DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

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OFFICE OF
CHIEF COUNSEL

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INTERNAL REVENUE SERVICE NATIONAL OFFICE FIELD SERVICE ADVICE

MEMORANDUM FOR
DISTRICT COUNSEL,

FROM: Blaise G. Dusenberry
Acting Senior Technician Reviewer, Branch 1
(Administrative Provisions and Judicial Practice) CC:PA:APJP:1

SUBJECT: Informal Claim Theory

This Field Service Advice responds to your memorandum dated October 6, 2000. 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.

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LEGEND

Corporation =

Holdings =
Year 1=
Year 2=
Year 3=
Year 4=
Year 5=
Year 6=
$X =

ISSUES

(1) Whether an amended return filed by Holdings to claim a refund for a year for which Corporation filed the original return may be treated as a valid claim under the informal claim theory.

(2) Whether amended returns for Years 1 and 2 filed by Holdings to carryback unused research credits arising in Year 3 and exceeding the amount of credits originally claimed on Holdings' Year 3 return may be treated as a valid claim for the excess amount of the credits under the informal claim theory.

CONCLUSION

(1) Under the informal claim theory, Holdings' claim may not be treated as a valid claim filed by Corporation because the Service is only authorized under section 6402(a) to credit an overpayment against the tax liability of the person who made the overpayment. [redacted]

(2) Amended returns for Years 1 and 2 filed by Holdings may be treated as a valid claim because a claim for one year is not a claim for another year, even though the issues involved may be identical. [redacted]

FACTS

Holdings acquired Corporation in a buyout that was completed in Year 1, and Holdings became the parent of Corporation. Corporation filed a consolidated return with its subsidiaries for its Year 1 fiscal year (Year 1). Holdings filed a return for its short year ending on the last day of Corporation's Year 1.

For the taxable years ending after the last day of Corporate's Year 1 year, Holdings filed consolidated returns for an affiliated group that included Corporation. For Year 3, Holdings timely filed its consolidated return reporting unused research credits. In Year

4, Holdings timely filed two protective claims using its EIN (employer identification number) for Years 1 and 2. These protective claims listed Corporation's return information and claimed unused research credits to be carried back from Year 3 to Years 1 and 2. In addition, the return noted "[t]he amount of research credits to be carried back is expected to exceed the amount of unused research credit reflected on the originally filed [Year 3] tax return."

In Year 5, Holdings timely amended the claims for Years 1 and 2. Attached to these claims were copies of Corporation's original Year 1 return altered by replacing Corporation's EIN with Holdings' EIN. The amended claims requested carrybacks for Years 1 and 2. The total amount of claimed carrybacks is $X more than the amount of the unused research credits available on Holdings' consolidated return for Year 3. Holdings never filed an amended return for Year 3 to claim the additional $X of unused research credits.

According to your memorandum, the District Director's Office received the initial claims in Year 4, which were then assigned to an examination team. The team examined the claims from Year 4 through Year 6 and conducted the audit as if all claims by Holdings had been filed by the proper party. In Year 6, the team realized that Corporation, rather than Holdings, should have filed the Year 1 amended claim because Corporation filed the original Year 1 return. Additionally, the team realized that Holdings failed to file a formal Year 3 claim for the additional $X of unused research credits. Therefore, the team raised two issues for consideration: (1) whether Corporation filed a valid claim allowing carrybacks of unused research credits to Year 1; and (2) whether Holdings timely filed a valid claim for $X of unused research credits (the unused research credits in excess of the amount available on Holdings' consolidated return for Year 3).

We sent a technical assistance request to the Associate Chief Counsel (Corporate), in order for them to address the consolidated return issues of this case which fall within their subject matter jurisdiction. The Corporate Division closed the assistance request and plan to answer the consolidated return issues in a separate memorandum as soon as they receive further factual development from the Field. Accordingly, our response does not address any consolidated return issues.

LAW AND ANALYSIS

Under § 6402(a) of the Internal Revenue Code the Secretary is authorized to credit, within the applicable period of limitations, an overpayment against any liability in respect of an internal revenue tax of the person who made the overpayment, and must refund any balance to that person.

Section 301.6402-2(b) of the Procedure and Administration Regulations provides that no refund or credit will be allowed after the expiration of the statutory period of limitation applicable to the filing of a claim therefor except upon one or more of the grounds set forth in a claim filed before the expiration of such period. The claim must set forth in

detail each ground upon which a credit or refund is claimed and facts sufficient to apprise the Service of the exact basis thereof. The statement of the grounds and facts must be verified by a written declaration that it is made under the penalties of perjury. A claim which does not comply with this paragraph will not be considered for any purpose as a claim for refund or credit.

