OFFICE OF
CHIEF COUNSEL

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

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INTERNAL REVENUE SERVICE NATIONAL OFFICE FIELD SERVICE ADVICE

MEMORANDUM FOR

FROM: Linda J. Bourquin
Acting Senior Technician Reviewer CC:DOM:FS:PROC

SUBJECT: Request for Field Service Advice

This Field Service Advice responds to your memorandum dated February 8, 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:

A	=	taxpayer			
Year 1	=		Year 7 =		
Year 2 =			Year 8 =		
Year 3 =			Year 9 =		
Year 4 =			Year 10	=	
Year 5 =			Year 11	=	
Year 6 =			Year 17	=	
x dollars	=	$	a dollars	=	$
y dollars	=	$	b dollars	=	$
z dollars	=	$			

i dollars	=	$	m dollars	=	$
ii dollars	=	$	n dollars	=	$
iii dollars	=	$	o dollars	=	$
			r dollars	=	$

ISSUE(S):

1. Whether a timely executed Form 870-AD, Offer of Waiver of Restriction on Assessment and Collection of Deficiency in Tax and of Acceptance of Overassessment, constitutes a claim for refund of deficiency interest arising under the circumstances described.

2. If so, whether the period of limitations provided by section 6511 remains open, where a notice of disallowance has not been issued to the taxpayer.

CONCLUSION:

1. For the reasons discussed below, the Form 870-AD executed by the taxpayer, under these circumstances, does not set forth the purported claim for a refund of interest with sufficient particularity to provide notice to the Service of the basis for the taxpayer=s claim, and accordingly, is not a claim for refund.

2. Since the answer to the first question is no, this issue does not arise, and will not be addressed further.

FACTS:

A filed a timely Form 1120, Corporate Income Tax Return, for year 1, and claimed an overpayment. In October of year 2, the Service refunded x dollars without interest. In years 3 and 6, respectively, A received refunds of tentative carrybacks which applied losses from years 2 and 5 to year 1.

In September of Year 10, A and the Service executed the first of two Forms 870-AD (hereinafter the first 870-AD). The first 870-AD recorded A=s agreement to the assessment of a deficiency of y dollars for Year 1. The deficiency of y dollars consisted of a general adjustment for Year 1 of a dollars, and a deficiency for Year 2 of b dollars, resulting from the recapture of the Year 2 tentative carryback. The Service computed the interest on this deficiency to be z dollars. The z dollar figure was excessive. The Service incorrectly charged interest on the a dollar amount by setting its beginning date as March of Year 2 instead of October of Year 2. It also failed to allow interest free periods for the

allowance of the carryback tentative refunds for Years 2 and 5. The y dollar deficiency was assessed in Year 10, and a worksheet detailing the interest computation was sent to A. A remitted its final payment of the y dollar deficiency and the z dollar interest in Year 11. A never filed a claim for refund of the overpaid deficiency interest, although it now admits that in Year 11, it had all the information it needed to discover the three interest computation errors, but did not discover them.

In Year 11, after an examination for years subsequent to Year 1, a carryback from Year 4 to Year 1, and an additional carryback from Year 5 to Year 1, became available to A. This resulted in an overassessment for Year 1 in the amount of i dollars, and consisted of a carryback credit of ii dollars from Year 4, and a carryback credit of iii dollars from Year 5. The iii dollar credit was in addition to the previously allowed credit carried back from Year 5. In October of Year 11, A and the Service executed a second Form 870-AD (hereinafter the second 870-AD), in which A agreed to the i dollar overassessment. No refund interest amount was specified in the second 870-AD, although the Form=s standard language states that the taxpayer consents to Athe assessment and collection of the following deficiencies with interest as provided by law.@ The Form also states: AThis offer, when executed and timely submitted, will be considered a claim for refund for the above overassessments, as provided in Rev. Rul. 68-85, 1968-1 C.B. 555.@ No specific reference to any amount of interest, whether deficiency interest or overpayment interest, appears on the second 870-AD.

In connection with the second 870-AD, the Service computed the interest due on the overassessment to be m dollars. This amount was not correct, because the Service computed the refund interest from the dates the year 4 and 5 credits had been allowed to the date that the i dollar overassessment was paid in year 11. The interest should have been calculated from the dates of A=s most recent payments into the account, in years 9, 10, and 11. As a result of this mistake, the m dollar amount of interest due to A on the i dollar refund was n dollars too high, although it was offset by o dollars in interest charged to A on the z dollar interest computation. The final result is a potential overassessment of r dollars. A filed a Form 843, Claim for Refund and Request for Abatement for this amount in Year 17.

