



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

OFFICE OF
CHIEF COUNSEL

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INTERNAL REVENUE SERVICE NATIONAL OFFICE SERVICE CENTER ADVICE

MEMORANDUM FOR PAUL A. SOBERT
NATIONAL ACCOUNT MANAGER
WAGE & INVESTMENT W:CAR:SPEC:FO:NAM

FROM: Pamela W. Fuller
Senior Technician Reviewer
Administrative Provisions & Judicial Practice CC:PA:APJP:1

SUBJECT: Refunding Excess Deposits of Withheld Employment Taxes

This Chief Counsel Advice responds to your memorandum dated July 10, 2001. In accordance with I.R.C. § 6110(k)(3), this Chief Counsel Advice should not be cited as precedent.

ISSUE

Whether there is an expedited process to refund excess deposits of withheld employment tax, before a Form 941 is filed?

CONCLUSIONS

If federal tax deposits (FTDs) or federal tax payments (FTPs) are made using the Electronic Federal Tax Payment System (EFTPS), the Automated Clearing House (ACH) rules will govern ACH credit and debit entry returns and reversals. These rules allow the various participants to an ACH transaction to reverse or return a file, in limited situations, as long as it is initiated within the specified time frames. No refunds of FTDs or FTPs will be made through EFTPS. A refund request may be made using existing tax refund procedures which do not specifically authorize the Service to grant an expedited refund. However, the procedures indicate that if error results in a significant hardship, the taxpayer may file a Form 911 in order to attempt to resolve the significant hardship.

FACTS

An employer uses a payroll agent to remit its deposits to the Service. One of these deposits resulted in a substantial excess remittance of withheld employment tax for one quarter. The payroll agent used its own money to make the remittance and the employer was required to reimburse the payroll agent. The employer claims that the excess remitted amount was sent in error and would like the excess remittance refunded before the Form 941 is filed for the quarter. The payroll agent has stated that it has had similar situations like this occur and the Service was able to accommodate its request for an expedited refund.

LAW AND ANALYSIS

a) General Rule for Refunds

Section 6413(a) of the Internal Revenue Code (the Code) states that if more than the correct amount of tax imposed by sections 3101 or 3111 (FICA), 3201 or 3221 (RRTA), or 3402 (withholding from wages) is paid or deducted with respect to any payment of remuneration, proper adjustments, with respect to both the tax and the amount to be deducted, shall be made, without interest, in such manner and at such times as the Secretary may by regulations prescribe.

If more than the correct amount of tax imposed under FICA, RRTA, or withholding from wages is paid or deducted with respect to any payment of remuneration and the overpayment cannot be adjusted under section 6413(a), the amount of the overpayment shall be refunded in such manner and at such times (subject to the statute of limitations properly applicable thereto) as the Secretary may by regulations prescribe. IRC § 6413(b).

Treasury Regulation section 31.6414-1(a) states that any employer who pays to the district director more than the correct amount of tax under section 3402... may file a claim for refund of the overpayment or may claim credit for such overpayment, in the manner and subject to the conditions stated in this section and § 301.6402-2 of this Chapter (Regulations on Procedure and Administration).

Section 6402(a) grants the Service the authority to credit overpayments against certain outstanding liabilities and to refund the balance to the taxpayer. Section 6402(a) of the Code provides that in the case of any overpayment, the Secretary, within the applicable period of limitations, may 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 and shall, subject to subsections (c), (d), and (e), refund any balance to such person.¹

¹ Subsections (c), (d), and (e) address: offset of past due support against overpayments, collection of debts owed to federal agencies, and collection of past due, and legally enforceable state income tax obligations.

Treasury Regulation section 31.6402(a)-2(a)(1) states that any person who pays to the district director more than the correct amount of employee tax under sections 3101 or 3201, (or) employer tax under sections 3111 or 3221... may file a claim for refund of the overpayment, or may claim credit for such overpayment, in the manner and subject to the conditions stated in this section and § 301.6402-2.

The claim must be filed prior to the expiration of the period of limitations. Treas. Reg. § 301.6402-2(a)(1). The claim must set forth in detail each ground upon which a credit or refund is claimed and facts sufficient to apprise the Commissioner of the exact basis thereof. The grounds and facts must be made under the penalties of perjury. Treas. Reg. § 301.6402-2(b)(1).

