



OFFICE OF
CHIEF COUNSEL

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
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INTERNAL REVENUE SERVICE NATIONAL OFFICE FIELD SERVICE ADVICE

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MEMORANDUM FOR

FROM: Nancy Romano
Senior Technician Reviewer CC:DOM:FS:PROC

SUBJECT: Internal Revenue Service National Office Field Service
Advice

This Field Service Advice responds to your memorandum dated September 14, 1998. Field Service Advice is not binding on Examination or Appeals and is not a final case determination. This document is not to be cited as precedent.

LEGEND:

X

Y

Tax Year 1

Year 1

Date 1

Date 2

Date 3

Date 4

Date 5

Date 6

Date 7

Date 8

Date 9

Date 10

Date 11

A

B

C

State 1

ISSUE(S):

- 1) Under what theory or policy, if any, may the Service refund a gift tax payment made by an estate on behalf of the decedent's incompetent surviving spouse based upon an erroneous second gift tax return, when the estate, but not the surviving spouse filed a timely refund claim and the Service did not timely notify the estate or the surviving spouse that the deceased spouse had already filed a gift tax return accounting for the gift tax obligation.
- 2) What action should the Service take to protect itself from a whipsaw claim by the surviving spouse.

CONCLUSIONS:

- 1) When spouses file two gift tax returns pursuant to I.R.C. § 2513, Gift by Husband or Wife to Third Party, each spouse is jointly and severally liable for the entire amount of both gift tax returns. Because X and Y are both subject for the full amount of the gift tax, X has paid the total gift tax deficiency, X's estate has standing to file a claim for refund for the full gift tax overpayment.
- 2) I.R.C. § 6402 provides that the only person who can be paid a refund of an overpayment is the person who made the overpayment. Y did not make any payment for the gift tax. X's estate paid the full amount owed for the gift tax. Therefore, Y is precluded from both filing a claim for refund and filing a suit for a refund.

FACTS:

X and Y were married. In Tax Year 1, X created a family trust for the benefit of Y and X's children. On Date 1, X and Y both mailed gift tax returns for Tax Year 1, which included gifts made to the family trust. These gift tax returns were deemed filed on April 15 of Year 1. X and Y filed the gift tax returns and elected to have the gifts treated as if one half was attributable to X and one half was attributable to Y pursuant to § 2513. X elected to treat the trust as a "qualified terminable interest" and claimed a marital deduction under § 2523. Y used the unified credit under § 2501 to offset Y's gift tax. Therefore, no gift taxes were due for either X or Y.

X died on Date 2. Shortly after X's death, Y was determined to be incompetent, and a guardian was appointed for Y. X's estate representative erroneously believed that X had not filed the gift tax returns before X died. X's estate representative did not contact the Service to confirm whether gift tax returns had not been filed for Tax Year 1. X's estate representative and Y's guardian reached an agreement on Date 3, whereby X and Y would elect to have X's gift be treated as if half was made by X and Y pursuant to § 2513. X's estate representative and Y's guardian further agreed that the estate representative of X would be responsible for paying the entire gift tax liability reported on X and Y's Tax Year 1 gift tax returns.

On Date 4, X's estate representative and Y's guardian prepared "delinquent" gift tax returns. These "delinquent" returns reported that X owed tax and interest in the amount of A, and Y owed tax and interest in the amount of B, for a total gift tax in the amount of C. X's estate paid the full gift tax liability of C. This payment was posted on Date 5. X's estate representative filed an estate tax return on Date 4. The estate tax return was audited on Date 7.

With regard to X's estate, Y's guardian elected to take a statutory share rather than take under the will. Under the law of State 1, the statutory share is reduced by administrative expenses including the estate taxes. On Date 6, the guardian for Y contested the administrative accounting for X's estate. Y's guardian filed a suit in State 1 alleging that the trust should have paid the federal gift taxes attributable to the gifts in Tax Year 1, not the estate. As a result of the litigation in State 1, X's estate filed a Protective Claim for Refund for the full amount of gift taxes paid in the amount of C on Date 8. The Protective Claim for Refund was not signed by Y, and it did not list Y as a claimant.

The two year period of limitations on the refund for the full payment made on Date 5 expired on Date 9. Two days after the expiration date, on Date 10, the Service advised X's estate representative that gift tax returns had already been filed for Tax Year 1 in Year 1. X's estate filed a second claim for refund the next day on Date 11 for the full gift tax paid on behalf of both X and Y in the amount of C. Y has never filed a claim for refund for amount B, which was paid by X's estate.

LAW AND ANALYSIS

ISSUE 1) Jurisdiction over a suit for refund of taxes under 28 U.S.C. § 1346 is proper only if certain jurisdictional prerequisites are satisfied. That is, a taxpayer must pay the full amount of the tax and file a timely administrative claim for refund prior to filing suit. Flora v. United States, 362 U.S. 145 (1960); I.R.C. § 7422 (a). Section 7422 (a) states that no suit or proceeding for a refund shall be maintained in any court until a claim for credit or refund has been duly filed with the Secretary. Section 6511 (a) provides a limitation period for a taxpayer to file a claim for refund:

Claim for credit or refund of an overpayment of any tax imposed by this title in respect of which tax the taxpayer is required to file a return shall be filed by the taxpayer within three years from the time the return was filed or two years from the time the tax was paid, whichever of such periods expires the later, or if no return was filed by the taxpayer, within two years from the time the tax was paid.

