INTERNAL REVENUE SERVICE
NATIONAL OFFICE TECHNICAL ADVICE MEMORANDUM

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Third Party Communication: None
Date of Communication: Not Applicable

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CASE-MIS No.: TAM-118524-04/CC:PA:APJP:B 2

Taxpayer's Name:
Taxpayer's Address:

Taxpayer's Identification No
Year(s) Involved:
Date of Conference:

LEGEND:

Issuer =
Date 1 =
Date 2 =
Date 3 =
Date 4 =
Date 5 =
Amount $A =
Amount $B =
Amount $C =
Amount $D =

ISSUES:

1. Whether the period of limitations for an issuer of bonds to bring suit to recover an overpayment of an arbitrage rebate paid to the Service is the two-year period

under I.R.C. § 6532(a) or the general six-year period under 28 U.S.C. §§ 2401 and 2501?

2. If we conclude under Issue 1 that the general six-year period applies, when does the period of limitations for bringing suit to recover an overpayment of an arbitrage rebate begin?

CONCLUSIONS:

1. The period of limitations for an issuer of bonds to bring suit to recover an overpayment of an arbitrage rebate paid to the Service is the general six-year period under 28 U.S.C. §§ 2401 and 2501.

2. The period of limitations for bringing suit to recover an overpayment of an arbitrage rebate under 28 U.S.C. §§ 2401 and 2501 begins upon payment of the rebate with the submission of Form 8038-T, the arbitrage rebate form. Consequently, any suit brought by Issuer at this time would be untimely, as more than six years have passed since Issuer submitted Form 8038-T and its final arbitrage rebate payment.

FACTS:

On Date 1, Issuer issued bonds in the amount of Amount $A. The last bond of the issue was redeemed on Date 2. A “Final Computation” under I.R.C. § 148(f) was made and a final arbitrage rebate of Amount $B was remitted on Date 3, which was within 60 days of Date 2. Issuer submitted its final arbitrage rebate payment with Form 8038-T, *Arbitrage Rebate*.

In Date 4, which was more than seven years after Date 2, the “Final Computation” for the period Date 1 to Date 2 was reviewed and it was discovered that Issuer appeared to have overpaid the rebate by Amount $C. Issuer filed a claim on Date 5 to recover the overpayment. Issuer did not submit its claim in accordance with Rev. Proc. 92-83, 1992-2 C.B. 487. The Service reviewed the computation and found the overpayment to be Amount $D and Issuer now agrees. The Service believes, however, that the claim is untimely because the claim was not submitted before the six-year period in 28 U.S.C. §§ 2401 and 2501 expired; if Issuer filed suit now, such suit would be untimely, and thus, the Service does not believe the claim should be allowed. The Service has not sent a notice of claim disallowance to Issuer.

To date, Issuer has not instituted a refund suit to recover Amount $D. Issuer’s position is that because the Service has not sent a notice of claim disallowance for the refund claim filed on Date 5, the two-year period for filing suit under I.R.C. § 6532 has not begun to run and any refund suit filed now would be timely.

BACKGROUND:

I.R.C. § 103 excludes from gross income interest on any State or local bond. This exclusion, however, does not apply to an arbitrage bond as defined by I.R.C. § 148. In general, I.R.C. § 148(a) defines an "arbitrage bond" as "any bond issued as part of an issue any portion of the proceeds of which are reasonably expected (at the time of issuance of the bond) to be used directly or indirectly (1) to acquire higher yielding investments, or (2) to replace funds which were used directly or indirectly to acquire higher yielding investments." I.R.C. § 148(a)(1), (2). A bond which is part of an issue is treated as an arbitrage bond unless the issuer rebates (turns over) to the Service any arbitrage profits earned from investing the proceeds of the tax-exempt issue in higher yielding investments. I.R.C. § 148(f).

