

Department
of the
Treasury

Internal
Revenue
Service

Office of
Chief Counsel

Notice

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CC-2003-021

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June 26, 2003

Claims for Refund on Late-Filed
Original Income Tax Returns -
Change in Litigation Position

Effective

Subject: in the Ninth Circuit **Cancel Date:** Until Further Notice

Purpose

This notice announces a change in the Service's litigating position concerning the application of I.R.C. § 6511(a) to a claim for credit or refund made on a late-filed original income tax return in cases appealable to the Ninth Circuit Court of Appeals.

Background

In Miller v. United States, 38 F.3d 473 (9th Cir. 1994), the Ninth Circuit held that a claim for refund contained in a late-filed original return is timely under section 6511(a) only if the taxpayer files the return 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, which provides that a claim is timely under section 6511(a), even when a taxpayer makes a claim for refund on a late-filed original return, because the applicable period of limitations is three years from the date the return is filed. In cases appealable to the Ninth Circuit where the Service denies the claim on grounds other than section 6511(a), Counsel attorneys would 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. See Chief Counsel Notice CC-2001-019 (March 22, 2001).

Change in Litigating Position

The Ninth Circuit revisited this issue in Omohundro v. United States, 300 F.3d 1065, 1068 (9th Cir. 2002), and determined that it is no longer bound by its holding in Miller.

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Accordingly, under section 6511, the Ninth Circuit held that a taxpayer's claim for credit or refund is timely if it is filed within three years from the date the tax return is filed, regardless of when the return is filed. Omohundro, 300 F.3d at 1069.

The decision of the Ninth Circuit in Omohundro results in uniform treatment of claims for credit or refund made on a late-filed tax return throughout the circuits. Thus, it is no longer necessary for Counsel attorneys to address Miller in recommendations to the Department of Justice for cases appealable to the Ninth Circuit. Instead, in all matters referred to the Department of Justice, Counsel should state the Service's position, consistent with Rev. Rul. 76-511, that a claim is timely even if the taxpayer makes it on an income tax return filed after the return due date. Notwithstanding the fact that the Service considers the claim timely, Counsel should still defend the denial of a claim in appropriate cases where the provisions of section 6511(b) limit the amount of a refund. See Rev. Rul. 76-511.

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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Associate Chief Counsel
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