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

OFFICE OF
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INTERNAL REVENUE SERVICE NATIONAL OFFICE FIELD SERVICE ADVICE

MEMORANDUM FOR: AREA COUNSEL, FINANCIAL SERVICES & HEALTHCARE
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FROM: James C. Gibbons
Chief, Branch 1
Administrative Provisions and Judicial Practice
CC:PA:APJP:1

SUBJECT: Refund Claims

This Chief Counsel Advice responds to your memorandum dated July 25, 2001. In accordance with I.R.C. § 6110(k)(3), this Chief Counsel Advice should not be cited as precedent.

LEGEND

Taxpayer =
Year 1 =
Year 2 =
Year 3 =
Year 4 =
Year 5 =
Year 12 =
Year 13 =
Year 18 =
Date 1 =
Date 2 =
Date 3 =
$a =
$b =
c =
d =

e =
f =

ISSUES

1. Whether timely refund claims filed on Date 1 were specific or general claims.

2. Whether refund claims submitted on Date 2 (after the running of the statute of limitations under section 6511 of the Internal Revenue Code) were amendments of the Date 1 claims or new claims.

3. Whether audit activity by the Service regarding the Date 2 claims constituted a waiver that would allow consideration of those claims.

CONCLUSIONS

1. The Date 1 refund claims should be regarded as specific claims.

2. To the extent they relate to contracts not taken into account by the Taxpayer in preparing the Date 1 claims, the Date 2 claims should be considered new claims.

3. The Service's audit activity regarding the Date 2 claims did not waive any available objections to the timeliness of those claims.

FACTS

The following facts are those found by the examination team(s) involved in reviewing refund claims filed by the Taxpayer. Any additions to or changes in these facts could affect the conclusions set forth below under "Law and Analysis".

On Date 1, the Taxpayer filed timely claims for refunds of income taxes for Years 1 through 5 by filing Forms 1120X with the appropriate Service Center (the "Date 1 claims"). In these forms, the Taxpayer claimed refunds totaling $a, but stated that the amount refunded should be any greater or lesser amount "as may be legally due".

Each of the Date 1 claims included a statement providing the Service with details concerning the basis for the claims. The Taxpayer stated that in its originally filed corporate income tax returns, it had generally not claimed research credits for research activity performed under various fixed-price contracts, and was now claiming additional research credits under section 41 (section 30 in the case of the claims filed for Years 1 and 2).

The Taxpayer asserted in the Date 1 claims that its research activities under the contracts should not be regarded as "funded" under applicable Internal Revenue Service regulations and that all of the qualified research expenses ("QREs") incurred pursuant to such contracts should qualify for the research credit. The Date 1 claims did not state the number of contracts that formed the basis for the refund claims.

Following receipt by the Service of the Date 1 claims, the Service and the Taxpayer agreed that processing of the claims would be delayed pending issuance of a ruling by the United States Court of Appeals for the Federal Circuit on an appeal from the United States Court of Federal Claims. The Taxpayer was not a party to the case pending before the Federal Circuit, but the outcome of that case could have affected the Taxpayer's entitlement to the refund requested in the Date 1 claims.

Following the Year 12 issuance of the Federal Circuit's opinion, the Taxpayer informed the Service that it wished to undertake a second review of the fixed-price contracts it performed during Years 1-5. The Taxpayer requested that the Service take no action on the Date 1 claims pending this review, and the Service agreed to this request.

Early in Year 13, the Taxpayer engaged a consulting firm to study Taxpayer's entitlement to certain research and development credits. This engagement produced the "Date 2 claims"; on Date 2, after the statute of limitations for claiming refunds for Years 1 through 5 expired, the Taxpayer submitted the results of the consulting firm's study to the Service. The study increased the Taxpayer's section 41 and section 30 refund claims from the $a noted in the Date 1 claims to approximately $b.

Along with the results of the consulting firm's study, the Taxpayer submitted a list of contracts for which the study was claiming QREs and an explanation of the methodology used by the firm to create the study. Based upon the consultant's study, the Taxpayer claims QREs arising from a total of c contracts. In the study, the consultants reviewed a total of d contracts. Following the review of these d contracts, the consultants stated they had developed a methodology which could extrapolate the findings on the d contracts to the remaining total of e contracts (d + e = c, where c = total number of contracts covered by the Date 2 claim).

On Date 3, the Service began an audit of the Date 2 claims by issuing certain Information and Document Requests ("IDRs"). The Service and the Taxpayer initially agreed that the Service would review a small percentage of the d contracts analyzed in the consultant's study. Subsequently, the Service requested and received information on each of the d contracts analyzed by the consultants in their study.

