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Tax Refunds

KPMG's Erin Collins and Edward M. Robbins and Lacey E. Strachan, both of Hochman, Salkin, Rettig, Toscher & Perez, examine the intricacies and interrelationships of the assessment and refund statutes of limitations—the period during which the IRS may impose additional tax owed by the taxpayer, and the period during which the taxpayer can claim a refund from the Service for tax that was overpaid. ''It is important for taxpayers and practitioners to know how to determine the period of limitations for filing a refund claim, how to apply the lookback rules and what to do if the deadline for filing a refund claim is approaching but you don't yet know the facts needed to quantify or support your refund claim,'' the authors write.

What You Need to Know About the Refund Statute of Limitations

By Erin Collins, Edward M. Robbins and Lacey E. Strachan

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The information contained herein is of a general nature and based on authorities that are subject to change. Applicability of the information to specific situations should be determined through consultation with your tax adviser. This article represents the views of the authors only, and does not necessarily represent the views or professional advice of KPMG LLP or of the Hochman, Salkin, Rettig, Toscher & Perez law firm.

It is critical to understand the intricacies and the interrelationships of the assessment and refund statutes of limitations—the period during which the Internal Revenue Service may impose additional tax owed by the taxpayer, and the period during which the taxpayer can claim a refund from the IRS for tax that was overpaid.[1]

There are a number of situations that may trigger the taxpayer to claim a refund from the IRS, including:

- when the taxpayer has overpaid his or her estimated taxes or had too much withheld from his or her employment wages;
- when the IRS has erroneously assessed additional tax that the taxpayer subsequently paid; or
- when the taxpayer's tax return information has changed, resulting in a lower overall tax liability and generating a refund.

The general rule is that the IRS has three years from the time a return is filed to make an assessment of tax.

[1] This article addresses federal statutes of limitation. Although many states have similar rules, you need to specifically check your applicable state rules if you have a state issue.

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The period of limitations for the taxpayer to file a claim for refund is three years from the date the tax return is filed, or two years after the tax was paid, whichever is later.[2] It is important for taxpayers and practitioners to know how to determine the period of limitations for filing a refund claim, how to apply the lookback rules and what to do if the deadline for filing a refund claim is approaching but you don't yet know the facts needed to quantify or support your refund claim.

There are many other issues that may impact the statute of limitations. The discussion below is intended as an overview of the applicable rules, but practitioners should carefully review the facts in determining the applicable statutes.

Determining the Deadline For Filing a Refund Claim

The key issue is to first determine the return's ''filing date.'' The return's filing date depends on factors including the return's statutory due date, the date the return is mailed to the IRS and the date the return is received by the IRS.[3] The importance of each of these factors varies depending on the situation, as shown by the following scenarios: early returns; returns timely filed on extension; timely mailed returns; late returns; e-filed returns; amended returns; superseding returns; tentative refund applications; and refunds from net operating loss or capital loss carrybacks.

Early Returns

In general, a return's filing date is the date the IRS receives the return. However, there are exceptions, including those tax returns filed prior to the statutory due date.

For example, for individuals the controlling date for the period of limitations for claims for refund and assessments is three years from the statutory due date, April 15, not from the earlier date the IRS received the return.[4] If the return is received on April 12, the return is deemed filed on the statutory due date, April 15, and the three-year period of limitations begins to run on the statutory due date of April 15. Note that this rule is unaffected if April 15 falls on a Saturday, Sunday or holiday giving the taxpayer until the next business day to file[5]—the statutory due date remains the statutory due date.

Returns on Extension

If the taxpayer files a proper extension,[6] and the taxpayer files a return on or before the extended date, it is important to note that the refund claim and assessment statute is controlled by the actual filing date, i.e., the date the IRS receives the return, and not controlled by the extension date.[7]

For example, if the taxpayer is on an Oct. 15 extension and mails the return on Aug. 30, and the IRS receives the taxpayer's return on Sept. 3, then the three-year period of limitations begins to run on Sept. 3, the date of receipt—not on Oct. 15. Don't make the mistake of thinking that you have until Oct. 15 to file your claim for refund, as it could have catastrophic consequences.

Mailbox Rule Returns

If the IRS receives a return after the statutory or extended due date, the return filing date is the date the IRS receives the return, unless the ''mailbox rule'' applies. The mailbox rule of Internal Revenue Code Section 7502(a)[8] provides that if a return has a ''United States postmark'' showing that the filing was mailed on or before the due date[9], but the return was delivered after the due date, the postmark date ''shall be deemed to be the date of delivery.''[10] This rule works in conjunction with the early return rule, so that the filing date of a return deemed delivered to the IRS prior to the statutory due date under the mailbox rule will be considered to be filed on the statutory due date.