The computation to determine if an arbitrage rebate is due is made at the end of every fifth year during the term of the issue (a "Required Computation") and when the last bond in the issue is discharged (the "Final Computation"). The computations are based on future values. A rebate amount must be paid no later than 60 days after each Required Computation date, as well as the Final Computation date. I.R.C. § 148(f). A rebate payment is paid when it is filed with the Service at the place designated by the Commissioner. Treas. Reg. § 1.148-3(g). A rebate payment must be accompanied by Form 8038-T, *Arbitrage Rebate.* The failure to pay a rebate amount when required can result in the bonds being classified as arbitrage bonds, and the interest paid on bonds may lose the I.R.C. § 103 exemption. The Service does not make any assessment as described in I.R.C. § 6201 or undertake any collection activity under I.R.C. § 6301 against the issuer for failure to pay the rebate, but the Service would assess the bondholders for the interest income, after following the deficiency procedures in I.R.C. §§ 6211-6215.

Proposed and temporary Treas. Reg. § 1.148 -13T prescribed in Treasury Decision 8418, 57 FR 20971 (May 18, 1992), provided for the recovery of an overpayment. The preamble to Treasury Decision 8418 explained that the regulation provides authority for the Commissioner to make refunds of rebate overpayments, provided that certain conditions are satisfied. The issuer must have made an overpayment as a result of a mistake of law or fact in order to qualify for a refund. Also, in many instances the Service is not required to refund an overpayment until after the Final Computation date or until after an issuer's rebate obligation is otherwise finally determined. The regulation does not prescribe a time by which a request must be filed with the Service. The Service subsequently published Rev. Proc. 92-83, 1992-2 C.B. 487, to explain how to request a recovery of overpayment. The revenue procedure does not, however, prescribe a time by which a request for refund must be filed with the Service.

The temporary regulation was replaced with the present Treas. Reg. § 1.148-3(i), which became effective on July 1, 1993 (which was before Date 5). Currently, Treas. Reg. § 1.148-3(i)(1) provides that an issuer may recover an overpayment for an issue

of tax-exempt bonds by establishing to the satisfaction of the Commissioner that the overpayment occurred. An overpayment is the excess of the amount paid to the United States for an issue under I.R.C. § 148 over the sum of the rebate amount for the issue as of the most recent computation date and all amounts that are otherwise required to be paid under I.R.C. § 148 as of the date the recovery is requested. The regulation does not prescribe a time by which a request for recovery must be filed with the Service.

Form 8038-R, *Request for Recovery of Overpayments Under Arbitrage Rebate Provisions*, replaced the procedures provided in Rev. Proc. 92-83. See Announcement 2001-115, 2001-2 C.B. 539. The Instructions for Form 8038-R do not prescribe a time by which a request must be filed with the Service.

LAW AND ANALYSIS:

Issue 1

28 U.S.C. §§ 1346(a)(1) and 1491(a)(1) provide the district courts and the Court of Federal Claims, respectively, with jurisdiction over any civil action against the United States for:

- any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or
- any penalty claimed to have been collected without authority, or
- any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws.

The jurisdiction granted under these two sections, however, is limited for purposes of the Internal Revenue Code by I.R.C. § 7422(a), which provides that until a claim for refund or credit has been duly filed with the Secretary, no suit or proceeding shall be maintained in any court for the recovery of:

- any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or
- any penalty claimed to have been collected without authority, or
- any sum alleged to have been excessive or in any manner wrongfully collected.

I.R.C. § 6532(a) provides that no suit or proceeding under I.R.C. § 7422 for the recovery of any internal revenue tax, penalty, or other sum, shall be begun before the expiration of six months from the date of filing the claim required under such section

unless the Secretary renders a decision thereon within that time, nor after the expiration of two years from the date of mailing by certified mail or registered mail by the Secretary to the taxpayer of a notice of the disallowance of the part of the claim to which the suit or proceeding relates.

I.R.C. § 6402(a) authorizes the Secretary of the Treasury to make refunds when a taxpayer overpays taxes. The regulations on Procedure and Administration under I.R.C. § 6402 provide that "refunds of overpayments may not be allowed or made after the expiration of the statutory period of limitation properly applicable, unless, before the expiration of such period, a claim therefor has been filed by the taxpayer." Treas. Reg. § 301.6402-2(a)(1).

