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

OFFICE OF
CHIEF COUNSEL

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MEMORANDUM FOR M. K. MORTENSEN
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CC:SB:5:SLC
Attn: Mark H. Howard

FROM: Pamela W. Fuller, Senior Technician Reviewer, Branch 1
Administrative Provisions and Judicial Practice
CC:PA:APJP:B01

SUBJECT: Significant Service Center Advice
OGD - Black Reparations Claim EITC
SCAF-104676-02

This Chief Counsel Advice responds to your memorandum dated February 21, 2002. In accordance with I.R.C. § 6110(k)(3), this Chief Counsel Advice should not be cited as precedent.

Issues

1. Should the Internal Revenue Service (Service) use the same claim disallowance letter that it has used for the previous black or slavery reparation claims or does it need to change the language of the claim disallowance letter?

2. Does Chief Counsel Notice CC-2002-012 provide adequate direction on how to deal with this new type of claim or is further guidance necessary?

3. What procedures should the Service follow in processing these returns/claims?

4. Should the Service treat these new returns as “valid” returns for purposes of processing?

5. May the Service use mathematical or clerical error procedures to recover any erroneous refund issued on one of these returns/claims?

6. May the Service make summary assessments when it has not yet issued refunds?

7. Would any facts patterns arise where the Service should use notices of deficiency with these returns/claims and, if so, how should it treat the claimed credit, *i.e.* as withholding, negative tax, etc.?

8. Would the answers to any of the above questions change because of correspondence attached to the return/claim?

9. Is the Service authorized to take action to recover a refund which it has sent to the taxpayer's bank as a direct deposit or paper refund but before the taxpayer has taken possession of it?

Conclusions

1. We agree with your office that the language of the claim disallowance letter as currently written or as proposed would serve the purpose of disallowing the black reparation claim and that the Service replace the word "believe" in the first sentence with the word "assert." We recommend, however, against the inclusion of additional language relating to the filing of a false EITC claim as provided in I.R.C. § 32(k).

2. Chief Counsel Notice 2002-012 provides general guidance as to the processing of a frivolous slavery reparations credit. Additional advice concerning how to process returns that claim the slavery reparations credit as an EITC is given below.

3. Chief Counsel Notice 2002-012 provides the correct processing procedures for these returns/claims.

4. The Service should treat these new returns as "valid" returns for purposes of processing.

5. Mathematical or clerical error assessment procedures under I.R.C. § 6213(b)(1) generally may be used when a taxpayer has claimed a black reparations tax credit on the line typically used to claim the EITC. However, mathematical or clerical error summary assessment procedures should not be used for tax year 2001 when the taxpayer claims a credit of no more than $464 on the EITC line, no Schedule EIC is attached, and the taxpayer's earned income and modified AGI are both less than $10,710.

6. The Service may simply disallow the claimed black reparations credit. Accordingly, there would be no need for summary assessment under I.R.C. § 6213(b)(1).

7. The Service should issue a statutory notice of deficiency where an erroneous refund has been issued, the Service has made a math error assessment under I.R.C. § 6213(b)(1) and the Service has abated the assessment at the request of the taxpayer as required under I.R.C. § 6213(b)(2). In calculating the deficiency, the Service should treat the erroneous EITC as a negative tax as provided under I.R.C. § 6211(b)(4).

8. The attachment of correspondence to the return/claim may require that an Service employee seek additional advice in connection with the processing of the claim/return.

9. The Service is authorized to take action to recover a refund which it has sent to the taxpayer's bank as a direct deposit or paper refund but before the taxpayer has taken possession of it.

Overview

Since the Service centralized the Frivolous Return Program in Ogden, Utah in January of 2001, taxpayers have submitted numerous black or slavery reparations claims. Most of these claims reflect a credit on the line of the return reserved for credits from an regulated investment company (RIC) or real estate investment trust (REIT), and which are normally reported on a Form 2439. However, personnel in the Frivolous Return Program have begun to receive black or slavery reparations claims with a slightly different claim. On these new returns or claims, the taxpayers show the black or slavery reparations claims as a credit on the line where the taxpayer would normally claim an earned income tax credit (EITC). As a result, significant issues have arisen concerning the proper processing of these returns/claims.

Discussion

Issue 1: Should the Service use the same claim disallowance letter that it has used for the previous black or slavery reparation claims or does it need to change the language of the claim disallowance letter?

We agree with your office that the language of the claim disallowance letter as currently written or as proposed would serve the purpose of disallowing the black reparation claim and that the Service replace the word "believe" in the first sentence with the word "assert."

