

Practice

By *Charles P. Rettig*

Limitations Period for Refund Litigation

In a recent Chief Counsel Notice,¹ the IRS has confirmed that, notwithstanding various recent district court cases to the contrary, a taxpayer may file a complaint for refund under Code Sec. 7422 at any time at least six months after the filing of an administrative claim when the IRS has not previously issued a notice of claim disallowance and the taxpayer has not waived the requirement to receive that notice.

Litigation in any court for the recovery of any internal revenue tax or of any penalty may not be commenced unless an administrative claim for refund or credit has first been timely filed with the IRS.² The administrative claim must generally be filed within the later of three years from the time the return was filed or two years from the time the tax was paid, or if no return was filed by the taxpayer, within two years from the time the tax was paid.³ Code Sec. 6532(a)(1) provides that a taxpayer must wait six months from the filing of an administrative refund claim with the IRS before commencing litigation by filing a complaint for refund in either the United States District Court or the United States Court of Federal Claims unless a notice of claim disallowance has previously been issued by the IRS within six months of the filing of the administrative refund claim. Under Code Sec. 6532(a)(1), a taxpayer also has two years to commence such litigation from the date that the IRS mails, by certified mail or registered mail, a notice of claim disallowance or the date the taxpayer waives the requirement to receive the notice of claim disallowance.

The foregoing two-year period may be extended for such period as may be agreed by execution of Form 907, *Agreement to Suspend Running of Statute of Limitations*.⁴ If a written waiver of the requirement to be mailed a notice of disallowance is filed, the



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two-year period begins on the date such waiver is filed.⁵ Any consideration, reconsideration, or action by the IRS with respect to such claim following the mailing of a notice of disallowance by certified mail or registered mail does not operate to extend the period within which suit may be begun.⁶

Revenue Ruling 56-381⁷ provides that when the IRS has not issued a notice of claim disallowance and the taxpayer has not waived the requirement to receive that notice, the taxpayer may file a complaint for refund at any time after six months from the administrative claim filing because the two-year period under Code Sec. 6532(a) is triggered only by the taxpayer's waiver or the IRS's mailing of the notice of claim disallowance. Although revenue rulings are not binding on the federal courts, courts should not agree that the IRS is not bound to follow its own revenue rulings in court proceedings. Indeed, the Tax Court has on several occasions treated revenue rulings as concessions by the IRS where such rulings are relevant to the court's disposition of the case.⁸

Three district courts have held that the general six-year period of limitation applicable to claims against the government⁹ applies to tax refund suits brought under Code Sec. 7422.¹⁰ In *Wagenet*, the two-year period under Code Sec. 6532(a) was not triggered because the IRS failed to issue a notice of claim disallowance and the taxpayers did not waive the requirement to receive notice. The district court, nonetheless, held that the taxpayer's refund suit was barred by the general six-year period¹¹ because it was commenced more than six years from the accrual of the taxpayer's claim. The court reasoned that the general six-year period served as an outer limit on all claims against the government.

In *Finkelstein*, the district court held that the fact that the notice of claim disallowance was not sent by registered or certified mail¹² was immaterial given the taxpayer's admission of receipt of it. On Summary Judgment, the court found that the specific two-year statute of limitations under Code Sec. 6532(a) applied to bar her claim as well as the general statute of limitations.¹³ Similarly, the court in *Breland* stated that the refund suit at issue was time-barred under the general six-year period of limitation applicable to claims against the government.

Although favorable to the government, the Chief Counsel Notice advises that holdings regarding the application of the general six-year statute of limitations under 28 USC §2401 to refund suits brought under Code Sec. 7422 are inconsistent with Rev. Rul. 56-381 and the decisions cited therein that reject the argument that six-year periods of limitation in either 28 USC §2401 or 28 USC §2501¹⁴ apply to bar tax refund suits.¹⁵ Congress has supplanted the catch-all limitation period provided for in 28 USC §2401 and 28 USC §2501 with a specific period of limitation in Code Sec. 6532 that governs tax refund suits¹⁶

The Chief Counsel Notice advises IRS attorneys to continue to follow Rev. Rul. 56-381 and to advise the IRS or the Department of Justice that the general six-year period of limitation for bringing claims against the government in 28 USC §2401 or 28 USC §2501 does not apply to tax refund suits. When the IRS has not issued a notice of claim disallowance and the taxpayer has not waived notice of receiving the claim disallowance, the taxpayer may file a refund suit anytime after the initial six-month period provided in Code Sec. 6532(a).

ENDNOTES

¹ Chief Counsel Notice CC-2012-012 (June 1, 2012).

² Code Sec. 7422.

³ Code Sec 6511(a). There are various exceptions within Code Sec. 6511 relating to: (i) extensions by agreement between the taxpayer and the IRS, (ii) a seven year term in matters involving bad debts and worthless securities, (iii) net operating loss or capital loss carrybacks, (iv) certain partnership items, and (v) suspension of the limitations period while the taxpayer is financially disabled, as defined in Code Sec 6511.

⁴ Code Sec. 6532(a)(2).

⁵ Code Sec. 6532(a)(3).

⁶ Code Sec. 6532(a)(4).

