INTERNAL REVENUE SERVICE
NATIONAL OFFICE TECHNICAL ADVICE MEMORANDUM

August 13, 2001

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CASE MIS No.: TAM-120743-01/CC:PA:APJP:1
Index (UIL) No.: 6402.04-00, 6402.04-02, 6402.04-03

Chief, Appeals Office

Taxpayer's Name: ***
Taxpayer's Address: ***

Taxpayer's Identification No: ***
Years Involved: ***
Date of Conference: None

LEGEND:

Taxpayer A = ***
Taxpayer B = ***
Taxpayer C = ***
Year 1 = ***
Date 1 = ***
Date 2 = ***
Date 3= ***
Date 4= ***
Date 5= ***
$a= ***
$b= ***
$c= ***
$d= ***
$e= ***
$f= ***

ISSUE: Whether refund claims regarding overpaid employment taxes constitute valid claims for refund under section 6402 of the Internal Revenue Code.

CONCLUSION: Because the claims on their faces relate only to the third and fourth quarters of Year 1, they fail to qualify as formal refund claims for tax paid in the second quarter of that year. The claims do constitute informal claims for payments made in the second quarter.

FACTS:

Taxpayer A filed two Forms 843 (“Claim for Refund and Request for Abatement”) on Date 1. These filings sought refunds of the Medicare portion of Federal Insurance Contributions Act (“FICA”) taxes paid in Year 1. One such form sought a refund of $a for the third quarter of Year 1, and the second sought a refund of $b for the fourth quarter of Year 1. Both forms were timely filed within the limitations period imposed by Code section 6511. The Forms 843 filed by Taxpayer A each stated in Section Five (“Explanations and additional claims”) that “[a] protective claim has also been filed by Taxpayer B due to limited information at time of due date”. These protective forms filed by Taxpayer B (also on Date 1) were identical to Taxpayer A’s filings in terms of the amount of refund sought and the calendar quarters involved. Taxpayer B was Taxpayer A’s predecessor entity. Taxpayer B’s Date 1 protective filings on Form 843 included the following notation in Section Five: “[a] refund has also been filed by Taxpayer A. A protective claim has been filed due to limited information at time of due date”.

A Form 843 was also filed in the name of Taxpayer B on Date 2, seeking a refund of $c in Medicare tax for the second quarter of Year 1. [$c is the sum of $a and $b] The form’s preparer added the words “as amended” to the top of the form, and included the following statement in Section Five: “This amended claim serves to perfect a protective claim filed on Date 1". The Form 843 filed on Date 2 was not timely filed within the limitations period for filing a claim for refund provided in Code section 6511. The filing on Date 2 occurred because Taxpayer A became aware that the Medicare tax at issue was paid in the second quarter of Year 1, not the third and fourth quarters as stated in the Date 1 filings of Form 843. Taxpayer A had also become aware that Taxpayer B (as opposed to Taxpayer A) paid the Year 1 Medicare taxes for which a refund was sought.

The Forms 843 filed on Date 1 stated “See Attachments” in Section 5. That section instructs the filer to “[e]xplain why you believe this claim should be allowed, and show computation of tax refund or abatement of interest, penalty or addition to tax”. Taxpayers A & B attached to the Forms 843 the following items:

1) Forms 941c (“Supporting Statement to Correct Information”) showing downward adjustments in wage payments for the third and fourth quarters of Year 1 and resulting decreases in Medicare tax liability; and

2) A Form 5701 (“Notice of Proposed Adjustment”) dated Date 3 in which the Service recharacterized as capital expenditures certain payments which Taxpayer B’s parent corporation treated as currently deductible.

