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MEMORANDUM FOR ASSISTANT REGIONAL COUNSEL (GL)
WESTERN REGION CC:WR

FROM: Joseph W. Clark
Senior Technician Reviewer CC:EL:GL:Br.2

SUBJECT: Significant Service Center Advice Request
Offset Bypass Refunds

This document responds to your request for advice dated November 20, 1998. This document is not to be cited as precedent.

ISSUE:

Whether the Internal Revenue Service (the "Service") may reverse an overpayment credited to a taxpayer's account to satisfy a prior outstanding tax liability so that the Taxpayer Advocate may issue a Taxpayer Assistance Order ("TAO") requiring the Service to issue a refund for the overpayment on the grounds of hardship?

CONCLUSION:

No. The Taxpayer Advocate cannot issue a TAO to require the Service to do an act which the Service is otherwise prohibited from doing. In this case, the Service cannot reverse the overpayment to issue a refund.

FACTS:

The Taxpayer Advocate wishes to order the Service to reverse an overpayment credited to a taxpayer's account, which credit satisfied a prior outstanding tax liability. In effect, the Taxpayer Advocate wants to reverse the application of funds to re-create an overpayment situation. The Taxpayer Advocate then would use the Secretary's discretionary authority under I.R.C. § 6402(a) to order a refund of the overpayment be made to the taxpayer.

LAW AND ANALYSIS

Section 6402(a) provides that in the case of any overpayment, the Secretary may credit the overpayment against any outstanding federal tax liability (“offset”), or may refund the overpayment to the taxpayer. I.R.C. § 6402(a). If the taxpayer owes only outstanding federal tax debt, the Service has the discretion to determine whether to offset the overpayment. See Kalb v. United States, 505 F.2d 506, 509 (2d Cir. 1974) (Service has discretion to apply, or not to apply, refund from voluntary overpayment to trust fund tax liability); Acker v. United States, 519 F. Supp. 178, 182 (N.D. Ohio 1981) (Service may credit tax overpayments to subsequent years, but is not required to do so).¹

When the Service exercises its discretion to issue a refund of an overpayment even though the taxpayer owes unpaid taxes which the refund may be offset against (because the taxpayer is in a condition of significant hardship), an offset bypass refund occurs. However, section 6402(a) permits offset bypass refunds only where an overpayment exists. Once the overpayment is credited, and the liability is paid, the overpayment ceases to exist.² Under the facts of this case, there is no overpayment to refund, and there is no authority for the Secretary, absent clerical or mathematical error,³ to reverse a tax payment properly credited to an outstanding liability of a taxpayer. IRM 21.4.6.9.2(1)h.

The Taxpayer Advocate may require the Secretary of the Treasury, or his subordinates, to “take any action as permitted by law.” I.R.C. § 7811(b)(2). In this regard, the Taxpayer Advocate may issue a taxpayer assistance order (TAO) requiring the Internal Revenue Service (Service) to release levied property or stop any action or refrain from taking further action against a taxpayer. The Taxpayer Advocate may not, however, order the Secretary, and by delegation the Commissioner of Internal Revenue, to take any action the Secretary is not

¹ However, an overpayment cannot be refunded, and must be applied to, any outstanding debt for child support or any non-tax debt owed to a federal agency. I.R.C. § 6402(c) & (d). Also, where the overpayment results from an installment, the overpayment must first be credited against any unpaid installments. I.R.C. § 6403.

² See, e.g., SCA 1998-002 (addressing overpayments in the context of interest netting).

³ Mathematical or clerical errors may generally be undone by the Service. See, e.g., I.R.C. § 6213(b)(1), Matter of Bugge, 99 F.3d 740, 745 (5th Cir. 1996) (unauthorized and accidental abatement of assessment is ineffective), Crompton-Richmond Co., Inc. v. United States, 311 F.Supp. 1184, 1186 (S.D. N.Y. 1970) (when abatement issued because of mistake of fact or bookkeeping error, assessment may be reinstated).

permitted to take in his own right under the Internal Revenue Code. Specific statutory authority is required for the Service to reverse a completed transaction. E.g., I.R.C. § 6323(j) (withdrawal of notice of federal tax lien), § 6404 (abatement of penalty and interest), § 6343 (release of levy). As previously mentioned, there exists no specific statutory authority for the Service to reverse an overpayment that already has been credited against a past due account. Therefore, the Taxpayer Advocate would have no authority to issue a TAO to require such a refund. Treas. Reg. § 301.7811-1(c)(3).⁴ See also IRM Problem Resolution Program Handbook No. 1.2.7.9 § 35(12).2 (taxpayer advocate cannot refund an overpayment once it has offset to the balance due).

Finally, the Office of the Taxpayer Advocate recognizes the foregoing as Counsel's position, and consequently has requested a legislative change be made to section 6402(a). See 1998 IRS National Taxpayer Advocate's Annual Report to Congress, Proposal No. 36 at 135 ("It is the Chief Counsel's opinion that the Service may bypass a refund offset under section 6402(a) only if the action is initiated prior to the assessment date of the return creating the overpayment").

If you have any questions, please call 202/622-3620.

⁴ Although the ability of the Taxpayer Advocate to issue TAOs was broadened by the 1998 amendments to I.R.C. § 7811(a), those amendments do not give the Taxpayer Advocate additional authority not granted to the Secretary.