OFFICE OF
CHIEF COUNSEL

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

MEMORANDUM FOR DISTRICT COUNSEL, GEORGIA DISTRICT,
CC:SER:GEO:ATL

FROM: ASSISTANT CHIEF COUNSEL (FIELD SERVICE)
CC:DOM:FS

SUBJECT: Form 4549 As Informal Refund Claim

This Field Service Advice responds to your memorandum dated December 22, 1999. Field Service Advice is not binding on Examination or Appeals and is not a final case determination. This document is not to be cited as precedent.

LEGEND

Taxpayer =

Tax Officer =
Year 1 =
Year 2 =
Year 3 =
Year 4 =
Year 7 =
Year 8 =
Day 1 =
Day 2 =
Day 3 =
Day 4 =

ISSUES

(1) Whether Taxpayer filed a timely informal claim for refund related to its federal income tax liability for the taxable year ended Day 4 of Year 3.

(2) If Taxpayer filed a timely informal refund claim, whether the variance doctrine precludes a refund claim for items unrelated to the rollover adjustments raised in the

formal claim filed after the expiration of the refund limitation period.

(3) Whether the Service has or will violate any duty of consistency with respect to Taxpayer's federal income tax liabilities for Years 1, 2, or 3 by disallowing Taxpayer's refund claim for those years.

(4) Whether the Service has or will violate a contractual duty to abate the portion of tax reported on Taxpayer's federal income tax return for the taxable year ended Day 4 of Year 3 attributable to rollover adjustments from Years 1 and Year 2.

CONCLUSIONS

(1) Taxpayer did not timely file any informal refund claim for the taxable year ended Day 4 of Year 3 based on agreed rollover adjustments from Taxpayer's federal income tax returns for Years 1 and Year 2 because it did not submit any document that constituted the necessary written component apprising the Service of a request for a refund.

(2) Even if Taxpayer had filed a timely informal claim for the taxable year ended Day 4 of Year 3, it would not be entitled to recover for items unrelated to the rollover adjustments related to Years 1 and 2 since such unrelated items were not raised prior to the expiration of the refund limitation period.

(3) The Service has not or will not violate any duty of consistency by disallowing Taxpayer's refund claim for the taxable year ended Day 4 of Year 3.

(4) The Taxpayer cannot recover on the ground that there was an implied contract or an account stated.

FACTS

The original due date of Taxpayer's Form 1120-L for the year ended Day 4 of Year 3 was Day 1 of Year 4. However, pursuant to an extension to file its Form 1120-L until Day 3 of Year 4, Taxpayer filed such return on Day 3 of Year 4.

Taxpayer's estimated tax payments for taxable year ended Day 4 of Year 3 exceeded its reported income tax liability. Therefore, the Service issued a refund for such amount. Taxpayer did not execute any agreements to extend the limitation period for taxable year ended Day 4 of Year 3 and therefore the 3-year period for filing a refund claim expired on Day 3 of Year 7 (3 years after the due date plus the extension period).

During the latter part of Year 4, the Service completed the examination of Taxpayer's Form 1120-L for taxable years ended Day 4 of Years 1 and 2. Upon completion of the examination, the Service issued a Form 4549 (Report of Income Tax Examination changes) reflecting increases to tax. Taxpayer's Tax Officer signed the Form 4549

agreeing to such adjustments on behalf of Taxpayer. The Service then assessed the income tax deficiencies set forth in the Form 4549.

Taxpayer did not file any Forms 1120X for taxable years 1, 2 or 3 before expiration of the applicable refund limitation periods with the exception of a Form 1120X for Year 1 reflecting an increase in tax. On or about Day 2 of Year 8, Taxpayer filed with the Service Center a Form 1120X reflecting an overpayment of and refund claim with respect to its Form 1120-L for the taxable year ended Day 4 of Year 3. The "Statement of Grounds and Authorities" states that "this claim for refund supplements Taxpayer's timely filed informal claim for refund in Year 3."

Taxpayer's attorneys submitted a legal memorandum attached to the Form 1120X stating that Taxpayer filed a timely informal refund claim in Year 4; and that even if Taxpayer did not file a timely informal refund claim, that Taxpayer is entitled to the refund under contract principles. The legal memorandum argues that the Form 4549 for the taxable years ended Day 4 of Year 1 and Year 2 satisfies the written component requirement for an informal claim. In addition, this memorandum claims the revenue agents made notes indicating that Taxpayer was entitled to a refund of tax, due to the application of rollovers. The memorandum also indicates that Taxpayer's Tax Officer had discussions with the revenue agents relating to the fact that Taxpayer desired a refund. In particular, Taxpayer's Tax Officer allegedly requested that the Service make rollover adjustments to correct the double inclusion of the "swap income" and allow additional amortizable DAC expenses and previously disallowed accrued general expenses. Taxpayer also asserts that the revenue agents agreed that the adjustments should be made. Taxpayer argues that the consideration for this so-called contract was Taxpayer's waiver of its rights to go the Appeals Office and the Tax Court. Finally, the memorandum argues that the Service has a duty of consistency in tax matters. As a result of the Service's purported duty of consistency, the memorandum argues that the Service has a duty to abate taxes for Year 3.