A certified or registered mail receipt is prima facie evidence of delivery under Section 7502, whether the item is actually delivered or not.

Note that the mailbox rule applies only if the IRS ultimately receives the return from the carrier.[11] A prob-

[2] See Internal Revenue Code Sections 6511 (refund claims) and 6501 (assessments).

[3] Taxpayers may request a copy of the taxpayer's transcript of account to verify the filing date. Practitioners can call the Practitioner Hotline at 866-860-4259 to request a transcript.

[4] See I.R.C. Sections 6513 (refund claims) and 6501(a) and (b)(1) (assessments).

[5] See I.R.C. Section 7503.

[6] Treasury Regulations Section 1.6081-1.

[7] See I.R.C. Section 6513(a); Treas. Reg. Section 301.6501(b)-1(a). A taxpayer filing on extension doesn't benefit from Section 6513(a). Section 6513(a) states: ''For the purposes of this subsection, the last day prescribed for filing the return . . . shall be determined without regard to any extension of time . . . .'' Likewise, the IRS doesn't benefit from Section 6501(b)(1) when the taxpayer files its return on extension. Reg. Section 301.6501(b)-1(a) specifies that the last day prescribed for filing a return is determined without regard to any extension of time for filing.

[8] Unless otherwise indicated, all references to ''section'' or ''sections'' in this document are references to the Internal Revenue Code of 1986 or to the U.S. Treasury Department regulations (Treasury Regulations).

[9] This rule applies to returns filed on extension as well as to returns filed by the statutory due date. Section 7502(a) refers to documents required to be filed ''on or before a prescribed date under authority of any provision of the internal revenue laws,'' which includes extensions authorized under Treas. Reg. Section 1.6081-1.

[10] Example of the application of the ''timely mailing, timely filing'' rule: If an individual income tax return is mailed on April 11 and the IRS receives the return on April 18, the timely mailing date of April 11 will control. The return will be deemed to be filed on April 15 and the three-year period of limitations will run from April 15. If a taxpayer has a proper extension until Oct. 15, and the taxpayer's return is mailed on Oct. 14 and received by the IRS on Oct. 18 (no weekend dates), the postmark date, Oct. 14, is deemed to be the date of delivery and the period of limitations will run from Oct. 14, the deemed filing date, not the extended date.

[11] Effective July 30, 1996, Section 7502(f) was amended to allow taxpayers to use either the U.S. Postal Service or a private delivery service. The private delivery services include DHL, FedEx and UPS. See Notice 2004-83, 2004-52 I.R.B, 1030, 2004-2 C.B. 1030. Only certain deliveries qualify. The amendment provides that, for purposes of the mailbox rule of

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lem arises, however, when the destination office fails to receive the document or denies receipt. This could happen in a number of ways—the destination office (the Service Center Campus, for example) loses the return after delivery but before entry into the system and then denies receipt, or the postal service or private delivery service loses the return in transit.

Fortunately, a certified or registered mail receipt is prima facie evidence of delivery under Section 7502, whether the item is actually delivered or not. As of the date of this publication there is no analog to this prima facie evidence of delivery rule for private delivery services. Although Section 7502(f)(3) provides the treasury secretary the ability to extend the prima facie evidence of delivery rule of Section 7502(c)(1)(A) to a designated private delivery service, this hasn't happened. Accordingly, the prudent practitioner sends all paper filings only by certified or registered mail and takes great care to save the mailing receipts and maintains a copy of the associated transmittal letters showing the certified mailing number.

Late Returns

As noted above, the controlling date for the period of limitations for claims for refund and assessments is three years from the date the late return was actually filed—that is, the date the return was received by the IRS. Although the refund claim might be considered to be timely, the refund may nonetheless be barred by the ''lookback'' rule, which limits a taxpayer's refund to the amount of tax paid within the preceding three years, plus the time of any extension.[12]

The interplay between the refund claim filing date and the lookback rule becomes very important for late-filed returns, as discussed in more detail in the next section.

