DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
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MEMORANDUM FOR SOUTH TEXAS DISTRICT COUNSEL
ATTN: JERRY HAMILTON

[SIGNED]

FROM: ROBERT A. MILLER, SENIOR TECHNICIAN REVIEWER
BRANCH 3 (COLLECTION, BANKRUPTCY, SUMMONSES)

SUBJECT: RECOVERY OR REVERSAL OF ERRONEOUS REPARATION TAX CREDIT – SIGNIFICANT SERVICE CENTER ADVICE

This responds to your memorandum dated May 24, 2000. This document is not to be cited as precedent.

ISSUE

Where the Service receives a return claiming a refund on the basis of a "black investment taxes ..." credit on Form 2439, Notice to Shareholder of Undistributed Long-term Capital Gains, used in connection with an interest in a regulated investment company (RIC) or real estate investment trust (REIT), is the proper means of recovery:

(1) If the refund was not made, to:

(a) reverse the credit,
(b) assess the overstated credit as a I.R.C. § 6201(a)(3) erroneous income tax prepayment credit, or
(c) determine a deficiency?

(2) If the refund was made, to:

(a) assess the overstated credit as a section 6201(a)(3) erroneous income tax prepayment credit,
(b) refer for the government to bring an erroneous refund suit under I.R.C. § 7405, or
(c) determine a deficiency?

CONCLUSION

The claim for a tax credit for reparations due to slavery is without merit.

(1) If a refund was not made, the credit should be reversed on the grounds that deemed paid provisions do not apply and the credit was not paid. An overstated credit reported on Form 2439 is subject to section 6201(a)(3) and can be summarily assessed. However, an assessment under section 6201(a)(3) is not needed since the Service has the money and does not need to use the administrative collection procedures such as levy. Also, assessment under section 6201(a)(3) requires more steps than reversal of the credit. A deficiency cannot be determined because the unpaid credit does not enter into a redetermination of the tax. See, I.R.C. §6211(b)(1).

(2) If a refund was made, the overstated credit should be summarily assessed under section 6201(a)(3). A referral for the government to bring an erroneous refund suit under section 7405 could be made but takes more time and more resources. A deficiency cannot be determined since the refund was not made on the basis of a redetermination of tax within the meaning of I.R.C. 6211(b)(1),(2) but was made on the basis of a claimed excess of payments.

FACTS

Service Centers have received a number of refund claims for overpayments based on claimed slavery reparation credits. You forwarded with your request for advice a return for one taxpayer, with taxpayer identifiers redacted, as an example of the scheme. In the example, taxpayer filed a Form 1040, U.S. Individual Income Tax Return, for taxable year 1998. The claimed standard deduction and exemptions reduced the taxable income to zero. With the return, taxpayer submitted a Form 2439 on which the RIC or REIT was identified as “black investment taxes Dept. of Treasury Washington DC”. On line 2 of Form 2439 and on line 63, Other Payments (the box for Form 2439 is checked), of Form 1040, $40,000 is shown as the tax paid by the RIC or REIT. You ask how the Service should deal with the claim for refund based on the alleged credit both where a refund was not made and where a refund was made. You refer to: G.C.M. 34508, Service Center Program to Correct Obviously Unallowable Items Appearing on Tax Returns, and General Litigation advisory TL-N-1004-98, Period for Making an I.R.C. § 6201(a)(3) Assessment, and ask whether these documents have an effect on our ultimate conclusion. Our views are stated below.

SLAVERY REPARATION CREDIT NOT ALLOWABLE

Some African-Americans have been misled to believe they could file tax claims with the Service for slavery reparations payable by the United States government to descendants of slaves. **1/** The Internal Revenue Code does not provide for a credit or refund premised on slavery of African-Americans. Thus, the assertion of a slavery reparation credit is without merit. The Service stated a consistent conclusion in Fact Sheets (FS) #94-6 (October 1994) and #96-8 (July 1996) which responded to prior attempts to obtain a refund on this meritless basis.