While carrying out its audit of the Date 2 claims, the Service sought to clarify the number of contracts included in the Taxpayer's timely Date 1 claims. Early in Year 18, the Taxpayer advised the Service that the Date 1 claims sought research credits arising from a total of f contracts. This number may be subject to a slight increase. The Taxpayer believes all of the credits attributable to contracts not included in the Date 1 claims should be refunded. The Taxpayer did not advise the Service that more than f contracts generated QREs for Years 1-5 until the statute of limitations on refund claims for those years had expired. Thus, although the Date 1 claims did not specify the number of contracts involved, they were in fact based on f contracts (plus a slight potential adjustment) and the Service was told only after the running of the statute that c contracts actually generated QREs for Years 1 through 5.

LAW AND ANALYSIS

Section 6402 provides that the Secretary (within the applicable period of limitations), may credit the amount of an overpayment of tax, including interest, against any internal revenue tax liability of the person who made the overpayment and shall refund the balance to the person.

Section 6511(b)(1) provides that no refund may be allowed or made after the expiration of the period of limitation for filing a claim for refund unless a claim for refund is filed by the taxpayer within such period. In general, the period of limitation under Section 6511(a) for filing a refund claim is three years from the time the return was filed or two years from the time the tax was paid, whichever is later.

Section 7422(a) prohibits any suit or proceeding in any court for a refund of taxes unless a claim for refund has been filed with the Secretary in the manner prescribed in regulations established by the Secretary.

Section 301.6402-2 of the Procedure and Administration Regulations identifies the following general requirements that must be satisfied for the filing of a proper refund claim: (1) with minor exceptions, the claim must be filed with the service center where the tax was paid (Reg. § 301.6402-2(a)(2)); (2) 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 thereof (Reg. § 301.6402-2(b)(1)); (3) the statement of the grounds and the facts must be verified by a written declaration made under the penalties of perjury (Treas. Reg. § 301.6402-2(b)(1)); (4) except as provided with respect to income tax and certain other taxes, the claim is to be made on a Form 843 (Reg. § 301.6402-2(c)); and (5) in the case of income, gift and Federal unemployment taxes, a separate claim is to be made for each type of tax for each taxable year or period (Reg. § 301.6402-2(d)).

Section 301.6402-2(b)(1) of the Procedure and Administration Regulations further provides that no refund or credit will be allowed after the expiration of the statutory period of limitations 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.

Section 301.6402-3(a)(1) of the Procedure and Administration Regulations 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).

1. The Date 1 claims should be regarded as specific, not general, refund claims.

The courts have described general refund claims as those which assert generally that an overpayment has occurred, but lack supporting facts or reasons. *See United States v. Andrews*, 302 U.S. 517, 524 (1938), *United States v. Memphis Cotton Oil Co*., 288 U.S. 62, 64-65, 70 (1933). "Specific" claims, by contrast, identify the particular transactions or factual circumstances underlying the refund request. *See United States v. Andrews*, 302 U.S. at 524-25.

The Date 1 claims should be regarded as specific, and not general claims. Those claims specifically identified the factual basis for the refund request, namely research activities the Taxpayer performed under fixed price contracts. The Taxpayer stated in the Date 1 claims that "... all of the qualified research costs incurred pursuant to such contracts are eligible for the research credit". In light of this specific reference to the circumstances generating the refund request, the Date 1 claims should not be regarded as a general statement that overpayments have occurred. Accordingly, those claims would not constitute "general" claims as that term is defined in the relevant case law.

As noted above, the Date 1 claims stated that if applicable law supported such a revision, the refund of $a requested in those claims should be adjusted upward or downward. Please note that inserting such language in a refund claim will not cause an otherwise specific claim to be considered a general claim. *United States v. Andrews*, 302 U.S. at 526. Moreover, the fact that the Date 1 claims failed to specify the number of contracts involved would not justify describing those claims as "general". A general claim is essentially a conclusory statement that an amount of tax has been overpaid. The Date 1 claims directed the Service's attention to the particular circumstances allegedly justifying a refund, and thus involved no such conclusory assertions of an overpayment.

2. The Date 2 claims should be regarded as new claims to the extent they are based upon contracts the Taxpayer did not take into account in formulating the Date 1 claims.

As noted above, the statute of limitations under section 6511 for filing a refund claim with the Service expired before the Taxpayer submitted the Date 2 claims. Therefore, the issue is whether these claims were amendments to the timely Date 1 claims, or new claims. If they were new, they were untimely under section 6511 and should be rejected. If they instead amended the Date 1 claims, the Date 2 claims should be considered by the Service along with the Date 1 claims. *See, e.g., Pink v. United States*, 105 F.2d 183, 39-1 U.S.T.C. (CCH) ¶ 9519 (2d Cir. 1939)(held, otherwise untimely refund claims which merely amend earlier, timely claims are properly joined with the earlier claims).