The Examination Division did not treat any documents that related to the adjustments for Years 1 and 2 as a formal or informal refund claim for the year ended Day 4 of Year 3. Consequently, until the receipt of the Form 1120X, the Service did not create any administrative file. The documents prepared by the revenue agents for Years 1 and 2 do not reflect that Taxpayer made any oral claim or assertion of entitlement to a refund or intended to file a claim for the year ended Day 4 of Year 3. There is no evidence of any written agreement as to a definite amount of any overpayment for Year 3. The only document reflecting an overassessment is a memorandum by one of the revenue agents requesting an abatement of the estimated tax penalty under I.R.C. § 6655 for Year 2. Although there are two documents that suggest that adjustments need to be made to the swap income, there are no documents that reflect any claim of overassessment, overpayment, or refund of income tax for Year 3 in the files. In fact, during Year 8, Taxpayer's Tax Official admitted to one of the revenue agents that he overlooked the filing of a claim for the carryover items from Years 1 and 2 to Year 3.

In addition, there is no evidence that any employee of the Service waived any formal requirements for filing a refund claim. Also, there is no written evidence in the Service's files through Day 3 of Year 7 that any employee of the Service made any written or oral commitments to Taxpayer that Taxpayer was entitled to an overpayment or refund for Year 3 or that it would postpone or take any action related to Taxpayer's Form 1120-L for Year 3. Nor was Taxpayer told that it would not have to file a refund claim for Year 3. There are no facts in the file indicating misconduct or bad faith by either Taxpayer or the Service.

LAW AND ANALYSIS

Issue 1: Whether an informal refund claim was filed

In order to maintain a refund action, a taxpayer must comply with the statutory requirements of I.R.C. § 7422(a), which requires that the taxpayer timely file a tax refund claim with the Service. I.R.C. § 6511(a) provides that a claim for refund may be filed within three years of the date the return is filed or two years from the date the taxes were paid, whichever is later.

Treas. Reg. § 301.6402-2 provides the components to a claim for refund. Treas. Reg. § 301.6402-2(a)(2) provides, in part, that a claim for refund, together with appropriate supporting evidence, must be filed with the service center serving the internal revenue district in which the tax was paid. Treas. Reg. § 301.6402-2(b)(1) provides, in part, that the claim must set forth in detail each ground upon which a credit or refund is claimed and facts sufficient to apprise the Commissioner of the exact basis therefor. The statement of the grounds and facts must be verified by a written declaration that it is made under the penalties of perjury.

Treas. Reg. § 301.6402-3(a)(1) provides, in general, in the case of an overpayment of income taxes, a claim for credit or refund of such overpayment shall be made on the appropriate form (here Form 1120X). The courts have long held that failure to use the official form is not necessarily fatal and that an informal claim may suffice. Rock Island Railroad v. United States, 254 U.S. 141 (1920). In addition, courts have waived the requirement for filing in the service center and the requirement of a penalties of perjury statement on the grounds that these requirements are merely directory and not mandatory. See Kidde Industries, Inc. v. United States, 40 Fed. Cl. 42 (1997).

There are three basic components to an informal claim. New England Electric System v. United States, 32 Fed. Cl. 636, 639 (1995). First, an informal claim must provide the Service with notice that the taxpayer is asserting a right to a refund. BCS Financial Corp. v. United States, 930 F Supp. 1273, 1277 (N.D. Ill. 1996). Second, the claim must describe the legal and factual basis for the refund. New England Electric System v. United States, 32 Fed. Cl. 636, 641 (1995). Finally, an informal claim must have some written component. Arch Engineering Co. v. United States, 783 F.2d 190, 192 (Fed Cir. 1986).

The determination of whether a taxpayer has satisfied the requirements for an informal claim is made on a case-by-case basis and is based on all the facts and circumstances. American Radiator & Standard Sanitary Corp. v. United States, 318 F.2d 915, 920 (Ct. Cl. 1963); Newton v. United States, 163 F. Supp. 614 (Ct. Cl. 1958). In Newton, the court explained that "[t]he basic underlying principle [of an informal claim] is the necessity to put the [IRS] on notice of what the taxpayer is claiming and that he is in fact making a claim for a refund." In American Radiator, the court noted that the purpose behind the requirement of an adequate informal refund claim is to prevent surprise through the giving of adequate notice of the nature of the claim as well as of its factual basis so that the Service may begin an investigation. It is not enough that the Service has information in its possession that could lead it to deduce that the taxpayer might desire a refund. Furst v. United States, 678 F.2d 147, 151 (Ct. Cl. 1982).