I.R.C. § 6511 provides a claim for credit or refund of an overpayment of any tax imposed by Title 26 in respect of which tax the taxpayer is required to file a return shall be filed by the taxpayer within three years from the time the return was filed or two years from the time the tax was paid, whichever of such periods expires later. For purposes of I.R.C. § 6511, the term "tax" expressly includes certain penalties imposed by the Code as well as interest. See I.R.C. §§ 6601(e)(1); 6665; 6671.

The Service and Issuer agree that an arbitrage rebate is not an internal revenue tax or penalty for purposes of I.R.C. §§ 7422 and 6532, or 28 U.S.C. §§ 1346(a)(1) and 1491(a)(1). Consequently, the requirement to file a claim under I.R.C. § 6402 and the timing of the filing of that claim under I.R.C. § 6511 are not applicable. Issuer contends, however, that an arbitrage rebate is "any sum" under those sections and, consequently, that the two-year period under I.R.C. § 6532 for filing suit has not started because the Service has not issued a notice of claim disallowance.

Neither the Internal Revenue Code nor the Treasury Regulations define "any sum"; however, the Supreme Court described the phrase as a catchall phrase but "to say this is not to define what it catches." Flora v. United States, 362 U.S. 145, 151 (1960), aff'g 362 U.S. 63 (1958). At issue in both Flora cases was whether a taxpayer must pay the full amount of a tax deficiency before challenging the correctness by a suit for refund under 28 U.S.C. § 1346(a)(1). The taxpayer contended that the use of the words "any sum" in 28 U.S.C. § 1346(a)(1) meant that the payment of the full assessment was not required before filing suit. The Supreme Court rejected the taxpayer's argument, holding that full payment of the deficiency was required before filing suit. In reaching this conclusion, the Court recognized that the phrase "any sum" was ambiguous, but noted that interest was one example of such a "sum" that was neither a tax nor a penalty. Id. at 149. The Court found it "significant that many old tax statutes described the amount which was to be assessed under certain circumstances as a 'sum' to be added to the tax, simply as a 'sum,' as a 'percentum,' or as 'costs.'" Id. at 149-50.

We note that the Supreme Court's conclusions in both Flora cases were made after a thorough consideration of the history of the various tax refund provisions. Because little other guidance on the meaning of "any sum" exists, we find the Supreme Court's review

of those provisions instructive. Given the ambiguity of the ”any sum” phrase, the Supreme Court examined the legislative history of 28 U.S.C. § 1346(a)(1), which was enacted in the Revenue Act of 1921; however, the Court found that history “barren of any clue to congressional intent.” Flora, 362 U.S. at 151. The Court also examined the ancestry of the language of 28 U.S.C. § 1346 (a)(1), which stems from a predecessor of I.R.C. § 7422, but found that ancestry no more enlightening than the 1921 legislative history. Id. at 152. The Court noted that the “any sum” language was taken from section 3226 of the Revised Statutes from 1878 (a predecessor to I.R.C. § 7422(a)). The predecessor to section 3226 of the Revised Statutes was section 19 of the Revenue Act of July 13, 1866, 14 Stat. 152, which did not contain the “any sum” phrase. In that same Revenue Act, however, a predecessor to I.R.C. § 6402 was enacted as follows:

> That the commissioner of internal revenue. . . shall be, and is hereby authorized, on appeal to him made, to remit, refund, and pay back all taxes erroneously or illegally assessed or collected, all penalties collected without authority, and all taxes that shall appear to be unjustly assessed or excessive in amount or in any manner wrongfully collected, . . . and all judgments and moneys recovered or received for taxes, costs, forfeitures, and penalties, shall be paid to the collector as internal taxes are required to be paid.

Section 9 of the Revenue Act of July 13, 1866, 14 Stat. 101, 111. Section 9 also authorized the Commissioner to repay collectors and deputy collectors the following:

> the full amount of such sums of money as shall or may be recovered against them, or any of them, in any court for any internal taxes or licenses collected by them, with the costs and expenses of suit, and all damages and costs recovered against assessors, assistant assessors, collectors, deputy collectors, and inspectors, in any suit which shall be brought against them, or any of them, by reason of anything that shall or may be done, in the due performance of their official duties.