After the statute of limitations on refund claims has expired, a taxpayer may amend the original claim with information that the Service would have naturally ascertained in the course of its investigation. *Caswell v. United States,* 190 F. Supp. 591, 593, 61-1 U.S.T.C. (CCH) ¶ 9130 (N.D. Cal. 1960); *see also True Bros., Inc. v. United States*, 93 F. Supp. 107, 110-11, 50-2 U.S.T.C. (CCH) ¶ 9459 (D. Mass. 1950); *Pink v. United States*, 105 F.2d at 187. The Taxpayer argues that the Service, in the course of investigating the Date 1 claims, would have discovered the information reflected in the Date 2 claims. Cases such as *Pink*, however, set a high standard for proving what the results of an investigation would be. A taxpayer must show that the matters it states in an amended claim would "naturally" (*Caswell)* or "necessarily" (*Pink and True Bros.*) have been discovered by the Service via its review of the original, timely claim. The facts of the present case do not appear to satisfy this standard. The Date 1 claims were based on approximately f contracts, whereas the Date 2 claims involved c contracts. The Service *conceivably* could have discovered the additional contracts via a broad investigation of the Date 1 claims, since those claims did not explicitly state that only f contracts were involved. In light of the significant factual differences between the Date 1 and Date 2 claims, however, there are no grounds for concluding that the Service would "naturally" or "necessarily" have ascertained the matters set forth in the Date 2 claims via its investigation of the Date 1 claims. Accordingly, to the extent the Date 2 claims take into account contracts which did not form the basis

for the Date 1 claims, the Date 2 claims should be considered new claims under *Pink* and the other authorities cited above. 1/

Case law does indicate that if a late-filed amended claim relies upon the same facts as a timely claim, the amendment may constitute an acceptable clarification of the original. *See True Bros., Inc. v. United States*, 93 F. Supp. at 110-11(held, untimely claim seeking carry-over adjustments based on same facts asserted in timely claim was permissible amendment). Similarly, if the Service already knew of the matters asserted in an amended claim because it had actually investigated the original timely claim, the amendment could be a permissible clarification of the

original. *See Addressograph-Multigraph Corp. v. United States*, 112 Ct.Cl. 201, 78 F. Supp. 111, 122-23, 48-1 U.S.T.C. (CCH) ¶ 9284 (1948). The present case does not pose either of these situations; the original claim was not investigated prior to submission of the amended claim, and the facts underlying the amended claim (c contracts generating QREs) differ from those underlying the original claim (f contracts generating QREs).

3. The Service's audit activity with respect to the Date 2 claims did not constitute a waiver allowing consideration of those claims.

The final issue you raise is whether the Service's considerable audit activity regarding the Date 2 claims waives any otherwise-available grounds for rejecting those claims. Numerous cases have held that if a refund claim fails to comply with the Service's regulations concerning the form or content of a claim, that defect may be waived by the Service. *See, e.g., Angelus Milling Co. v. Commissioner*, 325 U.S. 293, 297 (1945), *Missouri Pacific R.R. Co. v. United States*, 214 Ct. Cl. 623, 558 F.2d 596, 599, 77-2 U.S.T.C. (CCH) ¶ 9532 (1977). Such waivers are typically granted by means of the Service examining the merits of the claim. *See, e.g., Angelus Milling Co.,* 325 U.S. at 297.

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1/ Case law indicates that a general claim may be amended following the running of the statute of limitations to supply the missing information that caused the claim to be classified as general. *See, e.g.*, *United States v. Memphis Cotton Oil Co., 288* U.S. at 71. As noted above, however, the Date 1 claims in the present case should be regarded as specific claims. Therefore, the guidance in cases such as *Memphis Cotton Oil* regarding amendment of general claims following the expiration of the statute would not apply here.

Assume, for example, that the Service regarded the Date 1 claims as general claims that failed to supply the detail required by the regulations under section 6402. The Service could waive such a defect by processing the claims. The issue in the present case, however, is not whether the Date 1 or Date 2 claims failed to comply with applicable regulations. The Service challenges the Date 2 claims as untimely under section 6511. The statutory deadlines for submitting a refund claim to the Service, unlike certain regulatory requirements applicable to refund claims, cannot be waived by the Service. *United States v. Garbutt Oil Co.*, 302 U.S. 528, 533-34 (1938); *see also Missouri Pacific R.R. Co. v. United States*, 558 F.2d at 599. The taxpayer in *Missouri Pacific R.R. Co*. argued that the Service waived its

right to demand adherence to the statutory deadline for filing a refund claim. The Court held as follows in rejecting this contention:

> The requirements imposed by Treasury regulations must be distinguished from those imposed by statute; the former requirements may be waived while the latter may not. In the instant case we are concerned with the statutory requirement of filing a timely claim for refund imposed by I.R.C. § 7422(a). Under the applicable law that requirement cannot be waived.

Id.

Because the Service lacks authority to waive the statute of limitations under section 6511, its audit activity regarding the Date 2 claims cannot have such effect.

CASE DEVELOPMENT, HAZARDS AND OTHER CONSIDERATIONS

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Please call if you have any further questions.