DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

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MEMORANDUM FOR ASSOCIATE AREA COUNSEL (SBSE) - AREA 3
Attn: Kenneth Hochman

FROM: James C. Gibbons
Chief CC:PA:APJP:1

SUBJECT: Question of Apportionment Between Spouses of Overpayment Credited to Estimated Tax

This Chief Counsel Advice is in response to your request dated April 9, 2001. In accordance with I.R.C. § 6110(k)(3), this Chief Counsel Advice should not be cited as precedent.

Your request relates to a dispute over the allocation of an overpayment from a married couple's joint return for 1998 which was credited to their 1999 estimated tax. Husband and wife filed separate returns for 1999. The husband claimed the entire amount of the overpayment as estimated tax on his 1999 return, and the wife claimed none of it. However, the wife is now seeking to have a portion of the credit allocated to her.

The proper method for apportioning the amount in dispute depends on whether it is treated as a joint estimated tax payment for 1999, or an overpayment from 1998. If it is an estimated tax payment, then it must also be determined whether the parties have agreed on its allocation.

The division of joint estimated tax payments between spouses who file separate returns is not specifically covered in section 6654 of the Code, which deals with estimated tax penalties for individuals, except by a reference in the section 6654 regulations to regulations under former section 6015. Section 6015, as in effect for years prior to 1985, permitted the division of estimated tax payments by spouses who had filed a joint estimated tax declaration but then chose not to file joint returns. Section 1.6015(b)-1(b) of the Income Tax Regulations was promulgated setting forth rules for dividing the joint estimated tax payments. Pursuant to that regulation, joint estimated tax payments may be treated as payments on account of the tax liability of either the husband or the wife for the taxable year, or may be divided between them in such manner as they agree. Thus if the spouses agree to an allocation of the payments, the Service will allocate the payments as they have agreed. In the absence of an agreement, the Service will allocate the payments in proportion to the spouses' separate tax for the year. A formula is provided to compute the allocation, based on each spouse's separate tax.

Although section 6015 of the Code was repealed in 1984 (current section 6015 is the innocent spouse provision), the Service has continued to use the allocation rules set forth in section 1.6015(b)-1(b). The current Internal Revenue Manual provision, IRM 21.6.3.4.2.3.3 follows these allocation rules, and Publication 505, Tax Withholding and Estimated Tax, directs taxpayers to follow them as well. In each of these sources it is clear that the taxpayers may agree to divide the estimated tax payments as they like, but in the absence of agreement, the Service will allocate the payments according to the formula in the regulation notwithstanding the repeal of the declaration of estimated tax requirements of section 6015.

The allocation rules of section 6015 set forth a rational means of dividing joint estimated tax payments, and should continue to be followed. In United States v. Bell, 818 F. Supp. 444, 447, n.6 (D. Mass. 1993), the Service argued that § 1.6015(b)-1(b) of the regulations still governed the proper division of estimated tax payments made jointly but claimed separately. The district court stated that, insofar as the regulation represents a facially rational method for dealing with the problem of jointly made but separately claimed estimated tax payments, the IRS is entitled to employ that regulation to determine the proper method of allocating credits against such payments.

Similar allocation formulas in other regulations also lend support to the section 6015 allocation formula. Section 1.6654-2(e)(1) provides for a similar allocation formula to determine the preceding year's tax (for purposes of the section 6654(d)(1)(B)(ii) safe harbor) in the case of married taxpayers who are filing separate returns but filed jointly last year and refers to § 1.6015(b)-1(b) for rules with respect to the allocation of joint payments of estimated tax. See also § 20.2053-6(f) of the Estate Tax Regulations, which sets forth a similar allocation formula to determine spouses' separate tax and refers to § 1.6015(b)-1(b) to compute the decedent-spouse's contribution to joint tax, in order to determine the decedent's share of a refund.

Therefore, if the amount in dispute is an estimated tax payment for 1999, unless the husband and wife have agreed as to the division of their estimated tax payments, the Service should follow the rules set forth in section 1.6015(b)-1(b) and allocate the amount to the spouses' separate tax liabilities for 1999.

However, the disputed amount arose from an overpayment of this couple's 1998 tax liability. Section 6402(a) provides that the amount of any overpayment may be credited against the liability of the person who made the overpayment, or refunded to such person. An overpayment can therefore not be refunded or credited to a person who did not pay the tax giving rise to the overpayment.

It is well settled that when a husband and wife file a joint return, each spouse has a separate interest in the jointly reported income and a separate interest in any overpayment. Rev. Rul. 74-611, 1974-2 C.B. 399. The Service cannot apply the entire joint overpayment to a previous deficiency of one of the spouses. Maragon v. United States, 153 F. Supp. 365 (Cl. Ct. 1957). Overpayments by joint filers are apportionable

to each spouse to the extent that they contributed to the overpaid amount. Ragan v. Commissioner, 135 F. 3d 329 (5th Cir. 1998). See also Gens v. United States, 615 F.2d 1335 (Cl. Ct. 1980); Rosen v. United States, 397 F. Supp. 342 (E.D. Pa. 1975); United States v. Mooney, 400 F. Supp. 98 (N.D. Tex. 1975).

