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Clarifying Periods of Limitations for Filing Claims for Refund of Interest, Penalties, And Tax, and IRS Recourse When Errors Favoring Taxpayers Are Identified

By W. SCOTT ROGERS

Many taxpayers are unclear as to which periods of limitations apply with respect to filing claims for refunds of tax, interest, and penalties; this lack of clarity is compounded when interest netting claims are considered, claims which by definition include multiple tax periods.

In addition, taxpayers are often concerned that the Internal Revenue Service may have made a mistake in their favor in computing a refund or assessment, and wish to determine when the resulting risk or exposure may be extinguished.

The lack of clarity is compounded when interest netting claims are considered, claims which by definition include multiple tax periods.

The following definitions of the various periods of limitations affecting tax, interest, and penalties are organized in a question and answer format, with the goal that they may provide a quick reference to the tax executive seeking an answer to a specific period of limitations question. While directed primarily to interest and

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penalty adjustments, the same statutes may generally be applied to substantive tax matters.

What is the statute of limitations to file a claim for abatement of interest assessed on a deficiency in an administrative exam or appeal?

A claim for refund can be filed within three years of the filing of the return, or within two years of the date on which the tax was paid, pursuant to Internal Revenue Code Section 6511(a). However, under Section 6511(b)(2)(B), if a claim is filed under the “two-year” provision, a refund shall be limited to payments made during the two years preceding the filing of the claim.

Note that, for purposes of the three-year period of limitations, the statute of limitations with respect to any Form 941, Employer’s Quarterly Federal Tax Return, period begins to run on April 15 of the subsequent year. Thus, the three-year limitations period for filing a refund claim for the first quarter of 2013, Form 941 begins to run on April 15, 2014.

If I timely file a refund claim under Section 6511, but IRS does not act on it before the expiration of the two- or three-year period of limitations, will I be required to file suit to protect the claim?

No. A timely filed claim pursuant to Section 6511(a) or (b) protects the issues set forth in the claim until IRS either processes the claim or sends a notice of disallowance.

If I extend the period of limitations by agreement, do I have additional time to file a claim for refund?

Yes, if the period of limitations is extended by agreement, such as through execution of Forms 872, Consent to Extend the Time to Assess Tax, or 872-A, Special Consent to Extend the Time to Assess Tax, you may file a refund claim up to six months after the expiration date of the extended period of limitations under Section 6511(c)(1). However, such amount may be limited as set forth in Internal Revenue Code Section 6511(c)(2):

Limit on amount. If a claim is filed, or a credit or refund is allowed when no claim was filed, after the execution of the agreement and within 6 months after the expiration of the period within which an assessment may be made pursuant to the agreement or any extension thereof, the amount of the credit or refund shall not exceed the portion of the tax paid after the execution of the agreement and before the filing of the claim or the making of the credit or refund, as the case may be, plus the portion of the tax paid within the period which would be applicable under subsection (b)(2) if a

claim had been filed on the date the agreement was executed.

How do I request an abatement of erroneous interest assessed with respect to a Tax Court decision?

You may file a motion for redetermination of interest with the Tax Court up to one year after the decision becomes final, pursuant to Section 7481(c). For a definition of when the decision becomes final for purposes of the one-year period to request redetermination, see Section 7481(a).

If interest on a refund appears to be shorted, how long do I have to file a claim for refund?

Surprisingly, the Internal Revenue Code does not address the period of limitations to request a correction to interest on refunds. Refund interest has long been held to be a general claim against the U.S. government, subject to the six-year period of limitations to file suit under the Tucker Act.¹

Note that, unlike claims filed to request refunds of excess interest and/or penalty amounts paid, timely filing of a claim for additional refund interest will not hold the period of limitations open after the passing of the date that is six years from the date on which IRS scheduled the original refund (or offset of an overpayment), often referred as the "23C" date. Thus, you may have to file suit to protect an overpayment interest claim that remains outstanding as the expiration of the six-year period of limitations approaches.

In 2005, IRS issued Chief Counsel Advice 200532001, which states that a refund resulting from an administrative claim may be issued more than six years after the refund was scheduled if the administrative claim was filed before the expiration of the six-year period of limitations. Presently, IRS is applying the CCA to interest refund claims processed, but taxpayers lose their right to file suit when their claims are processed after the six-year period expires and they disagree with IRS's determination. Essentially, a taxpayer unhappy with IRS's decision with respect to such a claim has no recourse if he or she does not file suit before the period expires.

Are there special considerations in applying the period of limitations rules to interest netting pursuant to Section 6621(d)?

Yes. IRS has long asserted that both an underpayment and overpayment tax period under consideration for purposes of equalizing interest rates during concurrent periods of mutual indebtedness must have been open on July 22, 1998, the effective date of legislation codifying interest netting, under the traditional periods of limitations discussed above, and that either the over-

payment or underpayment period must be open under those same statutes when the interest netting claim is filed.

Courts have upheld IRS's position in several decisions.² At least one court has ruled that only one of the periods had to be open on the effective date of Section 6621(d), but the specific decision was to be narrowly applied only to taxpayers litigating interest netting claims that were filed before Jan. 1, 2000.³ Thus, it is highly unlikely if many, if any, taxpayers may benefit from the decision.

What is the government's recourse if it pays me too much interest on a refund, or fails to charge enough interest on an assessment of tax?

IRS may file suit to recover amounts erroneously refunded within two years of making the refund, or five years in instances of fraud or misrepresentation of material fact, under Section 6532(b). With respect to collection of additional interest on a tax assessment, IRS may have up to 10 years to collect interest on assessed tax, pursuant to Section 6502(a)(1).

Conclusion

With the exceptions of the items regarding claims for additional interest on refunds and interest netting, the various rules discussed above are generally long-established and noncontroversial.

I urge taxpayers who file claims requesting corrections to interest on refunds to consider filing suit if such claims remain unresolved as the six-year period of limitations to file suit approaches, especially in instances when large amounts are in controversy. Relying on a CCA as an authority for establishment of timely filing is not sound practice. I recall a period in the 1990s in which IRS, having followed a procedure identical to that established by the CCA issued in 2005 for several years, abruptly changed its position and denied numerous claims for corrections to refund interest that had been filed before the six-year period of limitations to file suit had expired, but were being processed after that period's expiration.

With respect to the period of limitations within which a tax period may be includible in an interest netting refund claim, the relevant authorities continue to evolve, and fact patterns that have yet to be identified could feasibly lead to more litigation before final clarity is established.

² See *Federal National Mortgage Association v. United States*, 379 F.3d 1303 (Fed. Cir. 2004).

³ See *Exxon Mobil Corp. v. Commissioner* 136.T.C. 5 (2011).

¹ See 28 U.S.C. Sections 2401 and 2501. See also Revenue Ruling 56-506.