Office of Chief Counsel
Internal Revenue Service
memorandum

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to: Timothy J. Bilotta
Director
(Examination - Specialty Policy)

from: Micah A. Levy
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subject: Refund Requests for Nominal Amounts of Excise Tax

This memorandum responds to your request for assistance. This advice may not be used or cited as precedent.

Your office has requested advice regarding whether the Service may allow and make a refund of an overpayment of excise taxes requested on a claim for refund that is filed after the section 6511(a) claim-filing period if, shortly before the period elapsed, the taxpayer had filed an identical request for only $1 or for some other nominal amount.

Sections 6514 and 7422 act as guardrails in the administration and litigation of claims for refund, respectively. Administratively, the Service is prohibited from making a refund after the section 6511(a) claim-filing period elapses, unless there was a claim filed within such period. I.R.C. §§ 6511(b) and 6514(a)(1). Any portion of a refund made after the period elapses that is not supported by a timely-filed claim is considered "erroneous" and a credit is considered "void." I.R.C. § 6514(a).[1]

And litigation over a late-filed claim is entirely proscribed, unless there was a claim filed within the section 6511(a) claim-filing period. Section 7422(a) provides:

> [n]o suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected … until a claim for refund or credit has been duly filed with the Secretary….

Accordingly, notwithstanding the waiver of sovereign immunity afforded to refund suits under 28 U.S.C. section 1346, a taxpayer may not sue the government for a refund of

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[1] An erroneous refund would be subject to recovery by the government under section 7405.

an overpayment unless the taxpayer "duly filed" a claim with the Service. A claim that is untimely-filed pursuant to section 6511(a) would not be "duly filed" pursuant to section 7422.

Normally, a claim that for the first time calculates a taxpayer-determined overpayment after the section 6511(a) claim-filing period has elapsed would not be considered a "supplemental claim" because, if the taxpayer does not "duly file" a claim before the section 6511(a) claim-filing period elapses, there would be nothing to "supplement." Accord United States v. Felt & Tarrant Manufacturing Co., 283 U.S. 269, 272 (1931)(claim filing requirement "is not satisfied by the filing of a paper which gives no notice of the amount or nature of the claim for which the suit is brought, and refers to no facts upon which it may be founded.").

A late-filed claim will not be treated as an amendment or "supplement" to an original claim if it would require the investigation of new matters that would not have been disclosed by the investigation of the original claim. United States v. Andrews, 302 U.S. 517, 524-526 (1938) ("a claim which demands relief upon one asserted fact situation ... cannot be amended to ... invoke action requiring examination of other matters not germane to the first claim."). Although some supplemental claims permissibly increase the amount of the alleged overpayment,[2] a late-filed claim that alleges a large increase from an earlier mere nominal request would represent the first formal indication of the ballpark in which the controversy lies. Such a nominal request, therefore, would not provide the Service the opportunity to make an informed decision regarding where to invest its examination resources (*e.g.*, into examining the support for the amount of the alleged overpayment, as opposed to the merits of a legal assertion or argument). And the Service cannot be said to be on notice with respect to a claim for refund or credit until it is in a position to make such an informed decision.

Accordingly, a claim for refund that for the first time affords the Service the opportunity to make an informed decision regarding whether to audit the taxpayer's entitlement to an alleged amount of overpayment must be filed before the section 6511(a) claim-filing period elapses. Otherwise, it most likely would be treated as a new claim and not as a supplement to an existing valid and complete claim. Such a late-filed claim necessarily would represent a substantial and impermissible variance from the earlier filed nominal request. Accord Lockheed Martin v. United States, 210 F.3d 1366, 1371 (Fed. Cir. 2000) (under the "substantial variance rule," taxpayers are barred from presenting in a tax refund suit claims that "substantially vary the legal theories and factual bases set forth in the tax refund claim presented to the IRS") (emphasis added); accord Felt & Tarrant Manufacturing Co., supra.