The Medicare overpayments for which a refund was sought arose due to the adjustments proposed in the above-noted Form 5701. Specifically, two employees of Taxpayer A received payments in Year 1 of $d each in anticipation of a corporate spin-off transaction. At the time paid, these distributions were treated as wages subject to withholding of federal income tax, social security tax and Medicare tax. Both employees exceeded the wage ceiling set forth in Code section 3121(a)(1) on payment

of social security tax. The Service, in its Form 5701 proposed adjustments, recharacterized the $e million combined payment to the two employees as a capital expenditure and identified the two employees by name. Taxpayer B's parent corporation accepted these proposed adjustments. Accordingly, the Date 1 claims seek a refund of the employer and employee share of the Medicare tax paid in Year 1 on the $e payment. The amount of the requested refund is $c, derived as follows:

$e x 1.45% = $f (employer portion)
$e x 1.45% = $f (employee portion)

Total Refund = $c

LAW AND ANALYSIS:

Code section 3101(b) imposes a 1.45% tax on an employee's wages (as defined in Code section 3121) with respect to the Medicare component of FICA taxes. Code section 3111(b) imposes an excise tax on an employer with respect to the Medicare component of FICA, totaling 1.45% of the wages paid by the employer.

Section 6402 provides that the Secretary (within the applicable period of limitations), may credit the amount of an overpayment of tax, including interest, against any internal revenue tax liability of the person who made the overpayment and shall refund the balance to the person.

Section 6413(a) provides, in pertinent part, that if more than the correct amount of tax imposed by sections 3101 and 3111 is paid 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.

Section 6413(b) provides, in pertinent part, that if more than the correct amount of tax imposed by sections 3101 and 3111 is paid or deducted with respect to any payment of remuneration and the overpayment cannot be adjusted under subsection (a) of section 6413, the amount of the overpayment shall be refunded in such manner and at such times (subject to the applicable statute of limitations) as the Secretary may by regulations prescribe.

Section 6511(b)(1) provides that no refund may be allowed or made after the expiration of the period of limitation for filing a claim for refund unless a claim for refund is filed by the taxpayer within such period. In general, the period of limitation under Section 6511(a) for filing a refund claim is three years from the time the return was filed or two years from the time the tax was paid, whichever is later.

Section 6532(a) provides, in pertinent part, that no suit or proceeding for the recovery of any internal revenue tax, penalty or other sum may be begun after the expiration of two

years from the date a notice of disallowance is mailed to the taxpayer by certified or registered mail.

Section 7422(a) prohibits any suit or proceeding in any court for a refund of taxes unless a claim for refund has been filed with the Secretary in the manner prescribed in regulations established by the Secretary.

Section 301.6402-2 of the Procedure and Administration Regulations identifies the following general requirements that must be satisfied for the filing of a proper refund claim: (1) with minor exceptions, the claim must be filed with the service center where the tax was paid (Reg. § 301.6402-2(a)(2)); (2) 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 (Reg. § 301.6402-2(b)(1)); (3) the statement of the grounds and the facts must be verified by a written declaration made under the penalties of perjury (Treas. Reg. § 301.6402-2(b)(1)); (4) except as provided with respect to income tax and certain other taxes, the claim is to be made on a Form 843 (Reg. § 301.6402-2(c)); and (5) in the case of income, gift and Federal unemployment taxes, a separate claim is to be made for each type of tax for each taxable year or period (Reg. § 301.6402-2(d)).

Section 31.6402(a)-2(a)(1) of the Procedure and Administration Regulations provides that any person who pays more than the proper amount of the employer or employee portions of FICA taxes may file a claim for credit or refund of the amount of the overpayment.

Section 31.6402(a)-2(a)(2) provides that an employer seeking a refund of the employee portion of the FICA tax must submit a number of supporting statements. These consist of (1) a statement that the employer (a) has repaid the amount of overcollected employee tax to the employee, or (b) has secured the employees' written consent to the employer's submission of a refund claim on behalf of the employee; and (2) if the employee tax was collected in a prior year, a statement that the employer has obtained from the employees a statement that (a) the employee has not claimed a refund or credit of the amount of the overcollection, or that if so, such a claim has been rejected, and (b) that the employee will not claim a refund or credit for such amounts.

