

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

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CC:LM:
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UILC: 6411.08-00;6405.03-00
Taxpayer =
=

Date: November 2, 2007

To: Taxpayer Advocate Office

From: Associate Area Counsel ()
(Large & Mid-Size Business)

Subject : Request for Advice Regarding Allowance of Application for Tentative Refund Based
: On Claim of Right Adjustment Pursuant to I.R.C. § 1341
Taxpayer:
Years:

This memorandum responds to your request for assistance. In accordance with I.R.C. § 6110(k)(3), this advice should not be cited as precedent. This writing may contain privileged information. Any unauthorized disclosure of this writing may have an adverse affect on privileges, such as the attorney client privilege. If disclosure becomes necessary, please contact this office for our views. This advice was coordinated with Deborah M. Grogan and Branch Chief Pamela W. Fuller of Branch 3 of Procedure & Administration.

ISSUES

1. Does the selection for audit of a Form 1045, Application for Tentative Refund, based on claim of right adjustment pursuant to I.R.C. § 1341, allow the Internal Revenue Service to not process the Application within 90 days as required by I.R.C. § 6411(d)(2)?

2. Because the refund for _____ is in excess of \$2 million, does a report under I.R.C. § 6405(a) need to be submitted to the Joint Committee on Taxation before the refund can be made?
3. If it is determined that that the Application should be processed and a refund made in 90 days, is the _____ Service Center or LMSB Exam (who is assigned to audit the Application) responsible for making the refund.

CONCLUSIONS

1. No. Pursuant to I.R.C. § 6411(d)(2), the Application for Tentative Refund, based on claim of right adjustment pursuant to I.R.C. § 1341, must be processed by the Service with a credit or refund made within 90 days from the date filed. The Service can make “a limited examination of the application to discover omissions and errors of computation” and shall determine the amount of the decrease in tax. The only bases set forth in the Internal Revenue Code for not acting within 90 days are errors of computation which cannot be corrected within 90 days or material omissions. I.R.C. § 6411(b).
2. No. I.R.C. § 6405(b) provides that any credit or refund allowed or made under I.R.C. § 6411 shall be made without regard to the provisions of I.R.C. § 6405(a). Any credits or refunds in excess of \$2 million based on an Application for Tentative Refund, Form 1045, must be made prior to submission of the report to the Joint Committee on Taxation. I.R.C. § 6405(b).
3. Treas. Reg. § 1.6411-3(a) provides that the district director or director of a service center shall act upon any application for a tentative carryback adjustment filed under I.R.C. § 6411(a) within 90 days from the date the application is filed. IRM 21.5.9.4 sets forth the procedures for campuses (service centers) to determine if an Application can be processed. Pursuant to IRM 21.5.9.5.30(1), the _____ Service Center (campus) is responsible for processing the Application within 90 days. Further, Taxpayer is not an LMSB taxpayer.

FACTS

On January 3, 2007, the _____ Service Center received a Form 1045, Application for Tentative Refund, in the amount of \$ _____ for the taxable year _____, based on a claim of right adjustment pursuant to I.R.C. § 1341(a)(1) from taxpayers _____ and _____. A statement with the Application stated the following. Taxpayer had reported a capital item of \$ _____ on his federal income tax return for the taxable year _____ because it appeared that he had an unrestricted right to that item. After the _____ return was filed, it was established by the _____ that Taxpayer did not have an unrestricted right to that capital item of \$ _____. Taxpayer restored the capital item in tax year _____ and claimed a deduction in _____ on the Application for Tentative Refund, Form 1045, for the repayment of income included in a prior year.

Pursuant to I.R.C. § 1341, Taxpayer maintains he is entitled to a refund on his restoration of the substantial amount held under claim of right. He claims he made the two refund computations required by sections 1341(a)(4) and 1341(a) (5) in the attachments to the Form 1045 for the year . The Service Center did not process the Form 1045 for 2005, but sent it to LMSB Exam for audit. Taxpayer's accountant contacted the Taxpayer Advocate Office because the Form 1045 was not processed.

On March 13, 2007, the Service Center received a Form 1045, Application for Tentative Refund, in the amount of \$ for the taxable year , based on a claim of right adjustment pursuant to I.R.C. § 1341(a)(1) from taxpayers . A statement with the Application stated the following. Taxpayer, as , had reported certain salary payments totaling \$ on his federal income tax returns for the years to , inclusive, because it appeared that he had an unrestricted right to those salaries. After the close of the tax years through , it was established by the , that Taxpayer did not have an unrestricted right to those salaries of \$ and he was ordered to repay those salaries to the corporation. Taxpayer repaid those salaries during the tax year and claimed a deduction in on the Application for Tentative Refund, Form 1045, for the repayment of income included in a prior year.