⁷ Rev. Rul. 56-381, 1956-2 CB 953 (the execution of an agreement to suspend the running of the period of limitation against

filing a refund suit is not necessary unless the IRS has provided notice disallowing the claim for refund or the taxpayer has waived notice). Since the period of limitations for filing suit [*3] does not commence in such a case, agreement Forms 907, Agreement to Suspend Running of Statute of Limitations, to extend such period are not necessary. See *Consolidated Edison Company of New York*, CtCls, 56-1 USTC ¶9119, 135 FSupp 881, 133 CtCls 376; *Detroit Trust Company*, CtCls, 55-1 USTC ¶9333, 130 FSupp 815, 131 CtCls 223.

⁸ See *G.A. Rauenhurst*, 119 TC 157, Dec. 54,899 (2002). See also *Stubbs, Overbeck & Assoc., Inc.*, CA-5, 71-2 USTC ¶9520, 445 F2d 1142, 1147; *R.D. Frazier*, 111 TC 243, 248, Dec. 52,876 (1998); *N. Ind. Pub. Serv. Co.*, 105 TC 341, 350, Dec. 50,979 (1995),

aff'd, CA-7, 97-1 USTC ¶50,474, 115 F3d 506; *C.W. Walker*, 101 TC 537, 550-551, Dec. 49,460 (1993); *R.M. Burlison*, 68 TCM 288, Dec. 50,009(M), TC Memo. 1994-364; *Nissho Iwai Am. Corp.*, 89 TC 765, Dec. 44,267 (1987); *Cascade Designs, Inc.*, 79 TCM 1542, Dec. 53,762(M), TC Memo. 2000-58; *R.J. Merritt*, 69 TCM 1779, Dec. 50,450(M), TC Memo. 1995-44; *E.D. Stalcup*, 69 TCM 1777, Dec. 50,449(M), TC Memo. 1995- 43; *F.A. Nikkila*, 66 TCM 1796, Dec. 49,508(M), TC Memo. 1993-628; *P.A. Boice*, 66 TCM 1794, Dec. 49,507(M), TC Memo. 1993-627; *G.W. Callison*, 66 TCM 1792, Dec. 49,506(M), TC Memo. 1993-626; *W.H. ZuHone*, 55 TCM 533, Dec. 44,679(M), TC Memo. 1988-142, *aff'd* CA-7, 89-2 USTC ¶9512, 883 F2d 1317, and *K.L. Phillips*, 88 TC 529, Dec. 43,749

ENDNOTES

(1987) (counsel may not choose to litigate against the officially published rulings of the Commissioner without first withdrawing or modifying those rulings. The result of contrary action is capricious application of the law). Further, private letter rulings may be cited to show the practice of the IRS. See *Rowan Cos., Inc.*, SCt, 81-1 USTC ¶9479, 452 US 247, 101 SCt 2288 n. 17; *Hanover Bank*, SCt, 62-1 USTC ¶9487, 369 US 672, 686, 82 SCt 1080; *M. Cristofani Est.*, 97 TC 74, 84 n.5, Dec. 47,491 (1991); *Woods Inv. Co.*, 85 TC 274, 281 n.15, Dec. 42,315 (1985); *J.L. Thurman*, 75 TCM 2625, Dec. 52,767(M), TC Memo. 1998-233.

⁹ 28 USC §2401.

¹⁰ See *C.D. Breland*, DC-NY, 2011-2 USTC ¶50,632; *D.J. Wagenet*, DC-CA, 2009-2 USTC ¶50,766; *E. Finkelstein*, DC-NJ, 97-1

USTC ¶50,173, 943 FSupp 425.

¹¹ *Id.*

¹² As specifically required in Code Sec. 6532(a).

¹³ 28 USC §2401(a). The court found that the statute of limitations found in Code Sec. 6511 was not applicable because Ethel Finkelstein was not claiming a refund for the overpayment of a tax for which she was required to file a return. See Code Sec. 6511(a). Rather, Ethel Finkelstein was seeking a refund for a deposit in the nature of a cash bond that she voluntarily paid on behalf of her husband, a taxpayer. The court further held that when a remittance is not in the nature of a payment of a tax, but rather is a deposit in the nature of a cash bond under Rev. Proc. 84-58, 1984 CB 50, formal refund procedures do not apply.

¹⁴ 28 USC §2501 is applicable to claims of which the United States Court of Federal Claims has jurisdiction and provides a six-year period identical to the 28 USC §2401 period.

¹⁵ See *Consolidated Edison Company of New York*, CtCls, 56-1 USTC ¶9119, 135 FSupp 881, 883, 133 CtCls 376; *Detroit Trust Company*, CtCls, 55-1 USTC ¶9333, 130 FSupp 815, 817, 131 CtCls 223.

¹⁶ See Revenue Act of 1932, H.R. 10236, S. Fin. Comm., 72d Cong. 57 (1932) (removing a five-year outer limit on the time for filing a tax refund suit from the predecessor to Code Sec. 6532 because “all parties concerned will be served by an amendment which makes the date of disallowance of the claim absolutely certain in every case and which specifies but one limitation period after that date.”).

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