Filing a request or incomplete claim for a nominal amount during the claim-filing period might serve to begin a conversation. For example, if the calculation of an overpayment

[2] IRS SCA 199941039 addresses a late filing that was, for whatever reason, already determined to be a "supplement" to a previously and timely filed claim for credit or refund. The SCA does not address why the filing was treated as a supplemental claim. Nor does it consider the circumstances under which a new filing may not be treated as a supplemental claim (as opposed to a new claim).

is burdensome or expensive, the Service may allow a taxpayer initially to file a request that might not otherwise be treated as a complete claim.[3] But any consideration of the request would be at the discretion of the Service and the Service may reject such a request as being unprocessible as a claim. Such a request will not preserve the taxpayer's right to sue for refund if the matter becomes controversial or otherwise remains unresolved. To the extent the Service does not both allow and make a refund before the section 6511(a) claim-filing period elapses, the above-referenced statutes prohibit the Service from doing so afterwards and prohibit the controversy from proceeding to suit (except, perhaps, merely to the extent of the nominally claimed amount). This is true regardless of whether the denial or mere Service inaction is because the Service disagrees with the position, an interpretation of law, or with the alleged facts. It also would be true when a denial has nothing to do with the merits of the claim, but instead is issued solely because the Service treats the request as being a defective and non-processible claim. It is not the case that a taxpayer has the absolute right to file a $1 claim, or a "$1-plus" claim, and simply refrain from calculating the correct amount of an alleged overpayment, to then later be afforded administrative or litigation refund rights.

The analysis differs when, as an empirical matter, an overpayment is not subject to current calculation. And this gets into "protective" claim jurisprudence. The concept of a "protective" claim being sufficient to satisfy the section 6511(a) claim-filing period, to allow for a complete and formal claim at the end of some existing, known, and identified contingency, is established by case law. See United States v. Kales, 314 U.S. 186 (1941). Importantly, the judicial doctrine does not allow some refunds to be allowed or made without claims, because that would be inconsistent with the statute. Rather, it helps interpret what the term "claim" means in certain situations. All claims necessarily must include those calculations of amounts that are subject to current calculation (and most amounts are subject to current calculation). See Felt & Tarrant Manufacturing Co., supra. However, when a claim's existence or amount is contingent on, for example, some pending event or circumstance, and it is not currently possible to determine the existence or amount of the overpayment with accuracy, then the claim for such contingent overpayment may be complete if it calculates whatever is subject to current calculation and then also identifies the contingency that impacts the amount of the claim that is not subject to current calculation.[4] It is not the case that the contingency changes the calculation. Rather, the satisfaction of the contingency after the section 6511(a) claim-filing period elapses is necessary to enable this later-in-time-determination of what the overpayment had been as of the close of the tax period at

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[3] For example, for the taxpayer's convenience, the Service could consider the merits of some contentious interpretation of a Code provision, without requiring the taxpayer to make or support calculations.

[4] There may be different components to an "amount" of a claim that may not be subject to current calculation or determination. For example, a taxpayer may know the amount of an expenditure, but the characterization of the expense as deductible might be contingent on a pending event. Conversely, a taxpayer might know that an expense would be deductible but cannot currently calculate its existence or amount because of a contingent event. In either situation, a taxpayer may file a "protective" claim that would not actually be a claim for anything, currently, because it would not purport to determine a lower tax liability and it would not purport to request the immediate refund of anything. Rather, it would contain every element of a claim for refund that the taxpayer is capable of filing.

issue. Accordingly, in a situation in which the exact amount of an alleged overpayment is not subject to precise determination, a taxpayer may both satisfy the section 7422 "duly-filed" requirement, and also avoid any section 6514 considerations, by timely-filing a "protective" claim.

Under Kales, a protective claim: (1) must have a written component; (2) must identify and describe the contingencies affecting the claim; (3) must be sufficiently clear and definite to alert the Service as to the essential nature of the claim; and (4) must identify a specific year or years for which a refund is sought. Id. at 194. Although a valid "protective" claim need not necessarily state a particular dollar amount or demand an immediate refund, taxpayers nonetheless should report an overpayment determination with as much accuracy as reasonably is possible. The best way to preserve a legal right to a refund of an overpayment would be to identify and to explain clearly the contingency that exists that makes a more precise determination impossible. And this is missing in the situations that we have been addressing.