Pursuant to I.R.C. § 1341, Taxpayer maintains he is entitled to a refund on his restoration of the substantial amount held under claim of right. He claims he made the two refund computations required by sections 1341(a)(4) and 1341(a) (5) in the attachments to the Form 1045 for the year . The Service Center did not process the Form 1045 for , but sent it to LMSB Exam for audit. Taxpayer's accountant contacted the Taxpayer Advocate Office in because the Form 1045 was not processed.

LAW AND ANALYSIS

1. I.R.C. § 6411(a) provides that a taxpayer who has a net operating loss may file an application for a tentative carryback adjustment. I.R.C. § 6411(b) provides that the Service shall make "a limited examination of the application, to discover omissions and errors in computation," and shall determine the amount of the decrease in tax attributable to the carryback. The examination shall be made within 90 days from the date on which the application for tentative carryback application is filed or from the last day of the month of the last date for filing the return for the taxable year of the loss from which such carryback occurs, whichever is later. I.R.C. § 6411(b) further provides that the Service may disallow, without any further action, any application which it finds contains either material omissions or errors of computation which it deems cannot be corrected by him within the 90 day period. Treas. Reg. § 1.6411-2(b) provides that in determining the decrease in tax which is affected by the carryback, it shall be assumed

that tax items reported in the taxpayer's return were correctly reported.

Pursuant to I.R.C. § 6411(d)(1), a taxpayer can file an Application for Tentative Refund, based on a claim of right adjustment under I.R.C. § 1341(b)(1). It will be verified in the same manner as an application filed under I.R.C. § 6411(a). Pursuant to I.R.C. § 6411(d)(2), the Application for Tentative Refund, based on claim of right adjustment pursuant to I.R.C. § 1341, must be processed by the Service with a credit or refund made within 90 days from the date filed. The Service can make "a limited examination of the application to discover omissions and errors of computation" and shall determine the amount of the decrease in tax. The only bases set forth in the Internal Revenue Code for not acting within 90 days are errors of computation which cannot be corrected within 90 days or material omissions. I.R.C. § 6411(b).

2. I.R.C. § 6405(a) requires that the Service must report to the Joint Committee on Taxation any proposed refunds or credits of income tax in excess of \$2,000,000. The refund can be issued 30 days after the date of the report. The report must contain the name of the person to whom the refund or credit is to be made, the amount of the refund or credit and a summary of the facts and the decision of the Service. I.R.C. § 6405(b) provides that any credit or refund allowed or made under I.R.C. § 6411 shall be made without regard to the provisions of I.R.C. § 6405(a). After the Service makes the credit or refund and determines the correct tax liability involved in the application for tentative refund, a report is submitted if there are still credits or refunds in excess of \$2 million dollars.

3. Treas. Reg. § 1.6411-3(a) provides that the district director or director of a service center shall act upon any application for a tentative carryback adjustment filed under I.R.C. § 6411(a) within 90 days from the date the application is filed. An application for tentative refund based on a claim of right adjustment is to be processed the same as a tentative carryback adjustment. I.R.C. § 6411(d)(1)(A). IRM 21.5.9.4 sets forth the procedures for campuses (service centers) to determine if an Application can be processed. Pursuant to IRM 21.5.9.5.30(1), the Service Center(campus) is responsible for processing the Application within 90 days. Further, Taxpayer is not an LMSB taxpayer.

An application for a tentative carryback adjustment does not constitute a claim for credit or refund. Treas. Reg. § 1.6411-1(b)(2). If such application is disallowed by the district director or director of a service center in whole or in part, no suit may be maintained in any court for the recovery of any tax based on such application. If the Service disallows the tentative refund claim in whole or in part, the taxpayer may file a standard claim for credit or refund. If that claim is disallowed, the taxpayer may file a suit for refund. Treas. Reg. § 1.6411-3(c).

This writing may contain privileged information. Any unauthorized disclosure of this writing may undermine our ability to protect the privileged information. If disclosure is determined to be necessary, please contact this office for our views.

We are closing our legal file. If you have any questions, please contact
at Tel. No. .

Associate Area Counsel
(Large & Mid-Size Business)
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By: _____

Senior Attorney ()
(Large & Mid-Size Business)
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