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

OFFICE OF
CHIEF COUNSEL

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INTERNAL REVENUE SERVICE NATIONAL OFFICE CHIEF COUNSEL ADVICE

MEMORANDUM FOR SMALL BUSINESS/SELF-EMPLOYED DIVISION COUNSEL
CC:SB:8:LA

FROM: ASSISTANT CHIEF COUNSEL (ADMINISTRATIVE PROVISIONS & JUDICIAL PRACTICE) CC:PA:APJP

SUBJECT: Notice of Claim Disallowance and Amended Refund Claim

This Chief Counsel Advice responds to your memorandum dated May 31, 2001. In accordance with I.R.C. § 6110(k)(3), this Chief Counsel Advice should not be cited as precedent.

LEGEND

Taxpayer	=
X	=
Year 1	=
Year 2	=
Date 1	=
Date 2	=
Date 3	=
Date 4	=
Date 5	=
Date 6	=
Date 7	=
a	=
b	=

ISSUES

(1) Whether the Service's Date 4, letter, which informed the Taxpayer that the Service was unable to process his claim for refund based on a net operating loss

carryback, constitutes a notice of disallowance pursuant to section 6532(a)(1), thereby starting the period of limitations for filing suit to recover tax.

(2) Whether Taxpayer's third Form 1040X was an amendment to an earlier filed claim for refund or is a claim that is separate and independent of the first and second refund claims.

CONCLUSIONS

(1) The Date 4, letter does not constitute a notice of disallowance as contemplated by section 6532(a)(1). Instead, the letter is a notice that states that the Taxpayer's claim was not being processed. Nothing in the letter informs the Taxpayer of his right to file suit to recover the tax or provides clear and concise notification of the period in which suit may be filed. Under these circumstances, the letter does not adequately advise Taxpayer that his claim for refund has been disallowed, Therefore, the letter did not start the period of limitations for filing a refund suit.

(2) Because the third Form 1040X is based on the same facts and legal theory as the prior two refund claims, the third as well as the second Form 1040X should be treated as an amendment of the first refund claim. Furthermore, because the second and third Forms 1040X are amending a timely filed claim for refund and no final notice of disallowance has been issued with respect to the timely filed claim for refund, Taxpayer's second and third Forms 1040X should also be considered timely.

FACTS

With respect to the taxable year Year 1, the Taxpayer made three claims for refund (three Forms 1040X) based on an alleged Year 2 net operating loss (NOL) carryback. The first Form 1040X was filed on Date 1, while the Taxpayer's tax year Year 1 was docketed in Tax Court. The IRS did not act on this Form 1040X. The Taxpayer filed a second Form 1040X on Date 3, and relied on the same NOL carryback from tax year Year 2 that the first refund claim relied upon; however, the claim stated a different amount. On the same date that the Taxpayer filed the second Form 1040X, the Taxpayer made a payment of $a (amount of tax deficiency for Year 1 as provided in the Tax Court's stipulated decision document, which the Tax Court entered on Date 2). On Date 4, the X Service Center sent a letter (LTR 916C) to Taxpayer, advising him that because the NOL issue had existed prior to the decision of the Tax Court, and because the Tax Court had made a final determination for the Year 1 tax year, the Service was unable to process the refund claim. It is not clear whether the Date 4, letter was sent via certified or registered mail. Additionally, the letter did not advise Taxpayer of his right to seek judicial review or state that he had two years from the date of the letter to file a refund suit.

On Date 5, Taxpayer made an additional payment in the amount of $b, which represented assessed interest and late payment penalties with respect to the taxpayer's Year 1 tax liability. The payment posted to the Taxpayer's Year 1 account on Date 6. On Date 7, the Taxpayer filed the third Form 1040X for the tax year Year 1, this time claiming a refund of $b for the payment of penalties and interest made on Date 6.

In your original defense letter, which we reviewed, you took the position that the second and third Forms 1040X are amendments of the timely-filed first Form 1040X, and treated Date 4, the date of the Service's letter advising Taxpayer that the Service was unable to process his second claim for refund, as the triggering date for statutory purposes with respect to filing a refund suit. Because the Taxpayer filed his complaint on Date 7, more than two years after the Date 4, letter, you concluded that taxpayer's complaint should be dismissed for lack of jurisdiction pursuant to the jurisdictional limitations of section 6532(a)(1).

The Assistant United States Attorney (AUSA) handling the case has asked the Service to reconsider the positions taken in that original letter.

LAW AND ANALYSIS

Section 6532(a) provides, in pertinent part, that no suit or proceeding for the recovery of any internal revenue tax, penalty, or other sum may be begun after the expiration of two years from the date of mailing by certified or registered mail to the taxpayer a notice of the disallowance. Failure to send a notice of disallowance by certified or registered mail, however, does not necessarily invalidate it. In Finkelstein v. United States, 943 F. Supp. 425 (D. N.J. 1996), the court held that the period for filing suit begins to run when the Service mails a notice of claim disallowance to the taxpayer, whether or not such notice is sent by certified or registered mail, where the taxpayer admits to receiving the notice in a timely manner. In so holding, the court concluded that the requirement that the notice be sent by certified or registered mail is a protective measure for the Service to use to prove that the notice of disallowance was indeed mailed. Because the Taxpayer admits to receiving the Date 4, letter (LTR 916C) from the Service, the fact that the Service is unable to show whether it was sent certified or registered mail should not control the determination of whether the letter as a notice of disallowance.