Refund Not Made

1/ One source for this erroneous belief is a magazine article, Forty Acres and a Mule, by L.G. Sherrod, Essence (April 1993, p. 124). That title refers to a statutory proposal in the 1860s to grant former slaves 40-acres and a mule and allegedly vetoed by President Andrew Johnson. However, it does not appear that such a proposal was passed by Congress. President Johnson twice vetoed a proposal to rent confiscated or abandoned land to freedmen for a period of time, with an option to buy the land, on the ground that it involved a taking without due process of law. S. Ex. Doc. No. 25 (as to bill S. 60), 39th Cong., 1st Sess., at page 5 (February 19, 1866), and H. Ex. Doc. 146 (as to bill H. 613), 39th Cong., 1st Sess., at page 4 (July 16, 1866). Approaches regarding slavery that were implemented in the 1860s took a different form. First, the Act of April 16, 1862, 12 S.L. 376, and the Act of June 19, 1862, 12 S.L. 432, abolished slavery in the District of Columbia and the territories of the United States. Second, Congress adopted a joint resolution favoring, and President Lincoln proclaimed, a standing offer of financial incentives to states to enable immediate or gradual elimination of slavery. Joint Resolution, April 10, 1862, 12 S.L. 617; Proclamation 13, May 19, 1862, 12 S.L. 1264, and Proclamation 16, September 22, 1862, 12 S.L. 1267. Third, by the Act of July 11, 1862, Congress implemented a Treaty with Great Britain for the suppression of the African slave trade. Fourth, the Act of July 17, 1862, 12 S.L. 589, abolished slavery in states in insurrection, and provided for confiscation of property used for purposes of treason, rebellion or insurrection, but authorized the President to grant pardons or amnesty to former confederates with restoration of all rights of property except slaves. Sections 7 and 8 of the Act of July 17, 1862 required an in rem proceeding under the supervision of the Attorney General to transfer title to confiscated or abandoned land. [General Sherman's Special Field Order No. 15 (1865) (establishing 40-acre tracts for former slaves accompanying him on the march across Georgia) could not transfer title.] Fifth, the terms for surrender at Appomattox indicated that former confederate military personnel could return to their homes. Sixth, President Andrew Johnson exercised the pardon authority of section 13 of the Act of July 17, 1862, and directed the Freedmen's Bureau to order the return of property (but not former slaves) to the pardoned former confederates. Seventh, declaration of ratification of the Thirteenth Amendment on December 18, 1865 abolished slavery. Eighth, declaration of ratification of the Fourteenth Amendment on July 28, 1868 extended rights of citizenship to all persons born in the United States. [Lack of citizenship prevented former slaves from, for example, taking advantage of the Homestead Act of May 20, 1862, 12 S.L. 392].

If refund is not made in respect of a taxpayer's refund claim based on an alleged slavery reparation credit, the Service can reverse the credit. The Congressional committee reports which accompanied section 6201(a)(3) when it was enacted indicate that the Service already had the authority to administratively reverse overstated withholding credits except when the Service had made a refund or had applied a credit. S. Rep. No. 1622, 83d Cong., 2d Sess., at page 572 (1954); H. Rep. No. 1337, 83d Cong. 2d Sess., at page A404 (1954).

In your example, the taxpayer asserts that the alleged withholding by the RIC or REIT should be treated as a deemed payment by the taxpayer-shareholder under I.R.C. §§ 852(b)(3)(D)(ii) or 857(b)(3)(D)(ii). The taxpayer filed with his Form 1040 a Form 2439 on which an RIC or REIT was identified as "black investment taxes Dept. of Treasury Washington DC" and $40,000 is shown as the tax paid by the alleged RIC or REIT. A Form 2439 is intended for issuance by a RIC or REIT to report to the shareholder and to the Service the shareholder's share of long-term capital gains retained by the RIC or REIT and income tax paid by the RIC or REIT in respect of the capital gains. The retained capital gains are reported on the shareholder's return, and the shareholder claims the taxes paid by the RIC or REIT as a deemed payment. The grounds for reversal of the credit are that: there is no statute that provides for the alleged credit, the deemed payment provisions do not apply because the alleged RIC or REIT does not exist and the Treasury Department did not issue the Form 2439, and the Service did not receive the alleged prepayment.