Section 301.6402-2(d) of the Regulations requires a separate claim be made for each type of tax for each taxable year or period.

Informal claims have long been recognized as an exception to the above rules regarding what constitutes a claim for refund. To constitute an informal claim, courts have held that the taxpayer's notice must fairly advise the Service of the nature of the claim, but need not comply with formal requirements of the regulations. Kales v. United States, 314 U.S. 186, 194 (1941); New England Electric System v. United States, 32 Fed. Cl. 636 (1995). Courts have enumerated three components to an informal claim. First, the informal claim must provide the Service with notice that the taxpayer is asserting a right to a refund. Second, an informal claim must have some written component. Finally, the claim must describe the legal and factual basis for the refund. American Radiator & Standard Sanitary Corp. v. United States, 162 Ct. Cl. 106, 113-114 (1963). However, there are no bright line rules as to what constitutes an informal claim. Rather, courts consider the facts and circumstances of each particular case. Id. at 114.

For a taxpayer to successfully bring a refund suit on the basis of an informal claim, most courts hold that there should be some evidence of a waiver by the Service on the formal requirements set forth in the regulations, such as evidence that the Service accepted and treated the informal claim as a claim for refund, notwithstanding its deficiencies. United States v. Kales, supra; Angelus Milling Co. v. United States, 325 U.S. 293, 297 (1945); and Turco v. Commissioner, T.C. Memo 1997-564 (1997).

Most courts have taken a liberal view as to what constitutes an informal claim. Typically, courts apply the informal claim theory in cases where a taxpayer fails to file within the 3-year statute of limitations period prescribed by section 6522 a claim satisfying the technical requirements imposed by the regulations under section 6402. See e.g. American Radiator, supra; New England Electric System, supra; Turco, supra. However, courts are unwilling to allow an informal claim that does not comply with statutory requirements. For example, in United States v. Memphis Cotton Oil Co., 288 U.S. 62, 71 (1933), the Court rejected a taxpayer's argument that although a claim was not timely, the Service, in considering the merits of the position taken therein, waived any objection that the claim lacked specificity, stating that "[t]he argument confuses the power of the Service to disregard a statutory mandate [requiring the presentation of a claim within a given period of time] with the Service's undoubted power to waive the requirements of the regulations [regarding form and specificity of the claim]. See also Tucker v. Alexander, 275 U.S. 228 (1927); and Angelus Milling Co. v. Commissioner, 325 U.S. 293 (1945).

ISSUE 1 - THE YEAR 1 CLAIM

DISCUSSION

Under section 6402, the Service is only authorized to credit an overpayment against the tax liability of the person who made the overpayment.

Section 1.1502-77 of the Income Tax Regulations provides that the common parent is generally the sole agent for each subsidiary in the group, duly authorized to act in its own name in all matters relating to the tax liability for the consolidated return year. Except as provided in the preceding sentence, no subsidiary shall have authority to act for or to represent itself in any such matter. The common parent will file claims for refund or credit, and any refund will be made directly to and in the name of the common parent and will discharge any liability of the Government in respect thereof to any such subsidiary.[1]

You conclude in your memorandum that based on the foregoing provisions and the case of Interlake Corp. v. Commissioner, 112 T.C. 103 (1999), that Corporation, not Holdings, was the appropriate entity to file a claim for refund for Year 1. Although we do not have subject matter jurisdiction over this issue, we find Interlake factually distinguishable from the present case because the new parent in Interlake took control of the group and the old parent became a separate unaffiliated entity. In addition, Interlake involved competing claims of old and new parent, whereas in the present case, both the old parent, Corporation, and the new parent, Holdings, are seeking to have the same entity receive the benefit of the claim.

If Holdings was the improper party to file the amended return, the taxpayer argues that Corporation is deemed to have filed the Year 1 claim under the informal claim theory. Case law applying the informal claim theory is not directly analogous to the present situation because none address whether the informal claim theory may apply to fix the