E-Filed Returns

A return filed electronically with an electronic return transmitter in the manner and time prescribed by the IRS is deemed to be filed on the date of the electronic postmark given by the authorized electronic return transmitter.[13] Thus, if the electronic postmark is timely, the return is considered filed timely although it is received (accepted)[14] by the agency, officer or office after the last date, or the last day of the period, prescribed for filing such return.[15] Thus, when the e-filed return is filed before the statutory due date, the general rule established in case law involving paper-filed returns should determine when a return is filed for purposes of refunds and assessments.

The rules are different for an e-filed return filed after the due date. Unlike paper filing, the e-filing date isn't the date the IRS accepts (receives) the e-filed return—the e-filing date is still the date of the electronic postmark. Thus, if a return is e-filed late and the taxpayer receives an e-postmark, the regulations deem the return to have been filed on the e-postmark date even if the IRS actually receives (accepts) the return after the e-postmark date.[16]

It should be noted that the IRS has issued informal guidance, IRS Publication 1345, Handbook for Authorized IRS e-File Providers of Individual Income Tax Returns (3/2009), which is more taxpayer favorable as it provides additional time not set forth in its Treasury regulation. Page 39 of the publication states, ''If the electronic postmark is after the prescribed deadline for filing, the IRS actual receipt date, not the date of the electronic postmark is the filing date.''[17] Caveat: Although the rule stated in Publication 1345 is more taxpayer favorable, inasmuch as it gives the taxpayer additional time to file a tax refund claim, it is inconsistent with the regulation. The better practice is to file refund claims within three years of the earlier e-postmark date, but note the argument is there if the amended return is filed within the later period pursuant to the publication.

The rules get more complicated where e-filed individual returns are rejected by the IRS a single or multiple times and the taxpayer re-files the return, single or multiple times, in response to the rejection(s), creating a challenge in determining which of the multiple e-filing dates controls. For individuals, the IRS has procedures in place for the timely filing of corrected re-

Basics for Determining Limitations Periods

- Factors that can affect a return's ''filing date'' include its statutory due date, the date it is mailed to the IRS and the date it is received by the IRS.
- For a return filed ahead of its statutory due date, limitations periods are measured from the statutory due date.
- The date the IRS receives a return filed on extension controls the limitations periods, rather than the extended due date.
- The ''mailbox rule'' deems the postmark date the date of delivery to the IRS if a return was mailed before its due date but received by the IRS after the due date.

Section 7502, a ''designated delivery service'' is treated as the equivalent of the U.S. Postal Service. The date a return is recorded or marked as received by a designated delivery service is treated as the date of filing, in the same manner as the U.S. Postal Service postmark.

[12] I.R.C. Section 6511(b)(2).

[13] Treas. Reg. Section 301.7502-1(d).

[14] The IRS electronically acknowledges the receipt of all transmissions. Returns in each transmission are either accepted or rejected for specific reasons. Accepted returns meet the processing criteria and IRS considers them ''filed'' as soon as the return is signed electronically or through the receipt by the IRS of a paper signature. Rejected returns fail to meet processing criteria and the IRS considers them ''not filed.'' The acknowledgment identifies the source of the problem using a system of error reject codes and form field numbers (sequence numbers). The error reject codes tell why the return rejected and the form field numbers tell which fields of the electronic return data are involved. Information regarding reject codes and correcting common errors is available at http://www.IRS.gov. IRS Publication 1345, Handbook for Authorized IRS e-File Providers of Individual Income Tax Returns (3/2009), at page 31.

[15] Id.

[16] Id.

[17] IRS Publication 1345, Handbook for Authorized IRS e-File Providers of Individual Income Tax Returns (3/2009), at page 39.

turns after rejection of an electronic return. In these cases, if the re-submission procedures are followed, the electronic postmark date of an e-filed return transmitted on or before the due date will be considered to be the filing date of the return, even if the return is ultimately rejected by the IRS and resubmitted after the due date.[18]

A different and more complex policy applies for e-filed business returns. The IRS has set forth a ''10-day transmission perfection period'' policy in Publication 4163 that applies to e-filed business returns that are rejected by the IRS.[19] This policy applies to e-filed business returns regardless of whether the return is electronically transmitted on or before the due date.[20] Publication 4163 provides that when an electronically transmitted business return is rejected by the IRS, the taxpayer is given a limited period of time from the electronic postmark date to perfect that return for electronic re-transmission. The perfection period is never extended regardless of weekends or holidays.[21]

The filing date for the e-filed business return can vary greatly, depending on how long it takes the taxpayer to get it right with the IRS.

For a business return, when the IRS rejects your early efforts to e-file the return you need to be able to calculate the return filed date:

- Find the date the IRS ultimately accepts the e-filed business return.