We recommend, however, against the inclusion of additional language relating to the filing of a false EITC claim as provided under I.R.C. § 32(k). I.R.C. § 32 sets forth the statutory provisions regarding the EITC. I.R.C. § 32(k)(1)(B)(i) prevents the taxpayer from claiming an EITC for the following ten taxable years when a taxpayer has filed a fraudulent claim for an EITC. Additionally, I.R.C. § 32(k)(1)(B)(ii) prevents the taxpayer

from claiming an EITC for the following two taxable years when a taxpayer has filed an unallowable claim for an earned income credit due to reckless or intentional disregard of rules and regulations. In this situation, however, taxpayers are claiming a black reparations credit and using the line item for the EITC. They are not actually making a claim for the EITC under I.R.C. § 32.

Issue 2: Does Chief Counsel Notice CC-2002-012 provide adequate direction on how to deal with this new type of claim or is further guidance necessary?

Chief Counsel Notice 2002-012 (December 26, 2001), provides correct general guidance concerning the processing of frivolous claims for slavery reparations. Processing instructions are separated into three categories, (1) cases in which the Service has not issued a refund; (2) cases in which the Service has already issued a refund; and (3) erroneous refunds returned to the Service.

In cases in which the Service has not issued a refund, the processing is practically identical (the only difference is that you use Transaction Code 765 to reverse the EITC). A claim for a refund based on a slavery reparations tax credit has no legal foundation regardless of the line item used by the taxpayer to claim the credit. No overpayment attributable to a slavery reparations tax credit exists and the Service has no obligation to issue a refund in such cases.

In cases in which the Service has already issued a refund, the Chief Counsel Notice advises the Service to use math error procedures under I.R.C. § 6213(b)(1). Under the facts addressed in the Chief Counsel Notice, a mathematical or clerical error was found based on the entry of an amount for a RIC or a REIT credit (line 64 of the 2000 Form 1040) which was inconsistent with a zero entry for capital gain income (line 13 of the 2000 Form 1040), in the absence of a Schedule D showing capital losses that would offset the capital gain income from the RIC or REIT that was necessary to generate the credit. Math error procedures may also be used when a purported black reparations credit is claimed on the line item for EITC. While the basis for summary assessment under math error procedures is different, processing of the return will be identical.

Issue 3: What procedures should the Service follow in processing these returns/claims?

Chief Counsel Notice 2002-12 as set forth above provides the correct processing procedures for these returns/claims.

Issue 4: Should the Service treat these new returns as “valid” returns for purposes of processing?

The Service should treat the returns claiming the black or slavery reparations credit as a “valid” return for purposes of processing. In *Zellerbach Paper Co. V. Helvering*, 283

U.S. 172, 180 (1934), the Supreme Court stated that "[perfect accuracy or completeness is not necessary to rescue a return from nullity, if it purports to be a return, is sworn to as such, and evinces an honest and genuine endeavor to satisfy the law." *See also Badaracco v. Commissioner*, 464 U.S. 386 (1984); *Florsheim Bros. Drygoods Co v. United States*, 280 U.S. 453 (1930). The lower courts have subsequently synthesized the criteria enunciated by the Supreme Court into the following four-part test for determining whether a defective or incomplete document is a valid return: "First, there must be sufficient data to calculate tax liability; second, the document must purport to be a return; third, there must be an honest and reasonable attempt to satisfy the requirements of the tax law; and fourth, the taxpayer must execute the return under penalties of perjury." *Beard v Commissioner*, 82 T.C. 766, 777 (1984), *aff'd per curiam*, 793 F.2d 139 (6th Cir. 1986). This generally accepted formulation of the criteria for determining a valid return is known as the "substantial compliance" standard. If a defective or incomplete document meets the "substantial compliance" standard, the document is a valid return for purposes of the statute of limitations on assessment and for purposes of determining the failure to file penalty of I.R.C. § 6651(a).

Apart from the so-called "tax protestor" cases, *see, e.g., United States v. Smith,* 618 F.2d 280 (5th Cir. 1980) (zeros and constitutional objections); *United States v. Moore*, 627 F.2d 830 (7th Cir. 1980);*United States v. Porth*, 426 F.2d 519 (10th Cir. 1970); *Beard*; *Thompson v. Commissioner*, 78 T.C. 558 (1982); and *Sochia v. Commissioner,* T.C. Memo. 1998-294); there is little authority for determining what constitutes an honest and reasonable attempt to satisfy the requirements of the tax law. Courts, however, have been reluctant to declare defective or incomplete returns as nullities in the absence of protestor language. Cases such as *Badaracco*, *Steines v. Commissioner*, T.C. Memo. 1991-588 (frivolous Schedule C claiming $100 billion loss), and *Nicolaisen v. Commissioner,* T.C. Memo. 1985-120, are typical. In *Badaracco*, the taxpayer filed returns that were fraudulent, but which contained no tax protestor arguments or alterations to the official return form. Despite the fraudulent nature of the returns, the Supreme Court declared them valid for purposes of starting the statute of limitations, noting that "[a]lthough those returns, in fact, were not honest, the holding in *Zellerbach* does not render them nullities." *Badaracco* 464 U.S. at 397. Therefore, despite the fact that a return may erroneously or fraudulently claim a black or slavery reparations claim, it is considered a valid return for purposes of starting the statute of limitations on assessment.

