

CC:DOM:FS:PROC
1997-006
RSGoldstein
5, 1997

CC-

May

REVISED ACTION ON DECISION

Re: Robert B. Risman and Eleanor Risman v. Commissioner
Citation: 100 T.C. 191 (1993)
T.C. Docket No.: 11429-91

ISSUE: Whether a remittance forwarded to the Service with a Form 4868, Application for Automatic Extension of Time to File U.S. Individual Income Tax Return, constitutes a payment of tax or a deposit in the nature of a cash bond for purposes of the period of limitations for seeking a refund of such remittance.

DISCUSSION: Robert B. and Eleanor Risman (the Rismans) sent the Service a Form 4868 on April 15, 1982, requesting an extension of time to file their 1981 federal income tax return until June 15, 1982. With the Form 4868, the Rismans remitted the amount of \$25,000. Later, in a letter to the Service dated June 27, 1983, Robert Risman stated that "Probably the amounts I have sent in is enough based on past returns but if you desire more I will be happy to comply." The Rismans filed their 1981 return, which claimed a refund, more than seven years after the remittance.

The Tax Court concluded that the \$25,000 remittance was not a payment of tax. The court stated that a remittance by a taxpayer to the Service generally will not be regarded as a payment of tax until the taxpayer intends that the remittance satisfy what the taxpayer regards as an existing tax liability. *Risman v. Commissioner*, 100 T.C. 191, 197 (1993). Finding that the taxpayers did not make a good faith estimate of the amount of their income tax liability and that the remittance was in an arbitrary amount, the court held that the remittance was a deposit in the nature of a cash bond. Accordingly, the period of limitations for filing a claim for refund under I.R.C. § 6511 did not apply.

We disagree with the Tax Court's conclusion that the Rismans made a deposit and not a payment of tax. All taxes must be paid by the original due date for filing the return, regardless of whether or not an extension of time to file a return is granted. I.R.C. §§ 6151(a) and 6072(a); *see also Gabelman v. Commissioner*, 86 F.3d 609 (6th Cir. 1996), *aff'g*, T.C. Memo. 1993-592; *Crocker v. Commissioner*, 92 T.C. 899 (1989). Further, for the years at issue, individual taxpayers requesting an extension of time to file their returns were required to remit "the amount properly estimated as tax" when filing their completed Form 4868. Treas. Reg. § 1.6081-4. Thus, we think that a remittance sent with a Form 4868 is a payment of tax as a matter of law. *See Gabelman v. Commissioner*, 86 F.3d at 612; *Nunziato v. United States*, 78 AFTR2d ¶ 96-5016 (D. Mass. 1996).

In *Gabelman*, the court of appeals concluded that a remittance sent with a Form 4868 is an amount that the taxpayer anticipates will be due. 86 F.3d at 612. The court of appeals found that, while taxpayers are given latitude in filing their returns, the law expressly prohibits an extension of time for the payment of tax. *Id.* Thus, the court of appeals held that, "the taxpayers retained their duty to submit a payment with their Form 4868." *Id.* The court of appeals also rejected the *Risman* court's conclusion that the remittance with a Form 4868 may be treated differently than a payment of estimated tax, which is a payment as a matter of law. *Id.* Accordingly, the court of appeals found it unnecessary to follow the *Risman* court and use a facts and circumstances analysis to determine whether a remittance sent with a Form 4868 is a payment of tax. *Id.* at 611.

We agree with the decision of the court of appeals in *Gabelman*. Remittances sent with a Form 4868 should not be treated differently than remittances of estimated tax payments. Congress has mandated that all taxes must be paid by the original due date for filing the return, and a remittance sent with a Form 4868 is an amount that the taxpayer believes is due. Therefore, the taxpayer intends that the remittance satisfy what the taxpayer regards as an existing tax liability. Thus, we think that a remittance sent with a Form 4868 is a payment as a matter of law.

For the reasons stated, we disagree with the result in *Risman* and the Tax Court's use of a "facts and circumstances" analysis to reach that result. The Service will continue to litigate this issue in all circuits, arguing that a remittance sent with a Form 4868 is a payment of tax as a matter of law.

RECOMMENDATION: Continued nonacquiescence, but that this action on decision be substituted for the action on decision reported at *Risman v. Commissioner*, AOD CC-1996-003 (Mar. 4, 1996).

/s/

RICHARD S. GOLDSTEIN
Senior Attorney, Procedural Branch
Field Service Division

REVIEWERS: SMC
RGG
DAB

APPROVED: STUART L. BROWN
Chief Counsel

/s/

By:

JUDITH C. DUNN
Associate Chief Counsel (Domestic)

OTHERWISE CITED AS PRECEDENT BY TAXPAYERS