- Look back 10 days from the IRS acceptance date. This is your transmission perfection period.

- If the IRS rejected the e-filed return at any time during the transmission perfection period, find the first rejection in the 10-day lookback period. (For purposes of initially applying the transmission perfection period policy, you use the date that the return was rejected by the IRS, not the electronic postmark date of the return that is later rejected.)

- Now find the electronic postmark date associated with the rejection that you identified in the previous step. That electronic postmark date is the return filing date, even if the electronic postmark date is outside of the 10-day lookback period.[22]

- If the IRS didn't reject the e-filed return at any time during that 10-day transmission perfection period, the filing date is the electronic postmark of the ultimately accepted e-filed business return.[23]

Needless to say, the filing date for the e-filed business return can vary greatly, depending on how long it takes the taxpayer to get it right with the IRS. We anticipate many instances where the IRS blows the assessment statute or the taxpayer blows the refund claim statute due to the complexity of calculating the filing date for e-filed business returns.

Amended Returns

An amended return is a return filed subsequent to a prior filed return and after the expiration of the filing period (including extensions).[24] Generally, an amended return doesn't impact the statute of limitations for either assessment[25] or filing a refund claim.[26]

An exception applies when a taxpayer files an amended return reflecting additional tax due within 60 days of the expiration of the statute of limitations for assessment. In such circumstances, the assessment period is extended for an additional 60 days after the day on which the IRS receives the amended tax due return in order to give the IRS sufficient time to assess the additional tax.[27]

Superseding Returns

A superseding return is a tax return filed prior to the statutory or extended due date but subsequent to the original return and which changes the data reported on the original return. Taxpayers need to be mindful of the potential statute of limitations issues that arise for the assessment (Section 6501) and refund (Section 6511) statutes when a superseding return is filed. A question arises regarding which filing date begins the running of the period of limitations for assessments and claims for

[18] Id. at 13.

[19] IRS Publication 4163, Modernized e-File (MeF) Information for Authorized IRS e-file Providers for Business Returns, at 50-52. The transmission perfection period was originally 20 days, but was reduced to 10 days, effective for business tax returns that are accepted after Dec. 31, 2009.

[20] Id. at 50.

[21] Id.

[22] For example, consider: Electronic filing date of Sept. 5 (first and only rejection by IRS); IRS rejects e-file return Sept. 8; the taxpayer perfects the e-file return Sept. 17, and IRS accepts on same day. Conclusion: It is important to note that the filing date is Sept. 5 even though it is outside the 10-day transmission perfection period, as the return was perfected during the 10-day lookback period.

[23] See id. at 51-52.

[24] See *Zellerbach Paper Co. v. Helvering*, 293 U.S. 172, 180 (1934) (''A second return, reporting an additional tax, is an amendment or supplement to a return already upon the files.''). An amended return isn't provided for in the Internal Revenue Code.

[25] It has been consistently held that the filing of an amended return doesn't serve to extend the period within which the IRS may assess a deficiency. See, e.g., *Zellerbach Paper Co. v. Helvering*, 293 U.S. at 180-182; *Nat'l Paper Prods. Co. v. Helvering*, 293 U.S. 183, 184-186 (1934); *Nat'l Ref. Co. v. Commissioner*, 1 B.T.A. 236 (1924). It also has been held that the filing of an amended return doesn't serve to reduce the period within which the IRS may assess taxes where the original return omitted enough income to trigger the operation of the extended limitations period provided by I.R.C. Section 6501(e) or its predecessors. See, e.g., *Houston v. Commissioner*, 38 T.C. 486, 489 (1962); *Goldring v. Commissioner*, 20 T.C. 79 (1953). There is an exception for amended returns that report additional tax within 60 days of the expiration of the three-year statute of limitations for assessments. In such cases, the period for the assessment of the additional amount shall not expire before the day 60 days after the day on which the IRS receives the amended return. I.R.C. Section 6501(c)(7).

[26] The period of limitations for filing a refund claim under the predecessor of I.R.C. Section 6511(a) begins to run on the filing of the original, not the amended, return. *Kaltreider Constr., Inc. v. United States*, 303 F.2d 366, 368 (3rd Cir. 1962), *cert. denied*, 371 U.S. 877 (1962).

[27] I.R.C. Section 6501(c)(7).

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refund—the date that the original return was filed or the date that the superseding return was filed.

