



OFFICE OF
CHIEF COUNSEL

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
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MEMORANDUM FOR MANHATTAN AREA COUNSEL - AREA 1
SMALL BUSINESS/SELF EMPLOYED

FROM: CURTIS G. WILSON
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(ADMINISTRATIVE PROVISIONS AND JUDICIAL PRACTICE)

SUBJECT: Significant Service Center Advice Request: Claims for Refund
of Trust Fund Recovery Penalty

This responds to a request for a Significant Service Center Advice dated March 20, 2001, in connection with a question posed by the Andover Service Center. This document is not to be cited as precedent.

ISSUE:

The taxpayer was found to be a responsible person and assessed a trust fund recovery penalty ("TFRP") under section 6672 of the Code. The taxpayer made several payments in partial satisfaction of the assessed liability. Subsequently, within two years of the last payment, the taxpayer filed a timely claim for refund asserting that she was not a responsible person within the meaning of section 6672. Upon consideration, the Service agreed that the taxpayer was not a responsible person and, thus, that she was not liable for the assessed TFRP. May the Service refund to the taxpayer the full amount paid by the taxpayer toward the TFRP, or is the amount of the refund limited by section 6511(b)(2) of the Code?

CONCLUSION:

The refund may not exceed the amount paid by the taxpayer during the two years immediately preceding the filing of the taxpayer's refund claim. I.R.C. § 6511(b)(2)(B).

BACKGROUND:

The Andover Service Center brought the following case to your attention. The case is allegedly representative of other similar cases.

The Service proposed a trust fund recovery penalty against the taxpayer and another

individual as responsible persons within the meaning of section 6672(a). The taxpayer did not dispute the Service's determination and the Service assessed the proposed TFRP. The amount of the original assessment, made in 1990, was \$82,000. The taxpayer made several payments towards the assessed liability, totaling approximately \$6,000. Within two years of making the last payment of \$750, the taxpayer filed a claim for refund asserting that she was not a responsible person within the meaning of section 6672(a). The Service's Technical Support and Compliance ("TSC") Function investigated the taxpayer's claim and determined that, in fact, she was not a responsible person. Accordingly, the TSC function instructed the Service Center to abate and refund to the taxpayer the \$750 the taxpayers paid within the look-back period of section 6511(b)(2)(B).

The Andover Service Center took the position that since the taxpayer was not a responsible person, the assessment against the taxpayer was erroneous. The Service Center abated the TFRP assessment in full and refunded to the taxpayer the full amount that the taxpayer paid towards the TFRP, plus interest. The statute of limitations on collection of the TFRP has now expired.

LAW AND ANALYSIS:

Section 6511 of the Code sets forth time and amount limitations on a taxpayer's claim for refund. Section 6511(a) provides that a refund claim must be submitted "within 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever of such periods expires the later." Even if a refund claim is timely under section 6511(a), however, section 6511(b)(2) limits the amount the taxpayer may recover. Section 6511(b)(2)(A) provides that where a claim for refund was filed within 3 years of the filing of the return, the amount of the refund is limited to "the portion of the tax paid within the period, immediately preceding the filing of the claim, equal to 3 years plus the period of any extension of time for filing the return." I.R.C. § 6511(b)(2)(A). Section 6511(b)(2)(B) provides that where no claim was filed within the 3-year period prescribed by subsection (a), the "amount of the credit or refund shall not exceed the portion of the tax paid during the two years immediately preceding the filing of the claim." I.R.C. § 6511(b)(2)(B) (emphasis added).

In a case of a claim for refund of paid trust fund recovery penalty, the claim must be filed within two years from the time the tax was paid. See Kuznitsky v. United States, 17 F.3d 1029, 1032 (7th Cir. 1994). If the claim is timely, the amount of the refund is limited to amounts paid within the two-year look-back period set forth in section 6511(b)(2)(B)¹. Neither the Service nor the courts have the authority to issue a refund in excess of the amounts paid within the applicable look-back period. See

¹ An exception to the two-year limitation may exist if the taxpayer shows that he was "financially disabled" during the applicable two-year period. See I.R.C. § 6511(h).

Commissioner v. Lundy, 516 U.S. 235 (1996) (Tax Court is forbidden to award a refund of any overpaid federal taxes that were not paid within the section 6511(b) look-back period). Also United States v. Dalm, 494 U.S. 596 (1999) (There is no distinction between a refund action and suits for funds wrongfully retained by the Service; the word “overpayment” in section 6511(a) encompasses “erroneously,” “illegally,” and “wrongfully” collected taxes); United States v. Brockamp, 519 U.S. 347 (1997) (Section 6511 limitations are not subject to tolling for nonstatutory equitable reasons).

