

Department
of the
Treasury

Internal
Revenue
Service

Office of
Chief Counsel

N o t i c e

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Upon incorporation

Subject: Change in Litigating Position Cancellation Date: into CCDM

Purpose:

This notice announces a change in the Service's litigating position concerning the application of I.R.C. § 7502(a) to a claim for credit or refund made on a late filed original income tax return.

Background:

Section 7502(a) generally provides that a return, claim, statement, or other document postmarked on or before the due date of the document will be treated as filed on the postmark date if the document is received after the due date. Prior to the issuance of Action on Decision in Weisbart v. United States Department of Treasury and Internal Revenue Service, 222 F. 3d 93 (2d Cir. 2000), rev'g 99-1 USTC (CCH) ¶ 50,549 (E.D.N.Y. 1999), AOD-CC-2000-09, it was the Service's position that section 7502(a) did not apply to a claim for refund filed on a delinquent original return postmarked three years after the due date of the return.

In Weisbart, the court rejected the government's argument that the "timely mailing/timely filing" rule of section 7502(a) did not apply to a claim for credit or refund included on an original return mailed after the due date of the return. The opinion in Weisbart conflicts with the opinions of other courts on this issue. See Anastasoff v. United States, 223 F.3d 898 (8th Cir. 2000); Christie v. United States, No. 91-2375MN (8th Cir., March 20, 1992) (per curiam) (unpublished); Branstrom v. United States, 44 Fed. Cl. 1 (1999); Becker v. Dept. of Treasury, 823 F. Supp. 231 (S.D.N.Y. 1994); King v. United States, 495 F. Supp. 344 (D. Neb. 1980).

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Change in Position:

After careful consideration of the relevant opinions, the Service will no longer argue that section 7502(a) does not apply under facts such as those in Weisbart, which decision was announced in the Action on Decision issued on November 13, 2000. AOD-CC-2000-09 (Nov. 13, 2000). Accordingly, the Service will apply the timely mailing/timely filing rule of section 7502(a) in such cases and treat claims for refund included on delinquent original returns as filed on the date of mailing for purposes of section 6511(b)(2)(A). Although Weisbart involved an individual income tax return made on Form 1040, the Service will also apply section 7502 to claims for credit or refund included on delinquent returns other than individual income tax returns. This would include returns such as Form 1120, Corporation Income Tax Return, Form 720, Quarterly Federal Excise Tax Return, Form 2290, Heavy Vehicle Use Tax Return, and Form 706, U.S. Estate Tax Return.

This change in position is also reflected in final regulations, Treas. Reg. § 301.7502-1(f), published in the Federal Register on January 11, 2001. See 66 Fed. Reg. 2257. In addition to treating the claim for refund as filed on the postmark date, Treas. Reg. § 301.7502-1(f)(2) treats the delinquent return as filed on the postmark date. Pursuant to Treas. Reg. § 301.7502-1(g)(2), the change in position will apply to any claim made on a late filed tax return (meeting the requirements of paragraph (f)(1) of the regulations) except for those claims which are barred by the operation of section 6532(a) or any other rule of law (including res judicata) as of January 11, 2001, the date of publication of the regulations.

Although the Service will now concede the timeliness of such claims for purposes of section 6511(b)(2)(A), the Service may nevertheless disallow a claim based upon a consideration of the merits of the claim. If the Service disallows the claim on the merits and the taxpayer files suit for refund or credit, the Counsel attorney assigned the preparation of the defense letter should affirmatively state that the Service does not rely on the period of limitations as a basis for defense of the claim. Similarly, Counsel attorneys should not raise the period of limitations as a defense to an overpayment claim in the United States Tax Court.

The acquiescence in Weisbart raises possible jurisdictional questions at least in cases appealable to the Ninth Circuit. The Ninth Circuit, in Miller v. United States, 38 F. 3d 473 (9th Cir. 1994), held that a claim for refund contained in a late-filed original return is timely under section 6511(a) only if filed within two years of payment of the taxes at issue. The holding in Miller conflicts with Rev. Rul. 76-511, 1976-2 C.B. 428. Although the Service disagrees with Miller, courts in cases appealable to the Ninth Circuit may conclude that they lack jurisdiction to consider such claims, regardless of the government's concession of the section 6511(b)(2)(A) issue. Accordingly, in cases appealable to the Ninth Circuit, the Counsel attorney should work with the Department of Justice or the taxpayer, as appropriate, to effectuate an administrative settlement with the taxpayer without the need for further judicial proceedings. If an administrative settlement can be reached, then the Government and the taxpayer should jointly move to dismiss based on Miller, and an administrative refund should be made to the taxpayer. Such a settlement may involve a full or partial refund of the amount claimed. If the claim is disallowed on the merits and there are no hazards to justify a settlement, the Counsel attorney should recommend that the Department of Justice cite Miller to the district court, but argue that the case should be decided on the merits, not on the section 6511(a) issue, because the Service does not follow Miller.

A section 7503 issue may also be present if the last day for filing the refund claim under section 6511(b)(2)(A) falls on Saturday, Sunday, or a legal holiday. In this situation, the claim is considered timely filed if it is mailed on the next succeeding day that is not a Saturday, Sunday, or legal holiday. Thus, for example, a taxpayer who receives an extension of time from April 15, 1996, to August 15, 1996, to file the 1995 Form 1040, but whose return is postmarked and mailed on August 16, 1999, will have filed a timely claim for credit or refund of taxes deemed paid on April 15, 1996. This is because August 15, 1999, was a Sunday and Monday, August 16, 1999, is the next day which is not a Saturday, Sunday or legal holiday. See Rev. Rul. 66-118, 1966-1 C.B. 290. If a case involves the more complicated factual situation in which the due date (including an extended due date) for the return is a Saturday, Sunday, or legal holiday, and the taxpayer mails the late-filed return three years from the next succeeding day after the due date that is not a Saturday, Sunday, or legal holiday, guidance from the National Office should be requested.

Any questions concerning the foregoing may be directed to Charles A. Hall of the Office of Associate Chief Counsel, Procedure and Administration (Administrative Provisions and Judicial Practice Division), at (202) 622-4940.

/s/
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