



OFFICE OF
CHIEF COUNSEL

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
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MEMORANDUM FOR ASSOCIATE AREA COUNSEL, KANSAS CITY
(SMALL BUSINESS/SELF-EMPLOYED: AREA 5)
CC:SB:5:KCY

FROM: Pamela Wilson Fuller
Senior Technician Reviewer, Branch 1
Administrative Provisions & Judicial Practice

SUBJECT: Significant Service Center Advice
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In accordance with I.R.C. § 6110(k)(3), this Chief Counsel Advice should not be cited as precedent.

This responds to your request for Significant Advice, dated April 12, 2001, in connection with a series of questions concerning the accrual of interest on various types of monies that the Internal Revenue Service must return to the taxpayer in connection with Offers in Compromise.

Issues

(1) Taxpayer enters into an installment agreement prior to submitting an offer in compromise ("OIC"). Taxpayer remains in compliance with the installment agreement by making payments after the OIC is proposed. If the OIC is accepted, then the Internal Revenue Service ("Service") refunds any installment payments made after acceptance of the offer. Does the Service pay interest on that refund if the refund is not made within 45 days of acceptance of the offer?

(2) Taxpayer submits a deposit with the OIC, but the deposit is larger than the amount called for under the terms of the offer. If the offer is accepted, then the excess deposit is refunded to the taxpayer. Does the excess deposit bear interest if not made within 45 days of acceptance of the offer?

(3) Does a deposit accrue interest if the offer in compromise is rejected and the deposit is not returned to the taxpayer within 45 days?

Conclusions

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(1) A payment made, pursuant to an installment agreement, after the acceptance of an OIC by the Service is an overpayment of tax. As such, the overpayment is subject to the offsetting provisions of section 6402 of the Code. If there exists no outstanding liability to which the overpayment can be credited, the money must be refunded to the taxpayer with interest if it is not refunded within 45 days of the taxpayer filing a claim for refund.

(2) A deposit proffered in connection with an OIC prior to acceptance of the OIC does not accrue any interest, regardless of whether or not it is returned to the taxpayer within 45 days.

(3) A refunded deposit made in connection with an OIC that is rejected by the Service will not be refunded with any interest, regardless of whether or not the deposit is returned to the taxpayer within 45 days of the OIC rejection.

Analysis

Issue 1:

Generally, the Service is required to pay interest on any overpayment of tax from the date the overpayment arises until the money is refunded to the taxpayer. I.R.C. § 6611(a) and (b). A noted exception to this rule is found in section 6611(e)(1) of the Code which provides that the Service is not obligated to pay overpayment interest on any amount that is refunded to the taxpayer within 45 days of either the last day prescribed for filing, the date the return was filed if after the last day prescribed for filing, or after the taxpayer files a claim for refund. Section 6611(e)(3) provides that for IRS initiated adjustments, the Service is directed to subtract 45 days from the number of days that interest would otherwise be allowed. Any such interest paid on an overpayment will be paid at the rate authorized by section 6621 of the Code and compounded daily.

Paragraph 8(f) of the standard OIC form provides the following:

The IRS will keep all payments and credits made, received or applied to the total original tax liability before submission of this offer. The IRS may keep any proceeds from a levy served prior to the submission of the offer, but not received at the time the offer is submitted. If I/we have an installment agreement prior to submitting the offer, I/we must continue to make the payments as agreed while this offer is pending. Installment agreement payments will not be applied against the amount offered.

To the extent that the installment payments exceed the amount of tax owed, they are overpayments of tax. See I.R.C. § 6401(c). Section 6403 of the Code provides for the

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overpayment of an installment to be refunded to the taxpayer if there is no other unpaid balance of the installment plan to which the overpayment can be credited against.¹

To the extent that an installment payment constitutes an overpayment of tax, it is subject to the offsetting provisions of section 6402 of the Code. Section 6402 invests the Secretary with the right, in the case of an overpayment, to credit the amount 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. Only then is the Service required, subject to subsections (c), (d), and (e), to refund the balance to the taxpayer. I.R.C. § 6402(a).

Thus, if an installment payment made after acceptance of an OIC creates an overpayment, the Service is only obligated to pay interest on that overpayment if it does not issue a refund to the taxpayer within 45 days after the taxpayer files a claim for refund.

Issues 2 & 3:

The fact that the Service only pays interest on overpayments and not deposits is a well-established principle of law. This general principle remains unaltered by the rules and regulations concerning OIC. Section 7809(b)(1) of the Code provides that sums offered in compromise under section 7122 shall be deposited in a deposit fund account. The Code further provides that upon the acceptance of such OIC, the amount accepted shall be withdrawn from such deposit fund account and deposited in the Treasury as Internal Revenue tax collections. Upon the rejection of any such offer, the Secretary shall refund to the maker of such offer the amount thereof. The statute makes no provision for the payment of interest.²

The Treasury regulations promulgated under section 7122 of the Code addresses interest on deposits proffered in connection with an OIC. The regulation makes it clear that the Service will not pay any interest on a deposit made in conjunction with an OIC. If an offer to compromise is withdrawn, is determined to be nonprocessable, or is submitted solely for purposes of delay and returned to the taxpayer, any amount tendered with the offer, including all installments paid on the offer, will be refunded *without interest*. If an offer is rejected, any amount tendered with the offer, including all installments paid on the offer, will be refunded, *without interest*, after the conclusion of any review sought by the taxpayer with Appeals. See Treasury Regulation 301.7122-

¹This refund must be performed in accordance with the provisions of section 6402 of the Code. Thus, the overpayment can be offset against another outstanding tax liability of the taxpayer as well as any of the other offset provision outstanding liabilities set forth in section 6402.

²The government, as the sovereign, enjoys sovereign immunity as a right against the imposition of interest. This, unless the statute specifically provides for the payment of interest by the government, it cannot be required to do so. See Angarica v. Baynard, 127 U.S. 251 (1888) and Library of Congress v. Shaw, 478 U.S. 310 (1986).

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1T(g). In accordance with section 301.7122-1T(j), these regulations are effective for any OIC submitted on or after July 21, 1999, through July 19, 2002.

Courts have long recognized that a deposit made in connection with an OIC does not bear interest. Moskowitz v. United States, 285 F.2d 451 (1961), states that a deposit of money representing an OIC prior to the time a deficiency has been assessed, and where that same money is more than the ultimately determined liability of the taxpayer, such money does not constitute an overpayment of taxes on which interest is payable.

Furthermore, this principle is embodied in the language of the standard OIC agreement, item 8(c), which states "I/we understand that the IRS will not pay interest on any amount I/we submit with the offer." The Service also includes a directive to the service centers in IRM 8(13)(32) stating that interest is not paid on funds on deposit regardless of whether the offer is accepted, rejected, or withdrawn.

For the reasons previously stated, no interest is paid on a deposit that is returned to the taxpayer.

Please call if you have any questions.