DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224
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MEMORANDUM FOR AREA COUNSEL (SMALL BUSINESS/SELF-EMPLOYED:
                          AREA 1)
                          CC:SB:1:BOS

FROM: Pamela Wilson Fuller
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                 Administrative Provisions and Judicial Practice

SUBJECT: Significant Service Center Advice

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

This memorandum is in response to your undated request for Significant Service Center Advice concerning offsets to federal debts under section 6402 of the Internal Revenue Code.

Issue

Whether the Internal Revenue Service has the authority to bypass the other outstanding federal debt in this case and refund the overpayment directly to the taxpayer.

Conclusions

The Internal Revenue Service has no authority to bypass the other outstanding federal debt in this case.

Facts

The Internal Revenue Service ("Service") levied on the taxpayer's wages. The Service later agreed that the levy was in error. Instead of refunding the overpayment directly to the taxpayer, the Service offset the overpayment against a debt that the taxpayer owed to another federal agency. Internal Revenue Manual (IRM) provision 21.4.6.4.8.2(1)(d) states that a Debtor Master File (DMF) or Treasury Offset Program (TOP) offset may not be reversed if the offset resulted from an over-collected or erroneously collected levy, unless the Service levied another taxpayer's account.

Law and Analysis

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Section 6402(a) of the Internal Revenue Code ("Code") provides that the Internal Revenue Service *may* credit, in the case of an overpayment, the amount of the overpayment and any interest allowed on the overpayment against any liability in respect of the 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. From this language stems the Service's discretionary authority to offset overpayments against other outstanding tax liabilities.

At issue in this case, however, is whether the Service has the same discretionary authority over offsets under section 6402(d). In general, section 6402(d)(1) provides that, upon receiving notice form any Federal agency that a named person owes a past-due legally enforceable debt, the Secretary *shall* (A) reduce the amount of any overpayment payable to such person by the amount of such debt; (B) pay the amount by which such overpayment is reduced under subparagraph (A) to such agency; and (C) notify the person making such overpayment that such overpayment has been reduced by an amount necessary to satisfy such debt. Of significant importance is the fact that the statute uses the word "shall." The Supreme Court has found in numerous cases that the use of the word "shall" leaves no room for the exercise of discretion.[1]

Because section 6402(a) uses the word "shall" when referring to section 6402(d), the Service has no authority to exercise discretion when offsetting an overpayment against outstanding federal debt, *i.e.*, the offset is mandatory. Accordingly, the Service must offset an overpayment against an outstanding federal debt to another federal agency before it issues a refund to a taxpayer. If the taxpayer's overpayment exceeds the amount due under section 6402(d), the balance may be refunded to the taxpayer.[2]

For the reason above, Internal Revenue Manual (IRM) provision 21.4.6.4.8.2(1)(d) is not incorrect.

Please call if you have any questions.

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[1]For example, in <u>Griffin v. Oceanic Contractors</u>, 458 U.S. 564, 570 (1982), the Supreme Court held the statutory language, "...*shall* pay to the seaman a sum equal to two days' pay for each day during which payment is delayed, ..." left no room for the exercise of discretion in determining whether to make payment, or in determining the period of days by which the payment is to be calculated (emphasis added).

[2]Assuming taxpayer's overpayment is not also subject to offset under sections 6402(c) or 6402(e) of the Code.