



DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
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INTERNAL REVENUE SERVICE CHIEF COUNSEL ADVICE

MEMORANDUM FOR:MARGARET BLACK
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W:CAS:AM:PPG:ATA

FROM: Peter K. Reilly
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CC:PA:APJP:Br3

SUBJECT: Math Error Authority Procedures and Previously Denied
Earned Income Tax Credit (EIC) Claims

This Chief Counsel Advice responds to your memorandum dated March 5, 2002, seeking our views concerning the processing of returns claiming EIC during a ban year. In accordance with § 6110(k)(3), this Chief Counsel Advice should not be cited as precedent.

ISSUES

1. Must math error procedures be used in addressing a current year EIC claim when the math error was the result of a previous EIC disallowance through statutory deficiency procedures?
2. If not, may the CSR response to the taxpayer advising that EIC cannot be claimed for any tax year ending prior to the 2-year ban?

CONCLUSIONS

1. Math error procedures are not mandatory. Furthermore, math error procedures cannot be used to disallow an EIC claim made during the two-year period set out in section 32(k)(1)(b)(ii). Instead, the Service should issue a notice of deficiency to disallow EIC during a ban year.

2. The Service may advise the taxpayer by letter that the EIC cannot be claimed for a tax year subject to the two-year ban; however, to disallow such a claim, the Service must issue a notice of deficiency.

FACTS

A taxpayer who was denied EIC in a prior year through statutory deficiency procedures may file a Form 1040 requesting EIC during the two-year period under section 32(k)(1)(B)(ii) for which the taxpayer is banned from claiming EIC. The return is identified as being subject the two-year ban set out in section 32(k)(1)(b)(ii) and sent "Rejects," where a letter is sent to the taxpayer advising that since EIC was disallowed for prior year examination due to reckless or intentional disregard of the EIC rules and regulations, the law does not allow the taxpayer to claim EIC for the next two years. In some instances, the taxpayer responds to this letter by providing an amended return attaching a Form 8862, Information to Claim Earned Income Credit After Disallowance, believing this to be sufficient to substantiate the entitlement to the credit. In other instances, the taxpayer responds by calling the Internal Revenue Service (Service) demanding EIC. Customer Service Representatives (CSRs) of Accounts Management are instructed to follow unsubstantiated math error procedures. That is, they allow the credit, freezing the refund, and assigning the case to Examination for resolution. Examination uses math error procedures to disallow the EIC subject the two-year ban set out in section 32(k)(1)(b)(ii).

LAW AND ANALYSIS

You ask whether math error procedures must be used in addressing a current year EIC claim when the basis for disallowing the claim in the present year was the disallowance of EIC in a prior year through statutory deficiency procedures. Section 6213(g)(2)(k) includes under the term mathematical or clerical error "an omission of information required by section 32(k)(2) (relating to taxpayers making improper prior claims of earned income credit)." Section 32(k)(2) deals with the handling of cases involving taxpayers who made improper prior EIC claims. The section provides that:

[i]n the case of a taxpayer who is denied credit under this section for any taxable year as a result of the deficiency procedures under subchapter B of chapter 63, no credit shall be allowed under this section for any subsequent taxable year unless the taxpayer provides such information as the Secretary may require to demonstrate eligibility for such credit.

The Service has set out the information required to demonstrate eligibility for EIC in Treas. Reg. § 1.32-3, which provides in pertinent part:

(a) In general. A taxpayer who has been denied the earned income credit (EIC), in whole or in part, as a result of the deficiency procedures under subchapter B of chapter 63 (deficiency procedures) is ineligible to file a return claiming the EIC subsequent to the denial until the taxpayer demonstrates eligibility for the EIC in accordance with paragraph (c) of this section. If a taxpayer demonstrates eligibility for a taxable year in accordance with paragraph (c) of this section, the taxpayer need not comply with those requirements for any subsequent taxable year unless the Service again denies the EIC as a result of the deficiency procedures.

(b) Denial of the EIC as a result of the deficiency procedures. For purposes of this section, denial of the EIC as a result of the deficiency procedures occurs when a tax on account of the EIC is assessed as a deficiency (other than as a mathematical or clerical error under section 6213(b)(1)).

(c) Demonstration of eligibility. In the case of a taxpayer to whom paragraph (a) of this section applies, and except as otherwise provided by the Commissioner in the instructions for Form 8862, "Information To Claim Earned Income Credit After Disallowance," no claim for the EIC filed subsequent to the denial is allowed unless the taxpayer properly completes Form 8862, demonstrating eligibility for the EIC, and otherwise is eligible for the EIC. If any item of information on Form 8862 is incorrect or inconsistent with any item on the return, the taxpayer will be treated as not demonstrating eligibility for the EIC. The taxpayer must follow the instructions for Form 8862 to determine the income tax return to which Form 8862 must be attached. If the taxpayer attaches Form 8862 to an incorrect tax return, the taxpayer will not be relieved of the requirement that the taxpayer attach Form 8862 to the correct tax return and will, therefore, not be treated as meeting the taxpayer's obligation under paragraph (a) of this section.

(d) Failure to demonstrate eligibility. If a taxpayer to whom paragraph (a) of this section applies fails to satisfy the requirements of paragraph (c) of this section with respect to a particular taxable year, the IRS can deny the EIC as a mathematical or clerical error under section 6213(g)(2)(K).

Thus, as a general rule, the Service can use math error procedures where a taxpayer previously had EIC disallowed through deficiency procedures unless a proper Form 8862 is filed. The use of section 6213(g)(2)(k), however, is not mandatory. The Service could use deficiency procedures to disallow EIC in such instances.

You have raised, though, the more specific instance where the EIC claim is subject to the two-year ban under section 32(k)(1)(B)(ii). You seek advice concerning how these claims should be processed. Section 32(k)(1) provides that EIC shall not be allowed for “the period of 2 taxable years after the most recent taxable year for which there was a final determination that the taxpayer's claim of credit under this section was due to reckless or intentional disregard of rules and regulations.” The letter sent by “Rejects” specifically instructs the taxpayer not to file the Form 8862 during the ban period. Furthermore, the instructions for Form 1040 also advise taxpayers not to file a Form 8862 during the ban period.

While section 6213(g)(2)(k) can be used for the general situation where a taxpayer previously had EIC disallowed through deficiency procedures, it cannot be used where a taxpayer is subject to the two-year ban. This is so because the failure to file a proper Form 8862 forms the basis for math error procedures in the general situation. Conversely, the taxpayer is advised that Form 8862 should not be filed during the two-year ban period. Furthermore, there is no other provision under section 6213(g)(2) which would allow the Service to resort to math error procedures when disallowing EIC during a year in which the ban is in place. Instead, the Service should issue a notice of deficiency to disallow EIC during a ban year.

This writing may contain privileged information. Any unauthorized disclosure of this writing may have an adverse effect on privileges, such as attorney-client privilege. If disclosure becomes necessary, please contact his office for our views.

Please call if you have any further questions.

By: _____
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