In Rev. Rul. 80-7, 1980-1 C.B. 296, the Service provided the proper method for computing the amount of an overpayment claimed in a joint return that may be credited to one spouse's unpaid separate tax liability. This revenue ruling applies the separate tax formula in regulation sections 20.2053-6(f) and 1.6654-2(e) to determine each spouse's share of the joint tax liability. Each spouse's share of the joint liability is based on the tax liability for which each would have been liable had each spouse filed a separate return for the tax year at issue. Section 1.6654-2(e). A spouse's contribution toward the payment of the joint liability must then be established. If the spouses made joint estimated tax payments, the payments are allocated pursuant to the following formula: (separate tax liability/both separate tax liabilities) x estimated tax payments. Therefore, the Service will determine a spouse's individual refund by subtracting the spouse's individual liability from the spouse's contribution toward the joint tax liability. See also Rev. Rul. 85-70, 1985-1 C.B. 361, amplifying Rev. Rul. 80-7 with respect to spouses residing in community property states.

In this case, the husband and wife had an overpayment on their 1998 return as a result of their joint estimated tax payments. However, their overpayment was applied to their 1999 estimated tax payments. The question is therefore whether to apply the provisions of Rev. Rul. 80-7 to determine each spouse's separate interest in the 1998 overpayment, or whether to treat the 1998 overpayment as a joint estimated tax payment in 1999. If we apportion the amount of this overpayment based on Rev. Rul. 80-7, then we must determine each spouse's portion of the refund by determining the spouse's individual contribution to the 1998 overpayment and individual liability for the 1998 tax. However, if the 1998 overpayment is a joint estimated tax payment in 1999, then we allocate such payment, in the absence of an agreement by the spouses, in proportion to the separate tax liabilities of the spouses in 1999.

In Rev. Rul. 76-140, 1976-1 C.B. 376, the Service ruled under similar facts that the amount of the joint overpayment, which was credited to the following year's estimated tax, should be allocated between them pursuant to the section 6015 allocation formula in the absence of a contrary agreement by the parties. G.C.M. 36485 provides that once the spouses elected to credit the amount of the overpayment to next year's estimated tax, it ceased to be an overpayment and became an estimated tax payment. See sections 6402(b) and 301.6402-3(a)(5) of the Code and regulations, respectively. It is no longer property of the parties, but is a tax payment belonging to the United States. See section 6513(d). Therefore, allocating the amount credited pursuant to the section 6015 formula is not abridging the parties of their property rights to the overpayment. They exercised those rights when they jointly credited their joint overpayment to estimated tax.

We believe that Rev. Rul. 76-140, as supported by the analysis set forth in G.C.M. 36485, remains the correct approach in determining the apportionment of estimated tax payments arising from joint overpayments in the prior year.[1] Therefore, the allocation formula of section 6015, using the separate tax liabilities of the spouses in 1999, should be applied in this case, in the absence of an agreement between the spouses. What remains to be determined is whether there is an agreement.

According to the facts presented, the returns as filed by husband and wife evidenced an agreement to allow the full amount to the husband and none to the wife. She is now claiming some of the credit. In Rev. Rul. 76-140, we stated that in such a case, the spouse now claiming there was no agreement should have the burden of proof with regard to that issue. Therefore, she should present some evidence that the returns filed did not reflect an agreement of the parties.

We hope this is helpful. If you need further assistance, please call Nancy Rose at (202) 622-7028.

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[1]As noted in your request for advice, the district court in United States v. Elam, 95-2 USTC ¶ 50,348 (C.D. Calif. 1995), rev'd and remanded, 112 F.3d 1036 (9th Cir. 1997), did not follow the allocation formula of section 1.6015(b)-1(b) under similar facts, treating the amount as an overpayment which must be allocated according to the spouses' contributions rather than as an estimated tax payment. The government apparently did not argue that the spouses' § 6402(b) election converted the overpayment to an estimated tax payment. On appeal the Ninth Circuit reversed the district court's granting of a motion for summary judgment and remanded to the lower court to consider the effect of a pre-nuptial agreement in determining the source of the overpayment. Thus, it appeared to accept, without revisiting the issue, the district court's determination that an overpayment credited to next year's estimated tax remained an overpayment to be allocated between the spouses according to contribution. We believe that the Elam decision does not correctly reflect the interplay between sections 6402(b), 6513(d), and 1.6015(b)-1(b). We believe that the analysis contained in Rev. Rul. 76-140 remains the correct position the Service should follow.