LAW AND ANALYSIS

Section 6601 provides that if an amount of tax is not paid on or before its due date, interest on the amount, at the underpayment rate, shall be paid from the due date to the date the tax is paid. This interest is usually referred to as deficiency interest. Pursuant to section 6601(e)(1), an overpayment of deficiency interest may be recovered within the limitations period found in section 6511. Alexander Proudfoot v. United States, 454 F.2d 1379, 1382 (Ct.Cl. 1972).

Section 6611 provides that interest shall be allowed on any overpayment of tax at the overpayment rate. A claim for the payment of interest on an overpayment is not a claim for refund, but such interest may be recovered within six years from the date the overpayment was allowed. See Rev. Ruls. 56-506, 1956-2 C.B. 959; 56-574, 1956-2 C.B. 959; 57-242, 1957-1 C.B. 452. General Instrument Corporation v. United States, 33 Fed.Cl. 4 (1998).

Section 6511(a) provides generally that a claim for refund of an overpayment must be filed within three years of the time the return was filed, or two years from the time the tax was paid, whichever is later. Recovery on a timely claim may be limited by the application of section 6511(b), which provides that if a claim for refund is filed within the three year period specified in section 6511(a), the amount of credit or refund cannot exceed the portion of the tax paid within the three years preceding the claim. If the claim is not filed within the section 6511(a) three year period, the amount of credit or refund may not exceed the portion of the tax paid within the preceding two years.

Treas. Reg. ' 301.6402-2 states that for a claim for refund to be valid, it 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 for the claim. Rev. Rul. 68-65, 1968-1 C.B. 555, holds that a Form 870 on which a taxpayer has agreed to an overassessment of tax determined by the Service, will, if executed and filed within the limitations period for claiming a refund, be considered a valid claim for refund of the overpayment attributable to the overassessment. The grounds for determining the overassessment are considered to be the grounds for the refund claim. Rev. Rul. 68-65 is based in part on the reasoning that the Form 870 supplies the same information a claim for refund on Form 843 would supply.

Where a taxpayer fails to file a timely formal claim for refund, courts have held that an informal claim for refund can supply the same information and will suffice to hold the period for filing a timely claim open. See, e.g. United States v. Kales, 314 U.S. 186 (1941); Furst v. United States, 230 Ct.Cl. 375 (1982). However, the informal claim must be in writing, and it must adequately apprise the Service that a refund for certain years is sought. American Radiator & Standard Sanitary Corp. v. United States, 162 Ct.Cl. 106 (1963).

In Arch Engineering v. United States, 783 F.2d 190 (Fed. Cir. 1986), the Claims Court rejected the taxpayer=s claim that a Form 870-AD met this requirement. In Arch Engineering, the taxpayer agreed to proposed deficiencies, and executed a Form 870-AD consenting to the assessment of those deficiencies. However, the taxpayer expressly reserved the right to file a claim for refund with respect to the issue. The Form 870-AD specifically stated that it was not to be construed as a claim for refund with respect to the

reserved issue. A change in the law provided the taxpayer with grounds for relief on the reserved issue; however, the change in the law occurred after the period of limitations for filing a formal claim had expired. Taxpayer sued for a refund, claiming that the Form 870-AD constituted an informal claim for refund on the reserved issue. The Claims Court rejected this claim, and the Federal Circuit affirmed. The Federal Circuit reasoned that the taxpayer had not yet paid the tax agreed to in the Form 870-AD, and therefore did not have a right to file a refund claim at the time the Form 870-AD was executed.

In Deluxe Check Printers, Inc. v. United States, 15 Cl.Ct. 175 (1988), the Service assessed a deficiency in self dealing tax against the taxpayer, and also assessed deficiency interest on the amount. The self dealing tax is technically a penalty and not a tax, and therefore, as the Claims Court noted, assessment of interest on that amount was limited by operation of section 6601(e)(2)(A). Under those limited circumstances, the Claims Court held that a claim for refund of the self dealing tax implicitly included a claim for refund of the interest which had been unlawfully assessed.

CASE DEVELOPMENT, HAZARDS AND OTHER CONSIDERATIONS:

Although the result in Deluxe Check Printers could be broadly interpreted to stand for the proposition that a claim for refund of an assessed deficiency the taxpayer contends is an overpayment of tax implicitly includes a claim for a refund of deficiency interest, no matter what the circumstances, it is plain from the cases that the courts analyze informal claims for refund based on all the facts and circumstances of each individual case. An analysis of all the facts and circumstances here makes it plain that A did not submit any writing asserting an error in the interest computations the Service performed. We conclude that A did not file an informal claim for refund of deficiency interest. Therefore we think that even if A were to file suit here, the Service would have a good chance of success.