Section 31.6402(a)-2(c) provides that any claim for refund of FICA taxes made with respect to remuneration that was previously erroneously reported on a return or schedule as wages paid to an employee must include a statement showing (1) the identification number of the employer, if he was required to make application therefor; (2) the name and account number of the employee; (3) the period covered by the return or schedule; (4) the amount of remuneration actually reported as wages for the employee; and (5) the amount of wages which should have been reported for the employee. No particular form is prescribed for making the statement required by section 31.6402(a)-2(c), but Form 941c or Form 941c PR, whichever is appropriate, can be used for this purpose.

The claims filed in the present case on Date 1 do not qualify as formal refund claims for Medicare tax paid in the second quarter of Year 1. This follows because the claims referred only to the third and fourth quarters of Year 1, and thus failed to state the correct tax period as required by section 31.6402(a)-2(c) of the Procedure and Administration Regulations. *See also Gustin v. United States,* 876 F.2d 485, 1989-2 U.S.T.C. (CCH) ¶ 9423 (5th Cir. 1989) (held, Form 843 claiming employment tax refund for fourth quarter of 1981 is not formal refund claim for third quarter, despite knowledge of IRS agents that taxpayer sought refund for both quarters).

The Fifth Circuit further held in *Gustin*, however, that an informal claim for refund is valid under section 7422. *See also United States v. Kales*, 314 U.S. 186, 194 (1941), Levitsky *v. United States*, 27 Fed. Cl. 235, 1993-1 U.S.T.C. (CCH) ¶ 50,011 (1992). The taxpayer in *Gustin* timely filed a Form 843 claiming it overpaid its employment taxes for the fourth quarter of 1981. The form made no reference to the third quarter of 1981. The Court therefore held that the taxpayer failed to comply with the formal requirements for a refund claim with respect to the third quarter. The taxpayer in *Gustin* argued, however, that whatever the flaws in the Form 843, it constituted an informal written claim for overpayments occurring in the third quarter.

The Court found that an informal written claim "is sufficient if it puts the Commissioner of Internal Revenue on notice that the taxpayer believes an erroneous tax has been assessed and desires a refund for certain years". *Gustin*, 876 F.2d at 488. [citations omitted] The Court stated that "... there are no hard and fast rules for evaluating the sufficiency of an informal claim, and each case must be decided on its own particular set of facts 'with a view towards determining whether under those facts the Commissioner knew, or should have known, that a claim was being made'". *Id*. at 488-89, *citing Newton v. United States*, 143 Ct. Cl. 293, 163 F. Supp. 614, 619 (1958).

The Court held that the taxpayer failed to present a valid informal claim, essentially because the Service's administrative file relating to the refund claim contained no indication that a refund was being sought for the third quarter. *Id*. at 489. The administrative file in the present case does suggest, to some degree at least, that the refund claims related to the second quarter of Year 1. As noted above, the $e payment to the two employees was to occur immediately before a corporate spin-off involving Taxpayer B's parent corporation. The Notice of Proposed Adjustment attached to the Date 1 refund claims specifically referred to this timing by stating that "... immediately prior to the spin-off, Taxpayer C, through Taxpayer A, would pay the employees and consultants...." The spin-off, according to the Notice of Proposed Adjustment, occurred on Date 4. Therefore, an item in the taxpayer's administrative file does suggest that the wage payment (and related Medicare withholding) occurred before the Date 5 close of the second quarter. Taxpayer B then conclusively alleged (in its Date 2 claim) that the Medicare withholding occurred in the second quarter.

A number of other circumstances also support a finding that the Date 1 filings constituted informal claims for refund. The documents submitted on that date provided

the Service with precise information regarding the basis for the refund claims. The Form 941c submitted with the refund claims identified the dollar amount of the claim ($c) and specified how that amount was derived. The Notice of Proposed Adjustment submitted with the refund claims identified the specific transaction that produced the claimant's entitlement to a Medicare refund, namely the Government's recharacterization of the $e million wage payment. The claims thus satisfy the requirement in applicable case law that an informal claim set forth the legal and factual basis for the refund. *See, e.g., New England Electric System v. United States*, 32 Fed. Cl. 636, 1995-1 U.S.T.C. (CCH) ¶ 50,069 (1995).

