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INTERNAL REVENUE SERVICE NATIONAL OFFICE SERVICE CENTER ADVICE

MEMORANDUM FOR M. K. Mortensen
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FROM: Pamela W. Fuller
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CC:PA:APJP:1

SUBJECT: Significant Service Center Advice
Offset Bypass Refunds

This responds to your memorandum dated April 25, 2001, in connection with a question posed by the Ogden Service Center. In accordance with IRC § 6110(k)(3), this Chief Counsel Advice should not be cited as precedent.

ISSUES

1. Can the Internal Revenue Service ("Service") reverse an offset of an overpayment where the Service made an error which prevented the Taxpayer Advocate Service from issuing a hardship refund?
2. If, after the Service has made the initial assessment of a return, the Service makes a subsequent adjustment which results in an overpayment, can the Service issue a hardship refund on this new overpayment before the adjustment posts to the account and is offset against a pending federal tax liability?

CONCLUSIONS

1. Generally, the Service is not authorized to reverse an offset of an overpayment that has been properly credited to a taxpayer's outstanding tax liability. However, where the Service performs such an offset due to clerical error, the Service may reverse the offset.

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2. Yes, the Service can issue a hardship refund on the new overpayment.

FACTS

During the filing season, taxpayers often file returns showing overpayments and claiming refunds. Some of these taxpayers have outstanding federal tax liabilities. Under normal procedures and under the authority of §6402 of the Internal Revenue Code (“Code”), the Service will offset the overpayment to pay the outstanding federal tax liability. At times, the taxpayer will contact the Service and notify the Service of a hardship situation. IRM 21.4.6.4.6. If the taxpayer can establish that a hardship exists, the Taxpayer Advocate Service will often issue an order for an offset bypass refund, a refund that will bypass the normal offset process. IRM 21.4.6.4.12. If the Taxpayer Advocate Service issues an order for an offset bypass refund after the Service has already made the offset, the Service will generally not reverse the offset to make the refund. According to Service procedures, a Taxpayer Advocate cannot refund an amount owed to the Service if the refund has offset to the balance due unless there was a clerical error that caused the refund to be offset. Taxpayer Advocates can provide full refunds prior to the 23C date of the return reflecting the overpayment. IRM 13.1.7.5.11.3(4)(c).

LAW AND ANALYSIS

Section 6402(a) of the Code provides that in the case of any overpayment, the Secretary may credit the amount of such overpayment against any outstanding federal tax liability (“offset”), or refund the overpayment, or any balance thereof, to the taxpayer.

Section 7811 authorizes the Service to exercise its discretion in issuing a refund of an overpayment in cases when the taxpayer is suffering or about to suffer a significant hardship, known as the offset bypass refund. The Service may authorize this offset bypass refund even though the taxpayer owes unpaid taxes, which the refund may be offset against. However, § 301.7811-1(c)(3) of the Regulations on Procedure and Administration (“Regulations”) allows offset bypass refunds only where an overpayment exists.

According to § 301.7811-1(c)(3) of the regulations, in the absence of an overpayment there is no authority under which the Service may release sums which have been credited against the taxpayer’s liability and deposited into the Treasury of the United States.

The Service’s internal guidance also instructs on the general rule prohibiting the Service from reversing an offset to honor a hardship refund request. The

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procedures direct the Service not to reverse an offset to honor an offset bypass refund hardship request. IRM 21.4.6.4.8.2 (Rev. 01-01-2001).

An exception to the general prohibition on reversing an offset is the judicially created doctrine known as clerical error. Succinctly stated, whenever an action occurs because of mistake of fact or bookkeeping error, that mistake can be corrected so long as this does not prejudice the taxpayer. Crompton-Richmond Co. v. United States, 311 F. Supp. 1184, 1187(S.D.N.Y. 1970). At least one other court has come to the same result by deeming the mistaken action as not being what it purported to be (“Clerical errors are by their nature not errors in judgment but merely inadvertencies”), which essentially permitted the correction to occur. Matter of Bugge, 99 F.3d 740, 745 (5th Cir. 1996)(citing NTN Bearing Corp. v. United States, 74 F.3d 1204 (Fed. Cir. 1995)).

Service procedures also reflect the clerical error doctrine. The Service’s manual states:

The Taxpayer Advocate cannot refund an amount owed to the IRS if the refund has offset to the balance due unless there was a clerical error that caused the refund to be offset. TAS can also provide a full refund prior to the 23C date of the return reflecting the overpayment. However, the manual refund must be input before the 23C date.

IRM 13.1.7.5.11.3(4)(c). See also IRM 21.4.6.4.8.1(1)(b), which states, in relevant part, that the Service may reverse an offset to “[c]orrect IRS initiated processing errors, such as math errors, data input errors, or misapplied payments.”

Issue 1

Whether the Service can reverse an offset of an overpayment depends on whether the clerical error doctrine applies. Whether the clerical error doctrine applies depends on the particular facts of the situation. The answer rests on whether the Service committed a clerical error when issuing the offset. We agree that the Service should exercise care when determining whether a clerical error has occurred. Generally, a clerical error is an immediately correctable error resulting from the copying or transmission of legal documents which is not made in the exercise of judgment or discretion, but is made by a mechanical or other inadvertence. Barron’s Law Dictionary, 74 (1996). Clerical errors are administrative, not substantive. Crompton, 311 F. Supp. at 1187. Clerical errors are not errors in judgment. Bugge, 99 F.3d at 745. If the Service determines that a clerical error has occurred, then the Service can reverse the offset so long as it does not prejudice the taxpayer.

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Issue 2

There is no distinction between the original overpayment and an overpayment created by an adjustment in tax for purposes of § 6402. Section 6402 provides that the Secretary may credit an overpayment to any outstanding federal tax liability. Section 7811 authorizes the Service to issue a refund of the overpayment when the taxpayer experiences significant hardship. As a result, the Service could issue a refund of the overpayment as long as the Taxpayer Advocate issues the Taxpayer Assistance Order prior to the offset of such overpayment.

Please call if you have any further questions.