A argues that the Forms 870-AD implicitly include a claim for a refund of deficiency interest. In support, we anticipate A would cite United States v. CSX Corp., 95-1 U.S.T.C. **&** 50,291 (E.D. Va. 1995). In CSX, the taxpayer filed Forms 1102X requesting refunds of tax on an issue which was being litigated, in order to protect the statute of limitations. Subsequently the Service agreed to schedule overpayments of tax based on the same issue. The taxpayer eventually received an additional payment of overcharged deficiency interest, but the Service determined this amount was erroneously refunded and filed suit. The district court held that the formal claims for refund of the tax were submitted timely, that the additional payment of deficiency interest had been made within the period of limitations, and that therefore the refund was not erroneous. We believe CSX is distinguishable on its facts. A did not file formal claims for refund within the period of limitations here, and instead relies on its claim that it filed informal claims within the period of limitations. In addition, in CSX, the interest clearly related to the issue that formed the

basis of the formal claims for refund. The same issue was the subject of litigation between the parties for other years and the Service was plainly well aware of the grounds for the refund of the tax, as well as the interest on that tax.

By contrast, an evaluation of all the facts and circumstances in this case makes it plain that the only issues reserved on the Forms 870-AD did not relate to interest, but to the substantive adjustments governed by a related TEFRA proceeding. A=s right to a refund of the deficiency interest arguably came into being in Year 11, when A fully paid the admittedly incorrect amount of interest on the Year 1 deficiency, and received incorrect explanations of the interest calculations performed with respect to both Forms 870-AD. Yet A filed no document intimating that it might be entitled to any amount of interest recovery, whether of deficiency interest or overpayment interest. Neither Form 870-AD refers to interest in any respect except in the standard language of the form. Even if the Forms 870-AD executed here could constitute timely informal claims for refund of some amount, the claim would only be timely if that claimed amount related to or resulted from the allowance of an item that was reserved in the Forms 870-AD. The interest issues here do not so relate. To allow a refund of the deficiency interest A claims here would therefore violate the doctrine of variance. See Union Pacific Railroad v. United States, 182 Ct.Cl. 103 (1968). A argues that the period for assessing the deficiency attributable to the recapture of the carryback credit from Year 5 to Year 1 was still open at the time the Service paid the i dollar overassessment. A reasons from this that a claim for the interest due from failure to allow the Year 5 interest free period was encompassed by agreement to an overassessment in the second Form 870-AD. We disagree. No course of conduct appears that would suggest that the Service=s representatives might have been aware of any desire on A=s part for a refund of deficiency interest. A=s claim for a return of excess interest was not brought to the Service=s attention in any form until Year 17, at which time the period for filing a refund claim to recover the deficiency interest had passed.

The Service recognizes that, generally, where a taxpayer files a claim for refund of a tax on which he has previously paid deficiency interest, a claim for refund of that tax includes a claim for refund of the interest paid on that tax. See Brandt & Brandt Printers v. United States, 300 F.2d 457 (Ct.Cl. 1962). A argues from this principle that an agreement to an overassessment for a year constitutes a claim for refund of any interest overpayment which might exist for that year, or any year that is impacted by that year. Therefore, A argues that the Service has an obligation to check its interest computations for any year impacted by an agreed overassessment to determine whether a taxpayer might have a claim for a refund of interest for that year. We decline to interpret claims for refund of tax, and the associated interest, so broadly. In our view, when an agreed overassessment may give rise to an overpayment of interest for a year impacted by the overassessment, it is incumbent on the taxpayer to act to apprise the Service of the potential overpayment of interest. Given the doctrines of variance and informal claims, the taxpayer could satisfy this

obligation by inquiring whether the interest computation for the impacted year is correct. A did not do that here, although it possessed enough information to discover the error and request correction of it.

In addition, we note that a portion of interest claimed in this matter is overpayment interest. As noted above, a claim for recovery of excess overpayment interest is not a claim for refund, and is subject to a six year period of limitations. Taxpayer should have filed suit for the amount of overpayment interest it desired returned before Year 17. We believe it is appropriate to continue to maintain the position that A=s claim for payment of this interest is time barred.

If you have any further questions, please call the branch telephone number.

LINDA J. BOURQUIN
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