Id. (emphasis added). Section 9 of the 1866 Act amended a provision that appeared in the Revenue Act of June 30, 1864, at section 44, 13 Stat. 239. The 1864 Revenue Act referred to “all duties” instead of “all taxes” but otherwise read much the same as the amendment. The first use of the term“ sums” appears in this 1864 provision regarding repaying collectors, but “[a]n examination of the legislative history discloses no indication of the purpose.” Flora, 357 U.S. at 1082 n.7.

The first use of the phrase “any sum” in the same manner as it appears today was in section 44 of the Revenue Act of June 6, 1872, which was a predecessor to I.R.C. § 6532. Again, nothing in the legislative history of the 1872 Act gives any indication of the significance of the use of the phrase “any sum.” Based on the evolution of I.R.C. §§ 7422 and 6532 from these earlier revenue acts, however, we believe the “any sum” phrase relates to costs incidental to the recovery of an internal revenue tax. An

arbitrage rebate under I.R.C. § 148 is not incidental to the recovery of an internal revenue tax; the payment of a rebate is an alternative to a payment of tax and stands apart from any tax. The rebate cannot be collected from an issuer using the tax collection procedures provided by the Internal Revenue Code. Moreover, we have found nothing in the ancestry of the "any sum" language to indicate that the phrase applies to nontax claims. Thus, "any sum" does not encompass an arbitrage rebate.

Our interpretation is supported by a recent United States Court of Federal Claims case that suggests Congress has viewed the "tax, penalty and any sum" language as either synonymous with, or at least not significantly different from, an overpayment of tax. See Usibelli Coal Mine v. United States, 54 Fed. Cl. 373, 385 (2002). In Usibelli Coal Mine, the Court of Federal Claims considered whether a plaintiff prevailing on a refund claim was entitled to interest under 28 U.S.C. § 2411, a provision that is similar to I.R.C. § 6611 (interest on an administratively determined refund). Section 2411 of Title 28 provides that overpayment interest shall be allowed on any judgment of a court for any overpayment in respect of any internal-revenue tax. The plaintiff sought prejudgment overpayment interest in connection with the overpayment of a Coal Tax. The plaintiff brought the action as a damages action under an Export Clause and not as an action for a tax refund even though the Coal Tax was imposed by the Internal Revenue Code; therefore, the requirements of I.R.C. § 7422 did not have to be met. The court did not accept the plaintiff's argument that a judgment rendered for a damage action was a judgment for an overpayment of internal revenue tax under 28 U.S.C. § 2411 because, basically, if the judgment did not involve an assessment or collection of a tax under I.R.C. § 7422, it could not involve an overpayment of tax under 28 U.S.C. § 2411.

The Court of Federal Claims considered the legislative history of 28 U.S.C. § 2411 and found the language varied several times and without reason between the current language and language that is essentially identical to that in I.R.C. § 7422. Usibelli Coal Mine, 54 Fed. Cl. at 383. The court then traced the operations and history of several provisions of the Internal Revenue Code that are operatively interwoven, feeding into and interacting with each other, noting that even the language of I.R.C. §§ 6402, 6511, 6611, and 7422 are not wholly consistent in their terminology. Id. at 384. The court demonstrated an apparent lack of any reason behind the variations, noting that the same phraseology often appeared in two or more provisions dealing with exactly the same subject, and found, "[T]here is no pattern to when and how they changed; some shifts in closely-related provisions occurred decades apart and, as reflected in the accompanying legislative reports, without the slightest indication that Congress intended anything more than housekeeping. [Footnote omitted]" Id. Consequently, the use of the term "sum" in certain provisions of the various revenue acts or the Internal Revenue Code but not in others cannot be said to have any decisive meaning.

Our conclusion that a payment of an arbitrage rebate does not constitute "any sum" is consistent with the Service's long-standing position regarding claims for refund of overpayment interest under I.R.C. § 6611, an amount that is not a tax or a penalty. See Rev. Rul. 56-506, 1956-2 C.B. 959. See also Rev. Rul. 57-242, 1957-1 C.B. 452.

