's claim that the government owed a refund of tax to the taxpayer. Inasmuch as the adjustments in the revenue agent's report were not connected to the taxpayer's claim and the 30-day letter made no reference to that claim, the court concluded that the taxpayer's claim was not ever considered, much less disallowed.

After reviewing the cases, we are persuaded that the appropriate position for the Service to follow is that the decision to disallow a refund claim is made when the Service sends the taxpayer a formal notice of claim disallowance by certified or registered mail. A notice of claim disallowance serves the dual purpose of informing the taxpayer that his or her claim for refund was considered and rejected by the Service and starting the period of limitations for filing suit to recover the tax for which such claim was made. Formal notices of claim disallowance (e.g., letters

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[2] Section 6532(a)(1) also bars a suit or proceeding for the recovery of tax before the expiration of 6 months from the date on which the claim for refund is filed with the Service unless the Service renders a decision thereon.

905(DO), 906(DO), 105C, 106C, 1363(RO) and 1364(RO)) unambiguously reject the taxpayer's claim for refund, or a portion thereof, and inform the taxpayer of his or her rights to seek judicial review, including the time period in which a suit must be filed. Math error notices and similar letters sent by the Service often request additional information before the taxpayer's claim can be granted. Thus, math error notices and similar letters requesting additional information would not constitute "final" disallowance as required by case law. Additionally, a math error notice or similar letter does not inform the taxpayer of his or her right to file suit to recover the tax or provide clear and concise notification of the period in which such suit may be filed. Thus, math error notices and similar letters may not provide sufficient notice to the taxpayer that his or her claim has been disallowed. A math error notice or similar letter, therefore, may not, under the facts and circumstances of any particular case, be a notice of claim disallowance because it did not serve the dual purpose that a notice of claim disallowance is intended to serve. Accordingly, we recommend that the Service not disallow a timely filed claim for refund because the taxpayer received a math error notice before he or she substantiated the claim and such substantiation was received after the period of limitations for filing an original claim for refund had expired.

If you have any questions, please contact the Administrative Provisions and Judicial Practice Division at (202) 622-4940.