In the case at issue, the overpayment of tax was made by X's estate on Date 5. Therefore, a claim for refund must have been made by the taxpayer within two years from Date 5, which is Date 9. X's estate filed a Protective Claim for Refund within the two year limitation period on Date 8.

Informal claims for refund have long been recognized as a valid claim, which tolls the limitation period from running. New England Electric Systems v. United States, 32 Fed. Cl. 636, 641 (1995). An informal claim for refund "must have a written component and should adequately apprise the Internal Revenue Service that a refund is sought and for certain years." United States v. Commercial National Bank of Peoria, 874 F.2d 1165, 1171 (7th Cir. 1989). The specific legal formulations of the claims need not be made. American National Bank and Trust Co. v. United States, 594 F.2d 1141, 1143 n.1 (7th Cir. 1979). An informal claim is adequate if it furnishes sufficient information to allow the Service to make a reasonable and intelligent investigation and evaluation of the taxpayer's claim. Id.

The Date 8 Protective Claim for Refund was in writing, and it advised the Service that the estate of X was claiming a refund for Tax Year 1 in the amount of C. The claim further advised the Service that X's estate was claiming a refund for the gift tax paid by the estate. Although the Date 8 Protective Claim for Refund stated that the reason for the protective claim was the litigation between the estate of X and Y's guardian, it provided the Service with sufficient notice that a refund was sought for a certain tax year, which tolls the limitation period for the filing of a proper claim. Gallo v. United States, 950 F. Supp. 1246 (S.D.N.Y. 1997). Therefore, even if the Date 8 Protective Claim for Refund cannot qualify as a claim for refund, it is sufficient to qualify as an informal claim for refund, which tolled the limitation period.

The estate of X timely filed a claim for refund for the amounts erroneously paid for both X and Y's gift tax. Clearly the estate of X can file a claim for refund for X. The question then becomes whether the estate of X can file a claim for refund for the amounts erroneously paid for Y's gift tax. Generally, a person may not file a claim for refund unless they are the taxpayer who was assessed with the tax deficiency. United States v. Williams, 514 U.S. 527 (1995). The courts, however, have allowed third parties to have standing to file a claim for refund when that third party has paid the tax under protest, in order to remove a tax lien or a levy

against property belonging to that third party. United States v. Williams, 514 U.S. 527 (1995); WWSM Investors v. United States, 64 F.3d 456 (9th Cir. 1995).

In the case at issue, the determination of whether or not the estate of X paid the full gift tax amount under protest does not need to be made if X was a taxpayer for the full gift tax amount. In the returns prepared by the estate representative of X and Y's guardian, the gift tax liability was equally divided between X and Y pursuant to § 2513. Section 2513 states that "a gift made by one spouse to any person other than his spouse shall, for the purposes of this chapter, be considered as made one-half by him and one-half by his spouse..." Section 2513 further provides that the liability with respect to the entire tax imposed by this chapter of each spouse shall be joint and several. Therefore, each spouse is liable for the entire amount of the gift tax.

Section 7701 (a)(14) defines a taxpayer as any person subject to any internal revenue tax. Because X and Y are both jointly and severally liable for the full amount of the gift tax, X and Y are both taxpayers for the full amount of the gift tax. Since X's estate paid the entire gift tax liability and was liable under § 2513 for the full amount of the gift tax, the estate of X has standing to file a claim for refund for the full gift tax amount of C, and a Williams standing determination does not need to be made.

ISSUE 2) I.R.C. § 6402 (a) states that:

In the case of any overpayment, the Secretary, within the applicable period of limitations, may credit the amounts of such overpayment, including any interest allowed thereon, against any liability, in respect of an internal revenue tax on the part of the person who made the overpayment and shall, subject to subsections (c) and (d), refund any balance to such person.

In Bruce v. United States, 759 F.2d 755 (9th Cir. 1985), the court held that the taxpayer who had no financial interest in the litigation because his attorney, rather than the taxpayer, had paid the deficiency and interest, did not have standing to obtain a refund. Section 6402 (a) provides that the only person who can be paid a refund of an overpayment is the person who made the payment. Estate of Fink v. United States, 852 F.2d 153 (6th Cir. 1988); Scanlon v. United States, 330 F. Supp. 269 (E.D. Mich 1971). The language of section 6402 (a) is specific in limiting the refund of overpayments to the person who made the overpayment. Id.

As stated previously, both X and Y were liable for the full amount of the paid gift tax. However, Y did not pay any of the gift tax. The estate of X is the only taxpayer who made the payment. In fact, the estate of X and Y's guardian have a written agreement that the estate of X would pay the full gift tax amount.

Therefore, only the estate of X can file a claim for refund for the overpayment amount, and Y lacks standing to file a claim for refund. Y would also be prohibited from filing a claim for refund at this time, because Y failed to file a timely claim for refund pursuant to § 6511 (a).

If you have any further questions, please call the branch telephone number.