Case law supports an argument that the general Section 6501 assessment period runs three years from the first filing date rather than the superseding date.[28] Although the IRS has informal guidance that indicates the superseding return controls the filing date,[29] taxpayers don't want to be in the position of relying on informal IRS advice for a statute of limitations argument. Before a taxpayer agrees to an assessment or signs an extension of the period of limitations on assessment (Form 872) for a year involving a superseded return, taxpayers should contact their practitioners to verify the applicable statute dates.

To help ensure certainty regarding the validity of their refund claims, taxpayers should make every effort to file their refund claims prior to the expiration of the period of limitations based on the filing date of the first-filed return. If you file your refund claim based upon the date of the superseding return, you may later learn that the government has decided that the first return governs, in your case triggering a late-filed claim outside the statute of limitations.

Tentative Refund

Filing a Form 1045, Application for Tentative Refund for Individuals, or a Form 1139, Corporation Application for Tentative Refund, enables a taxpayer to receive a tentative allowance quickly. It should be noted that the tentative refund will have no impact on the period of limitations for claims for refund and assessments for the loss return at issue.[30] An application filed under Section 6411 doesn't constitute a claim for credit or refund, and the amount carried back results in only the tentative allowance of any refunded overpayment.

The Service must act on a quick refund application. Payment must be made within 90 days after the application is filed or within 90 days after the last day of the month that the return for the year of loss (or unused credit) is due (including extensions of the return filing date), whichever is later. Typically, the Service processes the tentative allowance within 45 days of receipt.[31]

A taxpayer can file Forms 1045 or 1139 based on a tentative carryback adjustment that is attributable to net operating losses, net capital losses or a business credit carryback. Unlike a refund claimed on a Form 1040X or 1120X, the refunds for a tentative allowance will be paid prior to any examination of the refund and prior to Joint Committee on Taxation review.

A taxpayer can file Forms 1045 or 1139 based on a tentative carryback adjustment that is attributable to net operating losses, net capital losses or a business credit carryback.

The period of limitations for filing for a tentative refund using Forms 1045 or 1139 differs from the period of limitations for filing a claim for refund on Form 1040X or 1120X. Forms 1045 and 1139 must be filed within 12 months of the end of the tax year that generated the carryback.[32] The one-year period is calculated based on the date of the end of the source tax year and not based on a tax return filing date. For example, for a carryback that arose in 2012 for a calendar year taxpayer, the period for filing Form 1139 expires on Dec. 31, 2013—the year that generated the loss.

Carrybacks of a Net Operating Loss Or Capital Loss

The filing of a refund claim as the result of a carryback has no impact on the period of limitations for the loss year at issue. The Internal Revenue Code provides an enlargement of the general limitations period when a taxpayer carries back to the taxable year in question a net operating loss from a subsequent tax year.[33]

For example, the IRS can assess a deficiency for 2011 stemming from a 2013 NOL carryback at any time before the expiration of the limitations period for the loss year (2013). Likewise, a taxpayer may file a claim for refund carrying back the NOL to an otherwise barred carryback year, so long as the statute of limitations on filing a claim for refund in the loss year is open.[34] There

[28] See *Zellerbach*, 293 U.S. at 180.

[29] In an Office of Chief Counsel advice memorandum, CCA 200645019 (June 20, 2006), the IRS Chief Counsel took the view that the superseding return starts the statute of limitations on assessment (and logically would start the statute of limitations on filing a refund claim as well). See also Section 6501—Limitations on Assessment,SCA 1998-024, 98 TNT 177-60 (holding that a timely amended return is treated as the taxpayer's return for statute of limitations purposes); cf. *Haggar Co. v. Helvering*, 308 U.S. 389, 395 (1940) (A timely amended return is as much a ''first return'' for the purpose of fixing the capital stock value in contradistinction to returns for subsequent years, as is a single return filed by the taxpayer for the first tax year.). But see *Zellerbach Paper Co. v. Helvering*, 293 U.S. 172, 180 (1934) (''. . . a second return, reporting an additional tax, is an amendment or supplement to a return already upon the files, and being effective by relation doesn't toll a limitation which has once begun to run.''). Note that in *Cem Sec. Corp. v. Commissioner*, 72 F.2d 295 (4th Cir. 1934), the court held a return that failed to substantially comply with the main purpose of the return, namely, to state the items of income, deductions and credits for some particular taxpayer, didn't set in motion the running of the period of limitations. *Cem Sec.*, 72 F.2d at 299.

