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CHIEF COUNSEL

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

MEMORANDUM FOR

FROM: W. Edward Williams
Senior Technical Reviewer CC:INTL:Br1

SUBJECT:

This Field Service Advice responds to your memorandum dated November 16, 1998. Field Service Advice is not binding on Examination or Appeals and is not a final case determination. This document is not to be used or cited as precedent.

LEGEND:

Taxpayer	=
Agency-1	=
Agency-2	=
Year A	=
Treaty	=
Article D	=
Country E	=
Taxpayer Representative	=
Date G	=

- Date H =
- Date I =
- Date J =
- Date K =
- Date L =
- Date M =
- Date N =
- Date O =
- Date P =
- Date Q =
- Date R =
- Date S =

ISSUES:

Issue 1

Does the section 6511(a) limitation period apply to a claim for refund of tax withheld under section 1445 from the amount realized by Taxpayer, a foreign government, on the sale of the residence of the head of Taxpayer's diplomatic mission (Property), where, more than 4½ years after the sale, the Philadelphia Service Center (PSC) determined that Taxpayer was exempt from such tax?

Issue 2

Does contacting an agency of a city or of the U.S. government other than the Internal Revenue Service within the section 6511(a) limitation period satisfy the claim filing requirement of section 6511(a)?

Issue 3

If Taxpayer is owed a refund, is the Internal Revenue Service required to pay statutory interest on the refund? If so, from what date should the interest be

calculated?

Issue 4

What effect, if any, does the Treaty have on the issues discussed herein?

CONCLUSIONS:

Issue 1

The section 6511(a) limitation period applies to a claim for refund of the amounts withheld in connection with the sale of the Property, even though the sale was exempt from tax under section 897 and the exemption was confirmed by a withholding certificate issued by the PSC more than 4½ years after the sale. Further, notwithstanding that the PSC issued a withholding certificate to Taxpayer in connection with the sale, since, according to the information presented, Taxpayer failed to timely file a claim for refund, Taxpayer is barred from pursuing an administrative refund claim or from initiating a legal proceeding for a refund in a U.S. court.

Issue 2

Contacting an agency of a city or of the U.S. government other than the IRS regarding a claim for a refund does not satisfy the claim filing requirement of section 6511(a). Applicable caselaw, statutes, and regulations clearly provide that a taxpayer who seeks to file a claim for refund must make the claim known to the Commissioner or one of his delegates.

Issue 3

Because Taxpayer is not owed a tax refund, no interest is due.

Issue 4

Because no income tax treaty was in effect between the United States and Country F during Year A, no income tax treaty provisions apply to the issues discussed herein. Further, even if an international agreement such as the Vienna Convention on Consular Relations (Consular Convention) provided that Taxpayer was exempt from tax on the sale of the Property, U.S. law applicable to refund claims still applies. Because it did not claim a refund from the IRS within the applicable limitations period, Taxpayer is not entitled to a refund of the amount withheld in connection with the sale of the Property.

FACTS:

On Date H, Taxpayer sold the Property to a U.S. person. According to the information submitted, in accordance with section 1445, the buyer withheld ten percent of the amount realized by Taxpayer on the sale and remitted it by check dated Date G, to the IRS with a Form 8288, U.S. Withholding Tax Return for Dispositions by Foreign Persons of U.S. Real Property Interests. A copy of the Form 8288 (i.e., Form 8288-A) was furnished to Taxpayer Representative. In a letter dated Date N, Taxpayer acknowledged receiving in Year A a copy of the Form 8288 filed by the purchaser as well as a Form 1099-S for Year A.

Beginning on Date I, attempting to secure a refund of the tax withheld, Taxpayer contacted Agency-1 and on Date J, Taxpayer contacted Agency-2. In a letter to Agency-2, dated Date K, Taxpayer acknowledged Agency-2's recommendation that Taxpayer contact the IRS as well as the suggestion that Taxpayer engage the services of an attorney, due to the procedures associated with filing a claim with the IRS. However, Taxpayer was reluctant to do so "because of the financial implications." Instead, Taxpayer requested Agency-2's assistance in contacting the IRS. In a letter to Taxpayer dated Date L, Agency-2 provided Taxpayer with the telephone number of the IRS.

Taxpayer's earliest contact with the IRS was memorialized in a letter to the PSC dated Date M, which was nearly a year after the latest date on which the limitations period would have expired. We are not aware of any contact prior to that time. Also, a letter dated Date S refers to a telephone call made to the PSC on Date R and describes Taxpayer's desire for a refund of amounts withheld in connection with the sale of the Property.