The refund claims in the present case were the natural consequence of the Service's decision to recharacterize the $e payment. The factual basis for the claims, therefore, should not have been a surprise to the Service. The Claims Court has stated in this regard that "... the purpose behind the requirement of an adequate refund claim, whether formal or informal, is to prevent surprise through the giving of adequate notice of the nature of the claims as well as the factual basis so that the IRS may begin an investigation or correct errors". *Deluxe Check Printers, Inc. v. United States,* 15 Cl. Ct. 175, 1988-2 U.S.T.C. (CCH) ¶ 9426 (1988), *rev'd in part on other grounds sub nom. Deluxe Corp. v. United States*, 885 F.2d 848 (Fed. Cir. 1989).

The courts have rejected refund claims which fail to state the nature of the claim and sufficient facts to support it. *See, e.g., Angelus Milling Co. v. Commissioner*, 325 U.S. 293 (1945), *Stoller v. United State*s, 444 F.2d 1391, 1971-1 U.S.T.C. (CCH) ¶ 9418 (5th Cir. 1971), *Franks v. United States*, 1985-2 U.S.T.C. (CCH) ¶ 9829 (W.D. La. 1985). This obligation to explain the claim and provide adequate supporting facts applies to both formal and informal claims. *Deluxe Check Printers, Inc*., 1988-2 U.S.T.C. at 85,112.

In *Angelus Milling Co*., a taxpayer filed with the Service a refund claim which did not include the elements required by the applicable regulations. The claim consisted solely of the following elements: 1) an apportionment between the taxpayer and a related corporation of certain previously-filed claims; and 2) an attached affidavit which apparently did nothing more than portray the claim as an amendment to the previous claims. *Angelus Milling Co*., 325 U.S. at 295.

The taxpayer argued that despite these flaws, its refund claim -- when combined with that of another taxpayer -- provided the Service with sufficient facts and explanation to justify the refund. *Id*. at 299. In the present case, each of the Date 1 filings provided full details as to the origin and basis for the refund request. Unlike *Angelus Milling*, therefore, no claims by other taxpayers had to be considered in order to make the factual and legal rationale for the Date 1 filings apparent to the Service. Accordingly, *Angelus Milling* does not compel rejection of the Date 1 claims. As noted above, the Date 1 filings by Taxpayers A & B did cross reference each other to note that Taxpayer B was filing a protective claim for refund. Unlike the situation in *Angelus Milling*, however, each of the Date 1 filings by Taxpayers A & B fully described the factual and

legal grounds justifying a refund. As noted above, the taxpayer's claim in *Angelus Milling* did nothing more than attempt to apportion a refund; the rationale for that refund was stated only in another taxpayer's filing (if it was stated at all).

In *Stoller*, the Service assessed an income tax deficiency on the ground that the taxpayers were taxable on income they had assigned to another individual. After paying the assessed amount, the taxpayers filed a refund claim with the Service, which was rejected. The taxpayers filed a refund suit in U.S. District Court, claiming that the income they had assigned was non-taxable to them under the "valuable consideration" rule of *Cotlow v. Commissioner*, 228 F.2d 186 (2nd Cir. 1955).

The Court in *Stoller* upheld the District Court's rejection of the refund suit. The Court concluded that because the taxpayers filed a deficient refund claim with the Service, section 7422(a) precluded a refund suit. *Stoller v. United States*, 444 F.2d at 1393. The Court noted that the refund claim the taxpayers filed with the Service consisted solely of the following statement: "[t]he Commissioner of Internal Revenue erroneously determined that the taxpayers' profits from business totaled $16,935.40 in lieu of $1,859.40, which was the taxpayer's correct profit from business". *Id*.

The Court found that this statement by the taxpayers did not meet the regulatory requirement that a refund claim must set forth in detail each ground upon which a refund is claimed. *Id*. The taxpayers, the Court noted, failed to state in their refund claim that they were relying upon the "valuable consideration" rule. Accordingly, the Court held, the claim failed to notify the Service of the nature and basis of the refund request. *Id*.