[30] See I.R.C. Section 6411. Note that under I.R.C. Section 6501(k), the statute of limitations for assessment for the year in which the taxpayer receives the refund is governed by the assessment statute of the loss return and is therefore opened for assessment to the extent of any refund issued pursuant to a Form 1045 or a Form 1139.

[31] Treas. Reg. Section 1.6411-1(a). The IRS must act on the application within 90 days after application is filed or within 90 days after the last day of the month that the return for the loss year is due (including extensions), whichever is later. The IRS must act on the application for tentative allowance within 90 days after the application is filed or within 90 days after the last day of the month that the return for the loss year is due (including extensions), whichever is later (I.R.C. Section 6411(b)). If the IRS doesn't pay the tentative allowance within 45 days after the last day prescribed for filing or 45 days after the return is filed, it bears interest at the overpayment rate (I.R.C. Section 6411(b)).

[32] I.R.C. Section 6411; Instructions for Form 1139 (Rev. December 2012); Instructions for Form 1045.

[33] See I.R.C. Section 6501(h).

[34] See I.R.C. Section 6511(d)(2).

are no lookback limitations that apply to refunds of NOL carrybacks.[35]

Although the IRS can't assess and collect tax in a closed year, taxpayers and practitioners should be aware that the IRS can examine the loss year or carryback year and can offset the refund with any other proposed adjustments and reduce the refund amount to zero, absorb any excess net operating loss or reduce any carryover attributes into an open year, triggering a deficiency in a later open year. This rule is often misunderstood.

Taxpayers frequently file refund claims based upon net operating losses, business tax credits or capital losses on the basis of a claim carrying back a loss to an otherwise closed taxable year. The easy way to remember the rule is to remember that the year controlling the assessment statute is the year the loss arose. For example, if a loss arose in 2013 and was carried back to 2011 to obtain a 2011 refund, the assessment statute for the 2011 year attributable to a deficiency as a result of the 2011 carryback is controlled by the 2013 statute of limitation—the year the loss arose.

The easy way to remember the rule is to remember that the year controlling the assessment statute is the year the loss arose.

In other words, the tax code permits assessment of a deficiency in one taxable year (2011) attributable to the carryback of an NOL from a later year (2013) at any time before the expiration of the statute of limitations for the taxable year in which the NOL arose (2011).[36]

The Lookback Rule

Even if a refund claim is timely filed, the payment of a refund may be limited or prohibited by the ''lookback'' rule. The lookback rule can be confusing. Where the taxpayer relies on the three-year period under Section 6511(a) for filing a refund claim, the amount that can be refunded to the taxpayer is limited to the amount of tax paid during the three-year period immediately preceding the filing of the claim, plus any extension of time for filing the return.[37] This is often referred to as the ''three-year lookback period.''[38]

If the taxpayer relies on the two-year period under Section 6511(a) for filing a timely refund claim, the amount of refund is limited to the amount of tax paid within two years from the filing of the claim. This rule is often referred to as the ''two-year lookback period.''[39] This two-year lookback period usually applies if a deficiency is paid as a result of an audit of a taxpayer's previously filed return.[40]

The lookback rule limits a refund to the amount of tax that was paid within the lookback period.[41] Taxpayers must be aware of the limitations of the lookback rule if the original filed return wasn't filed timely. If a taxpayer files a claim for refund more than three years from the due date of the return, including extensions, the lookback rule bars claims for refund of amounts that were deemed paid on the return due date, i.e., estimated tax payments and withholdings.

For example, if the taxpayer paid all of his or her estimated taxes as of April 15 of year one but failed to file the refund claim until June 15 of year four, no refund of the estimated taxes will be allowable even if the refund claim was timely filed, because no payments had been made within the lookback period—the three-year period prior to the date the claim for refund was filed. In this example, in order to reach the estimated taxes for refund purposes, the taxpayer would have had to file his or her claim for refund no later than April 15 of year four.

In the foregoing example, if the taxpayer had filed a proper extension to Oct. 15, the three-year lookback period would be extended for the life of the extension (six months) and, assuming that the taxpayer filed a timely refund claim, the taxpayer's June 15 refund claim would reach the estimated tax payments.