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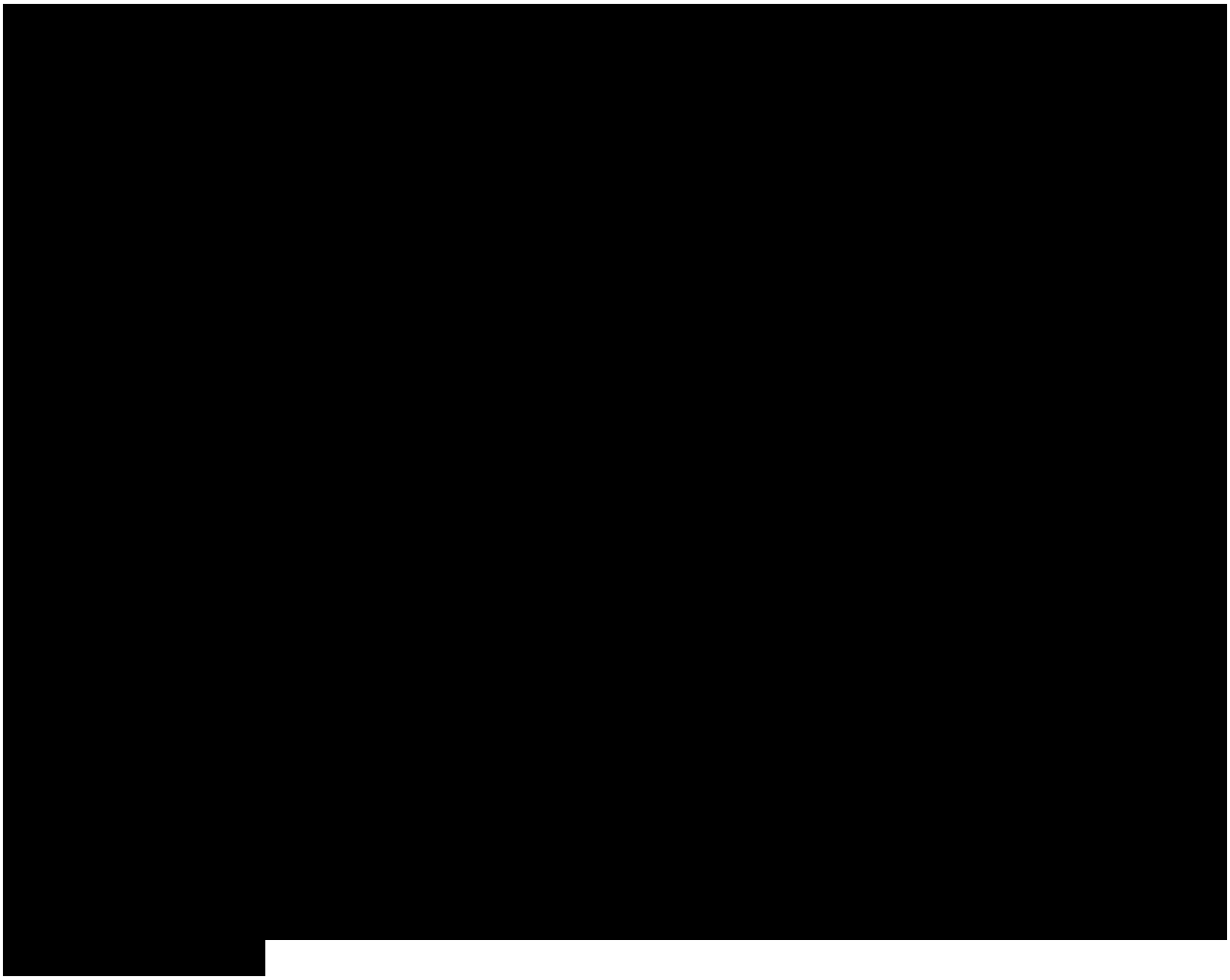
[1] Effective for consolidated return years beginning on or after the date final regulations are published, section 1.1502-77T of the proposed regulations, 2000-42 I.R.B. 376 (October 16, 2000), provides that the common parent for a consolidated return year remains the agent for the group for that year as long as it continues to exist. This rule applies even if the common parent, for whatever reason, ceases to be the common parent. Thus, for example, if the common parent becomes a subsidiary member of the consolidated group, which continues under section 1.1502-75(d), if the common parent becomes a stand-alone corporation, or even if the common parent becomes a subsidiary member of another group, it remains the agent of the group for those consolidated return years during which it was the group's common parent. In addition, the proposed regulation specifically clarifies the issue of whether the common parent in the carryback year or the common parent in the loss year should be the group's agent to receive a refund resulting from a tentative carryback adjustment. This same issue was addressed by the Tax Court in Interlake at 112-113 (1999). The proposed regulations amend section 1.1502-78(a) to provide that the common parent for a carryback year should file any application under section 6411 for a tentative carryback adjustment with respect to a loss or credit arising in a separate return limitation year that may be carried back to a consolidated return year.