In general, except with respect to refunds claimed on the taxpayer's original tax return or on an application for tentative carryback on which a taxpayer claims an overpayment of tax, the Service does not make refunds of tax, unless it has first determined that there is an overpayment of tax to be refunded. Refund claims submitted pursuant to Treasury Regulation sections 301.6402-2 and 3, do not, in themselves, provide a basis for making a refund of tax, until the Service determines that an overpayment exists and that the taxpayer is entitled to the refund. The Service is not required or authorized by statute to refund tax payments claimed by a taxpayer if an overpayment has not been determined. Lewis v. Reynolds, 284 U.S. 281 (1932).

An overpayment is the amount by which a payment of tax exceeds the correct total amount of the taxpayer's liability for a tax period or any amount that was assessed or collected after the expiration of the applicable period of limitations. I.R.C. § 6401; Jones v. Liberty Glass Co., 332 U.S. 524 (1948). Treasury Regulation sections 31.6011(a)-1, (a)-2, and (a)-4 contemplate quarter year tax periods for taxes under FICA, RRTA, and withholding from wages even though these tax payments are required to be made each deposit period within the quarter. These types of deposits are prepayments, and as such, an overpayment of such prepayments cannot be determined in the absence of the close of the quarter and the filing of a quarterly return. Sections 6402, 6413, 6414, and the regulations do not indicate that the Service is authorized to grant an expedited refund. Therefore, under existing refund procedures, a refund of overpaid withholding tax cannot usually be granted until after the close of the quarter and after a quarterly return claiming the refund has been filed. However, if such an overpayment creates a significant hardship, the taxpayer may contact the Service and request relief.

b) EFTPS Rules for Returns and Reversals

If the FTDs or FTPs are accomplished using EFTPS, the ACH rules will govern ACH credit and debit entry returns and reversals. See Section 9 and 10 of Rev. Proc. 98-32, 1998-1 C.B. 935. Under the ACH rules, returns or reversals may be made to correct a duplicated or erroneous file. Generally, the parties to an ACH transaction are the Originator (the party initiating the entry), the Originating Depository Financial Institution

(the institution that receives payment instructions from the Originator and forwards it to the ACH Operator), the ACH Operator (the central clearing facility to or from which Depository Financial Institutions (DFIs) receive or transmit ACH entries), the Receiving Depository Financial Institution (the DFI to which the ACH Operator sends ACH entries, and which posts the entries to the Receiver's accounts), and the Receiver (the consumer or organization which authorizes the Originator to initiate an ACH entry to the Receiver's account). Reversals and returns can be initiated by the various parties to the ACH transaction, depending on the reason for the reversal or return. See 2001 ACH Rules, NACHA Operating Rules, Article II, Sections 2.4, 2.5, Article V, and Article VII. It is the responsibility of the party that originated the duplicate or erroneous file to reverse it. See 2001 ACH Rules, NACHA Operating Guidelines, Section III, Chapter IV. The agency initiating the reversal must certify to the Service that the reversal does not violate applicable law or regulations. See 31 C.F.R. § 210.6(f) (2001). Reversal of the file by an Originator, Originating Depository Financial Institution, or ACH Operator must be initiated in a time frame so that it can be delivered or made available to the Receiving Depository Financial Institution within five banking days after the settlement date for entries within the file, and notification must be transmitted to any other parties that the ACH rules require within any time frames specified in the ACH rules. See 2001 ACH Rules, NACHA Operating Rules, Article II, Sections 2.4 and 2.5.

If a return or reversal cannot be made under the ACH rules, a refund can be accomplished using existing tax refund procedures which usually do not authorize the Service to grant a refund until after the close of the quarter and after a quarterly return claiming the refund has been filed. See Section 13 of Rev. Proc. 98-32 and "General Rules for Refunds" in this document. However, Rev. Proc. 98-32 indicates that if the taxpayer's error results in a significant hardship, the taxpayer may contact the Service for assistance at (800) 829-1040. Taxpayers suffering a hardship may also file a Form 911, Application for Taxpayer Assistance Order, with the Taxpayer Advocate. If the Taxpayer Advocate determines that a significant hardship exists, then it may issue a Taxpayer Assistance Order to resolve the significant hardship.

DISCLOSURE STATEMENT

This writing may contain privileged information. Any unauthorized disclosure of this writing may have an adverse effect on privileges, such as the attorney client privilege. If disclosure becomes necessary, please contact this office for our views.

Please call if you have any further questions.