On Date P, approximately one month after Date M, Taxpayer filed a Form 8288-B, "Application for Withholding Certificate for Dispositions by Foreign Persons of U.S. Real Property Interests" with the PSC. The PSC granted the withholding certificate on Date Q, on the basis that Taxpayer was exempt from tax under section 1445 in connection with the transaction. Taxpayer did not, however, receive a refund of the amounts withheld from the amount Taxpayer realized on the sale of the Property, nor did the PSC locate any record of an income tax return filed by the Taxpayer. Taxpayer asserts that it is exempt from tax imposed in connection with the sale of the Property and is owed a refund of the tax withheld in connection therewith.

LAW AND ANALYSIS

Issue 1

The Foreign Investment in Real Property Tax Act of 1980, Pub. L. No. 96-499,

section 1121(1), 94 Stat. 2682 (1980)(FIRPTA), enacted section 897 and authorized the United States to tax foreign persons on dispositions of interests in U.S. real property. Under section 897, "U.S. real property" includes sales of interests in parcels of real property as well as sales of shares in certain U.S. corporations that are considered U.S. real property holding corporations under section 897(c). Under section 1445, persons purchasing U.S. real property interests from foreign persons, certain purchasers' agents, and settlement officers are required to withhold 10 percent of the amount realized. Required withholding is intended to ensure U.S. taxation of gains realized on disposition of such interests. House Report 98-861, 98th Cong., 2d Sess. 941 (June 23, 1984), 1984-3 C.B. Vol. 2 at 195.

Generally, under section 897(a), a nonresident alien individual or a foreign corporation's gain or loss from disposition of a U.S. real property interest, defined in section 897(c), is taxed "as if the taxpayer were engaged in a trade or business within the United States during the taxable year and as if such gain or loss were effectively connected with such trade or business."

Section 1445(a), enacted by section 129 of the Tax Reform Act of 1984, P.L. 98-369 (Oct. 31, 1984),

[g]enerally imposes a withholding obligation when a U.S. real property interest is acquired from a foreign person. Withholding is required unless one of five exemptions applies. The withholding obligation is generally imposed on the transferee. In certain limited circumstances, an agent of the transferor or transferee is required to withhold.

General Explanation of the Revenue Provisions of the Deficit Reduction Act of 1984, prepared by the Staff of the Joint Committee on Taxation (Dec. 31, 1984), at page 407.

Section 1445(b) provides that withholding is not required in various situations. Among these are where a transferor has furnished an affidavit to the transferee that the former is not a foreign person (section 1445(b)(2)); where the transferee receives a statement that the transferor has reached agreement with the Secretary concerning payment of any tax under section 871(b)(1) or 882(a)(1) on any gain to be recognized by the transferor; or where a statement is obtained from the IRS that the transferor is exempt from tax imposed by section 871(b)(1) or 882(a)(1) on any gain to be recognized on the disposition (section 1445(b)(4)). Taxpayer does not contend that any exemption under section 1445(b) applies in this case.

Where the sale of a U.S. real property interest is not statutorily exempt from withholding under section 1445(b), withholding may be reduced or eliminated pursuant to a withholding certificate issued by the IRS. See section 1445(c)(2);

Treas. Reg. section 1.1445-3. A withholding certificate may be obtained from the IRS prior to disposing of a U.S. real property interest, excusing the transferee from its withholding obligations. Treas. Reg. section 1.1445-3. Alternatively, the IRS may issue a withholding certificate subsequent to the transfer of the U.S. real property interest. Id.

In general, foreign governments are included among foreign persons subject to withholding under section 1445. The Regulations under section 897 specifically include foreign governments among “foreign persons” subject to sections 897 and 1445. See Treas. Reg. section 1.897-9T(e). However, this regulation also provides that “[b]uildings...(including the residence of the head of the diplomatic mission) used by the foreign government for a diplomatic mission shall not be a U.S. real property interest in the hands of the respective foreign government.” Neither the Code nor the regulations exempt a foreign government from the normal exemption certificate/refund procedures applicable to any other taxpayer seeking refund of tax paid under section 897.

Where a foreign transferor seeks reduction or elimination of section 1445 withholding on the sale of a U.S. real property interest prior to the sale (e.g., on the basis of the interest being diplomatic property exempt under Treas. Reg. section 1.897-9T(e)), the withholding certificate procedures of Treas. Reg. section 1.1445-3 apply. Under section 1445, when an application for a withholding certificate is filed after a sale, a claim for refund may be filed prior to the due date of the tax return for the sale (early refund) or alternatively, within the normal statute of limitations on filing a claim for refund. Treas. Reg. section 1.1445-3(a) and (g). There is no provision in either the section 897 or the section 1445 regulations dealing specifically with a request for a withholding certificate filed by a foreign government before or after the sale of a U.S. real property interest.