Similarly, a deposit, although not a payment of tax, is not "any sum" sufficient to come within the purview of I.R.C. § 7422. See New York Life Insurance Co. v. United States, 118 F.3d 1553, 1558 (Fed. Cir. 1993), cert. denied, 523 U.S. 1094 (1998) (holding that I.R.C. § 7422 does not apply to a suit for recovery of a deposit in the nature of a cash bond because it is not a tax refund suit and consequently, the timeliness of the suit is governed by the six-year period of limitations for a cause of action brought under 28 U.S.C. § 1491). Further, look-back interest owed to the taxpayer on a completed long-term contract is a general claim against the government that is subject to the six-year period in 28 U.S.C. §§ 2401 and 2501. Treas. Reg. § 1.460-6(f)(3). Thus, our conclusion that a payment of an arbitrage rebate does not fall within the purview of "any sum" is consistent with the treatment of claims for refund of other non-tax amounts. For each of those non-tax amounts, the Service does not issue a notice of claim disallowance even though taxpayers can file claims for refund with the Service. We see no reason to draw a distinction between claims for refund filed in the I.R.C. § 148 context and those other non-tax amounts for which I.R.C. § 6532 is not applicable. Consequently, the timeliness of any refund suit filed by Issuer would be governed by the six-year period of limitations in 28 U.S.C. §§ 2401 and 2501.

Issue 2

In general, a civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues. 28 U.S.C. §§ 2401(a); 2501. The starting date for the six-year period is based on the common law rule for when the period for the cause of action begins (i.e., when all the events which fix the government's alleged liability have occurred and the taxpayer was or should have been aware of their existence). General Instruments Corp. v. United States, 33 Fed. Cl. 4, 7-8 (1995).

In the instant case, Issuer made its Final Computation under I.R.C. § 148(f) and paid the rebate with the Form 8038-T on Date 3. At that time, all the events which fixed the government's alleged liability had occurred and Issuer was or should have been aware of their existence. These events were: (1) the discharge of the last bond in the issue; (2) the requirement to do the Final Computation under I.R.C. § 148(f); and (3) the requirement to pay the arbitrage rebate within 60 days after the Final Computation date. The discovery of an error necessitating a recalculation of an amount due to the government does not change the time when the government's liability for any overpayment came into existence. Norwest Bank Minn. Nat'l Ass'n v. Federal Deposit Ins. Corp., 312 F.3d 447 (D.C. Cir. 2002).

At issue in Norwest, supra, was whether a suit for refund of an overpayment of amounts paid to the Federal Deposit Insurance Corporation (FDIC) was timely. In January of 1992, Norwest was required to pay a series of premiums to insure deposits of savings-and-loan associations. Norwest timely submitted its payment but misinterpreted the formula to be used for calculating the premiums due and consequently overpaid its premiums. Norwest then filed suit against the FDIC on June

1, 2000. While the court relied upon a five-year statute of limitations which applied specifically to an action for recovery of an amount paid to the FDIC in excess of the amount due, rather than the six-year period in 28 U.S.C. § 2401(a) to dismiss the action as untimely, the rationale for when the cause of action accrued in Norwest's situation is equally applicable in the instant case. In holding that Norwest's cause of action accrued in January of 1992 when the miscalculation of the premiums occurred, the court drew the following analogy: "Norwest's complaint is like a claim 'for restitution of money paid through mistake.' . . . In such cases, courts generally regard the statutory period to begin to run when the payment is made." Norwest, 312 F.3d at 452 (citations omitted). Similarly, any complaint filed by Issuer now would be a claim for restitution of money paid through mistakenly calculating the rebate due. Thus, the statutory period in Issuer's case began to run on Date 3 when Issuer submitted its final arbitrage rebate payment.

Issuer has raised several arguments in support of concluding that the cause of action has not yet accrued, but we do not find these arguments persuasive. First, Issuer believes that Treas. Reg. § 1.148-3(i) clearly evidences that the Service neither intends that an issuer seek recovery of a rebate overpayment directly from the courts nor that an issuer has the right to do so. In addition, Issuer contends that even if a refund suit is appropriate, the Service must recognize two separate time periods: (1) the period for an issuer to request a recovery of overpayment (for which Issuer contends, the Service failed to set a deadline), and (2) the period for an issuer to contest the denial of the administrative claim in a court of law. Issuer believes that the failure to separate the periods blurs the distinction between the initiation of an administrative adjudication process and the subsequent commencement of a lawsuit to challenge the Service's adverse determination. Issuer cites Swisher Int'l, Inc. v. United States, 205 F.3d 1358 (Fed. Cir. 2000), cert. denied. 531 U.S. 1036 (2000), as an example of an agency failing to establish a time limit for filing an administrative claim and, therefore, failing to set a deadline for beginning the statutory period in which to bring a refund suit. Issuer also cites Crown Coat Front Co. v. United States, 386 U.S. 503 (1967), as an example of when a claimant must be allowed to exhaust administrative remedies before accruing the right to bring suit.