In our view, reversal is the preferred remedy as it is the most efficient in terms of the Service's resources. The Service does not need to resort to a summary assessment under section 6201(a)(3), which requires further steps and documentation. In the circumstances of the example, upon reversal of the credit the account will show zero liability and zero payments. The deficiency procedures do not apply since the correct tax liability is zero and the claimed credit does not enter into the determination of a deficiency. See, section 6211(a),(b)(1).

Refund Made

If refund is made in response to a taxpayer's refund claim based on an alleged slavery reparation credit, the Service can make a summary assessment under section 6201(a)(3) of the overstated credit. See the Congressional Committee reports cited in the preceding section.

By its terms, section 6201(a)(3) allows the summary assessment of erroneous income tax prepayment credits where there is an overstatement of the credit for income tax withheld at the source, or of the amount paid as estimated income tax. For purposes of applying section 6201(a)(3), the overstatement occurring by reason of the allegation of credit under section 852 or 857 can be treated as an allegation of an overstated advance payment within the meaning of sections 852 and 857.

See also, Treas. Reg. §§ 1.852-4 and 1.852-9. Unlike the credit provision in section 31 for withholding taxes, or unlike the deemed time of payment provision in section 6513, there is no statutory connection between the sections 852 or 857 designation procedures and withholding or estimated taxes. Without a connection, a penalty for failure to pay estimated tax would apply. The regulations provide the connection by treating the deemed paid amount as an advance payment of tax imposed by Chapter 1 of the Code and within the prepayment categories addressed by section 6513(a). See, e.g., Treas. Reg. § 1.852-9(c)(2)(i). Since the deemed paid amount avoids the estimated tax penalty by being treated as an advance payment under section 6513(a), which includes the prepayment categories specified in sections 6201(a)(3) and 6513(b), it is appropriate to treat the advance payment as an estimated tax payment for purposes of section 6201(a)(3). Thus, even though as concluded in the preceding section the deemed payment provisions of sections 852(b)(3)(D)(ii) or 857(b)(3)(D)(ii) do not apply to the alleged credit, the overstatement of the advance payment credit on line 63 of Form 1040 can be summarily assessed under section 6201(a)(3).

Summary assessment is the preferred remedy as it enables collection, and enables protection of the Service's right to collect, at the earliest time. A recommendation could be made that the government bring a suit to recover an erroneous refund under section 7405. However, generally the government cannot take collection action premised on the suit until a judgement is obtained, thus subjecting to delay the time when collection, and protection of the government's right to collect, occurs. Also, the deficiency procedures do not apply. The claim for refund of the reparation credit is based on overpayment of a tax and not redetermination of a tax, and a prepayment credit cannot be considered in the determination of a deficiency. See, section 6211(a),(b)(1); S. Rep. No. 1622, 83d Cong., 2d Sess., at page 572 (1954); H. Rep. No. 1337, 83d Cong. 2d Sess., at page A404 (1954).

Other Matters

G.C.M. 34508 addresses the application of the math error provisions of I.R.C. §6213(b), including to Form 2439 circumstances, and holds that not all apparently patent errors fall into the definition of math errors. However, in a memorandum from the Acting Chief Counsel dated May 18, 1972, it was concluded that G.C.M. 34508 does not apply to claims of prepayments which in fact were not made. Thus, G.C.M. 34508 does not apply to the instant memorandum which addresses a meritless claim in a nonpayment circumstance.

TL-N-1004-98 addresses an assessment under section 6201(a)(3), concluding that it is an assessment of a tax, and addresses the statute of limitations for making a section 6201(a)(3) assessment, concluding that the I.R.C. § 6501 periods should be applied. In regard to a text statement that "[i]ncome tax returns or claims for refund sometimes show overstated amounts for income tax prepayment credits for income tax withheld at the source or for amounts paid as estimated income tax," footnote 1

indicates that “[t]he credits referred to are provided by I.R.C. §§ 31(a)(1) and 6315.” While we were trying to describe an ordinary circumstance, the text statement tracks the language of section 6201(a)(3) and, therefore, the footnote is unduly narrow as it fails to include all credits that fit within I.R.C. § 6513, such as the credits provided by I.R.C. §§ 33, 852(b)(3)(D)(ii) and 857(b)(3)(D)(ii).

If you should have any questions, call 202-622-3630.