Neither the statute nor the regulations thereunder require that the notice of disallowance be in any particular form. In this regard, the court in Smith v. United States, 478 F.2d 398 (5th Cir. 1973), stated that the purpose of a notice of disallowance is to provide the taxpayer official notification of the Commissioner's adverse action and, so long as the taxpayer receives adequate notice of the Commissioner's disallowance, no particular form of notice is necessary to start the running of the period of limitations. In Milford Trust Co. v. United States, 70 F. Supp. 917 (D. Conn. 1946), the court, in concluding that a letter was a notice of disallowance and effective to start the running of the two-year limitation statute,

noted that taxpayer was "advised sufficiently that his claim for refund had been disallowed, and well knew that his only recourse was a civil suit." 70 F. Supp. at 918.

Typically, when the Service sends a notice of disallowance, it uses a form letter that expressly states it is the taxpayer's legal notice that their claim has been disallowed, or partially disallowed. Each letter also provides that, if the taxpayer wishes to start legal action to recover any of the tax or other amounts disallowed, a suit for refund must be filed with the United States District Court or the United States Court of Federal Claims. Each letter further provides that, unless the taxpayer has signed Form 2297, Waiver of Statutory Notice of Claim Disallowance, the law permits the taxpayer to file such suit within two years from the mailing date of "this letter." These letters include letters 905(DO) and 906 (DO), letters 105C and 106C, and letters 1363 (RO) and 1364 (RO), which Appeals uses. See IRM sections 4.2.8.8.5; 4.2.8.8.6; 8.5.1.4.1; and see IRM 21.5.3.4.6.1.1.

Letter LTR 916C is not one of the form letters that the IRM directs be used to disallow a refund claim. Instead the letter LTR 916C is referenced as "Claim Incomplete for Processing; No Consideration." The version of the LTR 916C letter used in this case identifies the Taxpayer, kind of tax, the tax period, amount of the claim, the date the claim was received, and the ending date of the tax period to which the claim relates. The letter then states, "we are unable to process your claim for the tax period shown above." The letter explains that the claim cannot be considered because a Tax Court decision was entered with respect to the year in question, but then gives the Taxpayer information on how he might obtain further help.

We believe that such a letter does not qualify as a notice of claim disallowance. Rather than stating that the claim was disallowed, it states that it was not considered. Furthermore, rather than informing the Taxpayer that his administrative avenues for redress had been exhausted, the letter suggests that the Taxpayer could contact the Service for further help. We believe that such a letter is too equivocal and uncertain to qualify as a notice of claim disallowance.

We note that a few courts have held that the Service provided a notice of claim disallowance to the taxpayer by means other than a form letter unequivocally stating that the claim was disallowed. See, e.g., Gervasio v. United States, 627 F. Supp. 428 (E.D. Ill. 1986) (notice of claim disallowance was provided when agent refused to accept taxpayer's claim and mailed such claim back to the taxpayer); Register Publishing Co. v. United States, 189 F. Supp. 626 (D. Conn. 1960) (mailing of 30-day letter and revenue agent's report sufficient to provide taxpayer notice of claim disallowance); cf. Block-Southland Sportswear Co. v. United States, 73-1 USTC ¶ 9230 (E.D. N.C. 1972), aff'd per curiam, 480 F. 2d 921 (4th Cir. 1973) (held that a 30-day letter and the revenue agent's report attached thereto were not a decision within the meaning of section 6532(a)(1) because adjustments in the revenue agent's report were not connected to the taxpayer's claim and the 30-day

letter made no reference to that claim, indicating that the taxpayer's claim was not ever considered, much less disallowed).

Although the present case shares some characteristics with Gervasio v. United States, 627 F. Supp. 428 (E.D. Ill. 1986), we believe that the present case is distinguishable. In Gervasio, the court's finding that the return of a taxpayer's claim for refund constituted a notice of disallowance was necessary to the court finding it had jurisdiction over the case; six months had not elapsed between the time the taxpayer submitted his claim for refund and the date the taxpayer filed suit. See I.R.C. § 6532. The Service was not prejudiced in Gervasio, because it was clear that the Service had every intention of disallowing the refund claim and the taxpayer had no real hope of obtaining administrative relief on his claim. In the present case, it was not clear from the Date 4, letter that the Service intended to disallow the claim and was not willing to consider the matter administratively. Further, a finding that the letter LTR 916C constituted a notice of disallowance would bar the Taxpayer from recovery, because the Taxpayer did not file suit within two years of the letter. Id. [redacted]. We, therefore, believe that Gervasio is not controlling.

Because the Date 4, letter did not unambiguously inform Taxpayer that the Service disallowed Taxpayer's claim, we do not believe that it constitutes a "final disallowance" as required by law. As a consequence, the letter did not start the period of limitations for filing a refund suit. Furthermore, since the second and third Form 1040X are amending a timely filed claim for refund and no final notice of disallowance has been issued with respect to the timely filed claim for refund, Taxpayer's second and third Form 1040X should also be considered timely. See United States v. Ideal Basic Industries Inc., 404 F.2d 122, 124 (10th Cir. 1968) (a timely filed claim for refund may be amended after the period of limitations for filing a claim for refund has expired, but before final disallowance or allowance, when the amendment is based on the same facts stated in the original claim and requires no additional investigation).

Because we conclude that Taxpayer is not barred from filing a refund suit based on original refund claim as amended by his the second and third Form 1040X, we do not address Taxpayer's equitable arguments.

If you have any further questions, please contact Willie E. Armstrong, Jr., at (202) 622-4940.

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