We do not believe that the rationale of Swisher Int'l, Inc., supra, applies to claims filed in the I.R.C. § 148 context. Swisher paid to the Customs Service an excise tax on imports from the fourth quarter of 1990 through the second quarter of 1993. Swisher then filed a claim for refund of those taxes on September 28, 1994 on the ground that the tax was unconstitutional as applied to exports. The Customs Service denied Swisher's refund claim on October 26, 1994, and Swisher filed suit in the Court of International Trade on March 29, 1995. At the time Swisher filed its claim for refund, the Customs Service allowed a claimant to file for a refund under either of two procedures: (1) a court-approved claims resolution procedure, which provided a two-year statute of limitations for bringing an action over the act of payment of the tax, or (2) an administrative refund procedure, which inadvertently did not contain a statute of limitations for filing the claim for refund but did impose a 180-day period of limitations for filing suit that did not

commence until the Customs Service denied a claimant's protest. If the Customs Service denied the claim administratively, the claimant could protest the denial and then appeal to the United States Court of International Trade.

The Court of Appeals for the Federal Circuit held that Swisher's cause of action accrued on October 26, 1994 when the Customs Service denied Swisher's protest and therefore, Swisher's suit before the Court of International Trade was not barred by a statute of limitations, as Swisher filed suit within the 180-day period. Swisher, 205 F.3d at 1369. The administrative refund procedure in Swisher is distinguishable from the refund procedure prescribed in the I.R.C. § 148 context; in Swisher, if a claimant chose to recover an overpayment through the prescribed refund procedures, the claimant had to file suit within 180 days after the denial of its protest. Thus, a period of limitations did exist that was distinct from the period of limitations applicable if Swisher had chosen to forego the administrative procedures and proceed directly to court. In Issuer's situation, as we discussed above in Issue 1, no period of limitations existed for the prescribed refund procedures that was distinct from the period of limitations if Issuer had chosen to forego the administrative refund process. Thus, the only way Issuer could fully protect its rights was to file a civil suit against the United States prior to the termination of the six-year period under 28 U.S.C. §§ 2401 and 2501. See also Rev. Rul. 57-242, 1957-1 C.B. 452.

In addition, we do not believe the rationale of Crown Coat Front Co., supra, applies to Issuer's situation. Crown Coat Front Co. was a contractor that completed a contract on December 14, 1956 and then filed a claim for refund in October of 1961 arising from a price reduction agreement entered into after the contract began. The contracting officer denied the claim. On February 28, 1963, the Board of Contract Appeals affirmed the denial. On July 31, 1963, Crown Coat Front Co. filed suit. The government argued the six-year period in 28 U.S.C. § 2401 ran from December 14, 1956, the date of completion of the contract. In concluding that the contractor's claim arose under the contract, the Supreme Court held that the claim first accrued on February 28, 1963 when the Board of Contract Appeals made its final decision, and therefore the suit was untimely. The Court based its holding on the purpose of the disputes clause in the contract, which clearly provided that a contractor had to seek relief provided for under the contract or be barred from any relief in the courts. In Issuer's situation, however, there was no requirement that Issuer exhaust its administrative remedies within the Service before filing suit. We do not read the regulations under I.R.C. § 148 or any of the Service's existing procedures to find that the Service has mandated the submission of an arbitrage rebate claim prior to instituting a refund suit. Treas. Reg. § 1.148-13T(a) merely provided that an issuer could recover an overpayment of an amount paid under I.R.C. § 148 by filing a claim. Moreover, nothing in Rev. Proc. 92-83 nor Form 8038-R indicates that the filing of a claim is a prerequisite to filing suit.

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.