When an amount is not subject to current determination, you may, but are not required to, enter $1 into the Audit Information Management System[5] (AIMS) database as a placeholder. Any method of tracking may be employed because there is wide latitude regarding how to process claims with currently missing information. And you may request or direct taxpayers to report/request $1 in such situations.[6] This number is not a placeholder for a calculation that could currently have been made, rather it may be functional in the sense that the computer system might need to have some data entry to allow for proper processing and monitoring.[7]

Importantly, any guidance regarding such processing should be clear to avoid any inadvertent implication that a taxpayer has an unrestricted right to refrain from timely filing a complete claim for refund. A taxpayer lacks the unilateral authority to extend the section 6511(a) claim-filing period. Rather, the parties may agree to extend the section 6501(a) assessment period, which would correspondingly extend the section 6511(a) refund claim filing period by the same amount plus an additional six months. I.R.C.

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[5] AIMS is a computer database system used by Appeals, Examination (LB&I/SBSE/W&I), and TE/GE to control returns, input assessment/adjustments to Master File and provide management reports. See IRM 4.4.1.2 (04-15-2016). Current AIMS processing procedures explicitly provide for when "[a] protective claim is filed for '$1 or more' and no details are shown as to the amount of reduction in taxable income / tax." The procedure requires examiners in these situations to "[u]se $1 as the claim amount until a claim amount can be computed or a perfected claim is received. The $1 must be replaced with the correct amount of the claim as soon as the amount becomes evident. The amount must be changed before the case is closed from the group." IRM Exhibit 4.10.11-6 (table row 8).

[6] A protective claim may report the mere "existence of an overpayment," without any value, if the value is not subject to current determination, but only if the claim sets forth in detail the exact basis of each ground upon which the potential overpayment may be based. Accord Treas. Reg. § 301.6402-2(b).

[7] Given that a "protective" claim is not actually a complete claim for refund because it would not purport to determine a lower tax liability and it would not purport to request the immediate refund of anything, there really is no claim that the Service may need to act upon for purposes of section 6532(a). However, under general claims procedures, the Service may and does review "protective" claims that are recognizable as claims similarly to how it reviews claims for refund. See IRM 21.5.3. Protective claims are all considered to meet CAT-A criteria. IRM 21.5.3.4.7.3.

§§ 6501(c)(4) and 6511(c)(1). And this may be done any time before the expiration of the assessment period, meaning taxpayers can always protect an existing claim even if the refund claim-filing period is impending. And the corollary is also true. Neither may the Service unilaterally extend the section 6511(a) claim-filing period (nor the section 6501 assessment period). This means that Service inaction with respect to any claim cannot, in and of itself, serve as a tacit agreement to extend without limit the periods provided by Congress.

We are aware of other Service programs and functions that have existing procedures that explicitly contemplate $1 claims in addition to the one involving excise tax overpayments resulting from the Alternative Fuel Mixing Credit that we have been addressing with you. By way of examples, the $1 claim issue arises with respect to programs involving income tax overpayments resulting from Ponzi-type scheme theft loss matters and employment tax overpayments involving FICA litigation. Just because the Service may allow some dollar claims, however, does not mean that it must. Nor does it mean that the Service can allow all dollar claims or that it can allow any particular dollar claim. Controversies have arisen when taxpayers have filed purported protective claims for $1 in situations in which there was no contingency that prevented timely calculation. In many instances the Department of Justice moved to have litigation dismissed for lack of jurisdiction because of the taxpayer's failure to comply with section 7422. And in many of these instances this aspect of these controversies could easily have been avoided. It may be advisable to clarify that taxpayers may not rely on $1 claims to satisfy the section 7422 "duly filed" requirement when the actual amount of the alleged overpayment otherwise is subject to determination and that nominal claims should only be used, for some reason of temporary administrative convenience.

In conclusion, in many instances the Service is free to accept and process $1 claims. But this ability is often a matter of process. Both taxpayers and the Service are constrained by the legal framework. The Service is free neither to allow nor to make a refund after a section 6511(a) claim-filing period has elapsed unless a duly filed claim was timely filed. A request for a refund that reports only a nominal overpayment and that lacks the necessary indicia of a valid "protective claim" would not be a "duly filed" claim.

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Please contact me directly, micah.a.levy@irscounsel.treas.gov or (202) 317-5137 if you have any further questions.

By: _____

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