Note that the statutory lookback rules are unaffected if the last day of the statutory period for filing a claim for refund falls on a Saturday, Sunday or holiday, giving the taxpayer until the next business day to file the claim for refund—the lookback period remains three years plus the time of any extension. This would create the problem of the situation where the refund claim is timely because it was filed on the next business day after a deadline that fell on a Saturday, Sunday or holiday, but the additional day now causes the lookback period to be insufficient to reach the withholding. However, the IRS through a revenue ruling cures this problem. The revenue ruling basically extends the lookback period by the number of additional days the taxpayer is allowed to file his or her refund claim where the statutory period falls on a Saturday, Sunday or holiday, so that the extended lookback period is sufficient to reach the withholding.[42]

Protective Claims for Refund

If the resolution of the taxpayer's claim for refund is contingent on future events and may not be determinable until after the time period for filing a claim for refund expires, a taxpayer can file a protective claim for

[35] See id.
[36] I.R.C. Section 6501(h).
[37] I.R.C. Section 6511(b)(2)(A).
[38] See Rev. Rul. 76-511, 1976-2 C.B. 428; Rev. Rul. 78-343, 1978-2 C.B. 326; and *Weisbart v. United States*, 222 F.3d 93 (2d Cir. 2000), which caused the regulations under Section 7502 to be amended to treat late-filed original returns claiming a refund as filed on the postmark date for purposes of Section 6511(b)(2)(A). See T.D. 8932.
[39] I.R.C. Section 6511(b)(2)(B).

[40] The Taxpayer Relief Act of 1997 statutorily reverses a 1996 Supreme Court case, *Commissioner v. Lundy*, 116 S. Ct. 647, 96-1 U.S.T.C. ¶ 50,035 (1996), by allowing taxpayers to receive a refund of earlier tax payments (e.g., withholding) so long as they file their original tax return within three years of the original due date. In *Lundy*, the court held that a taxpayer would be limited to a refund of amounts paid within the prior two years if the IRS issues a statutory Notice of Deficiency prior to the date the original return is filed. The change applies to refund claims for tax years ending after August 5, 1997.
[41] I.R.C. Section 6511(b)(2). See also Rev. Rul. 76-511, 1976-2 C.B. 428; Rev. Rul. 78-343, 1978-2 C.B. 326; *Weisbart v. United States*, 222 F.3d 93 (2d Cir. 2000).
[42] Rev. Rul. 66-118, 1966-1 C.B. 290.

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refund. The protective claim preserves the taxpayer's right to claim a refund once the contingency is resolved.

Protective claims are often based on current litigation or expected changes in the tax law, other legislation or regulations. Generally, the IRS will delay action on the protective claim until the contingency is resolved, and may obtain additional information necessary to process the claim and either allow or disallow the claim.

A protective claim can be either an informal claim or a formal claim for credit or refund, but it is important to clearly mark the claim as ''Protective.'' A protective claim doesn't have to state a particular dollar amount or demand an immediate refund; however, to be valid, a protective claim must:

- be in writing and be signed;
- include the taxpayer's name, address and Social Security or identification number;
- identify and describe the contingencies affecting the claim;
- clearly alert the IRS as to the essential nature of the claim; and
- identify the specific year(s) for which a refund is sought.[43]

Typically, protective claims are filed when the refund statute is due to expire and the taxpayer is unable to file a refund claim. There are a few circumstances in which a protective claim should be considered, such as a situation in which the taxpayer is unable to submit supporting information that establishes its actual right to a refund; the taxpayer is unable to quantify the claim precisely, that is, calculate the exact amount of the claimed overpayment; there is pending litigation on the issue involved in the protective claim, the results of which may substantially affect whether the Service allows the claim; an expected change to the tax code or the regulations may have a substantial impact on the decision whether to allow the claim; or the Service has proposed changes in a tax year under examination that would, if sustained, create an overpayment in another tax year.

General Counsel Memorandum 38786 describes various circumstances in which filing a protective claim would be appropriate when the refund statute is due to expire. Those circumstances include:

- pending litigation that may substantially affect the IRS's decision whether to allow the claim; and
- an expected change in the code or the regulations that may have a substantial effect on the IRS's decision whether to allow the claim.

GCM 38786 stated that if the taxpayer can't submit the supporting statements with the refund claim, it ''should be allowed a reasonable period of time in which to furnish the necessary evidence.''[44] Also, ''If the information is not furnished within a reasonable period of time and if the Service does not obtain such information on its own, the claim may be disallowed.''[45]

[43] CCA 201136021 (released 9/09/2011); see, e.g., *United States v. Kales*, 314 U.S. 186, 194-197 (1941).
[44] GCM 38786 (8/13/1981).
[45] Id.

Nevertheless, there have been instances in which the Service has formally disallowed protective refund claims when the taxpayer specifically described the grounds on which it believed it was entitled to a refund (for example, entitled to a larger Section 41 research credit), but is unable to quantify precisely the overpayment amount because of an incomplete research credit study.