fact that the wrong party timely filed the claim. Most cases address whether the informal claim theory may apply to fix the fact that the correct party timely filed a deficient claim. See Kales, supra, New England Electric System, supra; American Radiator, supra; Turo, supra.[2]

LITIGATION HAZZARDS



ISSUE 2 - THE YEAR 3 CLAIM

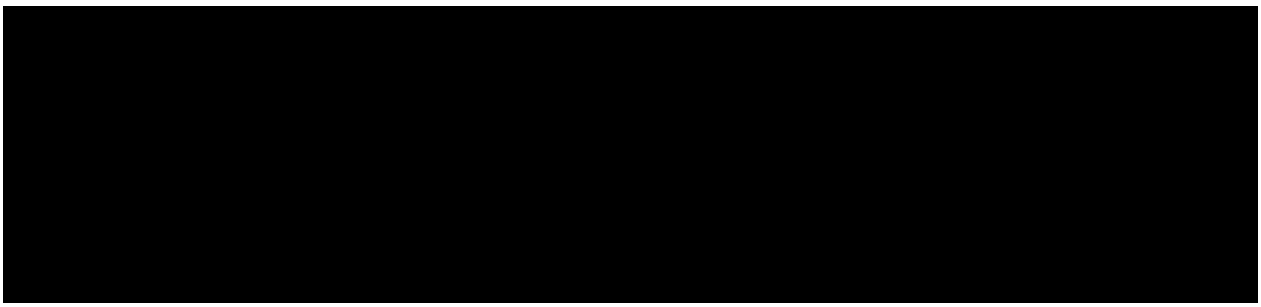
[2] Cases cited by the taxpayer, such as Bladine v. Chicago Joint Stock Land Bank, 63 F.2d 317 (8th Cir. 1933), and White v. Hopkins, 51 F.2d 159 (1931), involve a refund suit by a third party who had been coerced by the tax collector into paying taxes owed by another. Generally these cases allow the third party to file a refund suit under the common law right to sue a tax collector to recover taxes illegally exacted. However, these cases were decided before Congress in 1966 amended the Internal Revenue Code to provide a judicial remedy for third parties whose interest in property was harmed by a wrongful government levy. Section 7426 now provides a wrongful levy procedure by which third parties may challenge the tax-collection activities of the Service.

DISCUSSION

Holdings failed to file a Year 3 amended return claiming an additional $X in research credits. Holdings merely filed amended claims for Years 1 and 2 that assumed these additional credits were available. Section 301.6402-2(d) of the regulations specifically requires separate claims for each year. It is well settled that a claim for one year is not a claim for another year, even though the issues involved may be identical. See Rosengarten v. United States, 181 F. Supp. 275, 279 (Ct. Cl., 1960), cert. denied, 364 U.S. 822 (1960) (in which the court stated "[w]e are aware of no case, however, where a court has held that a request for a particular year constituted a claim for another year"). The issue for Year 3 is whether Holdings adequately specified in writing that for Year 3 it was claiming an additional $X in research credits.

Under similar facts to the present case, the Claims Court rejected the taxpayer's argument that an informal claim had been filed. In VDO-ARGO Instruments, Inc. v. United States, 3 Ct. Cl. 175 (1983), aff'd without opinion, 738 F.2d 453 (Fed. Cir. 1984), the taxpayer filed an application for tentative refund which sought refunds for 1974, 1975 and 1976. These refunds resulted from the carryback of a net operating loss from 1977. The carryback eliminated the income for years 1974, 1975 and 1976, with the result that previously used investment tax credits became available to be carried back to 1971, 1972 and 1973. The taxpayer filed Forms 1120X for 1971 through 1973, expressly stating that the refunds claimed were based on the fact that the 1977 net operating loss had been carried back to offset 1974, 1975 and 1976 taxable income. Also attached were the applications for tentative carryback adjustment for 1974, 1975 and 1976. Shortly after these claims were filed, the Service requested a copy of the taxpayer's 1977 return, and directed the taxpayer to file amended returns for 1974, 1975 and 1976. However, these amended returns were not filed until well after the expiration of the statute of limitations. Accordingly, the Service disallowed the claims for 1974, 1975 and 1976. The court rejected the taxpayer's argument that the application for tentative refund along with the written explanation provided on the amended returns for 1971 through 1973 constituted an informal claim because neither contained assertions that the taxpayer had overpaid its taxes for 1974 through 1976, nor did they contain any demand for a refund of tax paid for those years. See BCS Financial Corp. v. United States, 118 F.3d 522 (7th Cir. 1997).

LITIGATION HAZARDS



Please call if you have any additional questions regarding this memorandum.