The Court in *Stoller* also rejected the taxpayers' argument that regardless of the shortcomings of the refund claim, the Service was sufficiently aware of the assignment of income issue. This knowledge, the taxpayers argued, was evidenced by certain statements in a revenue agent's report. The Court found that even if this knowledge could be incorporated into the refund claim, that claim would still be deficient. Regardless of what the Service may have known concerning the taxpayers' situation, the Court held, no valid refund claim could result from "filing ... a paper which gives no notice of the amount or nature of the claim for which the suit is brought, and refers to no facts upon which it may be founded". *Id*. (quoting *United States v. Felt and Tarrant Mfg. Co*., 283 U.S. 269 (1931)).

In the present case, by contrast, the taxpayers did not rely upon the Service's background knowledge of their tax situation. Instead, as noted above, Taxpayers A and B filed on Date 1 all the documentation necessary to inform the Service of the precise nature and amount of the refund claim. Therefore, *Stoller* does not support rejection of that claim. As noted in *Stoller*, the Commissioner can "examine only those points to which his attention is necessarily directed". *Id*., (quoting *Alabama By-Products Corp. v. Patterson*, 258 F.2d 892, 900 (5th Cir. 1958)). The Date 1 filings directed the Service's attention to the specific transaction that generated the refund claim, and identified the

exact dollar amount of that claim.

In *Franks*, the taxpayers filed a claim for refund with the Service and attached to that claim a report by an IRS auditor describing the issues on which the taxpayer and the Service disagreed. The taxpayers stated in their claim that "[t]axpayers contest all adjustments described in the auditor's report". *Franks v. United States,* 1985-2 U.S.T.C. at 90,298 n16.

The Court found that the claim did not constitute a refund claim within the meaning of section 301.6402-2(b), and could therefore not serve as the basis for a refund suit under section 7422. *Id*. at 90,298. The Court found that by attaching the auditor's report to their refund claim and stating that they disagreed with the adjustments in that report, the taxpayers had provided the Government with nothing more than "mere notice that [they are] contesting certain amounts". *Id*. More than this, the Court held, must be provided through a refund claim. The taxpayer must provide grounds for its claim and facts supporting those grounds. *Id*.

Unlike the taxpayers in *Franks*, Taxpayers A & B did not support their refund claims by making a blanket objection to adjustments proposed by the Service. As noted by the Court in *Franks*, such a blanket statement fails to inform the Service of the grounds on which the taxpayer seeks a refund. In the present case, the taxpayers accepted the Service's proposed adjustments, namely the downward adjustment to wages and the resulting increase in capital expenditures. They then filed refund claims to reflect the natural consequence of that adjustment, i.e., the drop in Medicare tax liability. The grounds for the claims, therefore, were self-evident from the attached Notice of Proposed Adjustment and Forms 941c and can be stated as follows: once wages dropped, Medicare taxes paid on those amounts necessarily became refundable. Because Taxpayers A & B -- unlike those in *Franks* -- notified the Service of the grounds for refund, *Franks* does not support denial of the Date 1 claims.

It should be noted that the Date 1 refund claims failed to comply with Section 31.6402(a)-2(a) in one respect. Specifically, Section 31.6402(a)-2(a)(2)(ii) requires the employer to include a statement that the employer has obtained from the employee a written statement that the employee has not claimed a refund or credit of the amount of the overcollection, or that if so, such a claim has been rejected, and that the employee will not claim a refund or credit for such amounts. The failure to file such a statement within the time limit for filing a claim for refund does not make the claim untimely or invalid. Such a statement, however, is required to perfect the claim. *See Chicago Milwaukee Corp. v. United States*, 40 F.3d 373 (Fed. Cir. 1994).

Based upon all the facts and circumstances, the claims dated Date 1 constitute informal refund claims for Medicare taxes paid in the second quarter of Year 1.

CAVEAT(S)

A copy of this technical advice memorandum is to be given to the taxpayer(s). Section 6110(k)(3) of the Code provides that it may not be used or cited as precedent.