Issue 5: May the Service use mathematical or clerical error procedures to recover any erroneous refund issued on one of these returns/claims?

Mathematical or clerical error assessment procedures under I.R.C. § 6213(b)(1) generally may be used when a taxpayer has claimed a black reparations tax credit on the line typically used to claim the EITC. I.R.C. § 6213(g)(2)(F) includes in the definition

of math error "an omission of a correct taxpayer identification number required under I.R.C. § 32 (relating to the EITC) to be included on a return." I.R.C. § 32(c)(3)(D) and I.R.C. § 32(m) require the taxpayer to provide the name, age and taxpayer identification number of the qualifying child on the return in cases where the taxpayer is claiming the credit on the basis of a qualifying child. In that situation, the identification information for the child is required to be placed on Schedule EIC, Earned Income Credit. The failure to provide this information where the taxpayer is claiming the credit on the basis of a qualifying child permits the Service to summarily assess the amount claimed as an EITC under I.R.C. § 6213(b)(1).

Taxpayers without a qualifying child can also claim the credit. This taxpayer must meet certain additional requirements and the taxpayer's earned income and modified AGI must both be very low (below $10,710 for tax year 2001). In this situation, the maximum credit the taxpayer can claim for tax year 2001 is $464. Thus, mathematical or clerical error summary assessment procedures should not be used for tax year 2001 when the taxpayer claims a credit of no more than $464 on the EITC line, no Schedule EIC is attached, and the taxpayer's earned income and modified AGI are both less than $10,710.

A claim for a black reparations credit may also fit within other provisions of I.R.C. § 6213(g)(2) defining mathematical or clerical errors depending on the facts and circumstances of each case.

Issue 6: May the Service make summary assessments when it has not yet issued refunds?

As discussed in Chief Counsel Notice 2002-012, the Service has no obligation to issue a refund based on a purported tax credit that does not exist under the Internal Revenue Code. If the credit is entered on the taxpayer's account, then the credit may simply be reversed. There is no need for summary assessment procedures to be used.

Issue 7: Would any facts patterns arise where the Service should use notices of deficiency with these returns/claims and, if so, how should it treat the claimed credit, *i.e.* as withholding, negative tax, etc.?

The Service should issue a statutory notice of deficiency where an erroneous refund has been issued, the Service has made a math error assessment under I.R.C. § 6213(b)(1), and the Service has abated the assessment at the request of the taxpayer as required under I.R.C. § 6213(b)(2). In calculating the deficiency, the Service should treat the erroneous earned income credit as a negative tax as provided under I.R.C. § 6211(b)(4).

Issue 8: Would the answers to any of the above questions change because of correspondence attached to the return/claim?

Attached correspondence could affect the determination of whether a return is valid for purposes of processing. The courts have found that submissions that raise constitutional objections are not returns for purposes of the failure to file penalty. *See, e.g., United States v. Smith,* 618 F.2d 280 (5th Cir. 1980) (zeros and constitutional objections together with Form W-4E falsely swearing to nonexistence of taxable income); *Thompson v. Commissioner*, 78 T.C. 558 (1982) (Form 1040 together with attached materials raising constitutional arguments). If an Service employee finds correspondence or attachments included with returns which they believe could affect any of the answers in the Service Center Advice, they should seek further advice from appropriate Service personnel.

Issue 9: Is the Service authorized to take action to recover a refund which it has sent to the taxpayer's bank as a direct deposit or paper refund but before the taxpayer has taken possession of it?

The Service is authorized to recover a refund which the Service has sent to the taxpayer's bank as a direct deposit or paper refund, but before the taxpayer has taken possession of it, under the summary assessment procedures for mathematical or clerical error under I.R.C. § 6213(b)(1). The Service should also consider the potential applicability of jeopardy assessment and collection procedures under I.R.C. §§ 6861 and 7429. If the bank or other financial institution has all or most of the proceeds of the refund, a jeopardy assessment and levy may be appropriate to collect the refund before it can be dissipated. Counsel should work with the Service to ensure that the jeopardy assessment and levy procedures are followed and that the necessary approvals, as required by delegation orders, have been obtained.

The Service, however, should not employ the summary assessment procedures for erroneous income tax prepayment credits under I.R.C. § 6201(a)(3). I.R.C. § 6201(a)(3) permits the Service to summarily assess overstated credits for income tax withheld at the source or for amounts paid as estimated income tax. Payments under the EITC do not constitute either income tax withheld at the source or estimated income tax. Thus, the summary assessment procedures of I.R.C. § 6201(a)(3) applicable to overstatements of credit for income tax withheld at the source or to estimated tax payments do not apply to payments under the EITC and such assessments are invalid.

If you have any questions, please contact Michael Hara at (202) 622-4910.