In this case, even though Taxpayer could have obtained a pre-sale exemption certificate under Treas. Reg. section 1.1445-3, it did not do so; and the buyer withheld ten percent of the amount realized by Taxpayer on the sale and remitted it to the IRS. As such, Taxpayer’s recourse was to claim a refund of the withheld amount within the applicable time period. See Treas. Reg. section 1.1445-3(a).

We have no evidence that Taxpayer filed a timely formal or informal claim for refund. According to the facts and subject to verification, Taxpayer did not file a return for Year A, the year at issue. The return in this case, if required, normally would have been due on April 15 or June 15 of Year A+1 (Form 1120F is normally due on the 15th day of the third month (or the 15th day of the six month after the end of the tax year for a taxpayer with no office or place of business in the United States)). However, where tax liability is fully paid at the source, an annual return is not always required. See, e.g., Treas. Reg. sections 1.6012-2(g)(2)(i), 1.6012-1(b)(2).

Under section 6511(a), a claim for credit or refund of an overpayment of tax for which the taxpayer is required to file a return is due within 3 years of the filing of such return, or within 2 years of the time the tax was paid, whichever is later, or, if no return was filed by the taxpayer, within 2 years of the time the tax was paid. See also Treas. Reg. section 301.6511(a). Section 6513(b)(3) provides a special rule applicable to determining the limitations period for amounts withheld at the source. It provides, for purposes of section 6511, that “[a]ny tax withheld at the source...shall, in respect of the recipient of the income, be deemed to have been paid by such recipient on the last day prescribed for filing the return.” See also Treas. Reg. section 301.6513-1(b)(3).

Thus, the limitations period for a taxpayer to claim a refund of amounts withheld on the sale of a U.S. real property interest, and for which no return was filed, begins on the date the tax is considered paid under section 6513(b)(3). In this case, the withheld tax was considered paid on either April 15 or June 15 of Year A+1 (assuming Taxpayer is a calendar-year taxpayer and no extensions applied). Since we have no evidence that Taxpayer filed a tax return for Year A, the limitations period on claiming a refund as to such amount expired two years later, on either April 15 or June 15 of Year A+3.

Taxpayer failed to file a formal claim for refund by either of such dates. Approximately five years after the sale, on Date P, Taxpayer applied for and received a withholding certificate for the full amount withheld. Taxpayer did not act on the withholding certificate and file a claim for refund as required by Treas. Reg. section 1.1445-3(a) and (g).

It should be noted that even though the sale of the Property may have been exempt from FIRPTA withholding, section 6401(c) provides that “[a]n amount paid as tax shall not be considered not to constitute an overpayment solely by reason of the fact that there was no tax liability in respect of which such amount was paid.” See also Treas. Reg. section 301.6402-1(b). Further, Treas. Reg. section 301.6402-2(a)(1) provides that “refunds of overpayments may not be allowed or made after the expiration of the statutory period of limitation properly applicable unless, before the expiration of such period, a claim therefor has been filed by the taxpayer.” (Emphasis added).

The IRS does not have authority to waive the statute of limitations under section 6511. Angelus Milling Co. v. Commissioner, 325 U.S. 293, 295 (1945) (in upholding provisions of the Code and regulations that establish the elements comprising a valid claim for refund, the Court observed “[i]nsofar as Congress has made explicit requirements, they must be observed and are beyond the dispensing power of Treasury officials”). However, caselaw provides that valid claims for refund may also be made informally, as long as they meet certain requirements. That is, “[u]nder certain circumstances, a timely informal claim for refund may toll

the statute of limitations until the filing of a formal claim.” Estate of Tinari v. United States, 1998 U.S. Dist. LEXIS 14945, 14949-50 (E.D. Pa. 1998). As with valid formal claims for refund, valid informal refund claims must be made within the statutory period. See Newton v. United States, 163 F. Supp. 614, 618-620 (Ct. Cl. 1958).