Once the taxpayer has put the Service on alert, in writing, that he is claiming a refund, he may later perfect his claim for refund by providing a complete statement of the grounds for the refund. Such statement or statements need not be made in writing but must be made before the expiration of the statute of limitations. Treas. Reg. § 301.6402-2(b)(1). In New England Electric System v. United States, 32 Fed. Cl. at 644, the court stated that "elements such as the sum of the refund, the years involved, and the like may be provided through oral communications and other writings." In Levitsky v. United States, 27 Fed. Cl. 235, 241 (1992), the court, referring to Davis v. United States, 21 Cl. Ct. 84, 86 (1990), stated that "[t]he inquiry into whether the I.R.S. has received appropriate notice of the grounds underlying a claim goes beyond the four corners of plaintiff's tax return. Other written communications to I.R.S. can also supply adequate notice to support litigation under I.R.C. § 7422." In American Radiator, 318 F.2d at 921, the court found that the agent's knowledge gained in auditing the taxpayer's returns sufficed to inform the Service of the grounds underlying the claim.

Taxpayer's main argument here is that the Form 4549 for Years 1 and 2 reflected three adjustments that have a rollover effect to Year 3. These adjustments plus conversations with Service personnel allegedly put the Service on notice that Taxpayer wanted a refund for Year 3. We acknowledge that a Form 4549, which reflects an overpayment on line 16 (Balance Due or Overpayment) of the form, could be considered a valid refund claim. See Rev. Rul. 68-65, 1968-1 C.B. 555 (holding that a Form 870 waiver on which a taxpayer agrees to an overassessment will be considered a valid refund claim). Here, however, the Form 4549 for Years 1 and 2 did not contain any reference to Year 3, any rollover effect of any adjustments from Years 1 and 2 to Year 3, or any amount of overassessed or overpaid income tax or any right to file a refund claim for Year 3 attributable to any adjustments. On its face, the Form 4549 simply reflected increases to tax for Years 1 and 2.

In short, there is no evidence here of a written communication that explicitly alerts the Service that a refund of taxes is sought. Certainly there was no clear and explicit notice alerting the Service that a refund of taxes was sought as required by the court in

Missouri Pacific R.R. Co. v. United States, 558 F.2d 596 (Ct. Cl. 1977). In this particular case, the Form 4549 dealt with Years 1 and 2. The Service can hardly be expected to treat that form as a refund claim for Year 3 unless there is clear notice alerting the Service to a refund, such as by a separate transmittal. We find nothing in the submission by the taxpayer that explicitly alerts the Service that a refund of taxes for Year 3 was sought. Therefore the written component requirement was not met during the period of limitations. Based on the above, we conclude that Taxpayer has failed to file an informal claim for refund for Year 3.

Issue 2: Whether the untimely refund claim raises new issues

If we assume, arguendo, that Taxpayer filed a timely informal claim through use of the Form 4549, the question arises whether Taxpayer may raise new issues after the statute of limitations has run. A timely filed original claim for refund may be amended after the statute of limitations when the amendment is based on the same facts stated in the original claim and requires no additional investigation. Mutual Assurance, Inc. v. United States, 56 F.3d 1353 (11th Cir. 1995), acq. in result only, AOD 1999-104; Reynolds v. United States, 92-2 U.S.T.C. ¶ 50,347 (E.D. Wis. 1992); Combs v. United States, 490 F. Supp. 19 (E.D. Ky. 1978); and Ideal Basic Industries v. Commissioner, 404 F.2d 122 (10th Cir. 1968). If the amendment is to be allowed, it must simply clarify matters in the original claim.

Under the variance doctrine, taxpayers are obliged in their refund claims to identify the items at issue and to state why they were treated improperly. American Radiator & Standard Sanitary Corp. v. United States, 318 F.2d 915 , 920-922 (Ct. Cl. 1963). The policy ground for not allowing time-barred claims that impermissibly vary from timely claims is that the Commissioner lacks the time and resources to perform extensive investigations into the precise reasons and facts supporting every taxpayer's claim for refund. Charter Co. v. United States, 971 F.2d 1576, 1579-80 (11th Cir. 1992); and Angelus Milling Co. v. Commissioner, 325 U.S. 293, 297-298 (1945). The rationale for the variance doctrine is that the Service must be put on notice of a claimed error so that it may take timely administrative action before a suit can be filed. Florance v. United States, 237 F. Supp. 25 (E.D. Va. 1964).

