

**Office of Chief Counsel
Internal Revenue Service
memorandum**

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date: October 13, 2009

to: Jane E. Looney
Director Accounts Management
(Wage & Investment)

from: Blaise G. Dusenberry
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subject: GATT Interest and Refund of Employee's FICA Tax Overpayment

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

ISSUES

Whether the General Agreements on Tariffs and Trade (GATT) interest rate applies to an individual employee's share of the FICA tax overpayment.

CONCLUSIONS

The regular overpayment interest rate, not the GATT interest rate applies to an individual employee's share of a FICA tax overpayment, if the interest will be paid over to the individual employee.

FACTS

An employer, a corporation, pays wages to its employee and, as required by section 3102(a) of the Internal Revenue Code (Code), deducts the employee's share of FICA tax from the wages. The employer pays that amount and its share of FICA tax to the Internal Revenue Service (Service). It is later discovered that there is an overpayment of FICA tax. The employer files a claim for refund of the overpayment plus interest. The refund claim indicates that (1) the employer repaid or reimbursed the employees prior to filing the claim or (2) the employees have consented to having the employer pursue the FICA claim on their behalf or (3) the employer files for only its share of the refund. The Service allows the refund.

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In all three scenarios, the FICA refund claim will be paid to the employer by the Service. In scenario (1) and (3), a single interest rate will apply (the employer rate determined under section 6621(a)), because in scenario (1) the employer repaid or reimbursed the employees before filing the claim and in (3) the employer is filing for only its share of the claim. In scenario (2), however, the employer will repay the employee portion of the refund to the employees, such as in the case of many of the pending claims for refund of FICA taxes paid on behalf of medical residents - separate rates of interest may apply to the employer and employee portion of the refund claim.¹ In the medical resident cases, the Service, based on information provided by the employers, will determine the total amount of the employee share of the FICA tax refund and will calculate the amount of interest thereon. The Service will refund to each employer: (1) the employer's share of the FICA tax refund plus interest; and (2) the employee share of the FICA tax refund plus interest. Each employer will then pay to each consenting resident his or her share of the FICA tax refund, plus statutory interest.

LAW AND ANALYSIS

The allowance and payment of overpayment interest, and the rate of such interest, are mandated by statute. Section 6611(a) provides that interest shall be allowed and paid upon any overpayment in respect of any internal revenue tax at the overpayment rate established under section 6621. Section 6621(a) provides three rates for computing the overpayment interest. For all overpayments, except for overpayments by a corporation, the rate is the short-term Adjusted Federal Rate (AFR) plus 3 percentage points (the regular rate). For overpayments by a corporation of \$10,000 or less, the rate is the short-term AFR plus 2 percentage points. For overpayments by a corporation of more than \$10,000, the rate is the short-term AFR plus 0.5 percentage points (the lower, GATT rate).

The regulations under section 6402 provide that the Service may credit or refund an overpayment of tax, including interest thereon, only to the person that made the overpayment of taxes. See Treas. Reg. § 301.6402-1. Thus, it is important to establish the person who has paid the FICA taxes. For this reason, the employment tax regulations provide comprehensive rules for employers and employees who claim refunds of FICA taxes. In particular, the rules provide specific requirements for employers who are claiming refunds of an employee's portion of the FICA tax. See 31.6402(a)-2.

For the purpose of computing overpayment interest, if an employer repays a FICA tax overpayment to its employee and then files a claim for refund, the overpayment is generally considered to be made by the employer. This is scenario 1 discussed above. This is because to file a claim for refund of an overpayment of FICA tax, the employer must repay or reimburse the employee's share of FICA tax to the employee or secure the written consent of the employee for allowance of the refund or credit. Treas. Reg. § 31.6402(a)-2(a). The employer, however, is not required to repay or reimburse the

¹ The employer will be paid at the same rate as the employee if the employer is not a corporation. See section 6621(a).

employee, or obtain written consent of the employee, to the extent that the overpayment does not include taxes withheld from the employee or if, after reasonable efforts, the employer cannot locate the employee, or the employee, once contacted, will not provide the requested consent. Id. In cases where the employer cannot locate the employee or if the employee, once contacted, will not provide the requested consent, the employer can file a claim only for the employer's share of the FICA taxes. See Rev. Rul. 81-310, 1981-2 C.B. 241. This is scenario 3 discussed above.

When a refund of an overpayment of FICA tax will be made to a corporate employer, the GATT interest rate applies if the total FICA tax overpayment by the employer-corporation exceeds \$10,000. If the FICA tax overpayment by the employer-corporation is \$10,000 or less, the rate is the short-term AFR plus 2 percentage points. If the employer is not a corporation, then the regular interest rate applies.

In contrast, where the refund of FICA taxes plus interest will be paid over to the employee by the employer, then the regular interest rate, not the GATT interest rate, applies to the individual employee's share of a FICA tax overpayment. See I.R.C. §§ 6611, 6621(a), 6413(a) & (b), Treas. Reg. § 31. 6402(a)-2(a)(2)(i). This is because the employee share is considered the employee's refund and failure to pay the correct interest to the employee would underpay the employee. This is scenario 2 discussed above.

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Please call (202) 622-4910 if you have any further questions.

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