In general, “[t]o be acceptable, an informal claim must meet the following requirements: (1) it must notify the Commissioner that the taxpayer is asserting rights to a refund; (2) it must notify the Commissioner why the taxpayer is asserting this right; and (3) it must be at least partially written.” The Thomas G. Faria Corp. v. the United States, 1977 U.S. Ct. Cl. LEXIS 576, 607-608 (1977) (citing Wrightsman Petroleum Co., v. United States, 35 F. Supp. 86, 95-6 (Ct. Cl. 1940), cert. denied, 313 U.S. 578 (1941); Newton, 163 F. Supp. at 618-620; National Newark & Essex Bank v. United States, 410 F.2d 789, 792-94 (Ct. Cl. 1969)); D’Amelio v. United States, 679 F.2d 313, 315 (3d Cir. 1982). In Wrightsman, the court held that an oral claim made to a revenue agent was not sufficient compliance with the statute requiring the filing of a claim notwithstanding that the agent reported the claim. Wrightsman, 35 F. Supp. at 96.

Further, “[i]n determining whether an adequate informal claim has been filed, [courts are expected to] take into account all of the surrounding facts and circumstances.” Estate of Tinari, 1998 U.S. Dist LEXIS at 14949-50 (taxpayer’s timely correspondence to IRS, including a letter to the IRS regarding a related case with the IRS, a settlement stipulation approved and entered by the Tax Court, case history sheets produced by an IRS official, and an oral demand for a refund, together, fulfill the requirements of a valid informal claim for refund). In Newton v. United States, the U.S. Court of Claims discussed informal claims for refund:

[t]he basic underlying principle [of what constitutes a valid informal claim for refund] is the necessity to put the Commissioner on notice of what the taxpayer is claiming and that he is in fact making a claim for refund. No hard and fast rules can be applied because it is a combination of facts and circumstances which must ultimately determine whether or not an informal claim constituting notice to the Commissioner had been made. Necessarily each case must be decided on its own peculiar set of facts with a view toward determining whether under those facts the Commissioner knew, or should have known, that a claim was being made.

163 F. Supp. at 618-20.

As far as we know, Taxpayer’s earliest contact with the IRS regarding the refund was a telephone call memorialized in a Date M letter to the PSC, which was at least 1½ years after the statute of limitations expired. A subsequent letter from

Taxpayer, dated Date O, was attached to a letter from Taxpayer's counsel of the same date. We do not know the date of the contact referred to in this letter or of any other previous contacts. In the letter, Taxpayer requests the release of the funds withheld in connection with the sale of the Property. We think that Taxpayer's letter dated Date M constitutes an untimely informal claim for refund. Since Taxpayer did not file a tax return for Year A, it is entitled to a refund equal only to amounts it paid during the 2-year period preceding the filing of its claim for refund. Section 6511(a). This is true even though, as discussed above, PSC subsequently determined Taxpayer was exempt from tax on the sale of the Property. To illustrate, the same would be true in the case of an individual taxpayer who erroneously paid tax on an item of income where none was due, but failed to claim a refund within the time allowed under section 6511(a). Even though no tax was due, the taxpayer can only claim a refund within the statute of limitations afforded by section 6511(a).

We also think that Taxpayer's application for a withholding certificate, filed with the PSC on Date P, would constitute an informal claim for refund. However, the application was filed approximately five years after the tax was paid and a return was due, and therefore was untimely.

The PSC issued the withholding certificate to Taxpayer on Date Q. The certificate provides that Taxpayer is exempt from withholding under section 1445 on the sale of the Property. However, issuance of the certificate is unrelated to the section 6511(a) limitations period. The "withholding certificate serves only to adjust withholding obligations to correspond as closely as possible to the probable tax liability arising out of a transfer. Therefore, all determinations that are made by the Service in connection with the issuance of a withholding certificate apply solely for the limited purpose of determining withholding obligations under section 1445 of the Code and do not necessarily represent the Service's final view with respect to any substantive issue that may arise in connection with a transfer." Revenue Procedure 88-23, Sec. 3.02, 1988-1 C.B. 787, Sec. 2.02. That is, despite that a withholding certificate was issued, Taxpayer is time-barred from claiming a refund with respect to the tax withheld because the section 6511(a) limitations period had expired. As stated in the instructions for the Form 8288-B:

[a]ny withholding certificate issued by the IRS applies only for the limited purpose of determining the withholding obligation under section 1445 and does not apply to any substantive issue that may arise in connection with the transfer. The acceptance by the IRS of any evidence submitted in connection with this application is not binding on the IRS for any purpose other than issuing the withholding certificate.

General Instructions to Form 8288-B. See also id.

Additionally, since Taxpayer failed to timely file a claim for refund, under section 7422, Taxpayer is barred from initiating a legal proceeding for a refund of the amount withheld in connection with the sale of the diplomatic mission.