In Pham v. United States, the court of federal claims had an opportunity to address a fact pattern very similar to the one at hand. See Pham v. United States, 41 Fed. Cl. 886 (1999). In Pham, the plaintiff was assessed TFRP for the last two quarters of 1986 and the first two quarters of 1987. Between February 1992 and February 1994, Plaintiff made several payments towards the assessed liability. Subsequently, plaintiff filed a claim for refund asserting that he was not a responsible person within the meaning of section 6672(a). The Government denied plaintiff’s claim and plaintiff instituted a suit in the Court of Federal Claims.

In determining whether the plaintiff’s suit could go forward, the court looked to section 6511. The court determined that plaintiff’s suit was timely because it was filed within two years from “the time the tax [penalty] was paid.” Id., at 888. The court then turned to the amount limitation set forth in section 6511(b). The court held that even if the plaintiff were to prove that he was not a responsible person and, thus, not liable for the assessed penalty, he could recover only the payments made within the two years immediately preceding his claim for refund. Plaintiff could not recover any amounts paid outside of the two-year look-back period.

Similarly, in Mann v. Commissioner, the Tax Court upheld the Service’s denial of a refund even though the Service conceded that the taxpayer owed no taxes for the period at issue. Mann v. Commissioner, T.C. Memo 2000-70. In that case, the taxpayer failed to file his income tax return for 1990. However, on or about April 15, 1991, the taxpayer filed with the Service a Form 4868, *Extension of Time to File US Individual Tax Return*, and enclosed a \$5,000 payment. In 1997, the Service issued to the taxpayer a notice of deficiency for 1990. The taxpayer timely petitioned the Tax Court.

The Government conceded that the taxpayer owed no tax for 1990, and the taxpayer requested a refund of the \$5,000 payment. The government argued that the taxpayer was barred from recovering the overpayment. The Tax Court agreed. The court noted that sections 6511(b)(3)(B) and 6511(b)(2) limit the refund to amounts paid within two years prior to the date of the mailing of the statutory notice of deficiency. Since the taxpayer’s payment was made outside of this look-back period, the taxpayer was barred from recovering the \$5,000 payment.

Pham and Mann are consistent with the overall statutory scheme and the long established case law governing refunds. Section 6511(b)(2)(B) limits the amount of the refund the taxpayer may recover to payments made within two years immediately preceding the taxpayer's refund claim. While at first glance this result may seem inequitable, the Code contains numerous provisions mitigating this result. First, before the Service assesses a TFRP, the alleged responsible person is provided with an opportunity to dispute the Service's determination. I.R.C. § 6672(b). Although the Service should never assert or assess a TFRP against an individual who is not a responsible person within the meaning of section 6672(a), the Service is often forced to make its determination based on limited facts. The taxpayer is always in a better position to ascertain the degree of his or her responsibility and/or willfulness. However, it is up to the taxpayer to take advantage of this opportunity and to present evidence rebutting the Service's determination.

Moreover, the pre-assessment forum is not the only way for a responsible person to dispute the Service's determination. *See, e.g.*, I.R.C. § 6672(c). Recently, Congress enacted section 6330, providing all taxpayers with an opportunity (if they did not have such an opportunity earlier) to have their tax liability reviewed before the Service takes its first administrative collection action. Finally, because the TFRP is a divisible tax and, thus, not subject to the full payment rule², the responsible person may always pay a divisible portion of the assessed tax and file a timely refund claim. *See Steele v. United States*, 280 F.2d 89 (8th Cir. 1960).

In the instant case, the taxpayer did not present evidence disputing the Service's assertion of the TFRP until over two years after the liability was assessed by the Service. During that time, the taxpayer made several payments towards the assessed liability. Although the Service correctly determined that the taxpayer was not a responsible person and, thus, not liable for the assessed penalty, the Service incorrectly refunded to the taxpayer the full amount paid by the taxpayer. Instead, the Service should have refunded only the amount paid by the taxpayer during the two years immediately preceding the taxpayer's refund claim, or \$750, plus interest. I.R.C. § 6511(b)(2)(B). *See also* Rev. Rul. 81-87, 1981-1 C.B. 580. Payments made outside of the two-year look-back period should have been moved to excess collection or some other account appropriated for this type of payment.

Furthermore, to the extent that the refund exceeded the amount limitation set forth in section 6511(b)(2)(B), it was erroneous. The Service may recover this amount by filing an erroneous refund suit pursuant to section 7504 within the period of limitations set forth in section 6532(b). *See United States v. Gulf Oil Corp.*, 485 F.2d 331 (1973). In this case the Service has two years from the time the taxpayer received the erroneous refund to institute the erroneous refund suit. *O'Gilvie v. United States*, 519 U.S. 79 (1996).

² *See Flora v. United States*, 362 U.S. 145 (1960).

If you have questions or need additional assistance in this matter, please contact Branch 2 of the Office of Assistant Chief Counsel (Administrative Provisions and Judicial Practice) at 202-622-4940. If you have questions regarding erroneous refund procedures, please contact Branch 3 of the Office of Assistant Chief Counsel (Collection, Bankruptcy, and Summonses).

cc: Division Counsel, SBSE