In a Service Center advice memorandum SCA 199941039), the Service tried to distinguish protective refund claims from what it referred to as ''incomplete claims.'' Although the memorandum doesn't discuss GCM 38786, there is some support for the incomplete claim concept that can be found in Treasury Regulations Section 301.6402-3(a)(5), which provides that ''A return or amended return shall constitute a claim for refund or credit if it contains a statement setting forth the amount determined as an overpayment.''

If the Service attempts to disallow a protective claim, practitioners should consider requesting additional time to provide supporting documentation.

If the Service attempts to disallow a protective claim, practitioners should consider requesting additional time to provide supporting documentation. However, even when a claim is disallowed under such circumstances, GCM 38786 notes that the taxpayer ''should be allowed to reopen the claim if it subsequently obtains the additional evidence needed to prove its right to a refund, provided that the Service has sufficient time to reconsider the claim prior to the expiration of the period of limitations prescribed in section 6532(a).''

Informal Claims

In order to file a claim for refund, the practitioner should use Form 1040X (individual returns), Form 1120X (corporate income tax return) or Form 843 (refund of taxes other than income taxes), or whatever form the Service has designated. Although informal claims for a refund have been held to be sufficient, informal claims for refund must be in writing apprising the IRS that the taxpayer is requesting a refund and identifying the relevant tax periods involved.

An informal claim is considered adequate if it is in writing, includes a request for a refund/credit for certain years or periods, and informs the IRS of the basis for the overpayment and provides sufficient information as to the tax and year to allow the IRS to examine the claim. Claims filed on inappropriate forms or provided during an examination have sometimes been held to be valid.[46] Such claims have also been held to be invalid.[47]

[46] *United States v. Kales*, 314 U.S. 186 (1941); *Watson v. United States*, 246 F. Supp. 755 (E.D. Tenn. 1965). For a case regarding an informal claim where the taxpayer's complaint withstood a legal challenge to the district court's jurisdiction,

Affirmative Issue/Claim

The term ''affirmative issue'' isn't defined in the code or regulations but is commonly used in examination cases and IRS guidance. An affirmative issue is basically an informal claim for refund in which the taxpayer is requesting the IRS to consider an issue which is taxpayer favorable. Unlike a refund claim, an affirmative issue may not trigger a refund; rather, it will reduce or offset potential deficiencies resulting during an examination.

One benefit of raising an affirmative issue with the team rather than filing an amended return is the impact to the taxpayer's state filings. Most states require taxpayers to file an amended state return within a specified period of time, some as short as 30 days and some as long as 120 days, after the filing of an amended federal return. Many large taxpayers file in multiple states and an amended federal return triggers an administrative burden that could have been avoided by asserting an affirmative issue and waiting until the conclusion of the IRS examination to file amended state returns. Depending upon the taxpayer's situation, multiple amended returns may trigger multiple amended stated filing requirements.

Conclusion

Once the statute of limitations under Section 6511 has run, the IRS doesn't have discretion to allow a refund—the code authorizes the IRS commissioner to refund an overpayment only within the applicable period of limitations.[48] With the intricacies and complexity to the rules affecting the determination of the statute of limitations for a refund claim, taxpayers and practitioners should be sure to be aware of the applicable deadline for filing a refund claim, and file any claim in advance of this deadline.

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see *Salah v. United States*, 87 A.F.T.R.2d 2001-1462 (7th Cir. 2001).

[47] *Livermore v. Miller*, 94 F.2d 111 (5th Cir.), *cert. denied*, 304 U.S. 582 (1938). *Kaetz v. IRS*, 83 A.F.T.R.2d 99-2536 (D. Pa. 1999), *aff'd without published opinion*, 225 F.3d 649 (3d Cir. 2000); *Mobile Med Support Servs. v. United States*, 86 A.F.T.R.2d 2000-6760 (D. Conn. 2000). For a case involving an allegation of an informal claim where the taxpayer didn't prevail, see *Jackson v. Commissioner*, T.C. Memo 2002-44 (letter in which the taxpayer informed the IRS that he believed he had overpaid his taxes and was entitled to a refund didn't qualify as an informal claim).

[48] See I.R.C. Sections 6402(a), 6511(b)(1); *U.S. v. Dalm*, 494 U.S. 596, 602 (1990); *U.S. v. Garbutt Oil Co.*, 302 U.S. 528, 533-535 (1938).

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