Issue 2

Notifying the IRS that the taxpayer seeks a refund is a prerequisite to a valid claim for refund. There is no exception for notification of another government agency. See, e.g., Estate of Tinari, 1998 U.S. Dist LEXIS at 14953.

Prior to Date N, we understand that Taxpayer contacted only Agency-1 and Agency-2 regarding a refund. According to Taxpayer, diplomatic protocol precluded it from directly contacting the IRS. Nonetheless, applicable caselaw, statutes, and regulations clearly provide that a taxpayer who seeks a tax refund must make the claim known to the Commissioner or one of his delegates by way of a written instrument before expiration of the applicable statute of limitations. See, e.g., Estate of Trinari, supra; see also Treas. Reg. section 301.6402-2. The Form 8288-B filed by Taxpayer on Date O, would constitute a claim for refund. However, it was not filed within the limitations period.

Further, we know of no authority that supports Taxpayer's contention that the statute of limitations on filing a claim for refund is inapplicable to a Taxpayer that is a foreign sovereign; or that Taxpayer provided proper notice of its claim within the 6511(a) period by notifying Agency-1 and Agency-2.

Issue 3

Because Taxpayer is not owed a tax refund, no interest is due.

Issue 4

Section 894 provides that the Code "shall be applied to any taxpayer with due regard to any treaty obligation of the United States which applies to such taxpayer." See also Treas. Reg. section 1.894-1(a).

The existing treaty between the United States and Country F entered into force on January 1, Year A+5.

Article D of the Treaty (Entry into Force) provides that the Treaty's provisions apply to amounts paid or credited and taxable periods on or after the first day of January next following the date upon which the Treaty enters into force. See also Technical Explanation, Article D. Since the Treaty entered into force on January 1, Year A+5, its provisions apply to amounts paid or credited and with respect to taxable periods

on or after January 1, Year A+5. No tax treaty was in effect between the United States and Country F for Year A, the year that the Property was sold. As such, no treaty applies to the issues discussed herein.

Taxpayer challenges the time-bar on a refund claim by asserting that the section 6511(a) limitations period is inapplicable because taxpayer is a foreign sovereign. In support of this contention, Taxpayer cites the Vienna Convention on Diplomatic Relations, 23 UST 3229 (TIAS 7502) as well as the Consular Convention 21 UST 78 (TIAS 6820), which generally exempt the signatory countries from certain taxes relating to the premises of their diplomatic missions.

However, caselaw shows that even where a foreign government has erroneously paid tax on diplomatic property that is exempt from tax under the Consular Convention, a valid refund claim still requires compliance with the taxing jurisdiction's refund claim procedures. See Republic of Argentina v. City of New York, 250 N.E.2d 698, 1969 N.Y. LEXIS 1675, ***26 (Court of Appeals of New York 1969) (cited in Chateau D'If Corp. v. City of New York, 1990 U.S. Dist. LEXIS 8001, 8005 (S.D.N.Y. 1990), in which the court observed that "the New York courts have often required strict compliance with...notice provision[s] in connection with refund claims"). In Republic of Argentina, the New York State Court of Appeals affirmed the dismissal of Argentina's suit because Argentina had not complied with refund claim procedures under New York City's Administrative Code even though Argentina was exempt from property tax under the Consular Convention. Id. at ***26. The Court explained the rule of the [Consular] Convention, that "'under recognized principles of international law and comity,' the property owned by a foreign government and used for public noncommercial purposes should be exempt from local taxation." Id. at ***17. Nonetheless, it found that the

cause of action, which seeks the refund and recovery of taxes paid in the past, was properly dismissed since it conclusively appears that the [Republic of Argentina] failed to comply with provisions of [New York City's] Administrative Code insofar as they require that one who prosecutes a claim against the city for a money judgment must allege and establish that he has previously presented to the Comptroller a demand for the relief sought.

Id. at ***26-27.

Thus, even though a taxpayer may be exempt from tax under an international agreement, in order to make a valid claim for refund, the taxpayer must comply with the taxing jurisdiction's requirements for refund claims. In this case, even though Taxpayer may have been exempt from tax on the sale of the Property under the Consular Convention, the requirements for a timely refund claim under 6511(a) still apply. Because Taxpayer did not claim a refund from the IRS within the applicable

limitations period, it is not entitled to a refund of the amount withheld in connection with the sale of the Property.

If you have any further questions, please call the branch telephone number (202-622-3880).

By: _____
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