In the instant case, the Form 1120X was filed on Day 2 of Year 8. That form included claims based on the decrease to the deductions for Reserves or dividends received, interest netting, and rollover adjustments from years other than Year 1 or 2. None of these claims were raised in the Form 4549. Accordingly, we conclude that if there was a timely filed informal refund claim using the Form 4549, it must be limited to the issues raised therein and not new issues that were raised after the statute of limitations on assessments had run.

Issue 3: Nonapplicability of the Duty of Consistency

Taxpayer's legal memorandum indicates that the Service has a duty of consistency in tax matters. The doctrine known as the duty of consistency is used to prevent a taxpayer or the Service, after taking a position in one year to its advantage and after correction is barred, from shifting to a contrary position in a later year. Johnston v. United States, 605 F. Supp. 26 (D. Mont. 1984). With respect to a duty of consistency on the part of the Service, the three elements of the duty of consistency are as follows: (1) The Service must make a representation of fact in one tax year; (2) the taxpayer must acquiesce or rely on that fact for that year; and (3) the Service must desire to change the representation, previously made, in a later tax year when the period of limitations has expired. Johnston, 605 F. Supp. at 28.

The duty of consistency does not apply when a mutual mistake of law is made and both the taxpayer and the Service knew or had equal access to facts that would have alerted both parties to a possible mistake in reporting. Herrington v. Commissioner, 854 F.2d 755, 758 (5th Cir. 1988), cert. denied, 490 U.S. 1065 (1989); and Estate of Ashman v. Commissioner, T.C. Memo 1998-145.

In the instant case, the Service did not violate a duty of consistency to Taxpayer because the Service did not make any misrepresentation of facts. Both Taxpayer and the Service knew or had equal access to facts that should have alerted both entities to a possible mistake in Taxpayer's reporting for Year 3, attributable to the rollover adjustments from Years 1 and 2. Moreover, the Service did not make any mistakes of law. If there was a mistake of law, it was in failing to file a timely formal claim for refund. That mistake was Taxpayer's alone.

Issue 4: Implied Contract Theory or Action for an Account Stated

Taxpayer's legal memorandum claims that Taxpayer's Tax Officer had discussions with the revenue agents relating to the fact that Taxpayer desired a refund. In particular, Taxpayer's Tax Officer allegedly requested that the Service make rollover adjustments to correct the double inclusion of the "swap income" and allow additional amortizable DAC expenses and previously disallowed accrued general expenses. Taxpayer asserts that the revenue agents agreed that the adjustments should be made. Taxpayer argues that the consideration for this so-called contract was Taxpayer's waiver of its rights to go to the Appeals Office and the Tax Court.

A claim that is, at bottom, a tax refund suit is not based on contract. Girling Health Systems v. United States, 22 Cl. Ct. 66, 73 (1990). However, a taxpayer that has not filed a timely refund claim may file suit under a 6-year period of limitations in an action for an account stated if the government stipulates or agrees that the taxpayer is due a refund and the taxpayer agrees to accept the refund in satisfaction of the account.

An account stated is considered to arise when: (1) the government and the taxpayer have agreed that the taxpayer has overpaid taxes for a given period; (2) accord has been reached as to the amount of the overpayment; and (3) the government has

proposed and the taxpayer has agreed that a refund of the stated amount will be made and accepted to close the account. West Publishing Co. Employee's Preferred Stock Assoc. v. United States, 198 Ct. Cl. 668 (1972).

An account stated assumes the existence of an implied contract that is formed when the Service submits to the taxpayer a statement of the final balance due on an account and the taxpayer agrees to accept the proposed balance to close the account. An account stated arises only after the Service has the chance to pass on the taxpayer's claim and has made a definite decision in its favor. West Publishing, 198 Ct. Cl. at 675. To prove an account stated, the taxpayer must show "beyond peradventure" that the government has in fact agreed to pay a stated sum and communicated this intention to the taxpayer. Id. Where the statement of account is "provisional and tentative," there is no agreement. Harris v. United States, 44 Fed. Cl. 678, 683 (1999).

The Clawson court states a test for determining when a refund claim is in fact a contract based claim. The court noted that "if a plaintiff's claim is concerned solely with rights created within the contractual relationship and has nothing to do with duties arising independently of the contract, the claim is founded upon a contract with the United States." Clawson v. United States, 1997 U.S. Dist. LEXIS 5301 (D. Or. 1997). See also Roberts v. United States, 99-2 U.S.T.C. ¶ 50,959 (E.D. Mo. 1999).

In the instant case, no accord was ever reached as to the amount of the overpayment nor did Taxpayer agree that a refund of the stated amount would close the account. Accordingly, there is no ground for an action for an account stated. The claim here is, at bottom, a refund suit and therefore Taxpayer is limited to recovery under the applicable refund provisions and limitation periods set forth in the Internal Revenue Code.

If you have any questions concerning the above, please call the branch number.

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